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⁽¹⁾ Text with EEA relevance

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

COMMISSION NOTICE

Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market

(Text with EEA relevance)

(2021/C 526/01)

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INTRODUCTION

Directive 2005/29/EC of the European Parliament and of the Council ⁽¹⁾ on unfair business-to-consumer commercial practices in the internal market ('the UCPD') constitutes the overarching piece of EU legislation regulating unfair commercial practices in business-to-consumer transactions. It applies to all commercial practices that occur before, during and after a business-to-consumer transaction has taken place.

The purpose of this Guidance Notice (hereinafter referred to as 'Notice') is to facilitate the proper application of the Directive. It builds upon and replaces the 2016 version of the Guidance ⁽²⁾. The Notice also aims at increasing awareness of the Directive amongst all interested parties, such as consumers, businesses, the authorities of the Member States, including national courts and legal practitioners, across the EU. It covers the amendments introduced by Directive (EU) 2019/2161 of the European Parliament and of the Council ⁽³⁾ as regards the better enforcement and modernisation of Union consumer protection rules that enter into application from 28 May 2022. Accordingly, a part of this guidance reflects and discusses the rules that have not yet entered into application as of the date of issuance of this Notice. The relevant sections and points are clearly indicated. Where quotations from the text of the Directive or from Court rulings contain visual highlighting, such emphasis has been added by the Commission.

This Notice is addressed to the EU Member States and to Iceland, Liechtenstein and Norway as signatories of the Agreement on the European Economic Area (EEA). References to the EU, the Union or the Single Market should therefore be understood as referring to the EEA, or to the EEA market.

This Notice is intended purely as a guidance document – only the text of the Union legislation itself has legal force. Any authoritative reading of the law has to be derived from the text of the Directive and directly from the decisions of the Court. This Notice takes into account rulings of the Court published until October 2021 and cannot prejudice further developments of the Court's case law.

The views expressed in this document cannot prejudice the position that the European Commission might take before the Court. The information herein is of a general nature only and does not specifically address any particular individuals or entities. Neither the European Commission nor any person acting on behalf of the European Commission is responsible for any use that may be made of the following information.

As this Notice reflects the state of the art at the time of drafting, the guidance offered may be modified at a later date.

1. SCOPE OF THE UCPD

Article 3(1)

This Directive shall apply to unfair business-to-consumer commercial practices as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

The Directive is horizontal in nature and protects the economic interests of consumers. Its principle-based provisions address a wide range of practices and are sufficiently broad to catch also fast-evolving products and sales methods.

1.1. Material scope of application

The UCPD is based on the principle of **full harmonisation**. In order to remove internal market barriers and increase legal certainty for both consumers and businesses, it establishes a uniform regulatory framework harmonising national rules. Consequently, the UCPD establishes that **Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection unless so permitted by the Directive itself** ⁽⁴⁾.

⁽¹⁾ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22).

⁽²⁾ SWD(2016) 163 final.

⁽³⁾ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7).

⁽⁴⁾ Articles 4 and Recitals 5, 12 and 13 of the Directive.

The Court confirmed this principle in several rulings. For example, in the *Total Belgium* case the Court found that the Directive precludes a national general prohibition on **combined offers** ⁽⁵⁾. In the *Europamur Alimentación* case the Court ruled that the UCPD precludes a national general prohibition on **offering for sale or selling goods at a loss** ⁽⁶⁾. In the same case, the Court also clarified that restrictive national measures may include the reversal of the burden of proof ⁽⁷⁾.

In that regard, **Article 3(9)** places a limitation on the full harmonisation character of the UCPD by stating that ‘in relation to **‘financial services’ [...] and immovable property**, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates’. Consequently, in these sectors, Member States can impose rules which go beyond the provisions of the UCPD, as long as they comply with other EU law. Section 4.4 specifically deals with how the UCPD applies to financial services and immovable property.

Furthermore, according to **Article 3(5)**, as amended by Directive (EU) 2019/2161, the Directive does not prevent Member States from adopting additional provisions to protect the legitimate interests of consumers with regard to **aggressive or misleading marketing or selling practices** in the context of **unsolicited visits** by a trader to a consumer’s home or **excursions** organised by a trader with the aim or effect of promoting or selling products to consumers. However, such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection. Recital 55 to Directive (EU) 2019/2161 explains that such provisions should not prohibit those sales channels as such and gives some non-exhaustive examples of the possible national measures.

Article 3(6) requires Member States to notify the Commission of the national provisions adopted and any subsequent changes, so that the Commission can make this information easily accessible to consumers and traders on a dedicated website ⁽⁸⁾.

Recital 14 UCPD clarifies that the full harmonisation does not preclude Member States from specifying in national law the **main characteristics of particular products**, the omission of which would be material when an invitation to purchase is made. It also clarifies that the UCPD is without prejudice to provisions of EU law which expressly afford Member States the choice between several regulatory options for the protection of consumers in the field of commercial practices.

As regards consumer information, Recital 15 UCPD explains that Member States can, when allowed by the minimum clauses in EU law, maintain or introduce more stringent **information requirements** in conformity with EU law so as to ensure a higher level of protection of consumers’ individual contractual rights. See also section 1.2.3, which explains the interplay with the pre-contractual information requirements in the Consumer Rights Directive.

1.1.1. National legislation concerning commercial practices but protecting interests other than consumers’ economic interests

Article 1

*The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on **unfair commercial practices harming consumers’ economic interests**.*

The UCPD does not cover national rules intended to protect **interests which are not of an economic nature**. Therefore, **the UCPD does not affect** the possibility of Member States to set rules regulating commercial practices for reasons of **health, safety or environmental protection**.

Also existing national rules on marketing and advertising, based on ‘**taste and decency**’ are not covered by the UCPD. According to Recital 7, *This Directive [...] does not address legal requirements related to taste and decency which vary widely among the Member States. [...] Member States should accordingly be able to **continue to ban** commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers’ freedom of choice. [...].’*

⁽⁵⁾ Joined Cases C-261/07 and C-299/07, *VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV*, 23 April 2009, para. 52. See also Case C-522/08, *Telekom. Polska*, 11 March 2010.

⁽⁶⁾ Case C-295/16, *Europamur Alimentación*, 19 October 2017.

⁽⁷⁾ *Ibid.*, para. 42.

⁽⁸⁾ The Member States’ notifications will be published on the Commission’s webpages dedicated to the UCPD at: https://ec.europa.eu/info/law/law-topic/consumers/unfair-commercial-practices-law/unfair-commercial-practices-directive_en.

Therefore, in the context of commercial practices, **the UCPD does not cover national rules on protecting human dignity, preventing sexual, racial and religious discrimination or on the depiction of nudity, violence and anti-social behaviour.**

For example, the Court clarified that the UCPD did not apply to a national provision **preventing a trader from opening its shop 7 days a week** by requiring traders to choose a weekly closing day, as this specific provision did not pursue objectives related to consumer protection ⁽⁹⁾.

The Court has further clarified that the UCPD does not preclude a national provision, which protects public health and the dignity of the profession of dentist, first, by imposing a **general and absolute prohibition of any advertising relating to the provision of oral and dental care services** and, secondly, by establishing certain requirements of discretion with regard to signs of dental practices ⁽¹⁰⁾.

Conversely, national rules that aim to **protect the economic interest of consumers, even if it is in conjunction with other interests**, do fall within its scope.

Concerning **national rules banning sales with bonuses**, the Court has clarified that the UCPD precludes a general national ban on sales with bonuses that is designed to achieve consumer protection and other objectives (such as the pluralism of the press) ⁽¹¹⁾.

Concerning **national rules allowing clearance sales** to be announced only if authorised by the competent district administrative authority, the Court noted that the referring court had implicitly accepted that such a provision, which was at stake in the case, was aimed at the protection of consumers and not solely at the protection of competitors and other operators in the market. Therefore, the UCPD was applicable ⁽¹²⁾.

1.1.2. Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests

Recital 6

This Directive [...] neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of full subsidiarity, Member States will continue to be able to regulate such practices in conformity with Community law, if they choose to do so [...].

Business-to-business (B2B) commercial practices do not fall within the scope of the UCPD. They are partly regulated under the Misleading and Comparative Advertising Directive 2006/114/EC of the European Parliament and of the Council ⁽¹³⁾. Also, Directive (EU) 2019/633 of the European Parliament and of the Council ⁽¹⁴⁾ on unfair trading practices regulates B2B relationships in the agricultural and food supply chain. **Member States may however extend, under their national laws, the protection granted under the UCPD to B2B commercial practices.**

A national provision does not fall within the scope of the UCPD 'if it aims solely, as argued by the referring court, at regulating relations between competitors and does not aim at protecting consumers' ⁽¹⁵⁾.

Only those national **measures which protect exclusively competitors' interests fall outside the scope of the UCPD.** Where national measures regulate a practice with the dual aim of protecting consumers **and** competitors, they are covered by the UCPD.

Regarding **the distinction between consumers' and competitors' interests**, the Court considered that:

'39 [...] As is evident from recital 6 in the preamble to [the UCPD], only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is thus excluded from that scope.

40 [...] that is quite clearly not the case with the national provisions [that] refer expressly to the protection of consumers and not only to that of competitors and other market participants.' ⁽¹⁶⁾

⁽⁹⁾ Case C-559/11, *Pelckmans Turnhout NV*, 4 October 2012.

⁽¹⁰⁾ Case C-339/15, *Luc Vanderborght*, 4 May 2017.

⁽¹¹⁾ Case C-540/08 *Mediaprint*, 9 November 2010.

⁽¹²⁾ Case C-206/11, *Köck*, 17 January 2013, para. 31.

⁽¹³⁾ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ L 376, 27.12.2006, p. 21).

⁽¹⁴⁾ Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (OJ L 111, 25.4.2019, p. 59).

⁽¹⁵⁾ Case C-126/11, *Inno*, 15 December 2011, para. 29.

⁽¹⁶⁾ Case C-304/08, *Plus Warenhandelsgesellschaft*, 14 January 2010.

It is **for national authorities and courts to decide whether a national provision is intended to protect consumers' economic interests**.

The Court noted that:

'29 It is therefore for the national court and not for this Court to establish whether the national provisions [...] concerning price reduction announcements to consumers, actually pursue objectives relating to consumer protection, in order to determine whether such provisions are liable to fall within the scope of the Unfair Commercial Practices Directive [...].' ⁽¹⁷⁾

The Court has also found that the UCPD precludes a national provision **prohibiting sales at loss** only in so far as its aim is to protect consumers ⁽¹⁸⁾.

Regarding **national rules prohibiting price reductions during pre-sales periods**, the Court has clarified that such a prohibition is not compatible with the UCPD if it seeks to protect the economic interests of consumers ⁽¹⁹⁾.

1.2. Interplay between the Directive and other EU law

Article 3 (4)

In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

Recital 10

*It is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. [...] **This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices**, such as information requirements and rules on the way the information is presented to the consumer. **It provides protection for consumers where there is no specific sectorial 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. This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers' economic interests.*

Due to its general scope, the Directive applies to many commercial practices which are also regulated by other general or sector-specific EU legislation.

1.2.1. Relationship with other EU legislation

Article 3(4) and Recital 10 are key features of the UCPD. They clarify that **the UCPD complements other EU legislation** ('Community rules') that regulate specific aspects of unfair commercial practices. Consequently, the **UCPD works as a 'safety net'** ensuring that a high common level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law.

Where EU law, sector-specific or other, is in place and its provisions overlap with the provisions of the UCPD, the corresponding provisions of the *lex specialis* will prevail. Article 3(4) of the Directive clarifies indeed that *'in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects'*.

Article 3(4) read in conjunction with Recital 10 implies that a provision of EU law will **prevail over the UCPD if all of the following three conditions are fulfilled**:

- it has the status of EU law,
- it regulates a specific aspect of commercial practices, and
- there is a conflict between the two provisions or the content of the other EU law provision overlaps with the content of the relevant UCPD provision, for instance by regulating the conduct at stake in a more detailed manner and/or by being applicable to a specific sector ⁽²⁰⁾.

⁽¹⁷⁾ Case C-13/15, *Cdiscount*, 8 September 2015.

⁽¹⁸⁾ Case C-343/12, *Euronics*, 7 March 2013, para. 31.

⁽¹⁹⁾ Case C-288/10, *Wamo*, 30 June 2011, para. 40.

⁽²⁰⁾ See Joined Cases C-54/17 and C-55/17, *Wind Tre*, para. 60 and 61.

For example:

Article 12 of the Mortgage Credit Directive ⁽²¹⁾ prohibits, in principle, tying practices whereby a credit agreement for a mortgage is sold with another financial product and is not made available separately. This *per se* prohibition conflicts with the UCPD because tying practices would be unfair and thus prohibited under the UCPD only following a case-by-case assessment. Its Article 12 prevails over the general rules of the UCPD. Thus, tying practices within the meaning of Article 12 of the Mortgage Credit Directive are prohibited as such.

Where all three conditions set out above are fulfilled, the UCPD will not apply **to the specific aspect** of the commercial practice regulated, for example, by a sector-specific rule. The UCPD continues nonetheless to remain relevant to assess other possible aspects of the commercial practice not covered by the sector-specific provisions, such as, for example, aggressive behaviour by a trader.

For example:

In order to switch to a different telecom provider, a consumer is required by his or her current provider to fill in a form. However, the form is not accessible online and the provider is not replying to the consumer's emails/phone-calls. Article 106 of the European Electronic Communications Code (EECC) ⁽²²⁾ provides that, when switching, subscribers may retain their phone number, that the porting of numbers shall be carried out within the shortest possible time and that no direct charges are applied to end-users. The EECC also provides in Article 106(6) that providers must cooperate in good faith and must not delay or abuse the process. National regulatory authorities are responsible for ensuring the efficiency and simplicity of the switching process for the end-user. Furthermore, traders' practices regarding the switching can be assessed under Articles 8 and 9(d) UCPD, which prohibit disproportionate non-contractual barriers to switching as an aggressive commercial practice.

It follows from the above that, in general, the application of the **UCPD is not per se excluded just because other EU legislation is in place which regulates specific aspects of unfair commercial practices.**

In the *Abcur* case ⁽²³⁾, the Court noted:

'(...) the referring court asks, in essence, whether, if medicinal products for human use [...] fall within the scope of Directive 2001/83, advertising practices relating to those medicinal products [...] can also fall within the scope of Directive 2005/29.(...)

As the Court has already held, Directive 2005/29 is characterised by a particularly wide scope ratione materiae which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers. (...)

the answer (...) is that even where medicinal products for human use, such as those at issue in the main proceedings, fall within the scope of Directive 2001/83, advertising practices relating to those medicinal products [...] can also fall within the scope of Directive 2005/29 provided that the conditions for application of that directive are satisfied.'

Therefore the **UCPD can usually be applied together with sector-specific EU rules in a complementary manner** because the more specific requirements laid down under other EU rules usually **add** to the general requirements set out in the UCPD. Typically, the UCPD can be used to prevent traders from providing the information required by the sector specific legislation in a misleading or aggressive manner, unless this aspect is specifically regulated by the sector-specific rules.

⁽²¹⁾ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

⁽²²⁾ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

⁽²³⁾ Joined Cases C 544/13 and C-545/13, *Abcur*, 16 July 2015.

The interplay with the information obligations in sector-specific EU instruments was highlighted in the *Dyson v BSH* case ⁽²⁴⁾. The case concerned the labelling of vacuum cleaners and whether the lack of specific information about testing conditions, which is not required under the sector-specific rules at hand ⁽²⁵⁾, could constitute a misleading omission. The Court confirmed that, in case of conflict between the UCPD and sector-specific legislation, the latter will prevail, which in this case meant that information that is not required by the EU energy label cannot be considered as 'material information' and that other information cannot be displayed.

The interplay with sector-specific rules was also addressed in the *Mezina* case ⁽²⁶⁾. The case concerned health claims that were made in relation to natural food supplements. Regulation (EC) No 1924/2006 of the European Parliament and of the Council ⁽²⁷⁾ on nutrition and health claims made on foods applies to nutrition and health claims made in commercial communications, whether in the labelling, presentation or advertising of foods to be delivered as such to the final consumer. In case of conflict between the provisions of Regulation (EC) No 1924/2006 and the UCPD, the former will take precedence in relation to health claims.

1.2.2. Information established by other EU law as 'material' information

The UCPD provides that information requirements in relation to commercial communication established by other EU law are 'material'.

Article 7(5)

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as **material**.

Such information requirements are found in a number of pieces of sector-specific EU legislation. For example:

- environment (e.g. Energy Labelling Framework Regulation ⁽²⁸⁾ and related delegated Regulations, Ecodesign Directive ⁽²⁹⁾ and related delegated Regulations, Tyre Labelling Regulation ⁽³⁰⁾, Fuel Economy Directive ⁽³¹⁾);

⁽²⁴⁾ Case C-632/16, *Dyson*, 25 July 2018.

⁽²⁵⁾ Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJ L 153, 18.6.2010, p. 1); and the Commission Delegated Regulation (EU) No 665/2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of vacuum cleaners (OJ L 192, 13.7.2013, p. 1).

⁽²⁶⁾ Case C-363/19, *Mezina*, 10 September 2020.

⁽²⁷⁾ Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 404, 30.12.2006, p. 9).

⁽²⁸⁾ Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (OJ L 198, 28.7.2017, p. 1) provides, among other obligations for producers and dealers, for the labelling of energy-related products and the provision of standard product information regarding energy efficiency, the consumption of energy and of other resources by products during use and supplementary information concerning products, thereby enabling customers to choose more efficient products in order to reduce their energy consumption.

⁽²⁹⁾ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of eco-design requirements for energy-related products (OJ L 285, 31.10.2009, p. 10) contains a specific information requirement on the role consumers can play in the sustainable use of the product.

⁽³⁰⁾ Regulation (EU) 2020/740 of the European Parliament and of the Council of 25 May 2020 on the labelling of tyres with respect to fuel efficiency and other parameters, amending Regulation (EU) 2017/1369 and repealing Regulation (EC) No 1222/2009 (OJ L 177, 5.6.2020, p. 1).

⁽³¹⁾ Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO₂ emissions in respect of the marketing of new passenger cars (OJ L 12, 18.1.2000, p. 16) requires the display of a fuel economy label next to all new passenger cars at the point of sale containing, in particular, the official data on fuel consumption.

- financial services (e.g. Markets in Financial Instruments Directive ⁽³²⁾, Payment Services Directive ⁽³³⁾, Consumer Credit Directive ⁽³⁴⁾, Mortgage Credit Directive ⁽³⁵⁾, Payment Accounts Directive ⁽³⁶⁾, Regulation on key information documents for PRIIPs ⁽³⁷⁾);
- health (e.g. Directive 2001/83/EC of the European Parliament and of the Council ⁽³⁸⁾);
- electronic communications services (European Electronic Communications Code ⁽³⁹⁾);
- transport (e.g. Air Services Regulation ⁽⁴⁰⁾, passenger rights Regulations ⁽⁴¹⁾);
- food area (e.g. General Food Law Regulation ⁽⁴²⁾, Food Information to Consumers Regulation ⁽⁴³⁾).

Such information requirements will often be **more specific** than the information requirements of the UCPD.

Article 7(5) of the UCPD clarifies that such information requirements '*shall be regarded as material*'.

⁽³²⁾ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID 2) (OJ L 173, 12.6.2014, p. 349) requires, among other obligations, investment firms to provide clients, including consumers, with specific information on their services, the financial instruments and proposed investment strategies, costs and associated charges.

⁽³³⁾ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35) contains, among other obligations, more specific provisions on pre-contractual information and on the modalities for delivering this information.

⁽³⁴⁾ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66) contains specific information requirements when advertising for a credit.

⁽³⁵⁾ Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property contains rules on the marketing of mortgage credits such as the prohibition tying practices. The Directive also contains specific information requirements at advertising and pre-contractual stages.

⁽³⁶⁾ Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214).

⁽³⁷⁾ Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1).

⁽³⁸⁾ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67) contains additional requirements in terms of advertising and labelling of medicinal products.

⁽³⁹⁾ Directive (EU) 2018/1972 establishing the European Electronic Communications Code requires the provision of contractual information on various aspects, depending on the type of electronic communications service. The requirements are set in Article 102 and Annex VIII and include, among other aspects, information about the minimum service quality levels, the type of maintenance offered and any compensation and refund arrangements which apply if the service contracted does not meet quality levels. A contract summary is to be provided separately, the template for the contract summary is set in a Commission Implementing Regulation (EU) 2019/2243 of 17 December 2019 establishing a template for the contract summary to be used by providers of publicly available electronic communications services pursuant to Directive (EU) 2018/1972 of the European Parliament and of the Council (OJ L 336, 30.12.2019, p. 274).

⁽⁴⁰⁾ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3) requires the final price payable – which shall include all the foreseeable and unavoidable price elements available at the time of publication – to be indicated and broken down by components: air fare or air rate, taxes, airport charges, other charges and surcharges.

⁽⁴¹⁾ **Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1) contains a specific obligation to inform passengers that in case of denied boarding, flight cancellation or flight delay, they may be entitled to compensation and assistance and care;** Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p. 1); Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ L 334, 17.12.2010, p. 1); Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ L 55, 28.2.2011, p. 1); and Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations (OJ L 172, 17.5.2021, p. 1).

⁽⁴²⁾ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1).

⁽⁴³⁾ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ L 304, 22.11.2011, p. 18).

For example:

Article 23 of the Air Services Regulation requires air carriers, their agents and other ticket sellers, when offering flight tickets, to break down the final price by components (e.g. air fare, taxes, airport charges, and other charges and fees, such as those related to security and fuel). This constitutes material information within the meaning of Article 7(5) of the UCPD.

Accordingly, failing to provide such information can qualify as a misleading commercial practice under the UCPD **subject to the general transactional decision test**, i.e. if the omission causes or is likely to cause the average consumer to take a transactional decision they would not have taken otherwise. The concept of 'material information' within the meaning of the UCPD is discussed in section 2.9.1.

Recital 15 provides that Member States can retain or add information requirements relating to contract law where this is permitted by **minimum harmonisation clauses found in existing EU legal instruments**.

For example:

Member States can introduce additional pre-contractual requirements for on-premises sales, which are subject to the minimum harmonisation clause in Article 5(4) of the Consumer Rights Directive.

1.2.3. Interplay with the Consumer Rights Directive

The Consumer Rights Directive⁽⁴⁴⁾ (CRD) applies to all business-to-consumer contracts except in the areas that are excluded from its scope, such as financial and healthcare services. It fully harmonises **pre-contractual information requirements** for distance (including online) and off-premises contracts (i.e. contracts that are not concluded in regular brick-and-mortar shops, see Article 2(8) CRD for the full definition). At the same time, as stipulated in Article 6(8) of the CRD, the Directive does not prevent Member States from imposing additional information requirements in accordance with the Services Directive 2006/123/EC of the European Parliament and of the Council⁽⁴⁵⁾ and the e-Commerce Directive 2000/31/EC of the European Parliament and of the Council⁽⁴⁶⁾ (for further information, see Guidance on the CRD, section 4.1.1⁽⁴⁷⁾). As regards other contracts, in particular those concluded in regular brick-and-mortar shops ('on-premises' contracts), the Directive allows Member States to adopt or maintain **additional pre-contractual information requirements (Article 5(4))**. CRD also regulates certain contractual rights, in particular the right of withdrawal.

The **pre-contractual information requirements** in the CRD are more detailed than the information requirements in Article 7(4) of the UCPD for the invitations to purchase. An invitation to purchase under the UCPD refers to both the information provided at the marketing stage (advertising) and before the contract is signed. In the latter case, there may be an **overlap between the information requirements under Article 7(4) of the UCPD and the pre-contractual information requirements under the CRD**. The difference between pre-contractual information and an invitation to purchase is further explained in section 2.9.5.

Given the more exhaustive character of the information requirements in the CRD, complying with the requirements laid down by the CRD for the pre-contractual stage should normally also ensure compliance with Article 7(4) UCPD, as far as the content of the information is concerned. **However, the UCPD will still be applicable for assessing any misleading or aggressive commercial practices by a trader**, including as regards the form and presentation of this information to the consumer.

⁽⁴⁴⁾ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

⁽⁴⁵⁾ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

⁽⁴⁶⁾ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

⁽⁴⁷⁾ Commission Notice – Guidance on the interpretation and application of Directive 2011/83/EU of 25 October 2011 on consumer rights.

Another example of complementarity between the two instruments concerns the consequences of ‘inertia selling’ practices, which are prohibited under points 21 and 29 of the Annex I to the UCPD. Article 27 CRD clarifies that, in the case of inertia selling, the ‘consumer shall be exempted from the obligation to provide any consideration’ and in such cases ‘the absence of response from the consumer (...) shall not constitute consent’.

The concept of inertia selling has been further interpreted by the Court. It clarified that since neither the CRD nor UCPD regulate the formation of contracts, it is for national courts to assess, in accordance with national legislation, whether a contract may be regarded as concluded, for example, between a water supply company and a consumer in the absence of the latter’s express consent ⁽⁴⁸⁾.

In this context, the Court also clarified that point 29 of Annex I does not cover a commercial practice of a drinking water supply company maintaining the **connection to the public water supply network** when a consumer moves into a previously occupied dwelling, in a situation where the consumer does not have the choice of the supplier of that service, the supplier charges cost-covering, transparent and non-discriminatory rates that are proportionate to the water consumption, and the consumer knows that that dwelling is connected to the public water supply network and that water is supplied against payment ⁽⁴⁹⁾.

The Court has furthermore clarified that Article 27 CRD, read in conjunction with Article 5(1) and (5) UCPD, does not preclude a national law that requires the owners of an apartment in a building in co-ownership connected to a **district heating network** to contribute to the costs of the consumption of thermal energy by the common parts and the internal installation of the building, even though they did not individually request the supply of that thermal energy and they do not use it in their apartment since the contract was concluded at the request of the majority of the owners ⁽⁵⁰⁾.

1.2.4. Interplay with the Unfair Contract Terms Directive

The Unfair Contract Terms Directive ⁽⁵¹⁾ (UCTD) applies to all business-to-consumer contracts and concerns contractual terms which have not been individually negotiated in advance (e.g. pre-formulated standard clauses). Contractual terms may be regarded as unfair based on a general prohibition ⁽⁵²⁾, an indicative list of potentially unfair terms ⁽⁵³⁾ or an obligation to draft terms transparently, i.e. in plain, intelligible language ⁽⁵⁴⁾. In contrast to the UCPD, which is without prejudice to contract law and does not provide for the invalidity of contracts that result from unfair commercial practices, breaches of the UCTD have contractual consequences: under Article 6(1) of that directive, unfair terms used in a contract with a consumer must ‘not be binding on the consumer’ ⁽⁵⁵⁾.

Relationship between unfair contract terms and unfair commercial practices

The UCTD applies to business-to-consumer contracts in all sectors of economic activity, meaning that it may apply in parallel to other provisions of EU law, including other consumer protection rules such as the UCPD.

The Court has clarified certain elements of the relationship between these two Directives in the *Pereničová and Perenič* case, which concerned a credit agreement where the annual percentage rate of charge indicated was lower than the actual rate ⁽⁵⁶⁾.

⁽⁴⁸⁾ Case C-922/19, *Waternet*, 3 February 2021.

⁽⁴⁹⁾ *Ibid.*, para. 53-62.

⁽⁵⁰⁾ Joined Cases C-708/17 and C-725/17, *EVN Bulgaria Toplofikatsia*, 5 December 2019.

⁽⁵¹⁾ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

⁽⁵²⁾ Article 3(1) of Directive 93/13/EEC.

⁽⁵³⁾ Article 3(3) and Annex I of Directive 93/13/EEC. National law may extend the list or use formulations leading to stricter standards, including ‘black lists’ of terms that are always considered to be unfair without the need of a further assessment pursuant to Article 3(1) of the Directive. For more details, see section 3.4.7 of the Commission Notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (OJ C 323, 27.9.2019, p. 4) (COM(2019) 5325 final).

⁽⁵⁴⁾ Article 5 of Directive 93/13/EEC.

⁽⁵⁵⁾ For more details, see Commission Notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (COM(2019) 5325 final).

⁽⁵⁶⁾ Case C-453/10 *Pereničová and Perenič*, 15 March 2012.

The Court concluded that such erroneous information about the total price of the credit provided in the contract terms is **'misleading' within the meaning of the UCPD if it causes, or is likely to cause, the average consumer to take a transactional decision that they would not have taken otherwise.**

The fact that a trader resorted to such an **unfair commercial practice is one of the elements to be considered in the assessment of unfairness of contractual terms** under the UCTD ⁽⁵⁷⁾. In particular, this element may be used to establish whether a contract term which is based on it creates a **'significant imbalance'** in the rights and obligations arising under the contract, to the detriment of the consumer, under Article 3(1) and Article 4(1) of the UCTD. Similarly, this element could be relevant in assessing whether a contract term is **transparent** under Articles 4(2) and 5 of the UCTD ⁽⁵⁸⁾. At the same time, a finding that a trader resorted to an unfair commercial practice has **no direct effect on whether the contract is valid** under Article 6(1) of that Directive, without prejudice to any national rules pursuant to which the contract entered into on the basis of unfair commercial practices is void as a whole ⁽⁵⁹⁾.

The Court has not ruled directly on whether, in reverse, the **use of unfair contract terms** under the UCTD is to be regarded as an **unfair commercial practice** under the UCPD. It can be argued nevertheless that the use of such unfair contract terms, that are non-binding on the consumer as a matter of law, may in some cases be relevant for the identification of an unfair commercial practice. In particular, it can be the mark of a **misleading action** pursuant to Article 6 of the UCPD, insofar as it results in false information or in misleading the average consumer about the rights and obligations of the parties under the contract. In addition, the recourse to non-transparent contract terms, which are not drafted in plain and intelligible language as set out in Articles 4(2) and 5 of the UCTD, should be taken into account when assessing the transparency of material information and the existence of a **misleading omission** pursuant to Article 7 of the UCPD ⁽⁶⁰⁾. Furthermore, the use of unfair contract terms could indicate that a trader has failed to meet the requirements of professional diligence under Article 5 of the UCPD.

Only a few Member States' consumer protection authorities have specific powers in the area of contract terms to prohibit the use of non-negotiated standard contract terms which they consider to be unfair without having to take the trader to court ⁽⁶¹⁾.

Ex officio assessment

The Court has consistently held that national courts are under an **obligation to assess unfair contract terms of their own motion** (*ex officio*) ⁽⁶²⁾, i.e. even if the unfairness of contract terms is not raised by the consumer. The obligation stems from Article 6(1) of the UCTD, which provides that unfair terms are not to be binding on the consumer, as well as from the principle of effectiveness which requires that national implementing measures do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law ⁽⁶³⁾. The requirement of an *ex officio* control has been justified by the consideration that the system of protection established by the UCTD is based

⁽⁵⁷⁾ Case C-453/10 *Pereničová and Perenič*, point 2 of the operative part, second last sentence: 'A finding that such a commercial practice is unfair is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13/EEC, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer.'

⁽⁵⁸⁾ See section 3 of Commission Notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (COM(2019) 5325 final). See also Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance*, para. 76 and 77.

⁽⁵⁹⁾ Case C-453/10 *Pereničová and Perenič*, para. 46.

⁽⁶⁰⁾ See for example Case C-191/15, *Verein für Konsumenteninformation v Amazon*, para. 65-71 and point 2 of the operative part, where the Court ruled that a pre-formulated term on the choice of the applicable law designating the law of the Member State in which the seller or supplier is established does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 of the UCTD and is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation consumers also enjoy the protection of the mandatory provisions of the law that would be applicable in the absence of that term.

⁽⁶¹⁾ See examples in Italy, Poland, Belgium and the Netherlands.

⁽⁶²⁾ See for example Case C-618/10 *Banco Español de Crédito*, para. 41 to 43; Case C-415/11 *Aziz*, para. 46; Case C-109/17 *Bankia*, para. 37-39. For more details on the relevant case law of the Court, see section 5 of Commission Notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (COM(2019) 5325 final).

⁽⁶³⁾ See for example Case C-49/14 *Finanmadrid*, para. 46. In particular, the Court explained that Article 6(1) of the UCTD is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.

on the idea that the consumer is in a weak position vis-à-vis the trader as regards both the bargaining power and level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the trader without being able to influence the content of those terms ⁽⁶⁴⁾. Therefore, there is a real risk that consumers, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect them.

The Court recalled in the *Bankia* case ⁽⁶⁵⁾ that a national **court which assesses the fairness of contract terms in the light of the UCTD, including of its own motion, has the possibility to assess, in the context of that review, the unfairness of a commercial practice** on which that contract was based ⁽⁶⁶⁾.

By contrast, the Court ruled that, **in the other cases, national courts are not obliged to assess *ex officio* whether a particular contract or any of its terms has been concluded under the impact of unfair commercial practices** ⁽⁶⁷⁾. In particular, the Court found that, during mortgage enforcement proceedings, it is not necessary for national courts to be able to review whether the enforceable instrument breaches the UCPD because this directive does not place such an obligation on the national courts.

This interpretation has been justified by the fact that the UCPD does not provide for contractual consequences, unlike Article 6(1) of the UCTD. Moreover, the Court explained that the UCPD, in particular its Article 11, does not contain requirements similar to Article 7(1) of the UCTD, which precludes national legislation that does not provide for the possibility of interim measures in enforcement procedures. The absence of interim relief would limit the remedies available to consumers under the UCTD to a mere subsequent protection of a purely compensatory nature if the enforcement is carried before the judgment of the court declaring unfair the contract term on which the mortgage is based and annulling the enforcement proceedings ⁽⁶⁸⁾.

However, Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules introduces **individual remedies** for victims of **breaches of the provisions of the UCPD in a new Article 11a** of the UCPD, applicable as from 28 May 2022. Under this new provision consumers harmed by unfair commercial practices should have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract (see section 1.4 for additional information). The addition of that clear and unequivocal new provision may entail an extension of the requirement of an *ex officio* control to the unfair commercial practices under the UCPD (to be confirmed by the Court).

1.2.5. Interplay with the Price Indication Directive

The **Price Indication Directive** 98/6/EC of the European Parliament and of the Council ⁽⁶⁹⁾ (PID) requires traders to indicate the selling price and the unit price (price per unit of measurement) of goods in order to facilitate price comparison by consumers. Furthermore, Directive (EU) 2019/2161 added to the PID specific rules concerning 'price reductions'.

Concerning the interplay between the UCPD and the requirements of the PID regarding the indication of the selling price, the Court clarified in *Citroën* (paragraphs 44 to 46) that the PID regulates specific aspects of unfair commercial practices in dealings between businesses and consumers for the purpose of Article 3(4) UCPD, namely, those that relate to the indication, in offers for sale and in advertising, of the goods' selling price ⁽⁷⁰⁾. Therefore, the PID applies, rather than the UCPD (Article 7(4)(c)) **'in so far as the aspect relating to the selling price referred to in an advertisement such as that at issue in the main proceedings is governed by Directive 98/6'**.

In this case the relevant aspect was the trader's failure to indicate as selling price the final price, i.e. price including additional compulsory costs that were mentioned separately in the advertisement for the car. Accordingly, Article 2 of the PID, which defines selling price as the final price for the good including VAT and all other taxes, **does not prevent the application of other requirements of Article 7(4)(c) of the UCPD that are not governed by it**. In particular, traders

⁽⁶⁴⁾ See for example Case C-453/10 *Pereničová and Perenič*, para. 27.

⁽⁶⁵⁾ Case C-109/17, *Bankia*.

⁽⁶⁶⁾ *Ibid.*, para. 48.

⁽⁶⁷⁾ *Ibid.*, para. 34, 40-47, 51 and point 1 of the operative part.

⁽⁶⁸⁾ See for example Case C-415/11 *Aziz*, para. 60.

⁽⁶⁹⁾ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, p. 27).

⁽⁷⁰⁾ Case C-476/14, *Citroën*, 7 July 2016.

must comply with the UCPD requirement for an invitation to purchase to include **also information about possible additional charges where those cannot reasonably be calculated in advance.**

The amendments introduced to the PID by Directive (EU) 2019/2161 require Member States to adopt specific rules on price reductions ⁽⁷¹⁾. According to Article 6a, the trader announcing a 'price reduction' must indicate the 'prior price' which is defined as the lowest price charged by that trader during the past period of at least 30 days.

By analogy with the Court's findings in *Citroën*, the specific rules of the PID on price reductions should prevail over the UCPD regarding those aspects of price reduction that are governed by these specific rules, namely, the definition and indication of the 'prior' price when announcing price reduction. However, **the UCPD remains applicable to other aspects of price reductions**, in particular Article 6(1)(d) on the misleading claims about the existence of price advantage. It could apply, for instance, to different misleading aspects of price reduction practices, such as:

- excessively long periods during which announcements of price reductions apply compared to the period during which the goods are sold at 'full' price;
- advertising a promotion of, for example, 'up to 70 % off' when only a few of the items are reduced at 70 % and the rest are reduced at a lower percentage.

Such practices could be found to be in breach of the UCPD (Article 6(1)(d)), subject to a case-by-case assessment, notwithstanding the fact that the trader has complied with the requirements of the PID as regards the definition and indication of the 'prior' price. Conversely, a trader found in breach of the PID rules on price reductions, i.e. definition and display of the 'prior price', could also be found in breach of the UCPD.

Moreover, the **PID applies only to tangible goods** and not to services and digital content, hence the general UCPD rules continue to be fully applicable to the price reduction practices regarding such other products.

Finally, as the PID applies only to 'price reductions' as specifically defined therein, the **UCPD remains fully applicable and governs other types of practices promoting price advantages**, such as comparisons with other prices, combined or tied conditional offers and loyalty programmes (see section 2.8.2). The UCPD also applies to **personalised prices** (see section 4.2.8.).

1.2.6. Interplay with the Misleading and Comparative Advertising Directive

The Misleading and Comparative Advertising Directive ⁽⁷²⁾ (MCAD) covers business-to-business (B2B) relations. However, its rules on comparative advertising continue to provide a general test, based on fully harmonised criteria, for assessing whether comparative advertising is lawful also in business-to-consumer (B2C) transactions ⁽⁷³⁾.

Article 6(2)(a) of the UCPD qualifies as misleading a practice which, including through comparative advertising, creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor. At the same time, under Article 4(a) of the MCAD, comparative advertising is not permitted if it is misleading under Articles 6 and 7 of the UCPD.

Hence, these two Directives cross-reference each other. Being relevant for both B2C and B2B transactions, the conditions for assessing the lawfulness of comparative advertising laid down by Article 4 of the MCAD are rather broad and include also some aspects of unfair competition (e.g. denigration of trade marks). Therefore, the MCAD will either provide conditions for such assessment under the UCPD for B2C transactions or impose additional requirements which are relevant for traders, mainly competitors, in B2B transactions.

For those Member States which have extended all or part of the provisions contained in the UCPD to B2B transactions, the UCPD provisions as transposed into national laws will in practice replace the relevant MCAD provisions in B2B relations. It should be noted that some countries have also adopted specific rules for B2B.

⁽⁷¹⁾ Before these amendments to the PID, the Court had confirmed the impossibility for Member States to adopt more prescriptive national rules on price reductions on the basis of the UCPD and the (original) Price Indication Directive in Case C-421/12, *European Commission v Kingdom of Belgium*, 10 July 2014.

⁽⁷²⁾ Directive 2006/114/EC.

⁽⁷³⁾ The MCAD thus covers misleading advertising and unlawful comparative advertising as two independent infringements - see also the Court, Case C-52/13, *Posteshop SpA*, 13 March 2014.

The Court examined the interplay between the MCAD and the UCPD in the *Carrefour* case⁽⁷⁴⁾, which concerned comparative advertising that may be misleading under Article 7 of the UCPD. The practice involved advertising comparing the prices of products sold in shops having different sizes or formats, where those shops are part of retail chains each of which includes a range of shops having different sizes or formats (e.g. hypermarkets and supermarkets) and where the advertiser **compares the prices charged in shops having larger sizes or formats in its retail chain with those displayed in shops having smaller sizes or formats in the retail chains of competitors**. The Court considered that this type of advertising practice could be unlawful within the meaning of Article 4(a) and (c) of the MCAD, read in conjunction with Article 7(1) to (3) of the UCPD, unless consumers are informed clearly and in the advertisement itself that the comparison was made between the prices charged in shops in the advertiser's retail chain having larger sizes or formats and those indicated in the shops of competing retail chains having smaller sizes or format⁽⁷⁵⁾.

1.2.7. Interplay with the Services Directive

Contrary to sector-specific legislation, the Services Directive⁽⁷⁶⁾ has a broad scope of application. It applies to services in general as defined in the Treaty on the Functioning of the European Union, with certain exceptions. It can therefore not be considered as *lex specialis* to the UCPD within the meaning of Article 3(4).

Accordingly, the information requirements in Article 22 of the Services Directive apply **in addition** to the information required for invitations to purchase under Article 7(4) of the UCPD.

1.2.8. Interplay with the e-Commerce Directive

The e-Commerce Directive⁽⁷⁷⁾ applies to information society services, which will normally include the services provided by operators of websites and online platforms which allow consumers to buy a good or service.

Article 5 of the e-Commerce Directive lays down general information requirements for service providers, while Article 6 lays down information to be provided in commercial communications. The information requirements set out in these two articles are of minimum nature.

Article 6 in particular requires Member States to ensure that traders clearly identify promotional offers, such as discounts, premiums and gifts, where permitted in the Member States where the service provider is established, and the conditions to qualify for such promotional offers.

The Commission published on 15 December 2020 proposals for a Digital Services Act⁽⁷⁸⁾ (DSA) and for a Digital Markets Act⁽⁷⁹⁾ (DMA). The DSA aims to update and extend the rules on ecommerce and platforms in the EU, and the DMA aims to impose additional obligations on certain services operated by so-called gatekeepers⁽⁸⁰⁾.

1.2.9. Interplay with the Audiovisual Media Services Directive

The Audiovisual Media Services Directive⁽⁸¹⁾ (AVMSD) applies to linear and nonlinear audiovisual media services (i.e. TV broadcasting and on-demand media services), which can include audiovisual commercial communications which directly or indirectly promote goods or services (e.g. television advertising, sponsorship, teleshopping or product placement).

⁽⁷⁴⁾ Case C-562/15, *Carrefour*, 8 February 2017.

⁽⁷⁵⁾ *Ibid.*, para. 33-38.

⁽⁷⁶⁾ Directive 2006/123/EC.

⁽⁷⁷⁾ Directive 2000/31/EC.

⁽⁷⁸⁾ Proposal for a regulation on a Single Market For Digital Services (COM(2020) 825).

⁽⁷⁹⁾ Proposal for a regulation on contestable and fair markets in the digital sector (COM(2020) 842).

⁽⁸⁰⁾ The proposed Digital Services Act (DSA) would replace Articles 12-15 of the e-Commerce Directive. The proposed rules would be without prejudice to consumer law (Article 1(5)(h) DSA proposal). The DSA would also provide clarifications on the possible liability of online platforms for compliance with consumer protection law, including the UCPD, when the platform operates in a way that would lead an average and reasonably well-informed consumer to believe that the transaction takes place with the platform itself (Article 5(3) DSA proposal). According to the proposals, additional obligations for online platforms in the DSA and providers of core platform services designated as gatekeepers in the DMA (i.e. online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, advertising services – Article 2(2) DMA proposal) would apply in a complementary manner in addition to the specific rules established in EU consumer law.

⁽⁸¹⁾ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

Article 5 of the AVMSD lays down general information requirements for service providers, while Article 9 lays down requirements with which all audiovisual commercial communications must comply. Articles 10 and 11 respectively lay down the conditions which sponsorship and product placement in audiovisual media services must respect. The AVMSD also provides for other stricter criteria which apply only to television advertising and teleshopping (Chapter VII on television advertising and teleshopping).

The 2018 revision of the Directive⁽⁸²⁾ has extended some of these rules to video-sharing platforms (Article 28b). They must now comply with the requirements laid down in Article 9(1) with respect to audiovisual commercial communications that are marketed, sold or arranged by themselves and take appropriate measures to ensure compliance with respect to audiovisual commercial communications that are not marketed, sold or arranged by themselves. The revised Directive also includes disclosure requirements for audiovisual commercial communications in video-sharing platforms. The Commission has adopted Guidelines⁽⁸³⁾ on the practical application of the definition of a video-sharing platform service.

The UCPD applies to unfair commercial practices occurring in audiovisual media services, such as misleading and aggressive practices, to the extent that they are not covered by the provisions mentioned above.

1.2.10. *Interplay with the General Data Protection Regulation and the e-Privacy Directive*

The respect for private and family life and the protection of personal data are fundamental rights under Articles 7 and 8 of the EU Charter of Fundamental Rights. Under Article 7, everyone has the right to respect for his or her private and family life, home and communications. As regards the protection of personal data, Article 8(2) of the Charter contains key data protection principles (fair processing, consent or legitimate aim prescribed by law, right to access and rectification). Article 8(3) of the Charter requires that compliance with data protection rules be subject to control by an independent authority⁽⁸⁴⁾.

The **General Data Protection Regulation**⁽⁸⁵⁾ (GDPR) regulates the protection of personal data and the free movement of such data. Data protection rules are enforced by national supervisory authorities and national courts. The GDPR applies to the processing of 'personal data'. Personal data means any information relating to an identified or identifiable natural person ('data subject'). An identifiable person is someone who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, genetic, mental, economic, cultural or social identity.

The processing of personal data, which includes collecting and storing personal data, must be fair and lawful. One aspect of fair processing is that the data subject is given relevant information, including on the purposes of that processing, having regard to the specific circumstances in which the data are collected. Fair and lawful processing of personal data requires that data protection principles are complied with and that at least one of the six grounds for legitimate processing applies to any processing activity (see Article 6(1) GDPR). Consent by the individual is one of these grounds. Another is where a controller is under a legal obligation imposed by Union or Member State law to process the data (e.g. know-your-customer obligation).

⁽⁸²⁾ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (OJ L 303, 28.11.2018, p. 69).

⁽⁸³⁾ Communication from the Commission – Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive (OJ C 223, 7.7.2020, p. 3).

⁽⁸⁴⁾ The right to the protection of personal data established in Article 8 may be limited in accordance with the law and for the respect of the principles of a democratic society: subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52 (2) of the Charter).

⁽⁸⁵⁾ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

The **e-Privacy Directive** ⁽⁸⁶⁾ particularises and complements the GDPR regarding the processing of personal data in the electronic communication sector, as it facilitates the free movement of such data and of electronic communication equipment and services. In particular, Article 5(3) of the e-Privacy Directive requires the user's consent when 'cookies' or other forms of accessing and storing information on an individual's device (e.g. tablet or smartphone) are used, except where such storage or access is necessary for carrying out the transmission of a communication or for the provision of an information society service explicitly requested by a user.

Data-driven business structures are becoming predominant in the online world. In particular, online platforms analyse, process and sell data related to consumer preferences and other user-generated content. This, together with advertising, often constitutes their main source of revenues. The collection and processing of personal data in these types of situations must comply with the legal requirements under the ePrivacy Directive and GDPR mentioned above.

A trader's violation of the GDPR or of the ePrivacy Directive will not, in itself, always mean that the practice is also in breach of the UCPD. However, such privacy and data protection violations should be considered when assessing the overall unfairness of commercial practices under the UCPD, particularly in the situation where the trader processes consumer data in violation of privacy and data protection requirements, i.e. for direct marketing purposes or any other commercial purposes like profiling, personal pricing or big data applications.

From a UCPD perspective, the first issue to be considered concerns the **transparency of the commercial practice**. Under Articles 6 and 7 of the UCPD, traders should not mislead consumers on aspects that are likely to have an impact on their transactional decisions. More specifically, Article 7(2) and No 22 of Annex I prevent traders from **hiding the commercial intent** behind the commercial practice. See also section 3.4 on the use of the claim 'free' to describe digital products, which could be in breach of No 20 of Annex I.

Furthermore, the information requirements from the GDPR and e-Privacy Directive may be considered as material information under the UCPD Article 7(5). Personal data, consumer preferences and other user-generated content have economic value and are often being made available to third parties. Consequently, under Article 7(2) and No 22 of Annex I UCPD, if the trader does not inform a consumer that the data provided will be used for commercial purposes, this could be considered a **misleading omission of material information**, as well as a breach of transparency and other requirements under Articles 12 to 14 of the GDPR.

1.2.11. *Interplay with Articles 101-102 TFEU (EU competition rules)*

Council Regulation (EC) No 1/2003 ⁽⁸⁷⁾ provides the legal framework for implementing the competition rules laid down in Articles 101 and 102 TFEU. Both Articles are without prejudice to the UCPD.

Article 101(1) TFEU prohibits in certain circumstances agreements between undertakings, decisions by associations of undertakings and concerted practices, such as fixing purchase or selling prices or other trading conditions, which have as their object or effect the prevention, restriction or distortion of competition in the EU.

Article 102 TFEU prohibits, in certain circumstances, the abuse of a dominant position by one or more undertakings. Such an abuse may, for example, consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or directly or indirectly imposing unfair purchase or selling prices.

⁽⁸⁶⁾ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37), as amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13.4.2006, p. 54) and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337, 18.12.2009, p. 11).

⁽⁸⁷⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1). With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the TFEU. The two sets of provisions are, in substance, identical.

The fact that a given conduct is in breach of Articles 101 or 102 TFEU does not automatically mean that it is also unfair under the UCPD (or vice versa). The breach of competition rules should, however, be taken into account when assessing the unfairness of commercial practices under the UCPD insofar as they may be considered contrary to the general clause of Article 5(2) UCPD concerning ‘professional diligence’.

1.2.12. *Interplay with the EU Charter of fundamental rights*

According to its Article 51(1), the EU Charter of fundamental rights applies to the Member States when they implement Union law, thus also when they implement the provisions of the UCPD. The Charter contains provisions, among others, on the protection of personal data (Article 8), the rights of the child (Article 24), consumer protection (Article 38) and the right to an effective remedy and a fair trial (Article 47).

The Court has stressed the significance of Article 47 of the Charter on access to justice in relation to remedies available to consumers in connection with consumer rights granted under EU directives. The principle of effectiveness, as referred to by the Court, means that national rules of procedure may not make it excessively difficult or impossible in practice for consumers to exercise rights conferred by EU law ⁽⁸⁸⁾.

1.2.13. *Interplay with Articles 34–36 TFEU*

A national measure in an area which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of that harmonising measure and not those of the Treaty of the Functioning of the European Union (TFEU) ⁽⁸⁹⁾. Thus, when a national measure falls within the scope of the UCPD (discussed in sections 1.1 and 1.2 above), it should be assessed against the UCPD and not against the TFEU.

National measures that neither fall within the scope of the UCPD nor under any other harmonising instrument of secondary EU law are to be assessed under Articles 34–36 TFEU. The prohibition of measures having an effect equivalent to quantitative restrictions as laid down in Article 34 TFEU covers all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade ⁽⁹⁰⁾. See also the Commission Notice Guide on Articles 34–36 TFEU for further guidance on the application of these provisions ⁽⁹¹⁾.

The issue of when a national rule is capable of hindering intra-Union-trade has been dealt with extensively by the Court. Notably, in *Keck* ⁽⁹²⁾ the Court held that national provisions restricting or prohibiting certain **selling arrangements** are not such as to hinder directly or indirectly, actually or potentially trade between Member States, so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States ⁽⁹³⁾. The Court includes in the list of selling arrangements, measures relating to the conditions and methods of marketing ⁽⁹⁴⁾, measures which relate to the time of the sale of goods ⁽⁹⁵⁾, measures which relate to the place of the sale of goods or restrictions regarding by whom goods may be sold ⁽⁹⁶⁾ and measures which relate to price controls ⁽⁹⁷⁾.

Some of the examples of selling arrangements mentioned in the jurisprudence of the Court, notably national provisions that regulate the conditions and methods of marketing, **would fall within the scope of the UCPD if they concern business-to-consumer commercial practices and are intended to protect the economic interest of consumers.**

⁽⁸⁸⁾ Case C-34/13, *Kušinová*, para. 63–65 and Case C-169/14, *Sanchez Morcillo*, para. 35.

⁽⁸⁹⁾ Case C-322/01, *Deutscher Apothekerverband*, para. 64; Case C-205/07, *Gysbrechts* para. 33; Case C-37/92 *Vanacker and Lesage*, para 9; Case C-324/99, *DaimlerChrysler*, para. 32 and Case C-322/01, *Deutscher Apothekerverband*, para. 64.

⁽⁹⁰⁾ See Case C-8/74, *Dassonville*, para. 5.

⁽⁹¹⁾ Commission Notice – Guide on Articles 34–36 of the Treaty on the Functioning of the European Union (TFEU) (OJ C 100, 23.3.2021, p. 38).

⁽⁹²⁾ Cases C-267/91 and C-268/91, *Keck*.

⁽⁹³⁾ In *Keck*, the Court clarified its previous jurisprudence, in particular Case C-8/74, *Dassonville*.

⁽⁹⁴⁾ See Case C-412/93, *Leclerc-Siplec*, para 22, and Case C-6/98 *ARD*, para. 46.

⁽⁹⁵⁾ See Joined Cases C-401/92 and C-402/92, *Tankstation ’t Heukske and Boermans*, para. 14; Joined Cases C-69/93 and C-258/93, *Punto Casa and PPV* and Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94, *Semeraro Casa Uno and Others*, para. 9-11, 14, 15, 23 and 24.

⁽⁹⁶⁾ See Case C-391/92, *Commission v Greece*, para. 15; Joined Cases C-69/93 and C-258/93, *Punto Casa and PPV*.

⁽⁹⁷⁾ See Case C-63/94, *Belgacom*.

Many **commercial practices that do not fall within the scope of the UCPD** or other secondary EU law would appear to qualify as selling arrangements under *Keck*. Such selling arrangements **fall within the scope of Article 34 TFEU** if they, in law or in fact, introduce discrimination on the basis of the origin of products. Discrimination in law occurs when the measures are manifestly discriminatory, whilst discrimination in fact is more complex. Such measures would need to be assessed on a case-by-case basis.

If a measure or national practice violates Article 34 TFEU, it may in principle be justified under Article 36 TFEU or on the basis of one of the overriding requirements in the public interest recognised by the Court of Justice. It is for national authorities to demonstrate that the restriction on the free movement of goods is justified on one of these grounds ⁽⁹⁸⁾. Furthermore, the Member State must demonstrate that its legislation is necessary to effectively protect the public interests invoked ⁽⁹⁹⁾.

In order to be permissible, such provisions must be proportionate to the objective pursued and the objective must not be capable of being achieved by measures which are less restrictive of intra-EU trade ⁽¹⁰⁰⁾. More recently the Court held that *'in determining whether the restriction at issue is proportionate, it is also important to ascertain whether the measures implemented in that context go beyond what is necessary to attain the legitimate objective being pursued. In other words, it is necessary to determine whether there exist alternative measures that are also capable of attaining that objective while at the same time having a less restrictive effect on intra-Community trade'* ⁽¹⁰¹⁾. Moreover, the Court held that *'it should be borne in mind in that context that a restrictive measure may be regarded as complying with the requirements of European Union law only if it genuinely reflects a concern to secure the attainment of the objective pursued in a consistent and systematic manner'* ⁽¹⁰²⁾.

1.2.14. Interplay with the Platform-to-Business Regulation

The Platform-to-Business (P2B) Regulation ⁽¹⁰³⁾ lays down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities. The transparency requirements of the P2B Regulation cover ranking of search results (Article 5).

The Commission has published guidelines on ranking transparency that aim to facilitate the compliance of providers of online intermediation services and providers of online search engines with the requirements ⁽¹⁰⁴⁾.

A similar requirement concerning ranking transparency in the B2C area was introduced by Directive (EU) 2019/2161, which added to the UCPD a new point 4a in Article 7. It requires traders to provide consumers with information on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters. The interplay between the UCPD and the P2B Regulation in the area of ranking transparency is addressed in section 4.2.3.

1.3. The relationship between the UCPD and self-regulation

Article 2(f)

'code of conduct' means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;

Article 10

Codes of conduct

This Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organisations referred to in Article 11 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article. Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11.

⁽⁹⁸⁾ See Case C-192/01, *Commission v Denmark*.

⁽⁹⁹⁾ See, to that effect, Case C-333/08, *Commission v France*, para. 87.

⁽¹⁰⁰⁾ See, inter alia, Case C-313/94, *Graffione*, para. 17 and Case C-3/99, *Ruwet*, para. 50.

⁽¹⁰¹⁾ Case C-161/09, *Kakavetsos-Fragkopoulos*, para. 39.

⁽¹⁰²⁾ *Ibid.*, para. 42.

⁽¹⁰³⁾ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11.7.2019, p. 57).

⁽¹⁰⁴⁾ Commission Notice – Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council (OJ C 424, 8.12.2020, p. 1).

The UCPD recognises the importance of self-regulation mechanisms and clarifies the role that code owners and self-regulatory bodies can play in enforcement. Member States may encourage code owners to check for unfair commercial practices, in addition to enforcing the UCPD.

When the rules in self-regulatory codes are strict and rigorously applied by code owners and/or vigorously enforced by independent self-regulatory bodies, they may indeed reduce the need for administrative or judicial enforcement action. Moreover, when the standards are high and industry operators largely comply with them, such rules may be a useful reference point for national authorities and courts in assessing whether a commercial practice is unfair.

The UCPD contains several provisions which **prevent traders from unduly exploiting the trust which consumers may have in self-regulatory codes**. This is discussed in section 2.8.4 on non-compliance with codes of conduct.

1.4. Enforcement and redress

1.4.1. Public and private enforcement

According to Article 11 of the UCPD, Member States are required to ensure that **adequate and effective means exist to combat unfair commercial practices** in order to enforce compliance with the provisions of the Directive in the interest of consumers.

Such means include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may take legal action **in national courts and/or before an administrative authority** competent either to decide on complaints or to initiate appropriate legal proceedings.

Member States should ensure coordination in good faith between the different competent public enforcement authorities. In those Member States **where different authorities are responsible for enforcing the UCPD and sector-specific legislation**, the authorities should closely cooperate to ensure that the findings of their respective investigations into the same trader and/or commercial practice are consistent.

As regards the enforcement of the UCPD through legal action in the national courts, in the *Movic* case the Court of Justice confirmed that ‘an action where the opposing parties are the authorities of a Member State and businesses established in another Member State, in which those authorities seek, primarily, findings of infringements constituting allegedly unlawful unfair commercial practices and an order for the cessation of such infringements and, as ancillary measures, an order for publicity measures and the imposition of a penalty payment, falls within the scope of the concept of “civil and commercial matters”’ in Article 1(1) Brussels I Recast Regulation⁽¹⁰⁵⁾.

In the area of private enforcement, Directive (EU) 2020/1828 of the European Parliament and of the Council⁽¹⁰⁶⁾ on representative actions for the protection of the collective interests of consumers introduced in all Member States the possibility of enforcing the UCPD through **representative actions**. Such actions could be brought forth by qualified entities, seeking injunctive and redress measures on behalf of the affected consumers.

Finally, persons who report breaches of the UCPD (and of the CRD) are covered by the protective regime of Directive (EU) 2019/1937 of the European Parliament and of the Council⁽¹⁰⁷⁾ (the Whistleblower Directive) pursuant to Article 2(1a)(ix). By feeling safe to speak up, the number of whistleblowers’ reports will likely increase, thereby enhancing the enforcement of the UCPD.

1.4.2. Penalties

Article 13 of the UCPD deals with penalties for the infringement of the national rules transposing the Directive. Paragraph 1 requires Member States to lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to the Directive. It leaves to Member States to decide on the type of the available penalties and to determine the procedures for the imposition of penalties, as long as they are **effective, proportionate and dissuasive**.

⁽¹⁰⁵⁾ Case C-73/19, *Movic and others*, 16 July 2020.

⁽¹⁰⁶⁾ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, 4.12.2020, p. 1).

⁽¹⁰⁷⁾ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

Directive (EU) 2019/2161 amended Article 13 and added additional requirements. Firstly, it provides a non-exhaustive indicative list of criteria for applying the penalties (paragraph 2). Secondly, it lays down more specific rules (paragraphs 3 and 4) on fines for widespread infringements and widespread infringements with a Union dimension that are subject to coordinated enforcement actions under Regulation (EU) 2017/2394 of the European Parliament and of the Council ⁽¹⁰⁸⁾ on consumer protection cooperation ('CPC Regulation').

Recital 15 of Directive (EU) 2019/2161 encourages Member States to 'consider enhancing the protection of the general interest of consumers as well as other protected public interests' in the allocation of revenues from fines.

Article 13(5) requires Member States to notify the Commission of national rules on penalties and any subsequent amendments, i.e. by means of a specific notification explaining the exact national provisions concerned and not merely as part of the general notification of transposition measures.

Criteria for the application of penalties

Article 13(2) sets out a list of six **non-exhaustive and indicative criteria** that Member States' competent authorities and courts should take into account when imposing the penalties. They apply on a 'where appropriate' basis to infringements, both domestically and in cross-border situations:

Article 13

2. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

- (a) the nature, gravity, scale and duration of the infringement;
- (b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (c) any previous infringements by the trader;
- (d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- (e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;
- (f) any other aggravating or mitigating factors applicable to the circumstances of the case.

Recital 7 of Directive (EU) 2019/2161 explains some of the criteria. Recital 8 clarifies that they 'might not be relevant in deciding on penalties regarding every infringement, in particular regarding non-serious infringements.' Moreover, 'Member States should also take account of other general principles of law applicable to the imposition of penalties, such as the principle of non bis in idem.'

Intentional nature of the infringement is relevant for the application of the criteria set out in points (a) and (f). However, intention is **not** a necessary condition for the imposition of penalties in case of infringement.

The criterion set out in point (c) covers the relevant trader's same or different past infringements on the UCPD.

The criterion set out in point (e) concerns cases where **the same infringement has occurred in several Member States**. It only applies where information about penalties imposed by other Member States in respect of the same infringement is available through the co-operation mechanism established under the CPC Regulation.

Depending on the circumstances of the case, the penalties imposed on the same trader in other Member State(s) for the same infringement could indicate both greater scale and gravity under point (a) and/or qualify as a 'previous infringement' under point (c). Therefore, penalties imposed for the same infringement in other Member States could be an aggravating factor. The imposition of penalties in other Member States for the same infringement could also be considered in conjunction with other 'aggravating' circumstances covered by the other criteria referred to point (f) that generally refers to 'any other' aggravating or mitigating circumstances. However, a penalty imposed by another Member State on the same trader for the same infringement can also be relevant for the application of the *non bis in idem* principle in accordance with national law and Article 10(2) of the CPC Regulation ⁽¹⁰⁹⁾.

⁽¹⁰⁸⁾ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ L 345, 27.12.2017, p. 1).

⁽¹⁰⁹⁾ Article 10(2) of the CPC Regulation: 'The implementation and the exercise of powers set out in Article 9 in application of this Regulation shall be proportionate and shall comply with Union and national law, including with applicable procedural safeguards and with the principles of the Charter of Fundamental Rights of the European Union. The investigation and enforcement measures adopted in application of this Regulation shall be appropriate to the nature and the overall actual or potential harm of the infringement of Union laws that protect consumers' interests.'

Penalties in the context of CPC coordinated enforcement actions

Articles 13(3) and (4) provide additional, more prescriptive rules (compared to the general rule in paragraph 1) regarding penalties that must be available under national law for **infringements that are subject to coordinated actions under the CPC Regulation**.

Article 21 of the CPC Regulation requires Member States' competent authorities concerned by the coordinated action **to take enforcement measures, including the imposition of penalties, in an effective, efficient and coordinated manner against the trader responsible for the widespread infringement or the widespread infringement with a Union dimension**. 'Widespread infringements' and 'widespread infringement with a Union dimension' are cross-border infringements defined in Article 3(3) and (4) of the CPC Regulation ⁽¹¹⁰⁾.

For this category of infringements, Article 13(3) UCPD requires Member States to provide for **the possibility of imposing fines and the maximum amount of fine must be at least 4 % of the trader's annual turnover**. Accordingly, Member States can set the threshold of the maximum fine also higher than 4 % of the trader's annual turnover. They can also choose to apply the fine based on a larger reference turnover, such as trader's worldwide turnover. Likewise, they can extend the penalties available in the event of CPC coordinated actions to other types of infringements, such as domestic ones.

When information on the trader's annual turnover is not available, for example, in case of recently established companies, Article 13(4) requires Member States to provide for the possibility of imposing a **maximum fine of at least EUR 2 million**. Again, Member States can set the threshold of the maximum fine also higher than EUR 2 million.

This harmonisation of national rules on fines aims to ensure that enforcement measures are possible and coherent in all Member States participating in a CPC coordinated enforcement action.

The imposition of fines in accordance with Articles 13(3) and (4) of the UCPD is subject to the common criteria laid down in Article 13(2), including in particular 'the nature, gravity and duration or temporal effects of the infringement'. The actual fine imposed by the competent authority or court in a specific case **can be lower** than the maximum amounts described above, depending on the nature, gravity and other relevant characteristics of the infringement.

Subject to the coordination obligations under the CPC Regulation, the competent authority or court can decide to impose periodic fines (such as daily fines) until the trader stops the infringement. It could also decide to impose the fine conditionally if the trader fails to stop the infringement within the prescribed term despite the injunction to that effect.

The **relevant turnover** to be taken into account for the calculation of the fine is the turnover achieved in the Member State imposing the fine. However, Article 13(3) also makes it possible to establish the fine based on the trader's turnover achieved **in all Member States concerned by the coordinated action** if the CPC coordination results in a single Member State imposing the fine on behalf of the participating Member States.

Recital 10 of Directive (EU) 2019/2161 clarifies that 'in certain cases, a trader can also be a group of companies'. Accordingly, where the **trader responsible for the infringement is a group of companies**, its combined group turnover in the relevant Member States will be taken into account for the calculation of the fine.

The Directive does not define the reference year for the definition of the annual turnover. Therefore, for establishing the fine, the national authorities may use, for example, the **latest available annual turnover data** at the time of the decision on the penalty (i.e. preceding business year).

Under Article 13(3), Member States may, for national constitutional reasons, **restrict the imposition of fines to:** (a) infringements of Articles 6, 7, 8, 9 and of Annex I to this Directive; and (b) a trader's continued use of a commercial practice that has been found to be unfair by the competent national authority or court, when that commercial practice is

⁽¹¹⁰⁾ Article 3(3) of the CPC Regulation: "widespread infringement" means: (a) any act or omission contrary to Union laws that protect consumers' interests that has done, does or is likely to do harm to the collective interests of consumers residing in at least two Member States other than the Member State in which: (i) the act or omission originated or took place; (ii) the trader responsible for the act or omission is established; or (iii) evidence or assets of the trader pertaining to the act or omission are to be found; or (b) any acts or omissions contrary to Union laws that protect consumers interests that have done, do or are likely to do harm to the collective interests of consumers and that have common features, including the same unlawful practice, the same interest being infringed and that are occurring concurrently, committed by the same trader, in at least three Member States.
Article 3(4) of the CPC Regulation: 'widespread infringement with a Union dimension' means a widespread infringement that has done, does or is likely to do harm to the collective interests of consumers in at least two-thirds of the Member States, accounting, together, for at least two-thirds of the population of the Union.

not an infringement referred to in point (a). Accordingly, this restriction is meant to address circumstances of exceptional nature and allows Member State not to apply the provisions on fines to those one-off infringements subject to CPC coordinated enforcement for which the sole legal basis is Article 5 of the UCPD on professional diligence.

1.4.3. Consumer redress

Directive (EU) 2019/2161 added to the UCPD a new Article 11a requiring Member States to ensure that consumers harmed by the infringements of the UCPD have access to **proportionate and effective remedies**, in particular **compensation for damage and, where relevant, price reduction and contract termination**, subject to the conditions established at national level. Accordingly, consumer redress in the UCPD includes both contractual and non-contractual remedies.

The **conditions for the application of the remedies** are determined by Member States and could include factors such as the gravity and nature of the unfair commercial practice, the damage suffered and other relevant circumstances, where appropriate. The detailed **effects of the remedies** are also to be determined by Member States, such as whether the contract termination remedy results in the nullity of the contract from its conclusion (with the obligation for both parties to return to the state prior to the contract) or only in removing its future effects, provided that the principles of adequacy and effectiveness are respected and the effet utile of the directive is safeguarded.

These remedies are without prejudice to remedies available in other EU law instruments, such as those in the Digital Content Directive (EU) 2019/770 of the European Parliament and of the Council ⁽¹¹¹⁾ and Sale of Goods Directive (EU) 2019/771 of the European Parliament and of the Council ⁽¹¹²⁾. These remedies could also be claimed collectively through representative actions under Directive (EU) 2020/1828.

1.4.4. Application of the UCPD to traders established in third countries

The applicability of the UCPD to non-EU traders is regulated by Regulation (EC) No 864/2007 of the European Parliament and of the Council ⁽¹¹³⁾ on the law applicable to non-contractual obligations (Rome II). This Regulation applies 'in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters'. Rome II is applicable in civil or commercial disputes.

Article 6(1) of the Rome II Regulation:

The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

Article 6(4) of the Rome II Regulation:

The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

When the conditions of Article 6(1) of the Rome II Regulation are fulfilled, e.g. if misleading advertising is targeted to EU consumers and this harms the collective interests of EU consumers, the UCPD will be applicable. Pursuant to Article 6(4) of the Rome II Regulation, the law that is applicable may not be derogated from by a choice-of-law agreement.

2. MAIN CONCEPTS OF THE UCPD

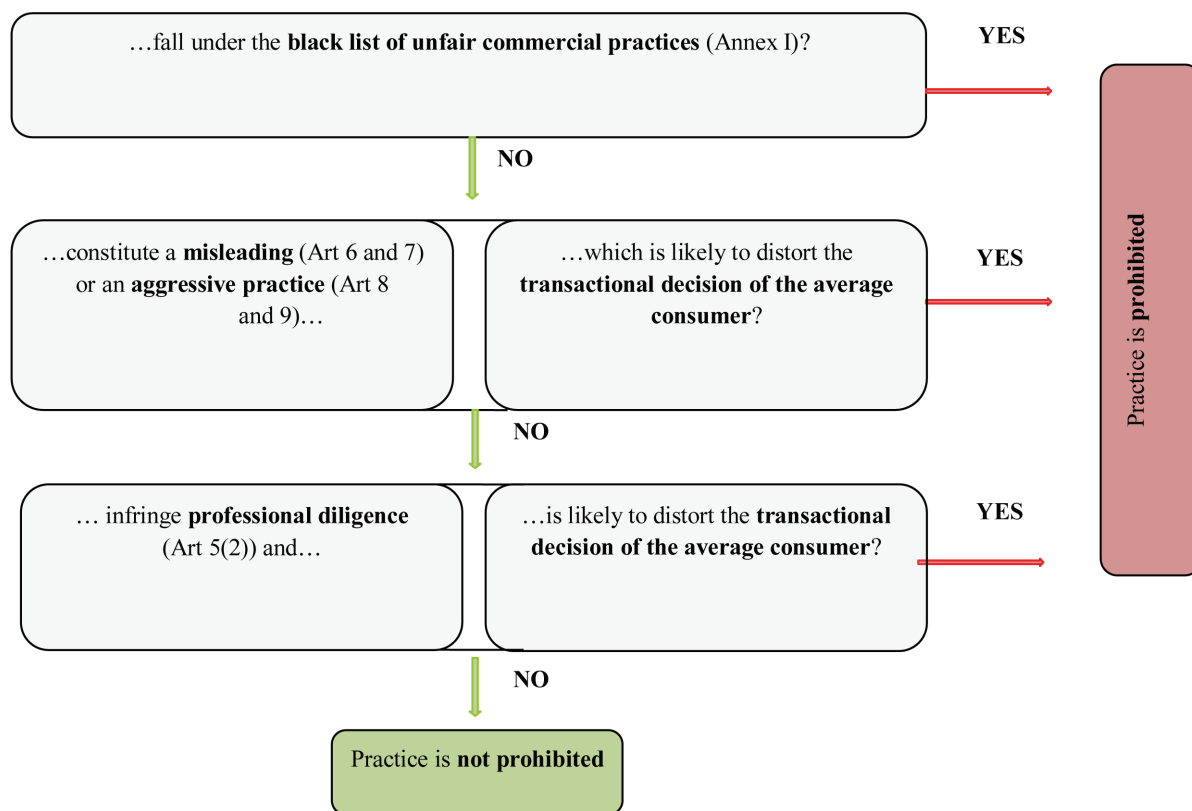
2.1. The functioning of the UCPD – Directive flowchart

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

⁽¹¹¹⁾ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

⁽¹¹²⁾ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

⁽¹¹³⁾ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

Does the commercial practice:**2.2. The concept of trader****Article 2(b)**

'trader' means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name or on behalf of the trader.

This definition covers not only traders who act on their own account but also persons, including consumers, **acting 'in the name of' or 'on behalf of' another trader.**

For example:

- A national court held that a company that placed advertisements in the media on behalf of and in the interests of another company, which was the service provider, was considered as a trader in the meaning of the national provisions transposing the UCPD ⁽¹¹⁴⁾.
- National consumer protection authorities acting through the European Consumer Protection Cooperation (CPC) Network carried out a joint enforcement action on online games that offer in-app purchases. They clarified that, although liability for the content of an app primarily rests with the app developer, an app store provider could also be held responsible for ensuring that games on their platforms do not contain direct exhortations to children ⁽¹¹⁵⁾.

Hence, under Article 2(b) in conjunction with relevant national laws on liability and sanctions, a trader can be held **jointly liable with another trader for infringements of the UCPD committed by the latter** on his behalf.

⁽¹¹⁴⁾ Judgment of the Latvian Administrative court, Case No. A420632710, 8 March 2012.

⁽¹¹⁵⁾ Press release of 18 July 2014: http://europa.eu/rapid/press-release_IP-14-847_en.htm

Furthermore, the Court has clarified that in a situation where an operator's commercial practices are put to use by another undertaking, acting in the name or on behalf of that operator, the UCPD could, in certain situations, be relied on against both that operator and the undertaking, if they satisfy the definition of 'trader' ⁽¹¹⁶⁾. This means that the Directive can be used to assess also the commercial practices of traders when those are **directly connected with a consumer's transaction with another trader** in whose name or on behalf of whom such trader is acting.

There may be situations where **individuals who appear to be consumers** selling products to other consumers could in fact be **either traders themselves or acting on behalf of traders** ('hidden B2C' sales).

Whether a seller qualifies as a 'trader' or a consumer must be assessed on a case-by-case basis. In the *Kamenova* case, a person had published a total of eight sales advertisements for various new and second-hand goods on a website ⁽¹¹⁷⁾. The Court noted that the mere fact that the sale is intended to generate profit or that a natural person publishes, simultaneously, on an online platform a number of advertisements offering new and second-hand goods for sale cannot suffice, by itself, to classify that person as a 'trader'. The determination of the status by the national court must take into account different non-exhaustive and non-exclusive criteria.

The criteria include the following:

- whether the seller has a profit-seeking motive, including the fact that they might have received remuneration or other compensation for acting on behalf of a given trader;
- the number, amount and frequency of transactions;
- the seller's sales turnover; whether the seller purchases products in order to resell them;
- whether the seller is subject to VAT;
- whether the sale is carried out in an organised manner;
- whether the seller had a legal status which enabled them to engage in commercial activities;
- whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods;
- whether the seller had technical information and expertise relating to the products which the consumer did not necessarily have, resulting in a more advantageous position of the seller compared to that of the consumer;
- whether the seller purchased these goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity ⁽¹¹⁸⁾.

Persons whose main activity is to sell products online on a very frequent basis, purchasing products to resell them at a higher price, could for example fall within the definition of trader.

Persons engaging in commercial endorsement activities online, such as **influencer marketing** (see section 4.2.6 for more information), could qualify as traders if they engage in such practices on a frequent basis, regardless of the size of their audience. Alternatively, in case the persons do not qualify as traders, they could nevertheless be considered to act 'on behalf of the trader whose products are promoted by the practice and therefore fall within the scope of the Directive. The obligations to be clear about the commercial communication, in particular under Article 7(2) UCPD, apply to traders regardless of whether they are the supplier of the products or not.

Organisations which pursue charitable or ethical goals may qualify as traders under the UCPD when they engage in commercial activities (e.g. the sale of products meeting certain ethical standards) towards consumers. Whenever they act as traders, they should comply with the UCPD insofar as their commercial activities are concerned. For instance, information about the origin of the product or its ethical aspects should not be misleading.

The fact that an organisation is structured as '**non-profit**' is not decisive to the assessment of whether it qualifies as a trader.

⁽¹¹⁶⁾ Case C-391/12, *RLvS*, 17 October 2013, para. 38.

⁽¹¹⁷⁾ Case C-105/17, *Kamenova*, 4 October 2018.

⁽¹¹⁸⁾ Case C-105/17, *Kamenova*, 4 October 2018, para. 38.

The same applies to **public authorities**, which may, depending on the circumstances also qualify as a trader when carrying out commercial activities.

For example:

A municipality marketing discounted ticket prices for an art exhibition it organises could fall under the definition of trader in the UCPD.

In the *BKK Mobil Oil* case, the Court confirmed that a public law body charged with a task of public interest such as managing a statutory health insurance fund, can qualify as a ‘trader’ as:

‘the EU legislature has conferred a particularly broad meaning on the term ‘trader’, which refers to ‘any natural or legal person’ which carries out a gainful activity and does not exclude from its scope either bodies pursuing task of public interest or those which are governed by public law’ ⁽¹¹⁹⁾.

The Court also concluded that:

‘[...] BKK’s members, who must manifestly be regarded as consumers within the meaning of the Unfair Commercial Practices Directive, could be deceived by the misleading information circulated by that body thus preventing them from making an informed choice [...] and leading them to take a decision they would not have taken in the absence of such information, as envisaged by Article 6(1) of that Directive. In those circumstances, whether the body at issue or the specific task it pursues are public or private is irrelevant’ ⁽¹²⁰⁾.

In particular, under **Annex I of the UCPD (the ‘black list’) No 22**, it is prohibited to falsely claim or create the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

This includes the situation where a trader initially acts as a trader but then pretends to be a consumer, for example when the seller presents oneself as a professional car trader for the purposes of the transaction but later signs the contract as a natural person.

2.3. The concept of commercial practice

Article 2(d)

business-to-consumer 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;

The Court held that the sole criterion in Article 2(d) of the UCPD is that the trader’s practice must be directly connected with the promotion, sale or supply of a product or service to consumers ⁽¹²¹⁾.

A commercial practice can be ‘directly connected’ to the promotion of a product for example by providing ‘information relating to the availability of a product at an attractive price during a certain period’ ⁽¹²²⁾. Based on the case-law currently available, it is difficult to define a limit for when a commercial practice would no longer be ‘directly connected’ to the promotion of a product. However, as an example, where a trader sells a street map not containing any promotional messages, and the consumer subsequently uses that street map to find his way to a given shop, it would seem unreasonable to qualify the selling of that street map as a commercial practice ‘directly connected’ to the promotion of a product in that given shop.

The Court stated that the UCPD covers activities of a professional following on from a commercial transaction relating to any good or service and following the conclusion of a contract or during the performance of that contract ⁽¹²³⁾.

On this basis, the Court concluded that:

‘[...] the fact that the action of the professional concerned took place on only one occasion and affected only one single consumer is immaterial in this context.

⁽¹¹⁹⁾ Case C-59/12, *BKK Mobil Oil*, 3 October 2013, para. 32.

⁽¹²⁰⁾ *Ibid.*, para. 37.

⁽¹²¹⁾ See, *inter alia*, Case C-388/13, *UPC*, para. 35, with references.

⁽¹²²⁾ Case C-281/12 *Trento Sviluppo*, 19 December 2013, para. 35.

⁽¹²³⁾ Case C-388/13, *UPC*, 16 April 2015, para. 36.

Neither the definitions set out in Articles 2(c) and (d), 3(1) and 6(1) of the Unfair Commercial Practices Directive nor the latter, considered as a whole, contain any indication that the act or omission on the part of the professional must be recurrent or must concern more than one consumer.'

'[...] the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a 'misleading commercial practice', within the meaning of that directive, even though that information concerned only one single consumer.' ⁽¹²⁴⁾

The Court has provided guidance on the limits of the scope of the UCPD in relation to the concept of commercial practices in the *Kirschstein* case. It held that there is a difference between the trader's 'commercial practices' that are closely linked to the promotion and sale or supply of products to consumers, hence caught by the Directive, and rules to which those practices refer, that relate to the 'product' itself (e.g. authorisation of service providers that can issue university degrees) and which therefore do fall outside the UCPD' scope of application.

'It follows from the above that a national rule which aims to determine the operator who is authorised to provide a service in a commercial transaction, without directly regulating the practices which that operator may subsequently implement to promote or dispose of the sales of that service, cannot be considered to relate to a commercial practice in direct connection with the provision of that service, within the meaning of Directive 2005/29.' ⁽¹²⁵⁾

Concerning the area of print media advertisements, while the Court acknowledged the particularly broad definition of 'commercial practices' and that the UCPD may apply in a situation where an operator's commercial practices are put to use by another undertaking, it ruled in the *RLvS* case that the UCPD, and in particular point 11 of Annex I concerning advertorials, cannot be relied upon against newspaper publishers ⁽¹²⁶⁾. The Court referred to the lack of EU secondary legislation for the written press and explained that this provision was not intended as such to require newspaper publishers to prevent possible unfair commercial practices by advertisers ⁽¹²⁷⁾.

Traders must also be cautious when making **ethical and corporate social responsibility** claims, which can cover various aspects of the traders operating methods, for example concerning working conditions, animal welfare, charity contributions etc. Corporate social responsibility refers to companies taking responsibility for their impact on society by having in place a process to integrate social, environmental, ethical and consumer concerns into their business operations and core strategy.

Claims regarding such aspects have become a marketing tool used to meet the growing concern of consumers that traders comply with ethical and social standards. Such claims may have an impact on the transactional decision of a consumer who has to choose between two competing products of similar quality and price. For this reason, they can be deemed to be 'directly connected with the promotion, sale or supply of a product' and therefore qualify as a commercial practice within the meaning of the UCPD. Due to the significant similarities between ethical/corporate social responsibility claims and environmental claims, the **key principles applying to environmental claims may also apply to ethical and corporate social responsibility claims** (see section 4.1).

2.3.1. After-sales practices, including debt collection activities

Under Article 3(1), commercial practices occur not only during the marketing and supply stages, but also after the transaction has been made (after-sales stage), which can be covered by the scope of the UCPD.

Recital 13 of the UCPD also refers to 'unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution'.

Debt collection activities should be regarded as after-sales commercial practices, because the debt collection is directly connected with the sale or supply of products. There are no objective reasons to differentiate that assessment based on whether a trader outsources it through specialised agencies or not.

This is also implied in **No 25 of Annex I** which considers the practice of 'Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return **except in circumstances and to the extent justified**, under national law, **to enforce a contractual obligation**' as unfair in all circumstances.

⁽¹²⁴⁾ Case C-388/13, *UPC*, 16 April 2015, para. 41, 42 and 60.

⁽¹²⁵⁾ Case C-393/17, *Kirschstein*, 4 July 2019, para. 44 and 45.

⁽¹²⁶⁾ C-391/12, *RLvS*, 17 October 2013, para. 44 to 50.

⁽¹²⁷⁾ *Ibid.*, para. 44 and 49.

The Court confirmed in the *Gelvora* case that the legal relationship between a debt collection agency and the debtor, who has defaulted under a consumer credit agreement and whose debt has been assigned to that agency, indeed falls within the material scope of the Directive ⁽¹²⁸⁾.

For example:

- A national court held that informing a consumer who is not complying with his financial obligations that his name will be published as a default payer in local media is an aggressive commercial practice ⁽¹²⁹⁾.
- A consumer authority took action against a debt collector that used a logo, name and documents that were similar to those used by the official agencies. The trader gave consumers the misleading impression that it was enforcing official court orders to force consumers to pay their debts when in fact such powers are reserved for public authorities ⁽¹³⁰⁾.
- A consumer authority considered debt collection as an after-sale commercial practice falling within the scope of the UCPD and fined a debt collection agency for misleading consumer debtors about the extent and gravity of adverse consequences they would face, would they fail to settle their debt immediately. The debt collection agency also failed to properly inform consumers about the exact contractual basis for the debt and exercised on them undue psychological pressure ⁽¹³¹⁾.

2.3.2. Traders buying products from consumers

Certain traders may, in the course of their professional activity, purchase products from consumers. Examples of this include car dealers, antique dealers and retailers of second-hand goods.

According to the definition provided in the UCPD, commercial practices are only those **'directly connected with the promotion, sale or supply of a product to consumers'**. The reverse situation, where traders purchase products from consumers, does not fall within the scope of the UCPD. However, there are cases where **a link can be established** between the sale of a product by a consumer to a trader and the promotion, sale or supply of a (different) product to the consumer.

For instance, trade-in agreements are common place in the motor vehicle trade. The trader purchases a used vehicle from the consumer who in turn buys a vehicle from the trader. In such cases, the trader's purchase could be considered as part of the remuneration given by the consumer for the business-to-consumer part of the transaction. Trade-in agreements clearly fall within the scope of the UCPD.

The purchase and resale of gold could in some circumstances fall under the UCPD. For example, a trader, who offers consumers a professional evaluation for their gold before buying it, could be considered as providing a service to the consumers. When this is the case, the UCPD will apply and, as a consequence, the trader should not provide misleading information on the real value of the gold or on the price of the service offered (e.g. omission of 'administrative fees').

For example:

A trader who is an expert on Chinese pottery tells a consumer that a Ming vase is a fake. If it is not the case, the statement would be likely to amount to a misleading action.

2.4. Transactional decision test

Article 2(k)

'transactional decision' means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.

⁽¹²⁸⁾ Case C-357/16, *Gelvora*, 20 July 2017.

⁽¹²⁹⁾ *Krajsky sud v Presove*, 27 October 2011, 2Co/116/2011.

⁽¹³⁰⁾ PS9042 - Esattoria-Agenzia Riscossioni. Provvedimento n. 24763, 22 January 2014.

⁽¹³¹⁾ DKK – 61 – 10/07/DG/IS.

The UCPD's general provisions (Articles 5 to 9) cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers' economic behaviour, **thereby causing or being likely to cause them to take a transactional decision that they would not have taken otherwise.**

The wording used in Article 2(k) suggests that the definition should be interpreted in a broad manner and that the concept of transactional decision should cover a wide range of decisions made by the consumer in relation to a product.

The Court held that 'transactional decision' covers not only the decision whether or not to purchase a product, but also **decisions directly related to that decision, in particular the decision to enter the shop:**

'Since the commercial practice at issue in the main proceedings concerns information relating to the availability of a product at an attractive price during a certain period, it must be determined whether the acts preparatory to the purchase of a product, such as the consumer's trip to the shop or the act of entering the shop, may be regarded as constituting transactional decisions for the purposes of the directive.

[...] "any decision taken by a consumer concerning whether, how and on what terms to purchase" is a transactional decision. That concept therefore covers not only the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop.

[...] Article 2(k) of the directive must be interpreted as meaning that any decision directly related to the decision whether or not to purchase a product is covered by the concept of "transactional decision" ⁽¹³²⁾.

In that sense, **the notion of transactional decision also encompasses pre-purchase and post-purchase decisions.**

There is a wide spectrum of transactional decisions a consumer may take in relation to a product or a service other than the decision whether to purchase.

These transactional decisions may result in actions which have no legal consequences under national contract law and may be taken at any time between the moment the consumer is initially exposed to the marketing and the end of a product's life or the final use of a service.

Many **pre-purchase decisions** could be considered transactional decisions.

For example:

- A decision to travel to a sales outlet or shop as a result of a commercial offer.
- A decision to agree to a sales presentation by a trader.
- A decision to click through a website as a result of a commercial offer.

Many **post-purchase decisions** made after having purchased a product or subscribed to a service can qualify as transactional decisions.

For example:

- A decision to withdraw from or terminate a service contract.
- A decision to switch to another service provider.

In addition, an unfair commercial practice directed at one consumer could lead to a **transactional decision by another consumer**, which the latter would not have taken otherwise.

For example:

Commercial practices by a trader offering online user reviews in which the trader screens negative reviews could be a misleading action or omission even though the relevant transactional decision relates to a decision by a different consumer than the one pressured into removing or not posting a negative review. In this situation, the trader's creation of a false or misleading overall impression about the nature of the review site, or how it operates, could cause the average consumer reading the online reviews to take a decision to contact a listed trader (and subsequently contract with them) which they would not have taken, had they known that negative reviews had been withheld.

⁽¹³²⁾ Case C-281/12, Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato, 19 December 2013, para. 35, 36 and 38.

The UCPD's general provisions (Articles 5 to 9) cover unfair, misleading and aggressive commercial practices which are capable of **distorting consumers' economic behaviour**. These provisions use a slightly different wording to express these requirements.

Under Article 5(2) UCPD, a commercial practice is unfair if it is contrary to the requirements of professional diligence and **'materially distorts or is likely to materially distort'** the economic behaviour of the average consumer. However, Articles 6, 7 and 8 prohibit a misleading or aggressive commercial practice if it causes or is likely to cause the average consumer to **'take a transactional decision that he would not have taken otherwise'**.

The requirement that a commercial practice must be capable of distorting the consumer's economic behaviour in order to be unfair is worded differently in Article 5(2) than in Articles 6, 7 and 8. At first sight, this apparent contradiction could pose problems of interpretation. However, Article 5(2) should be read in conjunction with Article 2(e), which states:

Article 2(e)

'to materially distort the economic behaviour of consumers' means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.

Consequently, on the basis of Article 5(2), what determines whether a commercial practice **'materially distorts or is likely to materially distort'** the consumer's economic behaviour is whether the commercial practice causes or is likely to cause the consumer to **'take a transactional decision that he would not have taken otherwise'**.

This is the same assessment that is to be made on the basis of Articles 6, 7 and 8. It follows that although the wording of Article 5(2) is different from the wording of the latter Articles, the requirement in relation to the material distortion of the consumer's behaviour is the same.

The broad concept of **transactional decision** developed by the Court ⁽¹³³⁾ allows for the UCPD to apply to a variety of cases where a trader's unfair behaviour is not limited to **causing the consumer to enter into a sales or service contract**.

A commercial practice may be considered unfair not only if it is likely to cause the average consumer to purchase or not to purchase a product, but also if it is likely to cause the consumer to, for example:

- enter a shop;
- **spend more time** on the internet engaged in a booking process;
- decide **not to switch** to another service provider or product;
- click on a **link or advertisement** online;
- continue using the service by browsing or scrolling.

The UCPD does not require to demonstrate whether the consumer's economic behaviour (i.e. its transactional decision) has actually been distorted. It allows an assessment as to **whether a commercial practice is 'likely'** (i.e. capable) to have such an impact on the average consumer. National enforcement authorities should therefore investigate the facts and circumstances of the individual case (i.e. *in concreto*), but assess also the **'likelihood'** of the impact of that practice on the transactional decision of the average consumer (i.e. *in abstracto*).

For example:

*A commercial announcement claimed that a new model of a car was 'the safest car in the world'. In deciding whether the claim had affected any consumer in regard to making a well-founded transactional decision, a national court held that to qualify as a transactional decision, it was sufficient that **the marketing was likely to raise an interest among the average consumer and trigger the consumer's decision to take any further action** (e.g. visit a store or website to obtain additional information on the product) ⁽¹³⁴⁾.*

⁽¹³³⁾ See *inter alia* Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica*, mentioned earlier.

⁽¹³⁴⁾ MD 2010:8, *Marknadsdomstolen, Toyota Sweden AB v Volvo Personbilar Sverige Aktiebolag*, 12 March 2010.

2.5. Average consumer

Recital 18

It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. **In line with the principle of proportionality**, and to permit the effective application of the protections contained in it, **this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice**, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group... **The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.**

As indicated in Recital 18 and further **specified in Articles 5 to 9**, the UCPD's **benchmark for assessing the impact of a commercial practice** is the notion of the 'average consumer', as previously developed by the Court:

*'...in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the **presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect.**'* ⁽¹³⁵⁾

This concept was indeed developed by the Court of Justice prior to the UCPD. It was codified then by the UCPD to give national authorities and courts common criteria to enhance legal certainty and reduce the possibility of divergent assessments.

In the case-law of the Court, the average consumer is a reasonably **critical person, conscious and circumspect in his or her market behaviour**.

For example:

The 'reasonably circumspect consumer' will not believe that the size of a promotional marking on a package corresponds to the promotional increase in the size of that product ⁽¹³⁶⁾. Usually, the average consumer will not attribute to goods bearing the marking 'dermatologically tested' any healing effects which such goods do not possess ⁽¹³⁷⁾.

The average consumer under the UCPD is in any event not somebody who needs only a low level of protection because they are always in a position to acquire available information and act wisely on it. On the contrary, as underlined in Recital 18, **the test is based on the principle of proportionality**. The UCPD adopted this notion to strike the right balance between the need to protect consumers and the promotion of free trade in an openly competitive market.

Therefore, the average consumer concept under the UCPD should always be interpreted having in mind **Article 114 of the Treaty, which provides for a high level of consumer protection**.

At the same time, the UCPD is based on the idea that, for instance, a national measure prohibiting claims that might **deceive only a very credulous, naive or cursory consumer** (e.g. 'puffery' ⁽¹³⁸⁾) would be disproportionate and create an unjustified barrier to trade.

As explicitly mentioned by Recital 18, the average consumer test is not a statistical test. This means that **national authorities and courts should be able to determine whether a practice is liable to mislead the average consumer**

⁽¹³⁵⁾ Case C-210/96, *Gut Springenheide and Tusky*, 16 July 1998, para 31.

⁽¹³⁶⁾ Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH*, 6 July 1995, para. 24.

⁽¹³⁷⁾ Case C-99/01, *Criminal proceedings against Gottfried Linhart and Hans Biffel*, 24 October 2002, para. 35.

⁽¹³⁸⁾ 'Puffery' is a subjective or exaggerated statement about the qualities of a particular product, which is not meant to be taken literally. This is the kind of practice referred to in the last sentence of Article 5(3) UCPD.

exercising their own judgment by taking into account the general presumed consumers' expectations, without having to commission an expert's report or a consumer research poll ⁽¹³⁹⁾.

For example:

- A national court found that people with impaired eyesight can also be considered average consumers and printing information in a very small font can be considered a misleading commercial practice ⁽¹⁴⁰⁾. A similar decision was taken by another enforcement authority ⁽¹⁴¹⁾.
- A national court found that a reasonably acting consumer is not suspicious and tends to trust that the received information is valid and accurate. A reasonably acting consumer is not obliged to further search for the entire accurate content of the message delivered to them, unless the sender of the message emphatically draws their attention to, or there is strong reference to such an obligation in the text of the message ⁽¹⁴²⁾.

Article 5(2)(b) of the UCPD further refines the average consumer test when the interests of **specific groups of consumers** are at stake. When the practice is **directed at a particular group of consumers**, its impact should be assessed from the perspective of the **average member of the relevant group**. For instance, this could be the case when a commercial practice concerns a unique product, which is promoted through marketing channels to direct the marketing towards a specific and limited group of recipients, such as a particular profession. In this case, the average member of that particular group could have more specific knowledge or characteristics that an average consumer would not necessarily have, which has a direct impact on the assessment of the effects of the commercial practice. Given the distinction from the general category of the average consumer, the 'particular group of consumers' should be sufficiently identifiable, of limited scope and homogeneous. If a particular group cannot be identified, then the assessment should focus on the general average consumer benchmark.

For example:

In a case concerning misleading advertising of children's diapers, notably implying a correlation between allergies and the trader's diaper's, a national court identified the average consumer as parents with small children, not having any special knowledge about allergies ⁽¹⁴³⁾.

It is also possible for different consumer groups to be concerned by the same commercial practice. For example, there can be an average consumer whom the practice reaches or to whom it is addressed (Article 5(1)(b)) and, at the same time, the practice can be targeted at a group of vulnerable consumers. In general, the assessment should take into account the consumers that were actually reached by the practice, irrespective of whether they were the consumers that the trader intended to reach.

When designing their commercial messages, traders may, at times and in light of the specific nature of the products at stake, need to take certain **social, linguistic and cultural features** into account which are typical of the average consumers to which the products are targeted. In certain cases, such **social, linguistic and cultural features, which can also be peculiar to a given Member State**, may therefore also justify a different interpretation of the message communicated in the commercial practice by the competent enforcement authority or court. In a case relating to misleading cosmetics advertising, the Court held that:

*'In order to apply that test to the present case, several considerations must be borne in mind. In particular, it must be determined whether **social, cultural or linguistic factors** may justify the term "lifting", used in connection with a firming cream, **meaning something different to the German [average] consumer as opposed to consumers in other Member States**, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word "lifting".' ⁽¹⁴⁴⁾*

Moreover, the Court stated that:

*'a prohibition of marketing on account of the misleading nature of the trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States. [...] **it is possible that because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another.**' ⁽¹⁴⁵⁾*

⁽¹³⁹⁾ Case C-210/96, *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt*, 16 July 1998, para. 31, 32, 36 and 37. See also Case C-220/98, *Estée Lauder Cosmetics GmbH & Co. ORG, v Lancaster Group GmbH*, opinion of Advocate General Fennelly, para. 28.

⁽¹⁴⁰⁾ 4 U 141/11.

⁽¹⁴¹⁾ P/0359/07/2010.

⁽¹⁴²⁾ Fővárosi Ítéltábla, Magyar Telekom Nyrt and others, case ID: 2.Kf.27.171/2012/4.

⁽¹⁴³⁾ Decision of 4 July 2012 of the Marknadsdomstolen.

⁽¹⁴⁴⁾ Case C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group*, [2000] ECR I-00117, para. 29.

⁽¹⁴⁵⁾ Case C-313/94, *F.lli Graffione SNC v Ditta Fransa*, [1996] ECR I-06039, para. 22.

Therefore, on the basis of the average consumer test and despite the UCPD's full harmonisation character, it could be theoretically justified to require a foreign trader to provide additional information on social, cultural or linguistic grounds. In other words, the omission of such information could mislead consumers in the country of destination, unlike those in the country of origin.

2.6. Vulnerable consumers

Article 5(3) – Prohibition of unfair commercial practices

3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are **particularly vulnerable** to the practice or the underlying product because of their **mental or physical infirmity, age or credulity** in a way which the trader could reasonably be expected to foresee, shall be **assessed from the perspective of the average member of that group**. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

Recital 19

Where **certain characteristics such as** age, physical or mental infirmity or credulity **make consumers particularly susceptible to a commercial practice** or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected **by assessing the practice from the perspective of the average member of that group**.

The UCPD is based on the idea that, whilst it is appropriate to protect all types of consumers from unfair commercial practices, consumers who qualify as members of one of the groups listed in Article 5(3) should be ensured **a higher level of protection** than 'the average consumer' referred to in Article 5(2).

Recital 19 of the Preamble further clarifies the interpretation of Article 5(3): while Article 5(3) appears to exclusively qualify consumers as vulnerable because of their 'mental or physical infirmity, age or credulity', recital 19 provides a non-exhaustive list of characteristics that make a consumer 'particularly susceptible'.

The concept of vulnerability is not limited to the characteristics listed in Article 5(3), as it covers also context-dependent vulnerabilities. Multi-dimensional forms of vulnerability⁽¹⁴⁶⁾ are particularly acute in the digital environment, which is increasingly characterised by data collection on socio-demographic characteristics but also personal or psychological characteristics, such as interests, preferences, psychological profile and mood. The concept of **vulnerability in the digital environment** is further discussed in section 4.2.7.

For example:

In a case involving the omission of material information by a credit institution, an enforcement authority considered that consumers that had been banned by credit institutions due to poor ability to pay were particularly susceptible to a specific offer⁽¹⁴⁷⁾.

Infirmity (mental or physical) includes sensory impairment, limited mobility and other disabilities.

For example:

A consumer authority considered advertising that misleadingly presented products as able to cure serious illness as particularly serious because it could cause vulnerable consumers, such as people affected by a serious illness, to take a transactional decision that they would not have taken otherwise⁽¹⁴⁸⁾.

⁽¹⁴⁶⁾ European Commission, Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08), http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm. The study defined the 'vulnerable consumer' as a consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation or market environment is at higher risk of experiencing negative outcomes in the market, has limited ability to maximise his/her well-being, has difficulty in obtaining or assimilating information, is less able to buy, choose or access suitable products, or is more susceptible to certain marketing practices.

⁽¹⁴⁷⁾ Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011.

⁽¹⁴⁸⁾ PS6980 - Autorità Garante della Concorrenza e del Mercato.

As regards **age**, it may be appropriate to consider a commercial practice from the perspective of consumers of various ages.

Elderly people may be more vulnerable to certain practices because of their age. Aggressive door-to-door selling methods may not affect the average consumer but are likely to intimidate a certain group of consumers, in particular the elderly, who may be more vulnerable to pressure selling.

In addition to Article 5(3) of the UCPD, **children** benefit from specific protection through the **ban on direct exhortations in Annex I No 28** to the UCPD. This ban, which includes putting pressure on children to buy a product directly or to persuade adults to buy items for them (the ‘pester power’), is further discussed in section 3.7.

The capacities of children in understanding online and offline advertising will vary greatly from one child to the next and depending on age and maturity⁽¹⁴⁹⁾. To a certain extent, it is possible to take this into account under the UCPD, as Article 5(3) allows assessing a commercial practice from the perspective of an average member of a specific age group.

Teenagers represent another category of consumers often targeted by rogue traders. Promoting products which are particularly appealing to teenagers might exploit their lack of attention or reflection, as well as their risk-taking behaviour, due to their immaturity and credulity.

The concept of ‘**credulity**’ covers groups of consumers who may more readily believe specific claims. The term is neutral and circumstantial, so the effect is to protect members of a group who are for any reason particularly open to be influenced by a specific commercial practice. Any consumer could qualify as a member of this group.

The 2016 Commission study on consumer vulnerability found that people failing a credulity test are more likely than others to have problems choosing deals. Furthermore, people who consider themselves as credulous are less likely to complain when facing problems and are more likely to feel vulnerable as consumers.

The ‘vulnerable consumer’ criteria apply if a commercial practice distorts the economic behaviour of a group of consumers who are particularly vulnerable **‘in a way which the trader could reasonably be expected to foresee’**.

This criterion adds an element of **proportionality** to the assessment of a commercial practice in relation to vulnerable consumers.

It aims at holding traders responsible only if the negative impact of a commercial practice on a category of vulnerable consumers could reasonably be considered foreseeable by the trader.

This means that traders are not required to do more than is reasonable, both in considering whether the practice would have an unfair impact on any clearly identifiable group of consumers and in taking steps to limit such impacts.

As a consequence, a commercial practice would not be likely to be considered misleading if some consumers, because of their extreme naivety or ignorance, are misled by, or otherwise act irrationally in response to, even the most honest commercial practice.

For example:

There may be a few consumers who may believe that ‘Spaghetti Bolognese’ is actually made in Bologna. Traders, however, will not be held liable for every conceivable interpretation of or action taken in response to their commercial practice by certain consumers.

2.7. Article 5 - professional diligence

Article 5 – Prohibition of unfair commercial practices⁽¹⁵⁰⁾

1. *Unfair commercial practices shall be prohibited.*
2. *A commercial practice shall be unfair if:*
 - (a) *it is contrary to the requirements of professional diligence, and*
 - (b) *it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*

⁽¹⁴⁹⁾ European Commission, Study on the impact of marketing through social media, online games and mobile applications on children’s behaviour (EACH/FWC/2013 85 08), https://ec.europa.eu/info/publications/study-impact-marketing-through-social-media-online-games-and-mobile-applications-childrens-behaviour_en.

⁽¹⁵⁰⁾ Likewise, Articles 6, 7 and 8 of Directive 2005/29/EC refer to the concept of average consumer.

Article 2 (h)

'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;

Article 5(2) provides a general clause setting **two cumulative criteria** for assessing whether commercial practices should be deemed unfair. It functions as a 'safety net' to make sure that any unfair practice which is not caught by other provisions of the UCPD (i.e. that is neither misleading, aggressive or listed in Annex I) can still be penalised. The provision is also future proof as it allows for emerging unfair practices to be tackled.

Article 5(2) prohibits commercial practices that are **contrary to the requirements of professional diligence** if they are likely to **materially distort** the economic behaviour of the average consumer.

This is a **self-standing criterion** – it is **not** an additional cumulative test that needs to be met for a practice to be found in breach of any of the specific categories of unfair practices in Articles 6 to 9 or Annex I to the UCPD. This is illustrated by the UCPD flowchart.

This was confirmed by the Court:

'45 [...] having regard both to the wording and to the structure of Articles 5 and 6(1) of that directive, and to its general scheme, a commercial practice must be regarded as 'misleading' within the meaning of the second of those provisions if the criteria set out there are satisfied, and it is not necessary to determine whether the condition of that practice's being contrary to the requirements of professional diligence, laid down in Article 5(2)(a) of that directive, is also met.

46 The interpretation above is the only one capable of preserving the effectiveness of the specific rules laid down in Articles 6 to 9 of the Unfair Commercial Practices Directive. Indeed, if the conditions for the application of those articles were identical to those set out in Article 5(2) of the directive, those provisions would have no practical significance, even though they are intended to protect the consumer from the most common unfair commercial practices [...]' ⁽¹⁵¹⁾

The notion of '**professional diligence**' encompasses principles which were already well-established in the laws of the Member States before the adoption of the UCPD, such as 'honest market practice', 'good faith' and 'good market practice'. These principles emphasise normative **values that apply in the specific field of business activity**. It may include principles derived from national and international standards and codes of conduct (see also section 2.8.4 on non-compliance with codes of conduct).

For example:

- An enforcement authority acted against a trader providing satellite television services on the grounds that it had not shown professional diligence. Although contracts were limited in time, if the consumer did not take steps to prevent renewal at the time of expiry, the trader would automatically consider the contract renewed ⁽¹⁵²⁾.
- A national court held that, in an action brought by an enforcement authority, a debt collection agency that exerted pressure on consumers to pay bills for agreements that were legally invalid and refused to answer their questions, violated professional diligence. Consumers have the right to know what bill the debt collection agency is collecting, and whether or not that claim is correct. The authority based the interpretation of the requirements of professional diligence on the code of conduct of an association of debt collection agencies and a national court confirmed this interpretation. It also ruled that even for companies that are not a member of the association, this code of conduct can be used as a reference for determining what constitutes professional conduct ⁽¹⁵³⁾.

It follows from Article 5(2)(b) that in order to be found contrary to the requirements of professional diligence, a commercial practice must also be considered likely to '**materially distort the economic behaviour**' of consumers. This concept is discussed in section 2.4 above.

⁽¹⁵¹⁾ Case C-435/11, *CHS Tour Services GmbH v Team4 Travel GmbH*, 19 September 2013; confirmed in Case C-388/13, *UPC*, 16 April 2015, para. 61-63.

⁽¹⁵²⁾ Decision No DKK 6/2014.

⁽¹⁵³⁾ ECLI:NL:RBROT:2019:226, 17 January 2019.

For example:

An enforcement authority took action against a debt collector. The authority found that the trader applied undue pressure and repeated aggressive practices against consumers, concluding that such behaviour was contrary to the requirements of professional diligence and impaired the freedom of choice of the average consumer, thus causing them to take a transactional decision that they would not have taken otherwise ⁽¹⁵⁴⁾.

2.8. Article 6 - misleading actions**Article 6 – Misleading actions**

1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

- (a) the existence or nature of the product;
- (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
- (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
- (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
- (e) the need for a service, part, replacement or repair;
- (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
- (g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (1), or the risks he may face.

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor;
- (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
 - (i) the commitment is not aspirational but is firm and is capable of being verified,
and
 - (ii) the trader indicates in a commercial practice that he is bound by the code;
- (c) any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors.

Together with Article 7 on misleading omissions, Article 6 is by far the most frequently used provision for enforcement purposes.

⁽¹⁵⁴⁾ PS9540 – Euroservice-Recupero Crediti. Provvedimento n. 25425, 15 April 2015.

Insights from behavioural economics show that not only the content of the information provided, but also **the way the information is presented can have a significant impact on how consumers respond** to it. For this reason, Article 6 explicitly covers situations where commercial practices are likely to deceive consumers ‘in any way, including overall presentation’ ‘even if the information provided is factually correct’.

It is for the national courts and administrative authorities to assess the misleading character of commercial practices by taking into account the most recent findings on behavioural economics. For example, the use of default settings (choices consumers are presumed to make unless they expressly indicate otherwise) or providing unnecessarily complex information may be considered misleading.

2.8.1. General misleading information

Article 6(1)(a) to (g) prohibit misleading actions which are capable of deceiving the average consumer on a wide range of elements, including:

- the existence of the product;
- its main characteristics (e.g. its composition, method of manufacture, geographical or commercial origin, the risks and results to be expected from its use);
- the price or the manner in which it is calculated or the existence of a specific price advantage;
- the nature, attributes and rights of the trader.

Article 6 clearly covers any commercial practice which ‘**contains false information and is therefore untruthful**’.

Information about the product’s ‘main characteristics’ must be provided in an invitation to purchase in accordance with Article 7(4) UCPD and before the conclusion of the contract in accordance with the Consumer Rights Directive. Article 6(1)(b) UCPD prohibits providing incorrect information about the main characteristics of a product if it is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

For example:

- A consumer authority acted against a trader who falsely claimed that its loans to consumers had the lowest interest rates on the market. In addition, the trader included incorrect information in advertisements by indicating that consumers would be granted loans regardless of their credit history ⁽¹⁵⁵⁾.
- For IT products such as external hard disks, USB sticks, mobile phones and tablets, the storage capacity or memory is major element of their main characteristics. A consumer authority has taken action against a trader who promoted storage capacities of IT products that differed significantly from the actual storage capacity of the products ⁽¹⁵⁶⁾. Similarly, a consumer association launched a class action on the basis of investigations among different brands of IT devices that revealed a difference on average of one third between advertised and actual memory.
- A flight agency communicated with consumers in a national language prior to the transaction. However, the after sales customer assistance was only provided in the English language, which consumers were not informed of prior to the transaction. This commercial practice was considered to be a violation of Article 6(1)(b) UCPD in conjunction with point 8 of Annex I ⁽¹⁵⁷⁾.
- A national court found that the fact that a ticket has been resold qualifies as a main characteristic of the ticket because the buyer of a resold ticket might be denied entry by the original seller ⁽¹⁵⁸⁾.

Articles 6(1)(c) and 6(1)(f) cover various information regarding the trader and the nature of the sales process. This may also include commercial practices where a trader falsely claims or implies that it is authorised to sell a product when the product is subject to a selective distribution network.

⁽¹⁵⁵⁾ Decision No RPZ 4/2015.

⁽¹⁵⁶⁾ PS9678 - Samsung - Caratteristiche Tecniche Smartphone. Decision No. 25138, 19 December 2014.

⁽¹⁵⁷⁾ ECLI:NL:CBB:2016:103, College van Beroep voor het bedrijfsleven, 15/338.

⁽¹⁵⁸⁾ ECLI:NL:CBB:2014:412, College van Beroep voor het bedrijfsleven, AWB 13/225.

A commercial practice, often referred to as ‘**up to claims**’, implies traders putting forward, as a marketing argument, the maximum benefit consumers can expect from the use of a product. An ‘up to claim’ may be found misleading within the meaning of Articles 6 if it does not **reflect the reality of the offer** made by the trader and if it is likely to cause the consumer to take a transactional decision they would not have taken otherwise. ‘Up to’ claims could be misleading if traders are not in a position to **substantiate that consumers are likely to achieve the maximum results promised** under normal circumstances. See also section 2.8.2 on price advantages.

Whether an ‘up to’ claim is misleading must be assessed on a case-by-case basis. Different criteria could be relevant, such as:

- Whether they clearly disclose results and benefits that the average consumer can reasonably expect to achieve, including any applicable condition or limitation. Not doing so could qualify as misleading in relation to the product’s ‘main characteristics’:
 - by omitting material information within the meaning of Article 7(4)(a) (in the case of an invitation to purchase);
 - as a misleading action within the meaning of Article 6(1)(b) of the UCPD;
- Whether the trader has adequate evidence readily available to substantiate the claim within the meaning of Article 12 of the UCPD.

Information provided to consumers should also **not deceive or be likely to deceive the consumer** in any way, including in the overall presentation, even if the information is factually correct.

For example:

- A financial institution promoted an investment product as a low risk 5-year deposit with privileged interest and guaranteed capital return on its expiry date. In fact, investors lost the interest on the capital and an important part of the capital initially invested. A consumer authority found this commercial practice misleading, as investors had received inadequate and misleading information about the financial product offered ⁽¹⁵⁹⁾.
- A national tribunal considered as misleading the advertising by a mobile phone operator since the trader, while claiming 30 % cheaper mobile rates than its competitors, failed to indicate in an unambiguous manner that the first minute of phone conversation was not on a per second basis. The tribunal considered that, due to the ambiguous presentation of the offer, the consumer was not in a position to take an informed decision ⁽¹⁶⁰⁾.

The UCPD does not provide for any formal requirement to indicate the **geographical (or commercial) origin of a product or its composition** ⁽¹⁶¹⁾. However, such requirements may exist in sector-specific legislation ⁽¹⁶²⁾. Furthermore, under the UCPD, misleading the consumer on such elements could fall under the ban laid down in Article 6(1)(b) of the UCPD if such false or deceiving information is likely to make the consumer take a purchase decision they would not have taken otherwise.

Some decisions by national courts specifically relate to the application of the UCPD to **misleading origin claims**.

For example:

A company from the Dominican Republic was marketing its production of rum in the Union by making several references to Cuba on the bottles and in commercial materials. A national court held that mentioning a famous geographical location on a product whereas the product does not originate from that location constitutes a misleading commercial practice ⁽¹⁶³⁾.

Questions have been raised also regarding the information about the **composition of products**, such as goods containing non-animal components labelled or marked with the term ‘leather’.

⁽¹⁵⁹⁾ Ombudsman of the Consumer, 25 Φεβρουαρίου 2013 (No of protocol 4995), Bank of Cyprus.

⁽¹⁶⁰⁾ Maltese Consumer Claims Tribunal, Melita mobile, 17 April 2013.

⁽¹⁶¹⁾ Although this could be deemed material information under Article 7 of the UCPD.

⁽¹⁶²⁾ For example, see Case C-363/18, *Organisation juive européenne and Vignoble Psagot*, 12 November 2019 concerning the mandatory indication of the country of origin or place of provenance of foodstuffs.

⁽¹⁶³⁾ Cour d’appel de Paris, 10 May 2012, *Société Havana Club International and SA Pernod v SAS Etablissements Dugas and Société 1872 Holdings VOF* (ref 10/04016).

For example:

National courts have decided that it is misleading to market furniture that does not include any leather with claims that parts of the furniture are made of 'textile leather'. The courts stressed that the average consumer would presume a presence of leather in such furniture ⁽¹⁶⁴⁾.

Under Article 6(1)(g), traders should not mislead consumers over their **consumer rights**.

For example:

- A national court ruled against an appeal by a trader who was fined by an enforcement authority for misleading consumers over their right of withdrawal. Rather than making explicit reference to the fact that consumers had 14 days to withdraw from the contract, the contracts only included a reference to the relevant provisions of the national legislation, in unclear and misleading language ⁽¹⁶⁵⁾.
- A trader was prominently advertising a 1-year free commercial guarantee in order to promote a payable extension of this commercial guarantee for up to three or 5 years. The company did not properly inform consumers about the existence of the legal guarantee of conformity to which they are entitled under the Consumer Sales and Guarantees Directive within 2 years of delivery of the product. A consumer authority found this commercial practice misleading, in particular on the basis of Article 6(1)(g) of the UCPD ⁽¹⁶⁶⁾. That decision was subsequently upheld by a national court ⁽¹⁶⁷⁾.

2.8.2. Price advantages

Article 6(1)(d) prohibits misleading information about the **price**. The application of the UCPD to price reductions, which are subject to specific rules in the Price Indication Directive 98/6/EC, is discussed in section 1.2.5. The **UCPD remains fully applicable and governs other types of practices promoting price advantages**, such as **comparisons with other prices, combined or tied conditional offers and loyalty programmes**. Several UCPD provisions are relevant for such promotional practices (e.g. Article 6(d) on the existence of a specific price advantage and point 20 on free offers). The UCPD also applies to **personalised prices** (see section 4.2.8.).

In particular, the UCPD continues to apply to promotional practices of comparing the price with the prices charged by other traders or with other reference prices, such as so-called manufacturer's 'recommended retail prices'. **Traders concerned must pay particular attention to clearly inform the consumer that the indicated reference price is a comparison** and not the reduction of the price charged by that trader previously. Such explanation must be immediately and readily indicated together with the reference price. This is especially relevant when using such techniques as **crossed-out reference price** that consumers are likely to perceive as a reduction of the price charged by that same trader previously. It is for the Member States' authorities to assess on a case-by-case basis whether such practices are not misleading and are in compliance with the UCPD.

Any use of '**recommended retail prices**' in price comparisons should be explained. Its use could be contrary to Article 6(1)(d) of the UCPD if it is unreasonably high and unrealistic giving consumers the impression that they are being offered a more significant advantage than what is really the case.

In the *Canal Digital Danmark* case ⁽¹⁶⁸⁾, the Court clarified that a commercial practice which consists of **dividing the price of a product into several components and highlighting one of them**, must be regarded as misleading under Article 6(1), since that practice would be likely, first, to give the average consumer the false impression that they have been offered a favourable price and, secondly, cause them to take a transactional decision that they would not have taken otherwise, which it is for the referring court to ascertain, taking into account all the relevant circumstances of the main proceedings ⁽¹⁶⁹⁾.

⁽¹⁶⁴⁾ Urteil Az. I-4 U 174/11* OLG Hamm 8. März 2012 and Urteil Az. 3 U 219/11* OLG Bamberg 21. März 2012.

⁽¹⁶⁵⁾ Prague City Court, 11 May 2015, *Bredley and Smith vs Czech Trade Inspection Authority*.

⁽¹⁶⁶⁾ PS7256, Autorità Garante della Concorrenza e del Mercato, 21 December 2011, *COMET-APPLE-Prodotti in garanzia*.

⁽¹⁶⁷⁾ Consiglio di Stato, N. 05253/2015REG.PROV.COLL. N. 05096/2012 REG.RIC.

⁽¹⁶⁸⁾ Case C-611/14, *Canal Digital Danmark A/S*, 26 October 2016.

⁽¹⁶⁹⁾ *Ibid.*, para. 47-49.

For example:

- In 2020, the Commission and national authorities in the Consumer Protection Cooperation (CPC) network received commitments from travel booking websites Booking and Expedia. As platforms, they agreed to ensure the clear presentation of price reductions and discounts in accordance with EU consumer law, including:
 - not presenting prices calculated in relation to different stay dates as a discount (e.g. by using a strikethrough or terms such as ‘% off’)
 - making it clear if lower prices are only available to members of reward programmes
 - not presenting an offer as time-limited if the offer will continue to be available at the same price also afterwards ⁽¹⁷⁰⁾.
- A trader advertised sport equipment by comparing its price to the somewhat higher recommended retail price of the importer, although the importer was not directly selling such product to consumers. A national court found the practice misleading and prohibited the trader from comparing its price to the recommended retail price, unless such price matches the price actually generally charged by other retailers for the same product ⁽¹⁷¹⁾.
- A national court found that a trader violated Article 6(1)(d) UCPD by using crossed-out reference prices for furniture, while those products were never offered at that price. By doing this, the trader created a non-existent price advantage, which misled or could potentially mislead consumers ⁽¹⁷²⁾.

2.8.3. Confusing marketing

Article 6(2)(a) of the UCPD addresses **confusing marketing**.

Article 6(2)(a):

A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor;

For example:

- A national court considered that sending out invoices that mimic another trader's branding (its name, marks and invoice design) and creating the impression that services were rendered by this other trader is an unfair commercial practice. This was also contrary to No 21 of Annex I to the UCPD (including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that they have already ordered the marketed product when they have not) ⁽¹⁷³⁾.
- The same court also considered the use of the indications ‘Taxi’ and ‘Taxi Gothenburg’, both in a yellow design on a taxi vehicle, to constitute comparative advertising and create confusion with the distinguishing marks of a competitor. This was because another trader had performed taxi services in the Gothenburg area since 1922 using the words ‘Taxi Gothenburg’ and the colour yellow as its trademarks ⁽¹⁷⁴⁾.

A practice which raises issues of compatibility with this provision is ‘**copycat packaging**’, which can occur in the offline and online sales channels. This refers to the practice of designing the packaging of a product (or its ‘trade dress’) to give it the general ‘look and feel’ of a competing well-known brand.

⁽¹⁷⁰⁾ Press release of 18 December 2020: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2444

⁽¹⁷¹⁾ MAO:829/15.

⁽¹⁷²⁾ ECLI:NL:RBROT:2019:4155, Rechtbank Rotterdam, ROT 18/4040.

⁽¹⁷³⁾ MD 2009:36, Marknadsdomstolen, 19 November 2009.

⁽¹⁷⁴⁾ MD 2015:9, Marknadsdomstolen, 11 June 2015.

Copycat packaging is distinct from counterfeiting as normally it does not involve copying trademarks. The risk posed by copycat packaging is consumer confusion and, consequently, the distortion of their commercial behaviour.

Consumer deception caused by copycat packaging can take a number of forms:

- Outright confusion – the consumer buys the copycat product having mistaken it for the brand;
- Deception over origin – the consumer recognises the copycat product is different but believes, due to the similar packaging, that it is made by the same manufacturer;
- Deception over quality or nature – again, consumers recognise the copycat is different but believe, due to the similar packaging, that the quality is the same or closer to that of the copied product.

The similar packaging suggests to consumers that the quality or nature of the copycat product is comparable to the quality or nature of the brand in question or at least that it is more comparable than they might otherwise assume. As such, similar packaging gives the impression to consumers that the price alone is the only term of comparison between the products (rather than the combination of price and quality).

For example:

A trader names or brands its new sunglasses so as to very closely resemble the name or brand of a competitor's sunglasses. This practice is likely to be in breach of Article 6(2) of the UCPD if the similarity is close enough to confuse the average consumer, making them more likely to opt for the new sunglasses when, without such confusion, they otherwise would not have done so.

Annex I to the UCPD prohibits in all circumstances some specific commercial practices that involve **confusing marketing in relation to trade marks, brands and related features**:

No 3 of ANNEX I

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

No 4 of ANNEX I

Claiming that traders (including their commercial practices) or products have been approved, endorsed or authorised by a public or private body when they have not been or making such a claim without complying with the terms of the approval, endorsement or authorisation.

No 13 of ANNEX I

Promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.

A practice that may mislead consumers is the **sale by traders or online marketplaces of brand names as keywords** if this creates confusion as regards the identity of the trader actually offering the product. The UCPD, in particular Articles 6(1)(a) and 6(2)(a), will come into play if the results displayed are likely to deceive consumers as to the nature of the product or create confusion between products, trade marks, trade names or other distinguishing marks of competitors. Companies using trademarked brand keywords to sell **counterfeited products** could potentially be found in breach of point No 9 of Annex I to the UCPD.

2.8.4. Non-compliance with codes of conduct

Article 6(2)(b):

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

(...)

- (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
- (i) the commitment is not aspirational but is firm and is capable of being verified,
 - and
 - (ii) the trader indicates in a commercial practice that he is bound by the code.

The UCPD contains several provisions to **prevent traders from unduly exploiting the trust which consumers may have in self-regulatory codes**. It does not provide specific rules on the validity of a code of conduct, but relies on the assumption that misleading statements about a trader's affiliation or about an endorsement from a self-regulatory body may distort the economic behaviour of consumers and undermine the trust that consumers have in self-regulatory codes. Firstly, Article 6(2)(b) obliges traders to comply with codes of conduct to which they have committed themselves in commercial communications.

The Court clarified in the *Bankia* case that the UCPD does not preclude national legislation that does not confer a legally binding nature on codes of conduct⁽¹⁷⁵⁾. While the Court acknowledged that Article 6(2)(b) provides that non-compliance by a trader with a code of conduct may constitute an unfair commercial practice, the Directive as such does not require that the Member States provide for direct consequences for traders solely on the ground that they have not complied with a code of conduct⁽¹⁷⁶⁾.

For example:

A consumer authority took action on the basis of this provision against a provider of energy supply services. The provider, which was a member of an association representing energy companies, claimed to be bound by a code of conduct issued by the association. The code of conduct stated that when consumers request information only, they should not be presented with product or service offers. In the case in point, however, consumers either did not receive the information requested or ended up bound by a contract to which they had not consented. The code of conduct also stated that a member should not take advantage of the inexperience or vulnerability (age) of the consumer. However, the energy provider in question had taken advantage of several elderly people who were contacted⁽¹⁷⁷⁾.

Secondly, Annex I to the UCPD prohibits certain **practices** in all circumstances **to ensure that traders make responsible use of codes of conduct in marketing** (Annex I points 1 and 3 on codes of conduct, point No 2 on trust marks and point No 4 on endorsement by a public or private body).

2.8.5. 'Dual quality' marketing

Article 6(2)(c)

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

(...)

- (c) any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors.

The free movement of goods does not necessarily mean that every product must be identical in every corner of the Single Market. Whilst consumers are free to buy the products of their choice, business operators are also free to market and sell goods with different composition or characteristics, provided that they fully respect EU legislation (whether on the safety of products, labelling or other horizontal or sectoral legislation).

However, as laid down in recital 52 of Directive (EU) 2019/2161, marketing across Member States of goods as being identical when, in reality, they have a significantly different composition or characteristics may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise. Such marketing practices are often referred to as 'dual quality'.

⁽¹⁷⁵⁾ Case C 109/17, *Bankia*, 19 September 2018.

⁽¹⁷⁶⁾ *Ibid.*, para. 58.

⁽¹⁷⁷⁾ CA/NB/527/29, 6 November 2010.

Therefore, Directive (EU) 2019/2161 introduced in the UCPD a specific provision (Article 6(2)(c)) to address situations where traders market goods in different Member States as being identical whilst in reality they have significant differences in terms of their composition or characteristics, unless justified by legitimate and objective factors. The application of Article 6(2)(c) is based on the **objective and apparent circumstances** of the presentation and composition or characteristics of the goods concerned.

Article 6(2)(c) of the UCPD clarifies the application of the UCPD to misleading 'dual quality' marketing practices and provides the national consumer enforcement authorities with a clearer and more specific legal basis to address such misleading practices. This guidance replaces and supersedes the 2017 Commission Notice regarding the application of the (original) UCPD to 'dual quality' of food ⁽¹⁷⁸⁾.

Subject matter and traders concerned

Article 6(2)(c) applies only to 'goods', which are not defined in the UCPD. The UCPD applies to 'products' broadly defined as comprising goods, services and digital content. Therefore, the definition of 'goods' in the Sale of Goods Directive (EU) 2019/771 should be applied by analogy. Accordingly, 'goods' mean tangible movable items as well as water, gas and electricity in limited volume or set quantity. Consequently, Article 6(2)(c) does not apply to services and digital content, which remain subject to the general UCPD rules on misleading actions or omissions.

'Dual quality' marketing practices present most problems in the area of **food** (including drinks. However, Article 6(2)(c) of the UCPD applies also to other kinds of goods.

Article 6(2)(c) applies to '**marketing**' which is a broad notion including both the presentation of the goods on their packaging, related advertising, and promotions and the selling of the goods to consumers.

The **primary target group of Article 6(2)(c) are the traders** that determine the presentation and composition of the goods concerned. Those are usually the producers, including the owners of 'private' labels and retailer brands. **The enforcement activities concerning Article 6(2)(c) should, therefore primarily focus on the producers of goods.**

Mere retailers do not usually have influence on either the composition or the packaging of the goods they sell. Notwithstanding this, once the fact of misleading 'dual quality' practices is established with regard to a specific good, the **enforcement authorities may also require remedial action from the retailers selling the good in question**. In particular, they may require retailers to provide consumers with additional information at the point of sale, thus ensuring that consumers are made aware that the good concerned is not actually identical to the good sold in other countries. As the UCPD does not apply to business-to-business (B2B) relations, it does not regulate the consequences of such enforcement actions in the context of the B2B contractual relations between the retailers and producers.

Due to the cross-border nature of 'dual quality' cases, the competent authorities must, where applicable, cooperate under **the CPC Regulation** (EU) 2017/2394. In particular, the CPC Regulation establishes clear mutual assistance obligations between competent authorities to ensure that the authorities of the Member State where the trader is established take the necessary measures to cease infringements which affect consumers in other jurisdictions of the Union.

Establishing the differences and whether the goods are marketed as being 'identical'

According to Article 6(2)(c) UCPD, potentially unfair 'dual quality' marketing practices in respect of a good exist where the following two conditions are met:

1. the good is marketed as being identical to the good marketed in other Member States, and
2. the good has significantly different composition or characteristics compared to the good marketed in other Member States.

⁽¹⁷⁸⁾ Commission Notice on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food (OJ C 327, 29.9.2017, p. 1). The current guidance replaces and supersedes this earlier Commission Notice.

The reference to 'other Member States' should be understood as covering **one or more Member States** besides the one carrying out the enforcement ⁽¹⁷⁹⁾.

The terms 'marketing as being identical' refers to how the goods are presented and perceived **by an average consumer**. Accordingly, the presentation of the good does not have to be completely identical in all respects in order to be perceived as being identical by an average person. According to recital 53 of Directive (EU) 2019/2161, the competent national authorities should assess whether the differentiation of the good is easily identifiable by consumers by looking at the availability and adequacy of information.

When presenting to consumers in different Member States versions of a good with significant differences in their composition or characteristics, traders should put themselves in the position of the average consumer and check whether the **average consumer will be likely to perceive those different versions as identical**. In this respect, traders can draw inspiration from the existing good marketing practices where companies present different versions of their food products (that are available in parallel in each of the national markets) in a way that make their differences very clear to the consumer, whilst keeping common elements that identify the brand.

Since the application of Article 6(2)(c) is triggered by the existence of 'differences', it does not require the determination of a 'good of reference'. Namely, **it does not require establishing which of the identically marketed goods is the 'original' one and which is the 'differentiated' version**. All that matters is whether the goods marketed in different Member States significantly differ in their composition or characteristics or not. This also means that it is up to traders to decide how to ensure that the different versions of their good are clearly distinguishable by consumers.

To establish the differences with the goods marketed in other Member States, the national enforcement authorities need to **compare the available information on the packaging (i.e. on the front-of-pack and label)**. If the legally required labelling information is found to be incorrect (via laboratory tests), it will be a breach of the EU food regulations in the first place – see further below and in sections 1.2.2 and 3.3.

Case-by-case assessment and 'significance' of the difference

According to the general provisions of Article 6 UCPD, marketing of goods with different composition or characteristics as being identical in different Member States is misleading and, therefore, unfair and prohibited, **if such marketing is likely to affect the transactional decision of the average consumer**. This requires a case-by-case assessment of the commercial practices concerned. The transactional decision test is the cornerstone and pre-requisite for the application of all the main UCPD provisions on unfair commercial practices (i.e. Articles 5 to 9).

In this respect, it should be noted that, in the Single Market, consumers have a general understanding that free circulation of goods and equal access to goods is ensured. Especially, brands act in the mind of consumers as a certificate for a controlled and constant quality. Brand advertising and image building efforts contribute to such consumer perception. Moreover, claims such as 'original', 'unique' and 'the founder's recipe' that are frequent on, for example, food packaging further reinforce the brand owner's message about the good's uniform characteristics across all the markets.

Therefore, consumers do not, a priori, expect branded goods sold in different countries to have different composition or characteristics. **Consequently, they could refrain from purchasing the good, had they known that the good offered for sale in their country is different** in terms of characteristics or composition from the good offered to consumers in other countries. However, as regards foods, a JRC study of 2020 showed that the **differentiation of versions had heterogeneous impact on consumers' purchase decisions** across the studied food products and Member States. Namely, informing consumers about the differentiation of the food products resulted in some cases in their preference for the 'domestic' versions, and in some others for the 'foreign' versions of the food products ⁽¹⁸⁰⁾.

⁽¹⁷⁹⁾ The selection and sampling of products for comparison is addressed in the common testing methodology established by the Commission's Joint Research Centre (JRC) in 2018. It is available at: https://ec.europa.eu/jrc/sites/default/files/eu_harmonised_testing_methodology_-_framework_for_selecting_and_testing_of_food_products_to_assess_quality_related_characteristics.pdf

⁽¹⁸⁰⁾ JRC report 'Empirical testing of the impact on consumer choice resulting from differences in the composition of seemingly identical branded products' (2020), available at: <https://ec.europa.eu/jrc/en/publication/empirical-testing-impact-consumer-choice-resulting-differences-composition-seemingly-identical>. It analysed, via lab and online experiments, whether informing consumers about the product differences (expressed as 'made for country X' designation) affects their choice of a product version. There was no clear preference for 'domestic' or non-domestic versions in the online experiment, whereas there was more preference for domestic versions in the lab experiment. In the online experiment, consumer preferred the domestic or non-domestic product version in, respectively, 6 and 2 out of 30 country-product pairs. Moreover, consumers had negative preference for the domestic and non-domestic version in, respectively, 9 and 8 cases. In the lab experiment the consumers' choices depended on the product and country but they would often prefer the version intended for their country (8 out of 12 cases).

The JRC's report also found that the consumer's behaviour when confronted with differentiation of goods **would also depend on the scale of the difference**. The average consumers' transactional decision is more likely to be affected if they knew that one or a number of key ingredient(s) or their content in, for example, food differs substantially⁽¹⁸¹⁾. Larger compositional differences are more likely to lead to different sensory characteristics, which are one of the important determinants of food quality for consumers. However, this being said, it is also important to stress that the **sensory perception of foods is only one of the elements that may affect consumers' choices**. For example, consumers may also want to avoid certain types of ingredients for various reasons other than those linked to their health (e.g. allergens). In particular, consumers increasingly attach importance to the environmental impact of certain good or their ingredients, their geographical origin, mode of manufacturing, chemical composition, etc.⁽¹⁸²⁾

The classification of 'significant' and 'non-significant' differences cannot be determined in advance as regards, for example, specific ingredients in food. Instead, the 'significance' of the difference is **an inherent element of the case-by-case assessment of the impact of the 'dual quality' marketing practice** on the average consumer. It is in this sense – of the impact on the average consumer – that this notion is used in Article 6(2)(c) of the UCPD.

Justified exceptions

Article 6(2)(c) allows traders to (continue to) market goods that significantly differ in composition or characteristics as being identical when this is **justified by 'legitimate and objective factors'**. A non-exhaustive indicative list of such factors is mentioned in recital 53 of Directive (EU) 2019/2161, namely: national legal requirements; availability/seasonality of raw materials; and voluntary strategies to improve access to healthy and nutritious food, as well as the traders' right to offer goods of the same brand in packages of different weight or volume in different geographical markets.

Indeed, **national rules may set specific requirements** as to the composition of certain types of food sold in some countries, which do not exist in other Member States. Also, there may be objective differences in sourcing due to **the geographical and/or seasonal availability of raw materials** that have an effect on the composition and/or taste of products. Traders may also introduce new recipes under **voluntary nutritional reformulation policies**, which cannot technically or economically be done simultaneously in all markets.

Furthermore, since the examples mentioned in recital 53 of Directive (EU) 2019/2161 are non-exhaustive, the differentiation of goods marketed in different Member States could also be justified by other objective factors.

The merits of any justification advanced by traders for the differentiation of goods would have to be assessed on a case-by-case basis. Traders must demonstrate the validity of the exception. In particular, where a trader tailors the national versions of products to local consumer preferences, it must be in a position to demonstrate (by means of, for example, economic or market studies) the existence of consumer preferences and that the product differentiation genuinely addresses those preferences.

Recital 53 to Directive (EU) 2019/2161 stresses that **traders who differentiate the versions of their goods due to legitimate and objective factors should still inform consumers thereof**. While the method to provide such information is left to the traders, the recital states that alternatives to the label of goods should generally be preferred by traders. Such other means can be information at the retailer premises/on online selling interfaces, product websites (that should be easily and directly accessible by, e.g. scanning a QR code on the packaging) or product advertising. In any case, the information should be easily and directly accessible for the average consumer, including for vulnerable consumers. By active and transparent communication about the differentiation of goods through these other means, traders will not only inform consumers but also make it clear to them and national enforcement authorities that it considers the continued marketing of the relevant goods as identical to be justified in accordance with the UCPD. Moreover, there should also be commercial interest in such active and transparent communication, in particular, where the differentiation of the versions of the good is truly implemented with the purpose of meeting national legal requirements or improving consumer experience.

⁽¹⁸¹⁾ JRC report 'Differences in composition of seemingly identical branded products: Impact on consumer purchase decisions and welfare' (2020), available at: <https://ec.europa.eu/jrc/en/publication/differences-composition-seemingly-identical-branded-products-impact-consumer-purchase-decisions-and>. It confirmed that consumers are likely to be affected by the differentiation of product versions for different countries only when differences in composition are perceived as significant.

⁽¹⁸²⁾ See JRC report 'Results of an EU wide comparison of quality related characteristics of branded food products. Part 2 – Sensory testing' (2021) available at: <https://ec.europa.eu/jrc/en/publication/results-eu-wide-comparison-quality-related-characteristics-branded-food-products-part-2-sensory>. The study concluded that larger differences in composition were more likely to be recognised by the sensory assessors, whereas smaller variations were mostly not noticed.

The trader's claims about the justification of marketing the goods as being identical despite their significant differences fall under Article 12 of the UCPD. Article 12 provides that Member States must empower national courts and authorities to require evidence from traders substantiating their factual claims. This power should also apply to traders' claims about the justification of differentiation.

Food products

EU food legislation applies in parallel with the UCPD and it may be relevant also when dealing with 'dual quality' cases, since these appear to happen mainly in the food sector.

Specifically, Regulation (EC) No 178/2002 on general food law aims at ensuring a high level of protection of human health and consumers' interest in relation to food, while ensuring the effective functioning of the internal market. It is the foundation of the Union food law. It establishes, amongst others, common principles of (Union and national) food law as well as responsibilities on food and feed business operators at all stages of production, processing and distribution of food and feed.

In that respect, it establishes the protection of consumers' interests as a general principle of food law⁽¹⁸³⁾. Accordingly, food law must aim at the protection of the interests of consumers and must provide a basis for consumers to make informed choices in relation to the foods they consume. In particular, it must aim at the prevention of: (a) fraudulent or deceptive practices; (b) the adulteration of food; and (c) any other practices which may mislead the consumer.

It also provides for a general obligation for the labelling, advertising and presentation of food or feed, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged, the setting in which they are displayed and the information which is made available about them through whatever medium, imposed on food and feed business operators, not to mislead consumers⁽¹⁸⁴⁾. Only safe food and feed products may be placed on the Union market⁽¹⁸⁵⁾. Finally, food and feed business operators at all stages of production, processing and distribution within the businesses under their control are required to ensure that foods or feeds satisfy all requirements of food law, which are relevant for their activities and must verify that such requirements are met⁽¹⁸⁶⁾.

Furthermore, Regulation (EU) No 1169/2011 on the provision of food information to consumers (the FIC Regulation) lays down general labelling rules and requirements, including mandatory provision of a complete list of ingredients, the quantity of certain ingredients or categories of ingredients, allergen information, a nutrition declaration, etc. This enables consumers to be fully informed of the composition of the food products and preventing misleading food information. Food information must be clear, accurate, and easy to understand for the consumer. For that purpose, the FIC Regulation lays down specific requirements for presentation of mandatory information, including minimum font size.

EU food law puts in place a comprehensive legal framework aimed at ensuring not only a high level of protection of health of consumers and their social and economic interests, but also the free movement of safe food in the EU Single Market.

The information requirements established by the FIC Regulation is 'material' information within the meaning of Article 7(5) of the UCPD. The omission of this information could be, after a case-by-case assessment, considered misleading to the extent that it is likely to affect the transactional decisions of the average consumer.

Investigation of potentially misleading 'dual quality' enforcement practices by the national authorities in charge of the UCPD will normally be based on the information about the product's composition provided on the packaging in accordance with EU food law requirements⁽¹⁸⁷⁾.

However, 'dual quality' misleading practices could also occur in cases where the product differences are not apparent from the product label. In these situations, the authorities in charge of food law will check the compliance with the FIC Regulation and the applicable product-specific regulations setting composition standards. In those Member States where different authorities are responsible for enforcing the UCPD and the relevant food legislation, these authorities should co-operate closely to ensure that the findings of their respective investigations into the same trader and/or commercial practice are consistent.

⁽¹⁸³⁾ Article 8 of Regulation (EC) No 178/2002.

⁽¹⁸⁴⁾ Article 16 of Regulation (EC) No 178/2002.

⁽¹⁸⁵⁾ Article 14 of Regulation (EC) No 178/2002.

⁽¹⁸⁶⁾ Article 17(1) of Regulation (EC) No 178/2002.

⁽¹⁸⁷⁾ This was the case in the first comparative EU-wide test (label comparison) that JRC performed in 2019 and in the second testing exercise that started in 2021.

Other goods

As the prohibition of misleading 'dual quality' practices is not restricted to food products, and in light of concerns as regards similar practices in the context of other consumer goods ⁽¹⁸⁸⁾, the Commission is conducting, as of 2021, a pilot study in the area of cleaning products, detergents and cosmetics. The objective of this study is to examine whether the above-mentioned common methodology developed by the Joint Research Centre in the area of food products can be extended to compare the composition of such goods as well as the feasibility of creating a monitoring tool for 'dual quality' cases by Member States' competent authorities, NGOs or the industry.

2.9. Article 7 - misleading omissions

Article 7 – Misleading omissions

1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it 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, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

- (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
- (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
- (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
- (d) the arrangements for payment, delivery and performance, 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;
- (f) for products offered on online marketplaces, whether the third party offering the products is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace.

4a. When providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material. This paragraph does not apply to providers of online search engines as defined in point (6) of Article 2 of Regulation (EU) 2019/1150 of the European Parliament and of the Council.

⁽¹⁸⁸⁾ For example, European Parliament resolution of 13 September 2018 on dual quality of products in the single market (OJ C 433, 23.12.2019, p. 191) refers to differentiation practices also concerning non-food products, including detergents, cosmetics, toiletries and products intended for babies, also available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0357_EN.html

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.

6. Where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as material.

2.9.1. Material information

Articles 7(1) and (2) establish in very general terms a positive obligation on traders to provide **all the information which the average consumer needs to make an informed purchasing decision**. This is what is called '**material information**' in Article 7.

The UCPD does not define 'material information', except for in the specific case of an 'invitation to purchase', which is dealt with in Article 7(4) (see section 2.9.5). In addition, Article 7(5) UCPD clarifies that 'information requirements established by EU law in relation to commercial communication, including advertising', shall be regarded as material (see section 1.2.2).

In contrast, as explained in recital 15, where Member States have introduced information requirements over and above what is specified in Community law, on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under this Directive.

In order to assess on a case-by-case basis whether **material information has been omitted**, national authorities and courts need to take into account all features and circumstances of a given commercial practice, including the limitations of the medium used to communicate it.

For example:

- A national authority acted against a trader who offered life insurance products without including material information in the advertising. The trader claimed that the relatives of a person covered by the insurance would obtain all insurance benefits if that person died. However, the trader omitted to inform consumers that if the person died within the first 24 months of the contract for reasons other than an accident, the relatives would only receive limited insurance benefits ⁽¹⁸⁹⁾.
- Some comparison tools use claims such as 'best deals' to identify not necessarily the cheapest deals, but rather those that offer the best value for money. Omitting information about the criteria for the 'best deal' claim could be misleading under Article 7 of the UCPD.

2.9.2. Hidden marketing/failure to identify commercial intent

Under Article 7(2), **failing to identify the commercial intent of a commercial practice is regarded as a misleading omission**, when this failure is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

The e-Commerce Directive ⁽¹⁹⁰⁾, the Audiovisual Media Services Directive ⁽¹⁹¹⁾ and the e-Privacy Directive ⁽¹⁹²⁾ similarly lay down certain requirements in this regard with respect to commercial communications and the sending electronic mail for purposes of direct marketing. A specific aspect of hidden marketing is also regulated by Article 8(5) of the Consumer Rights Directive.

Article 8(5) of the Consumer Rights Directive:

'(...) if the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall, at the beginning of the conversation with the consumer, disclose the identity and, where applicable, the identity of the person on whose behalf he makes that call, and the commercial purpose of the call'.

⁽¹⁸⁹⁾ Decision No DDK 7/2014 by the Polish Office of Competition and Consumer Protection.

⁽¹⁹⁰⁾ Directive 2000/31/EC.

⁽¹⁹¹⁾ Directive 2010/13/EU.

⁽¹⁹²⁾ Directive 2002/58/EC.

While these provisions focus on specific commercial practices or sectors, Article 7(2) has a **general and broader scope and addresses any commercial practice**.

For example:

A consumer authority acted against a trader who invited consumers to meetings offering them a free health check-up as part of an 'I care for my health' programme. The trader failed to disclose the fact that the main purpose of the meetings was to present products in order to sell them to consumers ⁽¹⁹³⁾.

In addition to Article 7(2), the UCPD bans in all circumstances certain specific practices that involve failure to disclose commercial intent.

Point **No 11 of Annex I** bans the use of '**editorial content in the media** to promote a product where a trader has **paid for the promotion without making that clear** in the content or by images or sounds clearly identifiable by the consumer (advertorial)'.

For example:

A major newspaper teamed up with a telecom operator who finances a particular section of the newspaper under the title 'The Digital Life'. This section and all of its material, including promotions of products which the telecom operator was about to launch, appear as the newspaper's editorial content; the only disclosure to the public about the commercial nature of the presented material is the discrete appearance of the text 'in collaboration with' followed by the telecom operator's trademark. This practice was found to be in breach of Point 11 of Annex I UCPD ⁽¹⁹⁴⁾.

Point **No 22 of Annex I** prohibits '**falsely claiming or creating the impression that the trader is not acting for purposes related to his trade, business, craft or profession or falsely representing oneself as a consumer**'.

Article 7(2), together with points 11 and 22 of Annex I, can be particularly relevant for online traders (see section 4.2.5 on social media and 4.2.6 on influencer marketing).

2.9.3. Material information provided in an unclear manner

According to Article 7(2), providing material information 'in an unclear, unintelligible, ambiguous or untimely manner' is a misleading omission, if this is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

For example:

- A national court concluded that a trader infringed Article 7 UCPD by informing consumers of their rights in an unclear, ambiguous and not reasonably understandable way. The trader had informed consumers about their right of withdrawal by providing the full text of a Government Decree. The court found that the text indicated numerous provisions not applicable to the contracts at stake and that delivering the full text of the Government Decree did not qualify as information by which consumers could plainly and concretely become aware of the conditions governing their right to withdraw from the contract ⁽¹⁹⁵⁾.
- A telephone operator advertised on TV a mobile phone subscription by highlighting the specific price benefits, whilst the restrictions and conditions of the offer were only presented in small print which appeared on the screen for a very short time. It was held that, despite the limits of space and time of the medium used (TV), nothing prevented the trader to more clearly indicate such central facts. Hence, to the extent that material information had been omitted, the advertising was found to be misleading ⁽¹⁹⁶⁾.

⁽¹⁹³⁾ Decision No RPZ 6/2015 by the Polish Office of Competition and Consumer Protection.

⁽¹⁹⁴⁾ Årenden 2016/53 and 2015/1000.

⁽¹⁹⁵⁾ Decision No K. 27.272/2014, Administrative and Labour Court of Győr.

⁽¹⁹⁶⁾ KKO 2011:65.

— The requirement to provide material information in a clear, intelligible and timely manner could be breached in a situation where an online trader targets consumers in a specific Member State, providing part of the material information in the language of that country but making other pieces of material information available only in a different language ⁽¹⁹⁷⁾, for example in the standard terms and conditions ⁽¹⁹⁸⁾. The application of the UCPD in such cases is complementary and without prejudice to more specific language requirements provided in accordance with other EU law, such as the regulatory option provided in Directive 2011/83/EU concerning contractual information in distance and off-premises contracts (see section 4.1.8 of the CRD Guidance Notice).

2.9.4. The factual context and limits of the communication medium used

Article 7(1) underlines that to assess whether a commercial practice is misleading, it needs to be considered ‘in its *factual context*, taking account of all its features and circumstances and the **limitations of the communication medium**’.

Article 7(3) should be read in conjunction with Article 7(1). Under Article 7(3), when assessing whether material information has been omitted, account should be taken of:

- the **limits of space and time** of the communication medium used;
- any **measures taken by the trader** to make the information available to consumers by other means.

The above provisions apply to all sections of Article 7. In addition, under the introductory part of Article 7(4), traders do not need to provide information in invitations to purchase that is **already apparent from the context**.

The Court has clarified that the assessment of a misleading omission in Article 7(1) and (3) UCPD must take into account the above-mentioned factors, even if this is not expressly referred to in the wording of the national legislation in question but instead can be found, for example, in preparatory works ⁽¹⁹⁹⁾.

In the same case, the Court also found that the limits of time and space of the communication medium used must be weighed against the nature and characteristics of a given product. It is required to assess whether the trader found it impossible to include or clearly communicate the information. Where it is impossible to include all material information concerning a product, the trader may refer on the product to its website. However, the website must contain information on the main characteristics of the product, the price and other conditions as required by Article 7 ⁽²⁰⁰⁾.

According to Article 7(2), providing material information ‘in an unclear, unintelligible, ambiguous or untimely manner’ is a misleading omission, if this is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

For example:

A telephone operator advertised on TV a mobile phone subscription by highlighting the specific price benefits, whilst the restrictions and conditions of the offer were only presented in small print which appeared on the screen for a very short time. A national court held that, despite the limits of space and time of the medium used (TV), nothing prevented the trader to more clearly indicate such central facts. Hence, to the extent that material information had been omitted, the advertising was found to be misleading ⁽²⁰¹⁾.

Article 7(4)(a) also states that, in invitations to purchase, account should be taken of ‘the medium and the product’ when clarifying whether the **main characteristics** of the product is one of the elements to be regarded as material information.

⁽¹⁹⁷⁾ The impact on the transactional decision of an average consumer is subject to an assessment by the national courts and authorities. For example, in a Member State where consumers generally understand English, even if it is a foreign language, the provision of certain information only in English may not necessary amount to a misleading omission.

⁽¹⁹⁸⁾ Standard contract terms are assessed under Directive 93/13/EEC (see also section 1.2.4 on the interplay with the UCPD).

⁽¹⁹⁹⁾ Case C-611/14, *Canal Digital Danmark A/S*, 26 October 2016, para. 29 ff.

⁽²⁰⁰⁾ Case C-611/14, *Canal Digital Danmark A/S*, 26 October 2016, para. 62 and 63.

⁽²⁰¹⁾ KKO 2011:65.

In the *Ving Sverige* case, the Court found that ‘it may be sufficient for only certain of a product’s main characteristics to be given and for the trader to refer in addition to its website, on the condition that on that site there is essential information on the product’s main characteristics, price and other terms in accordance with the requirements in Article 7 of that directive.’⁽²⁰²⁾

Given their importance for the consumer’s purchasing decision, information about a product’s **full price and main characteristics** should be prominently displayed.

For example:

A national court considered as misleading a leaflet claiming that 3 % savings on purchases could have been made by consumers using the promoted credit card. The court considered that the general statement in the leaflet led consumers to believe that savings would apply to any kind of purchase made with the credit card, whereas in reality important limitations applied. Such limitations were only specified in the contract terms: this was not deemed to be sufficient, as material information about the characteristics of the advertised product was omitted⁽²⁰³⁾.

The overall extent of the required information on a product’s **main characteristics** must be assessed based on the context of the invitation to purchase, the typology of product and the communication medium used.

2.9.5. Material information in invitations to purchase – Article 7(4)

Invitations to purchase

Article 2(i)

‘invitation to purchase’ means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;

For ‘**invitations to purchase**’, Article 7(4) of the UCPD regards certain pieces of information as ‘material’. This means that traders will need to provide consumers with this information if it not otherwise apparent from the context.

The ‘*characteristics of the product*’ are invariably present as soon as there is verbal or visual reference to the product. A different interpretation could incentivise traders to provide vague product descriptions or omit information in their commercial offers in order to circumvent the information requirements provided for by Article 7(4) of the UCPD.

The last part of the definition in Article 2(i) (‘*and thereby enables the consumer to make a purchase*’) does not require the commercial communication to provide the consumer with a mechanism to actually purchase (e.g. a phone number or a coupon). It means that the information given in the product marketing must be **sufficient to enable the consumer to take the decision as to whether to purchase a specific product for a specific price**.

In the *Ving Sverige* case, the Court held:

‘It follows that, for a commercial communication to be capable of being categorised as an invitation to purchase, it is not necessary for it to include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity.’⁽²⁰⁴⁾

An **invitation to purchase is a narrower concept than advertising**, and not all commercial communications will qualify as an invitation to purchase within the meaning of Article 2(i).

However, an **invitation to purchase is a wider concept than pre-contractual information**. While pre-contractual information requirements refer to information that needs to be provided before the consumer enters into a contract, an invitation to purchase does not necessarily imply that the next step for the consumer is to enter into a contract with a trader.

For example:

Radio advertising that includes a product’s characteristics and price is an invitation to purchase, but will normally not qualify as pre-contractual information.

⁽²⁰²⁾ Case C-122/10, *Konsumentombudsmannen v Ving Sverige AB*, 12 May 2011, para. 59.

⁽²⁰³⁾ Audiencia Provincial de Madrid Sentencia nº 270/2014. Similar conclusions were raised in another case handled by Spanish Court, Juzgado de lo Mercantil de Madrid Sentencia nº 704/2012.

⁽²⁰⁴⁾ Case C-122/10, *Konsumentombudsmannen v Ving Sverige AB*, 12 May 2011, para. 32.

This distinction is particularly important in relation to the interplay between the UCPD and the CRD. A wide variety of commercial communications would normally qualify as invitations to purchase.

For example:

- An airline website displaying offers for flights and their prices.
- A mail order advertisement ⁽²⁰⁵⁾.
- A leaflet from a supermarket advertising discounted prices on certain products.

The UCPD leaves traders the choice as to whether to include the price in their commercial communications. A commercial communication or advertisement that includes an exhaustive description of a product or service's nature, characteristics and benefits but **not its price cannot be considered an 'invitation to purchase'** within the meaning of Article 2(i) of the UCPD. An example of commercial communications which are not invitations to purchase would be advertisements promoting a trader's 'brand' rather than any particular product (i.e. brand advertising).

For example:

A national court ruled that an advertisement inviting a consumer to visit a website to obtain an insurance offer does not constitute an invitation to purchase ⁽²⁰⁶⁾.

Material information

Article 7(4) lists a number of information requirements which are considered material. This is to ensure the maximum amount of legal certainty for consumers at this critical point ⁽²⁰⁷⁾. The aim of Article 7(4) is to ensure that, whenever traders make commercial offers, they make available simultaneously, in an intelligible and unambiguous manner, **enough information to enable the consumer to take an informed decision to purchase**, unless that **information is already apparent from the context**.

Failing to provide consumers with information required by Article 7(4) in the case of an invitation to purchase is a **misleading omission**, if this failure is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

The Court has clarified that Article 7(4) contains an exhaustive list of the material information that must be included in an invitation to purchase. Nevertheless, the fact that a trader provides all the information listed in Article 7(4) does not preclude that invitation from being regarded as a misleading practice within the meaning of Article 6(1) or Article 7(2) ⁽²⁰⁸⁾.

However, in order not to place **unnecessary or disproportionate information burdens on traders**, the requirements of Article 7(4) are not static and require different pieces of information depending on the situation. This follows, in particular, from the clarifications made both in Articles 7(1), 7(3) and 7(4) that the factual context and limits of the communication medium used should be taken into account, as discussed in the previous section.

The *Verband Sozialer Wettbewerb* case concerned an advertisement made by a platform, showing different products that are not provided by the platform itself but by third party sellers on the platform ⁽²⁰⁹⁾. The marketplace facilitated the conclusion of contracts between traders and buyers, including consumers. The Court clarified that the advertisement can be assessed under Article 7(4), in particular to verify whether all the material information was provided, such as the names of the traders offering specific products, while taking into account the **limitations of space and other specific circumstances** of the case. The Court also clarified there may be limitations of space within the meaning of Article 7(3) that could justify omitting the geographical address and identity of each trader. Such information must nevertheless be supplied simply and quickly, upon access to the platform ⁽²¹⁰⁾.

⁽²⁰⁵⁾ For example, an advertisement in a magazine features T-shirts for sale. The prices and sizes of the T-shirts available are given in the advertisement and the bottom half of the advertisement is an order form which can be filled in, with payment enclosed, and sent direct to the retailers.

⁽²⁰⁶⁾ Commercial Court of Antwerp, 29 May 2008, *Federatie voor verzekerings- en financiële tussenpersonen v ING Insurance Services NV and ING België NV*.

⁽²⁰⁷⁾ Recital 14 clarifies that 'In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision...'

⁽²⁰⁸⁾ Case C-611/14, *Canal Digital Danmark A/S*, 26 October 2016, para. 71.

⁽²⁰⁹⁾ Case C-146/16, *Verband Sozialer Wettbewerb*, 30 March 2017.

⁽²¹⁰⁾ *Ibid.*, para. 28-30.

Article 7(4)(a) specifically clarifies that, when assessing whether there is an omission of material information as regards the **main characteristics** of the product, account should be taken of *'the medium and the product'*.

Establishing what constitutes a product's main characteristics therefore **depends on the product** concerned and on what can be considered **'appropriate' given the 'medium' used** by the trader to make the commercial communication.

Information about the main characteristics for goods may already be available from their appearance, packaging or labelling that the consumer can consult at the time of sale. More complex goods may require the communication of additional information – on the product description tags in the shop or on online pages – to establish their main characteristics.

Those latter product's **characteristics and restrictive conditions that the average consumers will not normally expect** from the given category or kind of product must in particular be communicated to the consumer as those are especially likely to affect their transactional decisions. Such characteristics could be, for example, the limitation of the duration or of the nature and performance of a service (e.g. whether a **'fibre'** internet service is 'fibre-to-the-home' or another type) or a particular composition or specification of goods (e.g. the **synthetic** origin of precious stones such as diamonds).

Safety warnings may, subject to a case-by-case assessment, constitute a main characteristic of a product within the meaning of Article 7(4). Currently, EU sector-specific legislation on product safety usually requires traders to inform about safety issues on the product itself and/or on its packaging. In the case of online sales, it may therefore be difficult for consumers to take truly informed transactional decisions in case the relevant online website does not provide a legible picture of the product/package labelling. An important exception to this approach is contained in Article 11(2) of the Toys Safety Directive 2009/48/EC of the European Parliament and of the Council ⁽²¹¹⁾, which explicitly requires that safety warnings for toys, such as those specifying the minimum/maximum age of the user, must be clearly visible before the purchase, including where the purchase is made online. For most other products, the UCPD can be used as a legal basis to require traders, especially when promoting products online, to inform consumers about those safety aspects that can, taking into account the nature of the product, be considered as main characteristics within the meaning of Article 7(4).

Under Article 7(4)(b), failure to inform consumers of the trader's **geographical address and identity can constitute a misleading omission**.

For example:

In a case relating to an online dating service, a national court ordered a trader to post information about its name, address, registration number and email address in a direct and permanent manner when marketing the services it provided on the Internet. The court held that the trader's not posting its correct address or any email address on its website constituted a misleading omission likely to cause the consumer to take a transactional decision they would not have taken otherwise ⁽²¹²⁾.

On the other hand, omitting to provide information about the identity of the trader could sometimes be considered as **'apparent from the context'** within the meaning of Article 7(4).

For example:

- The address of a shop or restaurant which the consumer is already in.
- For online shops, Article 5 of the e-Commerce Directive requires traders to make their name, address and other details including their electronic mail address **easily, directly and permanently accessible**. Furthermore, under Article 10 of the e-Commerce Directive, certain information (e.g. on the various technical steps necessary before the formal conclusion of a contract) must also be provided before the order is placed.

Based on a case-by-case assessment, stating the **commercial name** of a trader could be enough to comply with the requirement in Article 7(4)(b) on the **trader's identity**. The **legal name** must be stated in the terms and conditions of sale, but it may not necessarily be considered material information within the meaning of Article 7(4).

⁽²¹¹⁾ Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170, 30.6.2009, p. 1).

⁽²¹²⁾ MD 2015:2, 9 March 2015.

For example:

In its advertising material, a fast food company will not need to specify its legal status such as Ltd, SA, SARL, Inc.

In addition to the requirement in Article 7(4)(b), the CRD lays down further information requirements on the trader's **contact details**, specifically in Article 5(1) (on-premises sales) and Article 6(1) (off-premises and distance sales).

Article 5(1)(c) of the e-Commerce Directive requires online service providers to render accessible to recipients of their services and competent authorities information about 'the details of the service provider, including his **electronic mail address**, which allow him to be contacted rapidly and communicated with in a direct and effective manner'.

E-commerce traders' email addresses may therefore be material information under Article 7(5) UCPD. This information should be easy to find (i.e. not only in the general terms and conditions) and directly and permanently accessible.

Also, under the GDPR, a data controller must provide to the data subject certain mandatory information, which *inter alia* includes the identity (and the contact details) of the controller and of his representative, if any (except where the data subject already has that information).

Article 7(4)(c) requires traders to state the **total (or final) price** in an invitation to purchase. This must include all applicable taxes (e.g. VAT) and charges. **The final price must** include applicable **charges and taxes** which are unavoidable and foreseeable when the offer is published. When the nature of the product means that the price cannot reasonably be calculated in advance, consumers should be properly informed about the manner in which the price is calculated, as well as, where appropriate, about all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, about the fact that such additional charges may be payable (see also Articles 5(1) and 6(1) CRD).

In the *Canal Digital Danmark* case, the Court established that where a trader states the **price for a subscription so that the consumer must pay both a monthly charge and a 6-monthly charge**, that practice must be regarded as a misleading omission under Article 7 if the price of the monthly charge is particularly highlighted in the marketing, whilst the 6-monthly charge is omitted entirely or presented only in a less conspicuous manner, if such failure causes the consumer to take a transactional decision that they would not have taken otherwise ⁽²¹³⁾.

For example:

- A consumer authority took action against a telecom operator who did not inform consumers that they would have to pay an activation fee in order to use the services provided. Consumers were only informed about this fee after the contract had been signed ⁽²¹⁴⁾.
- A consumer authority imposed administrative fines against a telecom operator who applied charges, of which the consumers were not informed, to provide services that the company could not deliver/supply ⁽²¹⁵⁾.
- A national court ruled in favour of a decision by a municipality imposing a fine on an internet provider who had failed to display the full price of its services in its commercial offers, notably by omitting to include network charges and taxes ⁽²¹⁶⁾.

Under Article 7(4)(c) of the UCPD, using '**entry-level prices**', i.e. indicating the price 'as from' a specific minimum amount, is permitted if the final price cannot '*reasonably be calculated in advance*' due to the nature of the product.

⁽²¹³⁾ C-611/14, *Canal Digital Danmark*, 26 October 2016, para. 46-49.

⁽²¹⁴⁾ Decision No RBG 38/2014.

⁽²¹⁵⁾ 16 July 2015 - Administrative Decision with regard to Stoppa Telefonförsäljning Limited.

⁽²¹⁶⁾ Tribunal Superior de Justicia de Madrid Sala de lo Contencioso Administrativo Sección 10, No 112/2014.

For example:

A travel agency indicated prices 'as from' for given flights and travel packages. A national court ruled that the UCPD does not rule out the use of entry-level prices, as long as the information provided meets the Directive's requirements, taking into account the circumstances of a real case. It held that: 'A reference only to an entry-level price may, therefore, be justified in situations where the price cannot reasonably be calculated in advance, having regard, inter alia, to the nature and characteristics of the product' ⁽²¹⁷⁾.

The minimum price should, however, be a **real price** applicable to certain products, in accordance with the advertisement.

For example:

A company advertised the sale of apartments using statements such as 'It's cheaper than you might think. Prices starting from EUR 2 150 per square metre'. However, it turned out that there were no apartments available at the price indicated. Moreover, the price indicated did not include VAT. This commercial practice was found to be misleading by a consumer authority ⁽²¹⁸⁾.

Commercial practices where traders advertise prices that do not exist could also be in breach of points 5 and 6 of Annex I to the UCPD, as they may be considered instances of bait advertising (point 5) or bait and switch (point 6).

Under Article 7(4)(d), traders must provide information about **arrangements for payment, delivery and performance**, if these depart from the requirements of professional diligence. This means that such information only needs to be displayed if such arrangements are to the consumer's disadvantage compared with the standard of special skill and care a trader may be reasonably expected to exercise towards consumers.

The requirement to provide for information about the **complaint handling policy** was deleted following amendments from Directive (EU) 2019/2161. That information is most relevant at the pre-contractual stage, which is already regulated by the CRD, and therefore the requirement was not needed for invitations to purchase at the advertising stage under the UCPD.

Under Article 7(4)(e), **the existence of a right of withdrawal or cancellation** must be mentioned in invitations to purchase whenever applicable. Under this requirement, traders are only required to inform consumers about the existence of such rights, without detailing the conditions and procedures to exercise them.

The CRD lays down more rules on the pre-contractual information to be provided to the consumer before the contract is signed, for example on e-commerce websites, during a seller's home visit or during a sales call over the telephone (Articles 5(1)(d) and 6(1)(g)).

For example, that Directive requires the trader to provide information about 'the total price' before the consumer is bound by a contract (Articles 5(1)(c) and 6(1)(e)). In addition, the consumer is entitled to the reimbursement of any extra payment where the consumer has not given express consent for such a payment, but the trader has inferred it by using default options, e.g. by using pre-ticked boxes (Article 22).

For distance or off-premises contracts, the trader must provide information about the conditions, time limit and procedures for exercising the right of withdrawal. It must also provide the model withdrawal form set out in Annex I(B) to the Consumer Rights Directive (Article 6(1)(h)).

Obligations in Article 7(4)(f), (4a) and (6) concerning **online marketplaces**, transparency of **search results** and **user reviews** are discussed in section 4.2.

⁽²¹⁷⁾ Case C-122/10, *Konsumentombudsmannen/Ving Sverige AB*, 12 May 2011, para. 64.

⁽²¹⁸⁾ Decision no. RWA-25/2010, Prezes Urzędu Ochrony Konkurencji i Konsumentów, Delegatura w Warszawie, 28 December 2010, Eko-Park S.A.

2.9.6. Free trials and subscription traps

Free trials are marketing tools that allow consumers to order a product or subscribe to a service without costs or for a small amount (i.e. postage of the sample). Some free trials involve unfair commercial practices that mislead consumers into subscriptions. A 2017 Commission study on online free trials and subscription traps reported the prevalence of various practices described below ⁽²¹⁹⁾.

If a trader **fails to provide his geographical address and identity** in an invitation to purchase it can be contrary to Article 7(4)(b) UCPD. In addition, Article 6(1) of the CRD and Article 5(1)(c) of the e-Commerce Directive require online traders to render accessible information that allows consumers to contact them. The requirements of these Directives qualify as material information under Article 7(5) UCPD.

If a trader **does not make it clear to consumers that they may enter into subscriptions by signing up to a free trial**, they may infringe Article 7(1), 7(2) and 7(4)(a) of the UCPD by omitting material information. Depending on the circumstances, there may also be an infringement of Article 6(1)(a) UCPD.

Omitting or providing information in an unclear manner on the recurring costs of a subscription may be contrary to Articles 6(1)(d) and/or 7(1), 7(2) and 7(4)(c) UCPD.

For example:

- A telecom operator advertised on billboards that consumers could receive either two tablets or one mobile phone and a tablet for the price of PLN 1,-. However, the trader did not clearly inform consumers that, in order to take advantage of this offer, they would have to sign both a subscription contract for 24 months and a purchase contract for the products with 36 monthly instalments. A consumer authority found this advertising misleading within the meaning of Article 6(1)(d) of the UCPD ⁽²²⁰⁾.
- In 2021, the Commission and national consumer authorities took action concerning the lack of clear information when making purchases with credit cards, which may involve problems such as concealing actual costs in hidden or small print about recurring payments ⁽²²¹⁾. While credit card companies are not the ones running these schemes, they have a duty to properly inform their customers. In the payment window where consumers enter their credit card information when shopping online, there is often only information about a one-off payment amount, not the recurring subscription. Under the UCPD and Payment Services Directive, consumers must be made aware of the specific amounts for all payment transactions, including recurring ones.
- In 2020, a national authority fined the operator of two dating websites for breaches of the UCPD concerning the websites' subscription models. Specifically, the authority found that although the websites were advertised as free of charge, essential services (e.g. contacting other users) were subject to a fee, providing misleading information to consumers on subscriptions, renewals and fees. Further, the high number of consumer complaints, as well as their poor handling indicated the trader's refusal to change its communication practices ⁽²²²⁾.

Moreover, the CRD contains specific rules to improve the transparency of payments on the internet in its Article 8(2). According to Article 8(2), in distance contracts concluded by electronic means, information relating to the main characteristics of the good or service, the price inclusive of taxes and the duration of the contract and of the consumers' obligations must be provided in a clear and prominent manner, and directly before the consumer places his order; it does not suffice to provide this information in the previous steps of the ordering process. In addition, the consumer must be given the possibility to explicitly acknowledge that the order implies an obligation to pay, including recurring amounts, e.g. by activating an unambiguously labelled ordering button. Both the amount of a one-off payment as well as the amount of recurring payments that may follow should be clearly provided to the consumer.

⁽²¹⁹⁾ European Commission, Study on Misleading 'free' trials and subscription traps for consumers in the EU (2017), <https://op.europa.eu/en/publication-detail/-/publication/bf621260-9441-11e7-b92d-01aa75ed71a1>.

⁽²²⁰⁾ Decision No RBG 32/2014.

⁽²²¹⁾ Press release of 21 June 2021: https://ec.europa.eu/commission/presscorner/detail/en/mex_21_3127.

⁽²²²⁾ Hungarian Competition Authority, 17 August 2020, VJ/19/2018, be2.hu and academicsingles.hu

For example:

A trader contacted consumers via telemarketing to promote the sale of a free puzzle book together with a 6 month subscription, which entails five additional books at a cost. A national court considered that, based on the information provided and the emphasis on the first free book, consumers may have thought that they committed themselves to a one-off payment, while in fact they engaged in a subscription. The trader was found to infringe Article 6(1)(a) UCPD by not providing clear information about the nature of the product ⁽²²³⁾.

In addition, describing a products as **'gratis', 'free', 'without charge' or similar** if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item' is a commercial practice which is **in all circumstances considered unfair and thus prohibited under the UCPD**. This follows from No 20 of Annex I of the Directive.

Inertia selling (demanding payment for or the return or safekeeping of products not solicited by the consumer) is also a commercial practice which is **in all circumstances prohibited under the UCPD**. This follows from No 29 of Annex I of the Directive.

2.10. Articles 8 and 9 - 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, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken.

Article 9 – Use of harassment, coercion and undue influence

In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation 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 imposed 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.

The UCPD provides a single definition of aggressive commercial practices that can be applied across the EU. The Directive **prevents traders from adopting selling techniques which limit the consumer's freedom of choice or conduct with regard to the product, thereby distorting their economic behaviour**.

Aggressive commercial practices are those which make use of **harassment, coercion, physical force or undue influence**. They can involve behaviour at the marketing stage but also practices which occur during or after a transaction has taken place. As clarified by the Court, unless assessing prohibited practices in Annex I, a commercial practice cannot be classified as aggressive 'until a factual and case-specific assessment of its features has been carried out in the light of the criteria set out in Articles 8 and 9 of that directive' ⁽²²⁴⁾.

⁽²²³⁾ ECLI:NL:CBB:2018:465, College van Beroep voor het bedrijfsleven, 17/1282.

⁽²²⁴⁾ Case C-628/17, *Orange Polska*, 12 June 2019, para. 31.

For example:

A national court ruled that in order to qualify as aggressive and unfair, a commercial practice should not only influence the consumer's transactional decision, but also be carried out using specific methods. This implies that an aggressive practice should entail active conduct by the trader ('harassment, coercion including the use of physical force, or undue influence') which limits the consumer's freedom of choice ⁽²²⁵⁾.

Aggressive practices can involve conduct already covered by other national legislation, including contract and criminal law. The UCPD adds an additional layer of protection which can be activated by public enforcement means without necessarily having to start criminal or civil law proceedings.

Article 9(c) outlaws practices which exert **undue influence on consumers**, such as where a trader exploits a specific misfortune or circumstance of which it is aware to influence a consumer's decision on a product. For additional explanations on the relevance of this legal basis in the digital environment, see section 4.2.7.

Article 9(d) prevents traders from imposing **disproportionate non-contractual barriers** that are detrimental to consumers who wish to exercise their rights under a contract, including the right to terminate the contract or switch to another product or trader. This provision is important in particular to prevent non-contractual barriers to switching in telecoms ⁽²²⁶⁾ and energy utilities contracts. For additional explanations regarding the issue of 'consumer lock-in', see section 4.2.11.

For example:

A national court found that the practice where a trader made it particularly burdensome for its customers to terminate their service contracts with it to the point that they were often trapped in de facto automatic renewals amounted to an aggressive commercial practice ⁽²²⁷⁾.

Article 9(e) covers any **threat to take any action that cannot legally be taken**. Aggressive practices often occur in doorstep sales or other off-premises sales of consumer goods and in the timeshare sector. Aggressive practices can also occur in debt recovery, where third parties are mandated to collect debts. Onerous or disproportionate switching barriers should also be regarded as aggressive practices.

For example:

A consumer authority ruled that sending a notice to a consumer to appear before a judge who had no jurisdiction and who had not received any application from the trader was an aggressive practice. The purpose of the practice was to intimidate consumers through undue influence ⁽²²⁸⁾.

The Court has provided further guidance on the assessment of aggressive practices in specific cases.

In the *Wind Tre* case, the Court held that the sale of SIM cards with pre-loaded and pre-activated services without adequately informing the consumers of these services and their costs, could be a prohibited aggressive practice of **inertia selling under point 29 of Annex I** ⁽²²⁹⁾. For the purposes of the assessment, it is **not relevant whether the use of the services required conscious action** by the consumer **or whether the consumer could have deactivated the services**, since without sufficient information, such action cannot be deemed as exercising free choice in relation to the services ⁽²³⁰⁾.

The Court clarified in the *Waternet* case that point 29 of Annex I does not cover a practice of maintaining the **connection to the public water supply network** when a consumer moves into a previously occupied dwelling, since that consumer does not have the choice of the supplier of that service, that supplier charges cost-covering, transparent and non-discriminatory rates that are proportionate to the water consumption, and the consumer knows that that dwelling is connected to the public water supply network and that water is supplied against payment ⁽²³¹⁾. The

⁽²²⁵⁾ Consiglio di Stato, Adunanza Plenaria - Sentenza 11 maggio 2012, n.14 - Pres. Coraggio – est. Greco.

⁽²²⁶⁾ Article 106 of the Directive 2018/1972 (European Electronic Communications Code) lays down rules on switching between providers of electronic communications services.

⁽²²⁷⁾ Supreme Court of Bulgaria, 3 November 2011, 15182/2011, VII d.

⁽²²⁸⁾ See for example PS8215, decision no 24117 of 12 December 2012.

⁽²²⁹⁾ Joined cases C-54/17 and C-55/17, *Wind Tre and Vodafone*, 13 September 2018.

⁽²³⁰⁾ Para. 48-50.

⁽²³¹⁾ C-922/19, *Waternet*, 3 February 2021.

Court distinguished this scenario from the *Wind Tre* case and noted that the use of water requires a conscious act by the consumer and that an average consumer would likely know that a dwelling is connected to the public drinking water supply network against payment ⁽²³²⁾.

In the *Orange Polska* case, the Court held that the signing a contract in the presence of a courier cannot be considered in **all** circumstances as an aggressive practice using undue influence under Articles 8-9 ⁽²³³⁾. Account must be taken of the **conduct of the trader in the specific case**, the effect of which is to **put pressure on the consumer so that his freedom of choice is significantly impaired**, and that **makes the consumer feel uncomfortable or confuses his thinking** concerning the transactional decision to be taken. There must therefore be an assessment of the 'significance' of the impairment of the average consumer's freedom of choice or conduct with regard to a product.

The fact that the consumer was not given the opportunity to read the standard contract terms beforehand is not by itself sufficient to classify that model for concluding contracts as an aggressive practice (para. 43). However, the Court gave examples of scenarios which may be deemed aggressive in para. 48:

'By way of example, the announcement that any delay in signing the contract or amendment would mean that the subsequent conclusion thereof would be possible only under less favourable conditions, or the fact that the consumer would risk having to pay contractual penalties or, in the event of the contract being amended, would risk the trader suspending the service, may fall within that category. The fact of the courier informing the consumer that, if he refuses to sign or delays in signing the contract or amendment that has been delivered to him, he could receive an unfavourable assessment from his employer could also fall within that same category.'

3. BLACK LIST OF COMMERCIAL PRACTICES (ANNEX I)

Article 5(5)

Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.

Recital 17

It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.

The list in Annex I was drawn up to enable enforcers, traders, marketing professionals and customers to identify certain practices and give a more immediate enforcement response to them. It therefore leads to greater legal certainty. If it can be proved that the trader has carried out a blacklisted commercial practice, national enforcers can take action to sanction the trader without having to apply a case-by-case test (i.e. assessing the likely impact of the practice on the average consumer's economic behaviour).

3.1. Products which cannot legally be sold – No 9

Point No 9 of Annex I

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

This practice has been banned to prevent situations where a trader markets a product or a service and omits to clearly inform the consumer that there are legal rules which may restrict the sale, possession or use of a given product. This involves products or services for which the **sale is banned or illegal in all circumstances**, such as the sale of illegal drugs or stolen goods. Since such practices often involve criminal activities and/or dishonest operators, they are easy to identify. Such practices are usually also serious violations of other laws that usually are more specific and which take precedence over the UCPD.

A second category of practices concerns products or services which are not illegal but which may be legally marketed and sold **only under certain conditions and/or subject to certain restrictions**.

⁽²³²⁾ Para. 58-62.

⁽²³³⁾ Case C-628/17, *Orange Polska*, 12 June 2019.

For example:

- Travel packages can only be organised by traders that comply with the insolvency protection requirements imposed by the Package Travel Directive ⁽²³⁴⁾. A national court found that a travel agency offering such packages despite having failed to lodge a guarantee deposit with a national insolvency fund, had infringed point No 9 of Annex I in that consumers were given the false impression that the offer was in full compliance with the law ⁽²³⁵⁾.
- Giving the impression that tickets may legally be sold where there is a national legislative prohibition in either the EEA state of sale, the EEA state of performance or both is considered an unfair commercial practice, according to the judgment of the EFTA Court in a case concerning a trader's marketing and resale of tickets to the London 2012 Olympic and Paralympic Games ⁽²³⁶⁾.

3.2. Pyramid schemes – No 14**Point No 14 of Annex I**

'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.'

This practice has been banned to prevent traders from luring consumers into a scheme promising them compensation when in fact the consumer will actually be **compensated primarily for bringing new members into the scheme, rather than from the sale or consumption of products**. The pyramid structure of the scheme is generally devised in such a way that it will deliver benefits only to the organisers at the top, whereas recruited consumers usually do not stand any reasonable chance to recover what they have invested. The Court has clarified the conditions under which a system of trade promotion can be considered a 'pyramid promotional scheme' within the meaning of Point No 14 of Annex I. The Court noted that:

'the prohibition of pyramid promotional schemes is based (...) on three common conditions. First, such a promotion is based on the promise that the consumer will have the opportunity of making a commercial profit. Next, the realisation of that promise depends on the introduction of other consumers into the scheme. Finally, the greater part of the revenue to fund the compensation promised to consumers does not result from a real economic activity' ⁽²³⁷⁾.

In the same case, the Court clarified that:

'a pyramid promotional scheme constitutes an unfair commercial practice only where such a scheme requires the consumer to give financial consideration, regardless of its amount, 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' ⁽²³⁸⁾.

In the case at hand, a company had advertised a bonus to new customers for every other customer they would recruit. Any newly recruited customer had to pay a registration fee. The Court expressed doubts as to whether the possibility for the consumer to receive compensation was derived primarily from the introduction of other consumers into the scheme, noting that the bonuses paid to existing members were funded only to a small extent by the financial consideration required from new members. The Court also recalled that, if a given practice is not prohibited by the provisions of Annex I, it may still be concluded that the practice is unfair within the meaning of the Directive's general provisions (Article 5 to 9).

Another case *Loterie Nationale* concerned a scheme where players were recruited to play Lotto together. New players were constantly recruited and de facto paid upwards in the scheme to players who had joined before and to the benefit of the organisers of the scheme. New members would pay EUR 10 as an introduction fee and some EUR 43 monthly to participate. Players who won would effectively receive 50 % of their win and there was also a cap on winnings over one

⁽²³⁴⁾ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 26.6.1990, p. 59). Repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, 11.12.2015, p. 1) with effect from 1 July 2018.

⁽²³⁵⁾ 2009:17, Marknadsdomstolen (Stockholm), The Consumer Ombudsman v Casa Nordica Altavista C AB, 26 June 2009.

⁽²³⁶⁾ Case E-1/19, EFTA Court, 14 December 2019, *Andreas Gyrré v The Norwegian Government, represented by the Ministry of Children and Equality*.

⁽²³⁷⁾ Case C-515/12 '4finance' UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, 3 April 2014, para. 20.

⁽²³⁸⁾ Ibid., para. 34.

million EUR, which were not paid to players. The Court clarified that **it is sufficient that there is an indirect link between the contributions paid by new players and the compensation/profit paid to existing players** for such a scheme to be classified as a pyramid scheme. A contrary interpretation would deprive the prohibition of its effectiveness⁽²³⁹⁾.

'It cannot, on the other hand, be deduced from the wording of that provision that the required financial link must necessarily be direct. What matters is the description 'primarily' or 'mostly' applicable to the contributions paid by new participants in the scheme.'⁽²⁴⁰⁾

For example:

A consumer authority took action in three cases involving pyramid schemes. One case involved a sales scheme where the compensation system was based not on the sales volumes, but on the number of new sales agents that each of the resellers was able to attract to the system⁽²⁴¹⁾. Another case involved a sales scheme where the rewards structure was aimed mainly at attracting new consumers by recovering the registration fee from the entry of other agents⁽²⁴²⁾. In a third case, consumers were proposed to purchase products through mechanisms aimed at recruiting other sellers who were asked for an initial contribution or subscription to a program of personal purchases⁽²⁴³⁾. The authority also took into account how the schemes worked in practice. It focused on the number of agents who actually generated sales compared with the total number of recruited consumers and to the varying significance of the revenues/acquisitions from the agents or from sales to outsiders. Investigations showed that the mechanisms involved that the consumer could not make a contribution in exchange for the opportunity to receive compensation that was derived primarily from the introduction of other consumers into the scheme rather than from the sale/consumption of products.

Hierarchical structures such as pyramid schemes are complex and it may be difficult to quantify the benefits of new members for the company. There may also be different methods for calculating the compensation received by existing members.

For example:

A consumer authority took action against a pyramid scheme in which the organiser offered participants opportunities to receive cash donations in return for introducing new members into the scheme⁽²⁴⁴⁾. To obtain such financial gains, the participants had to: pay a registration fee, make a cash donation to another participant, make other donations to another participant and pay a commission to the organiser of the system. The opportunity to obtain cash donations from a new participant would appear only when a 'Blue Circle' was in place, consisting of participants introduced by people previously introduced by a new participant.

It seems necessary to distinguish between banned commercial practice No 14, where **participants make money mostly or solely by recruiting new participants** into the programme, and **multilevel marketing**, where the sales force is compensated mostly for sales they personally generate and also for the sales of the other salespeople they recruit.

It is also difficult to **draw the line between consumers and traders**: after a consumer has entered into a scheme, that person could, from the moment they starts promoting it, be considered as a trader and become subject to the prohibition of the UCPD themselves, as regards the professional conducts carried out in the framework of the scheme.

3.3. Products which cure illnesses, dysfunctions and malformations – No 17

Point No 17 of Annex I

'Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.'

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

⁽²³⁹⁾ Case C-667/15, *Loterie Nationale*, 15 December 2016.

⁽²⁴⁰⁾ *Ibid.*, para. 30.

⁽²⁴¹⁾ PS6425 Xango-Prodotti Con Succo Di Mangostano. Provvedimento n. 21917, 15 December 2010.

⁽²⁴²⁾ PS4893 Agel Enterprises-Integratori. Provvedimento n. 23789, 2 August 2012.

⁽²⁴³⁾ PS7621 – Vemma Italia – Prodotti con succo di mangostano, Provvedimento n. 24784, 5 February 2014.

⁽²⁴⁴⁾ Decision No RKR 34/2014.

For example:

A consumer authority ruled that claims that a massage armchair had healing effects on human health (including curing spine and blood circulation diseases) fell under the ban imposed in point No 17 of Annex I ⁽²⁴⁵⁾.

Misinformation related to health claims was prevalent during the **COVID-19 pandemic**. Rogue traders advertised and sold products, such as protective masks, caps and hand sanitisers, which allegedly would prevent or cure an infection. However, such statements were often made without references to solid scientific evidence or without being in full alignment with official expert advice. Such claims may breach Articles 5 and 6 of the UCPD that prohibit misleading actions about the main characteristics of the product; in specific cases such claims may be banned by the prohibition in No 17 of Annex I. To help fight such practices, the Commission brought together the national authorities working in the Consumer Protection Cooperation network and adopted a common position ⁽²⁴⁶⁾ on how to deal with COVID-19 related scams.

For example:

- *A national authority blocked the website of a trader who advertised a drug containing the active ingredients of antiviral for HIV treatment as the 'only drug against Coronavirus (COVID-19)' and the 'only remedy to fight Coronavirus (COVID19)' despite official statements from health authorities that there is no effective cure to fight the virus ⁽²⁴⁷⁾.*
- *In three cases of traders marketing products whilst giving the impression that the products could protect against the coronavirus, national authorities and a court found that such practices were aggressive. In particular, it was found that traders took advantage of the consumers' fear of being infected by the coronavirus, thereby reducing their judgment, and the specific marketing practices exploited a situation of serious societal concern ⁽²⁴⁸⁾.*

Such claims are also partly covered under specific EU legislation. The UCPD is also without prejudice to EU rules on the health properties of products. Point 17 therefore applies only **in addition to existing EU rules on health claims**. However, any misleading practices with regard to health and wellness products can still be assessed in the light of Article 6 of the UCPD (e.g. where the overall presentation is deceptive).

The prohibition relates first of all to claims regarding physical states classified as pathologies, dysfunctions or malformations by medical science. However, as such claims are also regulated by sector-specific EU legislation, the practical utility of point 17 in relation to these practices is marginal.

Under Article 7(3) of the FIC Regulation ⁽²⁴⁹⁾, **information about a food** provided by a trader to a consumer 'shall not attribute to any food the property of preventing, treating or curing a human disease, nor refer to such properties'. This general provision applies to food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers. The term 'food information' means information concerning the food and made available by means of labelling other accompanying material, or any other means including technology tools or verbal communication.

In addition, the EU's Nutrition and Health Claims Regulation ⁽²⁵⁰⁾ lays down detailed rules on the use of **nutrition and health claims on foods** in commercial communications whether in the labelling, presentation or advertising of foods.

Under the Regulation, nutrition claims ('any claim which states, suggests or implies that a food has particular beneficial nutritional properties') shall only be permitted if they are listed in the Annex and are in conformity with the conditions set out in the Claims Regulation. Health claims ('any claim which states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health') shall be prohibited unless they are authorised in

⁽²⁴⁵⁾ Decision of the President of the Office for Competition and Consumer Protection, Ref. RPZ 2/2012 ZdroWita of 13 March 2012.

⁽²⁴⁶⁾ Common Position of CPC Authorities, Stopping scams and tackling unfair business practices on online platforms in the context of the Coronavirus outbreak in the EU, 20 March 2020: https://ec.europa.eu/info/sites/info/files/live_work_travel_in_the_eu/consumers/documents/cpc_common_position_covid19.pdf

⁽²⁴⁷⁾ PS11723, Coronavirus, 17 March 2020.

⁽²⁴⁸⁾ Cases MR-2020-563: The Market Council, 23 September 2020, *Visjon TV & Webshop AS*; MR-2020-687: The Market Council, 22 October 2020, *Vitability AS*; FOV-2020-663: The Norwegian Consumer Authority, 6 April 2020, *Emptiodirect AS*.

⁽²⁴⁹⁾ Regulation (EU) No 1169/2011 on the provision of food information to consumers.

⁽²⁵⁰⁾ Regulation (EC) No 1924/2006.

accordance with the Claims Regulation and included in the lists of authorised claims provided for in Articles 13 and 14. The Regulation also specifically bans the following health claims ⁽²⁵¹⁾:

- claims which suggest that health could be affected by not consuming the food;
- claims which make reference to the rate or amount of weight loss;
- claims which make reference to recommendations of individual doctors or health professionals and other associations not referred to in Article 11 of the Claims Regulation.

Health-related claims are also covered by EU **health and pharmaceutical legislation**. Article 6(1) of Directive 2001/83/EC **on medicinal products** makes it clear that no medicinal product may be placed on the market of a Member State unless a marketing authorisation has been issued. Articles 86 to 100 of this Directive also sets out specific provisions on advertising medicinal products to the general public. Advertisement of prescription-only medicines and products containing psychotropic or narcotic substances is prohibited. Member States can also forbid advertisement for products which are reimbursed. Advertisement for products which are available over the counter is allowed but with precise conditions. For example:

- it has to be set out in such a way that it is clear that the message is an advertisement and that the product is clearly identified as a medicinal product;
- shall encourage the rational use of the medicinal product, by presenting it objectively and without exaggerating its properties;
- shall not be misleading;
- cannot be directed exclusively or principally at children;
- cannot use, in improper, alarming or misleading terms, pictorial representations of changes in the human body caused by disease or injury, or of the action of a medicinal product on the human body;
- cannot refer to recommendation by scientists or health professionals who, due to their celebrity, could encourage the use of the product.

Article 7 of Regulation (EU) 2017/745 of the European Parliament and of the Council ⁽²⁵²⁾ on medical devices and Article 7 of Regulation (EU) 2017/746 of the European Parliament and of the Council ⁽²⁵³⁾ on *in vitro* diagnostic medical devices have introduced at EU level a prohibition on claims in labelling, instructions for use or advertising that mislead the user or patient with regard to the device's intended purpose, safety or performance, notably by:

- ascribing functions and properties to the device which the device does not have;
- creating a false impression regarding treatment or diagnosis, functions or properties which the device does not have;
- failing to inform the user or the patient of a likely risk associated with the use of the device in line with its intended purpose;
- suggesting uses for the device other than those stated to form part of the intended purpose for which the conformity assessment was carried out.

In addition, specific limits (i.e. bans) exist on **promoting pharmaceuticals and medical treatments** between professionals i.e. traders and doctors. The choice of the product/treatment depends on the doctor or specialist who prescribes it. Any misleading advertising in this area (whether it concerns an authorised trader or not) will trigger the relevant EU or national rules and be subject to the respective systems of enforcement and sanctions. These will take precedence over the UCPD.

No 17 also applies to goods or services such as **aesthetic treatments, wellness products and similar** in case they are commercialised with false claims that they are able to cure illnesses, dysfunction or malformations.

⁽²⁵¹⁾ Article 12 of Regulation (EC) No 1924/2006.

⁽²⁵²⁾ Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC (OJ L 117 5.5.2017, p. 1).

⁽²⁵³⁾ Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on *in vitro* diagnostic medical devices and repealing Directive 98/79/EC and Commission Decision 2010/227/EU (OJ L 117 5.5.2017, p. 176).

As regards **cosmetic products**, Article 20(1) of Regulation (EC) No 1223/2009 of the European Parliament and of the Council ⁽²⁵⁴⁾ on cosmetic products requires Member States to prohibit the wording, use of names, trademarks, images or other signs (figurative or otherwise) suggesting a characteristic the products in question do not possess in the labelling, making available on the market and advertising of cosmetic products.

A trader's failure to produce the appropriate and relevant evidence on the physical effects a consumer can expect from a product's use will fall under banned commercial practice No 17 on the grounds that a false claim has been made, if it is not covered by sector-specific EU legislation.

In order to avoid the ban, **traders must be able to substantiate any factual claims of this type with scientific evidence**. The fact that the burden of proof rests on the trader reflects the principle, more broadly formulated in Article 12 of the UCPD, which states that 'Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings [...]: (a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case'.

For example:

An online trader advertised a number of products on its website, including clothes and cosmetics, as having various positive effects on health (e.g. reducing pain, improving sleep and decreasing wrinkles). However, it could not substantiate its claims with appropriate evidence. A national authority considered this to be an example of the misleading commercial practice banned under Annex I to the UCPD ⁽²⁵⁵⁾.

3.4. Use of the claim 'free' – No 20

Point No 20 of Annex I

'Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.'

This ban is based on the idea that **consumers expect a 'free' claim to be exactly that, meaning they receive something without giving** money in exchange. This means that an offer can be described as free only if consumers pay no more than:

- the minimum, unavoidable cost of responding to the commercial practice (e.g. the current public postage rates, the cost of telephoning up to and including the standard national rate or the minimum, unavoidable cost of sending a text message);
- the true/real cost of freight or delivery;
- the cost, including incidental expenses, of any travel involved if consumers collect the offer.

As a consequence, **traders should not charge for packaging, handling or administration of a product marketed as free**. When traders make 'free' offers, they should also state clearly in all material what the consumer's liability is for any unavoidable costs, as referred to above.

It is harder to determine whether the commercial practice is unfair when the claim 'free' is used in **combined offers**, which are commercial offers involving **more than one product or service**. Combined offers are usually conditional purchase promotions or package offers. The following are some principles which national authorities could take into account when assessing combined offers. They are already largely reflected in some advertising regulatory codes:

- Traders must not try to recover their costs by reducing the quality or composition or by inflating the price of any product that must be bought as a pre-condition for obtaining a separate, free item.
- Traders should not describe an individual element of a package as 'free' if the cost of that element is included in the package price.

⁽²⁵⁴⁾ Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (OJ L 342, 22.12.2009, p. 59).

⁽²⁵⁵⁾ 2S-17, Lietuvos Respublikos konkurencijos taryba (Vilnius), 4.7.2011.

For example:

- In a combined offer for a mobile phone with a subscription, a telecom operator marketed the price as '0 kr'. However, once consumers accepted the offer, the monthly instalments for the subscription increased. A national court considered that this fell under point No 20 in Annex I to the UCPD ⁽²⁵⁶⁾.
- In the case of an offer for a 'free credit', a consumer authority found that it falls under point No 20 in Annex I to the UCPD if the consumer may have to sign a credit insurance contract with additional costs to get the loan granted.

The ban does not prevent traders from using the claim 'free' in **conditional purchase promotions** where **customers are required to buy other items** (i.e. 'buy one get one free'-type offers), provided that:

- it is made clear to consumers that they have to pay all costs;
- the quality or composition of the paid-for items has not been reduced; and
- the price of the paid-for items has not been inflated to recover the cost of supplying the free item.

For example:

A trader launched a promotional campaign on the internet and in newspapers offering two free car tyres when buying two new ones. In reality, the price stated for the two tyres in the campaign was twice as high as the previously applied retail price. A national authority ruled that this conditional purchase promotion was prohibited under point No 20 of Annex I ⁽²⁵⁷⁾.

The key distinguishing feature of a conditional purchase promotion is that the item described as 'free' must be **genuinely separate from and additional to the item(s) that the customer is required to pay for**. Hence, in such conditional purchase promotions, **traders must be able to show**:

- that the free item is genuinely additional to the item(s) usually sold for that price or that the free item is genuinely separable from the paid-for item(s);
- that they only supply the 'free' item with the paid-for item(s) if the consumer complies with the terms of the promotion; and
- that consumers are aware of the stand-alone price of the item(s) they are paying for and that that price remains the same with or without the free item.

For example:

- A 'free wall-chart when you buy Thursday's paper' claim is legitimate if the paper is sold without a wall-chart on other days for the same price.
- A claim of 'free travel insurance for customers who book their holiday online' is legitimate if customers who book the same journey by telephone are offered the same price but not offered free insurance.
- A claim that consumers can get a 'free subscription to a streaming service for a certain number of months' together with their purchase of a good, such as a television, is legitimate if the consumer is not required to pay for that subscription and the price of the good is not increased due to the added subscription.

Point 20 of Annex I prohibits the use of the claim 'free' to describe an individual element of a package offer **if the cost of that element is included in the package price**. A 'package offer' here means a pre-arranged combination of features offered for a single, inclusive price where customers cannot exercise genuine choice on how many elements of the package they receive for that price.

⁽²⁵⁶⁾ Joint Judgments Dnr B 2/11 and B 3/11 by Marknadsdomstolen, 11 May 2012.

⁽²⁵⁷⁾ 2S-27, Lietuvos Respublikos konkurencijos taryba (Vilnius), 11 November 2010.

For example:

If a car is advertised with leather seats, air conditioning and a multi-media system for a standard price of EUR 10 000, that combination of features is a package. The consumer pays one all-inclusive price for the car as advertised. If any of the advertised features were to be removed, the quality and composition of the car the customer is paying EUR 10 000 for would be diminished. In order to claim that the multi-media system is free and that the EUR 10 000 relates to the other elements, the trader needs to demonstrate either (a) that the requirements of a conditional purchase promotion are satisfied, or (b) that the multi-media system was a new additional feature and that the price of the car had not increased.

However, traders sometimes add new elements to existing packages without increasing the overall price of the package or reducing the quality or composition of the elements included. In those circumstances, consumers are likely to regard the element that has been added to the package as additional to the established package for a period after its introduction. However if the price of a package increases or its quality or composition is reduced after a new element is added, the new element may not be described as 'free'.

One-off up-front costs incurred, for example, **to buy or install equipment**, do not negate claims that products or services supplied without subscription are 'free' within the meaning of No 20 of Annex I. For example, digital free-to-air television channels are available only to consumers who have the necessary digital receiving equipment; similarly, call packages are available only to consumers who have a telephone line.

Likewise, connection fees payable to a third party to activate an internet service will not negate claims that the internet service is free, provided the connection fee has not been inflated to recover the cost of supplying the free internet service. **Traders must always adequately inform consumers** about the requirement for any of such up-front payments.

Products presented as 'free' are especially common in the online sector. However, many such services collect **personal data** of users such as their identity and email address. Importantly, the UCPD covers all commercial practices concerning 'free' products and does not require payment with money as a condition for its application. Data-driven practices involve an interplay between EU **data protection legislation** and the UCPD. There is an increasing awareness of the economic value of information related to consumers' preferences, personal data and other user-generated content. The marketing of such products as 'free' without adequately explaining to consumers how their preferences, personal data and user-generated content are going to be used could be considered a misleading practice in addition to possible breaches of data protection legislation.

In addition, Directive (EU) 2019/770 ⁽²⁵⁸⁾ applies to contracts where digital content or digital services are provided to consumers and the consumers provide or undertake to provide personal data. The Digital Content Directive applies regardless of whether personal data is provided to the trader at the time of concluding a contract or at a later time, for example where the consumer gives consent for personal data processing. Following the amendments introduced by Directive (EU) 2019/2161, also the Consumer Rights Directive applies (as from 28 May 2022) to contracts for the supply of digital services and content where the consumers provide or undertake to provide personal data.

For example:

- A consumer authority fined an online platform for misleading information on the basis of Article 6 UCPD for its claim that its service is 'for free' or 'without charge', because the company derives its revenues from analysing users' private data and providing the information to third party traders ⁽²⁵⁹⁾.
- A consumer authority fined an online platform for misleading users (under Articles 6 and 7 UCPD) into registering and not immediately and adequately informing them during the creation of the account that the data provided would be used for commercial purposes and, more generally, of the remunerative purposes underlying the service, emphasising instead the free of charge nature of the service ⁽²⁶⁰⁾.

⁽²⁵⁸⁾ 'Digital Content Directive'.

⁽²⁵⁹⁾ Vj-85/2016/189 Facebook Ireland Ltd, 16 December 2019.

⁽²⁶⁰⁾ AGCM, PS11112 - Facebook, 29 November 2018.

3.5. Reselling events tickets acquired by automated means – No 23a

Point No 23a of Annex I

'Reselling events tickets to consumers if the trader acquired them by using automated means to circumvent any limit imposed on the number of tickets that a person can buy or any other rules applicable to the purchase of tickets.'

Directive (EU) 2019/2161 added to the UCPD a new banned commercial practice in Point 23a, which prohibits traders from reselling to consumers tickets to cultural and sports events that they have **acquired by using specialised software ('bots')**.

Such automated means enable traders to buy tickets in excess of the technical limits imposed by the primary ticket seller or to bypass any other technical means put in place by the primary seller to ensure accessibility of tickets for all individuals, such as the organisation of the online buying queue. The prohibition would also apply in case the tickets are 'reserved' by the automated software, but then paid for separately by other means. It also applies where the ticket reseller acquires the tickets from a third party that used bots to buy tickets. The fact that the use of the bot by the reseller has been known to the primary ticket seller is not relevant for the purposes of the prohibition, as long as its use has enabled the reseller to acquire those tickets in larger numbers than was possible for other buyers.

The prohibition applies generally to 'events' that include cultural and sports events specifically mentioned in recital 50 of Directive (EU) 2019/2161 and other types of leisure activities. It only applies to technical measures used by the reseller to circumvent the technical measures implemented by the primary ticket seller in order to limit the number of tickets sold to each buyer or to manage the sales process. Such measures could be implemented by the primary seller at its own initiative or on the basis of requirements in national legislation.

The prohibition in Point 23a of Annex I complements the general UCPD provisions on unfair practices as regards this specific aspect of ticket resale. Recital 50 to Directive (EU) 2019/2161 explains that the prohibition is without prejudice to any other national measures that Member States can take to protect the legitimate interests of consumers and to secure cultural policy and broad access of all individuals to cultural and sports events, such as regulating the resale price of the tickets.

3.6. Persistent marketing by a remote tool – No 26

Point No 26 of Annex I

'Making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC and 2002/58/EC.'

This ban aims to **protect consumers against pestering by distance marketing tools**. Point No 26 of Annex I does not prohibit distance marketing per se but rather **persistent and unwanted solicitations** ⁽²⁶¹⁾.

For example:

An insurance adviser searched online and offline newspapers for reports of accidents and then sent standard letters to the victims, offering advice on and help with compensation issues. A national court ruled that sending a single letter to a person does not qualify as 'persistent and unwanted solicitations' within the meaning of point 26 of Annex I ⁽²⁶²⁾.

Specific rules on unsolicited communications using electronic communications networks (i.e. by telephone or email) are laid down in Article 13 of the **e-Privacy Directive** 2002/58/EC. Automatic calling machines, facsimile machines (fax) or electronic mail may be only used for the purposes of direct marketing to contact users who have given their prior consent. However, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given

⁽²⁶¹⁾ See also the pending Case C-102/20 *StWL Städtische Werke Lauf a.d. Pegnitz*, which will probably clarify the application of this prohibition to advertising displayed in the email inbox.

⁽²⁶²⁾ 4 Ob 174/09f, OGH (Oberster Gerichtshof), 19 January 2010.

the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details at the time of their collection and on the occasion of each message in case the customer has not initially refused such use. These sector-specific provisions prevail over the UCPD, meaning that such solicitations do not have to be persistent and that Member States must penalise solicitations from the first call or email.

If for marketing purposes a controller uses **personal data** (e.g. the name and/or address of the recipient or other data relating to an identifiable person), this constitutes processing of such data under **EU data protection law**. The safeguards and obligations under the GDPR must be complied with, including informing individuals that processing will be carried out before any marketing taking place and allowing individuals to object to having their personal data processed for this purpose (Article 21(2) GDPR).

There are no similar sector-specific EU rules for marketing by **post and other printed advertising**. These are exhaustively regulated by the UCPD, and by point No 26 of the Annex in particular. Therefore, **national provisions prohibiting all kinds of unaddressed printed advertising**, unless consumers give prior consent (opt-in), would go beyond the fully harmonised provisions of the UCPD. Such a prohibition would be allowed only if it falls outside the scope of the Directive, i.e. it does not have the **aim of protecting the economic interest of consumers**. Some Member States have defended such prohibitions on different grounds, e.g. protecting the environment (reducing paper wasted on marketing material).

3.7. Direct exhortations to children – No 28

Point No 28 of Annex I

'Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.'

This ban includes putting pressure on children to buy a product directly or to persuade adults to buy items for them ('pester power'). A recurrent claim made by many traders about this ban is that it can be difficult to **distinguish marketing directed at children** from marketing directed at other consumers. Similarly, it could sometimes be unclear **whether a commercial practice includes a direct exhortation to children**.

Nevertheless, the check to determine whether a commercial practice falls under point 28 of Annex I must be carried out taking into account all the facts and circumstances of an individual case. The assessment may take into account various factors, such as the **design of the marketing**, the **medium** used to send the marketing, the **type of language** used, the presence of **topics or characters that may in particular appeal to children**, the presence of **age-restrictions**, providing **direct links** to making purchases etc. ⁽²⁶³⁾ A national enforcement authority or court is also **not bound by the trader's own definition of the target group** for the commercial practice in question, although that definition may be taken into account. The assessment should also take into account the steps that the trader has taken in protecting minors from direct exhortation. Traders should adapt the marketing according to the consumers that could actually be reached by the practice, not only according to the intended target group.

For example:

- An online commercial practice involving a gaming community in which children dress virtual dolls invited children to 'buy more', 'buy here', 'upgrade now' and 'upgrade to Superstar'. A national court banned such practices on the grounds that the statements were direct exhortations to children within the meaning of No 28 Annex I ⁽²⁶⁴⁾.
- A concert organiser had advertised tickets for a Justin Bieber concert using phrases such as 'Belibers – there are still RIMI-cards available at many stores. Run, jump on your bike or get someone to drive you' and 'Remember to also buy tickets for the Bieberexpress when you buy concert tickets at RIMI today'. A national court found this to be in breach of point No 28 of Annex I ⁽²⁶⁵⁾.

⁽²⁶³⁾ See also ICPEN, Best Practice Principles for Marketing Practices directed towards Children Online, June 2020.

⁽²⁶⁴⁾ MD 2012:14, Norwegian Market Court, 6 December 2012, *Stardoll*.

⁽²⁶⁵⁾ MR-2012-1245-2, Norwegian Market Council, 3 December 2013, *Atomic Soul*.

- A national authority found that when a bank addressed direct marketing letter to children turning 10, this was an aggressive practice. In the letter, the children were welcomed to a branch office of the bank to obtain a personal Visa Electron card to mark their 10th birthday ⁽²⁶⁶⁾.
- A national authority found a direct exhortation in a competition advertisement that was carried out using augmented reality (AR). The reader would download an AR application to their phone and use it to scan the panels of a story with video materials. The videos included numerous comic-like visual elements and sound effects. At the end of the story, the application showed a wheel of fortune where the reader had a chance to win tickets to a concert. If the reader was not lucky enough to win, a link popped up next to the wheel of fortune encouraging the reader to 'check out the tickets'. In the same situation, virtual avatar encouraged the reader to 'click here and get tickets'. According to the national authority, this was a direct invitation to purchase, especially because it was possible to purchase tickets from the associated link. The national authority also took the view that the AR content and advertisement was targeted at children were published in a comic magazine, itself aimed at a child audience ⁽²⁶⁷⁾.
- A Member State court considered the issue of whether the display of a link to an online store constitutes a direct invitation to purchase. The court found that an advertisement addressing the viewer in second-person singular, using terms typical for children is targeting children in the first instance, and that such direct invitations to purchase are covered by point No 28 of Annex I even if the prices and characteristics of the products advertised are not displayed until the link is clicked ⁽²⁶⁸⁾.
- In a similar case, the Member State court considered that indirect invitations to purchase are not subject to the prohibition in point No 28 of Annex I, and are defined as references to the intended use of the advertised products. In this case, advertising messages and links to the online store were accompanied by the message 'If you also want a copy for yourself, you can also order it for your console using the links below'. It was found that providing information about a purchasing opportunity or inviting the user to virtual business premises is not inadmissible ⁽²⁶⁹⁾.
- In 2021, an enforcement authority fined the operator of an online game and several online influencer agencies for the infringement of the prohibition in point No 28 of Annex I. The advertisements for the game were promoted across a range of online channels, encouraging children and adolescents to interact with an animal character by sending premium-rate SMS messages. Children were therefore directly invited to make purchases. In addition, the fine took into account misleading practices of the trader and influencers, as certain advertisements and promotions were not marked accordingly and misled consumers into viewing an advertisement ⁽²⁷⁰⁾.

In 2013-2014, the Commission and national authorities, carried out a **joint enforcement action on online games** that offer possibilities to make purchases while playing (in-app purchases) and that are likely to appeal to or to be played by children, which is further discussed in section 4.2.9 ⁽²⁷¹⁾. The authorities considered that point No 28 Annex I to the UCPD applies to games that are likely to appeal to children, not only those solely or specifically targeted at children. A game or application, and the exhortation contained within it, may be considered as directed at children within the meaning of point No 28 of Annex I if the trader could reasonably be expected to foresee that it is likely to appeal to children.

3.8. Prizes – No 31

Point No 31 of Annex I

'Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

— there is no prize or other equivalent benefit,

or

— taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.'

⁽²⁶⁶⁾ KUV/5564/41/2012, Finnish Competition and Consumer Authority, 1 March 2013, Nordea Oyj.

⁽²⁶⁷⁾ Finnish Consumer Ombudsman, decision KKV/54/14.08.01.05/2019.

⁽²⁶⁸⁾ German Federal Court, 17 July 2013 - I ZR, 34/12, *Runes of Magic*.

⁽²⁶⁹⁾ Austrian Supreme Court of Justice, 9 July 2013, 4 Ob 95/13v, *Disney Universe*.

⁽²⁷⁰⁾ Hungarian Competition Authority, 26 May 2021, VJ/3/2020, *Global AWA Pty Ltd et al.*

⁽²⁷¹⁾ Press release of 18 July 2014: http://europa.eu/rapid/press-release_IP-14-847_en.htm

The assessment of the first category of situations (i.e. no prize) is fairly straightforward. In order not to breach the ban, **traders must always be able to demonstrate that they awarded the prize/s or equivalent benefit/s in the exact terms stated in their announcement to the consumer.** Failing this, the practice would fall under the ban.

For example:

- A trader created the false impression that consumers could win a prize by stating that everyone who participated in a specific lottery would have the chance to win a laptop computer. In reality, no such computer could be won ⁽²⁷²⁾.
- A trader created the false impression that a consumer had won a prize by stating unequivocally in a letter to the consumer that they had won a prize of 18 000 euros, when in fact there was no such prize. A national court clarified that this commercial practice was contrary to the national law transposing Annex I No 31 of the UCPD ⁽²⁷³⁾.

The second part of point No 31 (i.e. the prize or benefit is subject to the consumer paying money or incurring a cost) covers dishonest practices where, for instance, consumers are informed that they have won a prize but have to **call a premium rate line** to claim it, or where consumers are initially informed that they have won a prize but then learn that they **must order another good or service to receive the advertised prize** or the equivalent benefit.

The Court has clarified that even when the cost imposed on the consumer for claiming the prize (i.e. requesting information on the nature of that prize or taking possession of it) is minimal, as in the case of a stamp, compared to the value of the prize, and regardless of whether the payment of such costs procures any benefits to the trader, such practices are prohibited by point No 31 of Annex I ⁽²⁷⁴⁾.

For example:

A mail order company sent promotional advertising by post stating that the consumer 'is guaranteed 100 % that they are one of the selected people to receive an electronic product. This product is free of charge!' In fact, consumers had to respond within 2 days and pay EUR 19,99 to cover 'administration and transport costs'. A consumer authority found that giving consumers the false impression that they have already won a prize while requiring them to pay a fee within 2 days of receiving notice of the promotional action fell under point No 31 of Annex I and also other blacklisted actions such as No 20 owing to the use of the word 'free' ⁽²⁷⁵⁾.

4. APPLICATION OF THE UCPD TO SPECIFIC FIELDS

4.1. Sustainability

4.1.1. Environmental claims

The expressions 'environmental claims' and 'green claims' refer to the practice of suggesting or otherwise creating the impression (in a commercial communication, marketing or advertising) that a good or a service **has a positive or no impact on the environment or is less damaging to the environment** than competing goods or services. This may be due to its composition, how it has been manufactured, how it can be disposed of and the reduction in energy or pollution expected from its use. When such claims are not true or cannot be verified, this practice is often called 'greenwashing'. The coordinated screening of websites ('sweep') that the Commission and national consumer authorities carried out in 2020 confirmed the prevalence of vague, exaggerated, false or deceptive green claims ⁽²⁷⁶⁾.

'Greenwashing' in the context of business-to-consumer relations can relate to all forms of business-to-consumer commercial practices concerning the environmental attributes of products. According to the circumstances, this can include all types of statements, information, symbols, logos, graphics and brand names, and their interplay with colours, on packaging, labelling, advertising, in all media (including websites) and made by any organisation, if it qualifies as a 'trader' and engages in commercial practices towards consumers.

⁽²⁷²⁾ Prague City Court, 29 October 2014, Golden Gate Marketing v Czech Trade Inspection Authority.

⁽²⁷³⁾ Audiencia Provisonal de Barcelona, 26 June 2014, 323/2014.

⁽²⁷⁴⁾ Case C-428/11, *Purely Creative e.a. v Office of Fair Trading*, 18 October 2012.

⁽²⁷⁵⁾ CA/NB/544/10, Consumentenautoriteit, 21 September 2010, Garant-o-Matic B.V.

⁽²⁷⁶⁾ Press release of 28 January 2021, Screening of websites for 'greenwashing': half of green claims lack evidence, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269.

The UCPD does not provide specific rules on environmental claims. However, it provides a legal basis to ensure that traders do not present environmental claims in ways that are unfair to consumers. It does not prohibit the use of 'green claims' as long as they are not unfair. On the contrary, the UCPD can help traders investing in the environmental performance of their products by enabling them to communicate these efforts to consumers transparently and by preventing competitors from presenting misleading environmental claims.

The **New Consumer Agenda** ⁽²⁷⁷⁾ and the **Circular Economy Action Plan 2020** ⁽²⁷⁸⁾ foresee further proposals to tackle greenwashing. Furthermore, the Commission is working on initiatives such as establishing standards for the **certification of carbon removals** ⁽²⁷⁹⁾.

As regards **consumer redress** for harm incurred from a breach of the UCPD related to environmental claims, such as compensation for damage, price reduction and contract termination, see section 1.4.3.

4.1.1.1. Interplay with other EU legislation on environmental claims

Article 3(4) and Recital 10 set out the principle that the UCPD complements other EU legislation as a 'safety net' ensuring that a high common level of consumer protection against unfair commercial practices is maintained in all sectors. In the area of environmental claims, UCPD complements instruments such as:

- Regulation (EC) No 66/2010 of the European Parliament and of the Council ⁽²⁸⁰⁾ on the EU Ecolabel;
- Regulation (EU) 2017/1369 of the European Parliament and of the Council ⁽²⁸¹⁾ setting a framework for energy labelling;
- Directive 1999/94/EC relating to the availability of consumer information on fuel economy and CO₂ emissions in respect of the marketing of new passenger cars;
- Directive 2012/27/EU on energy efficiency ⁽²⁸²⁾, as amended by Directive (EU) 2018/2002 ⁽²⁸³⁾;
- Directive 2010/31/EU on the energy performance of buildings ⁽²⁸⁴⁾;

⁽²⁷⁷⁾ Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening consumer resilience for sustainable recovery (COM(2020) 696 final), 13.11.2020.

⁽²⁷⁸⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan: For a cleaner and more competitive Europe (COM(2020) 98 final), 11.3.2020. Commission Recommendation 2013/179/EU of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations (OJ L 124, 4.5.2013, p. 1) and any updates thereof.

⁽²⁷⁹⁾ In the Circular Economy Action Plan, the Commission announced an initiative on a regulatory framework for certification of carbon removals. This Carbon Removal Certification mechanism would support the deployment of carbon removal solutions at a scale compatible with the objective of climate neutrality.

⁽²⁸⁰⁾ Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ L 27, 30.1.2010, p. 1).

⁽²⁸¹⁾ Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (OJ L 198, 28.7.2017, p. 1).

⁽²⁸²⁾ Notably, Article 9(2) of this Directive stipulates that, where consumers have 'smart meters' for natural gas and/or electricity, 'metering systems shall provide to final customers information on the actual time of use' and Article 10(1) stipulates that, 'where final customers do not have smart meters', billing information shall be 'accurate and based on actual consumption'.

⁽²⁸³⁾ Notably, amendment of Article 10 on billing information for gas and electricity stipulates that billing information is reliable, accurate and based on actual consumption, in accordance with point 1.1 of Annex VII, for electricity and gas, where that is technically possible and economically justified; Article 9a stipulates that final customers are provided with competitively priced meters that accurately reflect their actual energy consumption.

⁽²⁸⁴⁾ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158, 14.6.2019, p. 125). According to Article 10 of this Directive, energy performance certificates shall make it possible for owners and tenants to compare and assess the energy performance of buildings. The energy performance certificate shall provide, e.g., 'an indication as to where the owner or tenant can receive more detailed information (...) of the recommendations made in the energy performance certificate'. According to Article 12(2) and (3), the energy performance certificate must be 'showed to the prospective new tenant or buyer and handed over to the buyer or new tenant' when the building is constructed, sold or rented out, and when this is done before a building is constructed, the seller must 'provide an assessment of its future energy performance'. Notably, according to Article 12(4), when buildings having an energy performance certificate are offered for sale or for rent, the energy performance indicator of the energy performance certificate of the building must be 'stated in the advertisements in commercial media'.

- Regulation (EU) 2020/740 on the labelling of tyres with respect to fuel efficiency and other parameters ⁽²⁸⁵⁾;
- Directive (EU) 2019/944 of the European Parliament and of the Council ⁽²⁸⁶⁾ on common rules for the internal market in electricity;
- Directive 2009/125/EC establishing a framework for the setting of ecodesign requirements for energy-related products ⁽²⁸⁷⁾;
- Regulation (EU) 2018/848 of the European Parliament and of the Council ⁽²⁸⁸⁾ on organic production and labelling of organic products;
- Directive (EU) 2018/2001 of the European Parliament and of the Council ⁽²⁸⁹⁾ on the promotion of the use of energy from renewable sources;
- Directive 2009/73/EC of the European Parliament and of the Council ⁽²⁹⁰⁾ on common rules for the internal market in natural gas.

Here are a few examples of the interplay between the UCPD and specific EU legislation concerning environmental claims.

For example:

- Regulation (EU) 2017/1369 setting a framework **for energy labelling** prohibits additional labels and symbols that in themselves may mislead consumers with regard to consumption of energy or other resources ⁽²⁹¹⁾. However, it does not include specific rules on what is considered misleading. On this point, the UCPD can come into play. For example, a court considered the use of the slogan 'very energy saving' for a refrigerator/freezer in energy efficiency class 'A' a misleading commercial practice under the UCPD. 308 out of 543 appliances on the market at the time belonged to class 'A+' and 17 % of all available appliances were in energy efficiency class 'A++' ⁽²⁹²⁾.

⁽²⁸⁵⁾ This Regulation establishes a framework for the provision of harmonised information on tyre parameters through labelling, allowing end-users to make an informed choice when purchasing tyres.

⁽²⁸⁶⁾ According to point 5 of Annex I of this Directive, consumers shall be provided in bills with information on the contribution of each energy source to the electricity purchased in accordance with the supply contract. In particular, according to subparagraph (a) and (b), electricity suppliers shall specify 'the contribution of each energy source to the overall energy mix of the supplier (...)' and 'information on the environmental impact, in at least terms of CO₂ emissions and the radioactive waste resulting from the electricity produced by the overall energy mix of the supplier over the preceding year'.

⁽²⁸⁷⁾ On the basis of this framework Directive, minimum requirements are established via product specific implementing measures, e.g. for light bulbs and household appliances. According to Article 14 of this Directive, in accordance with the applicable implementing measure, manufacturers shall ensure that consumers are provided with 'information on the role that they can play in the sustainable use of the product' and 'when required by the implementing measures, the ecological profile of the product and the benefits of eco-design'.

⁽²⁸⁸⁾ Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ L 150, 14.6.2018, p. 1). Article 30 of this Regulation provides rules on the use of terms referring to organic production. Article 33 provides rules on the use of the organic production logo of the EU.

⁽²⁸⁹⁾ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82). See notably Article 24, which stipulates that information on the energy performance and the share of renewable energy in their district heating and cooling systems is provided to final consumers in an easily accessible manner, such as on the suppliers' websites, on annual bills or upon request; and Article 19, which stipulates that 'for the purposes of demonstrating to final customers the share or quantity of energy from renewable sources in an energy supplier's energy mix and in the energy supplied to consumers under contracts marketed with reference to the consumption of energy from renewable sources, Member States shall ensure that the origin of energy from renewable sources can be guaranteed as such within the meaning of this Directive, in accordance with objective, transparent and non-discriminatory criteria'. Also note the proposal to amend the Directive (COM(2021) 557 final), which introduces a requirement that the labelling of 'green' industrial products indicates the percentage or renewable energy used following a common EU-wide methodology.

⁽²⁹⁰⁾ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

⁽²⁹¹⁾ Notably, under Article 6(c) of this Regulation, the display of labels, marks, symbols or inscriptions which do not comply with the requirements of the Regulation is prohibited, if it is likely to mislead or confuse customers with respect to the consumption of energy or other resources. Under Article 3(1), information relating to the consumption of electric energy, other forms of energy and, where relevant, other essential resources during use shall be brought to the attention of end-users by means of a product information sheet and a label related to products offered for sale, hire, hire-purchase or displayed to end-users by any means of distance selling, including the Internet.

⁽²⁹²⁾ MDEC Report 2013, p. 18.

- A tyre manufacturer had its own tyre label for marketing tyres. The label was intended to depict a tyre's driving capabilities in winter conditions. The company's own label is very similar to **the official EU tyre label** ⁽²⁹³⁾, which has been compulsory as of November 2012. The tyre manufacturer marketed its tyres using the proprietary label, which may have given consumers the misleading impression that the tyres complied with the testing and classification requirements of the EU tyre label. Additionally, the tyre label did not give a reliable picture of the tyres' properties, in comparison to the tyres of other manufacturers that carried the EU label. A court prohibited the tyre manufacturer from using the company's own tyre labels in marketing that targets consumers, unless the company clearly distinguished this label from the EU's tyre label ⁽²⁹⁴⁾.
- Under Directive (EU) 2019/944 electricity suppliers need to specify in their billing information the 'environmental impact of electricity, in at least terms of CO₂ emissions and the radioactive waste resulting from the electricity produced by the overall energy mix of the supplier over the preceding year' and supplier companies will need to specify the actual CO₂ footprint of their energy mix in accordance with its Annex I (5) (b).
- A trader advertised its diesel cars to consumers as 'environmentally friendly', while in reality the exhaust gas emission tests were manipulated through the use of defeat device software ('Dieselgate' scandal). Claims about the environmental features of the cars in question were displayed on the trader's website, advertising materials and in product listings. The Court of Justice confirmed in its judgement of 17 December 2020 in Case C-693/18 that the defeat device software was illegal under **EU type approval legislation** ⁽²⁹⁵⁾. From the UCPD perspective, the practice in question raises concerns under **Article 5** (practice contrary to professional diligence), **Article 6** (providing consumers with misleading information about the main characteristics of the product, such as the advertised environmental impact of the product) and **Annex I point No 4** (claiming that a product has been approved by a public body without complying with the terms of the approval). National consumer authorities have issued fines on the basis of these provisions ⁽²⁹⁶⁾.

4.1.1.2. Main principles

The application of the UCPD to environmental claims can be summarised in the following main principles ⁽²⁹⁷⁾.

Based on **Articles 6 and 7 UCPD** on misleading actions and omissions, **green claims must be truthful, not contain false information** and be presented in a **clear, specific, accurate and unambiguous manner**, so that consumers are not misled.

Based on **Article 12 UCPD**, **traders must have the evidence to support their claims** and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged.

Furthermore, **Annex I to the UCPD** contains a list of unfair practices that are prohibited in all cases. Several points of the Annex I relate to specific claims or the marketing of relevant certifications, labels and codes of conduct.

The **general clause of Article 5(2) UCPD** provides an additional possibility to assess unfair commercial practices. It functions as an additional 'safety net' to capture any unfair practice which is not caught by other provisions of the UCPD (i.e. that is neither misleading, aggressive or listed in Annex I). It prohibits commercial practices that are contrary to the requirements of **professional diligence** if they are likely to materially distort the economic behaviour of the average consumer.

⁽²⁹³⁾ Regulation (EU) 2020/740 on the labelling of tyres with respect to fuel efficiency and other parameters.

⁽²⁹⁴⁾ MAO:185/13.

⁽²⁹⁵⁾ Case C-693/18, *CLCV and Others*, 17 December 2020.

⁽²⁹⁶⁾ PS10211, Volkswagen, 4 August 2016. ACM/UIT/23048, 18 October 2017. UOKiK, Volkswagen Group Poland, 15 January 2020.

⁽²⁹⁷⁾ These principles are also reflected in several national guidance documents on environmental claims (inter alia in CZ, DE, DK, FI, HU, LV, NL, NO, FR, IT). In addition, the Commission coordinated the work of a multi-stakeholder group on environmental claims (MDEC), which was composed of representatives of national authorities, European business and consumer organisations, and environmental NGOs. The MDEC provided recommendations in their 2013 Report (https://ec.europa.eu/consumers/archive/events/ecs_2013/docs/environmental-claims-report-ecs-2013_en.pdf) and in their 2016 'Compliance Criteria on Environmental Claims' (https://ec.europa.eu/info/sites/info/files/compliance_criteria_2016_en.pdf). This advice is not legally binding, but has fed into this Guidance Notice. These principles are also reflected in international standards and self-regulation, such as the ISO 14021-2016 standard and the ICC Advertising and Marketing Communications Code. Other useful criteria and examples can be found in the Commission's guidelines published in 2000 for making and assessing environmental claims (http://ec.europa.eu/consumers/archive/cons_safe/news/green/guidelines_en.pdf).

The standard of professional diligence in the area of environmental claims may include principles derived **from national and international standards and codes of conduct**. For example, professional diligence may require that certification schemes that traders use to promote the environmental virtues of their products adhere to such standards and provide substantial benefits to consumers and that they are independently controlled and audited. Practices contrary to professional diligence will be unfair if they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise, such as purchasing a specific product as a result of the expected benefits derived from the claimed adherence to a certification scheme. National enforcement authorities will assess such situations based on the facts and circumstances of each individual case.

4.1.1.3. Application of Article 6 of the UCPD to environmental claims

Article 6 of the UCPD implies that **consumers must be able to trust environmental claims** put forward by traders. Consequently, in order not to be misleading, environmental claims must be truthful, not contain false information and be **presented in a clear specific, unambiguous and accurate manner**.

An environmental claim can be misleading if it **'contains false information and is therefore untruthful'** in relation to one of the elements listed in Article 6(1)(a) to (g).

For example:

- Using the term 'biodegradable' for a product which is not actually biodegradable or for which no tests have been carried out ⁽²⁹⁸⁾.
- Presenting electrical appliances such as irons, vacuum cleaners, coffee machines, as 'environmentally friendly' ('eco'), although tests show that they frequently do not perform better than similar products or where no tests have been carried out ⁽²⁹⁹⁾.
- Presenting car tyres as 'eco tyres' and promoting their environmental performance and impact on fuel consumption, although tests show mixed results ⁽³⁰⁰⁾.
- Presenting tableware containing bamboo as a sustainable, recyclable and eco-friendly alternative to plastic materials, when such products are in reality a mix of plastic, bamboo (sometimes bamboo dust) and resin made of melamine and formaldehyde that is necessary to produce various shapes (dishes, bowls etc.) and degrees of stiffness ⁽³⁰¹⁾.

An environmental claim can also be misleading if it **'deceives or is likely to deceive the average consumer, even if the information is factually correct'** in respect of the items referred to in Article 6(1)(a) to (g).

Accordingly, also **the imagery and overall product presentation** (i.e. layout, choice of colours, images, pictures, sounds, symbols or labels), should be a truthful and accurate representation of the scale of the environmental benefit, and should not overstate the benefit achieved. Implicit claims may, depending on the circumstances of the case, include the use of images (e.g. trees, rainforests, water, animals) and colours (e.g. blue or green backgrounds or text) that are associated with environmental sustainability.

Environmental claims are likely to be misleading if they consist of **vague and general statements of environmental benefits** without appropriate substantiation of the benefit and without indication of the relevant aspect of the product the claim refers to. Examples of such claims are 'environmentally friendly', 'eco-friendly', 'eco', 'green', 'nature's friend', 'ecological', 'environmentally correct', 'climate friendly', 'gentle on the environment', 'pollutant free', 'biodegradable', 'zero emissions', 'carbon friendly', 'reduced CO₂ emissions', 'carbon neutral', 'climate neutral' and even the broader claims of 'conscious' and 'responsible'.

⁽²⁹⁸⁾ See for example a scientific opinion of December 2020 on the biodegradability of plastics in the open environment: https://ec.europa.eu/info/research-and-innovation/strategy/support-policy-making/scientific-support-eu-policies/group-chief-scientific-advisors/biodegradability-plastics-open-environment_en.

⁽²⁹⁹⁾ Which?, Greenwashing claims investigated, August 2012.

⁽³⁰⁰⁾ Institut national de la Consommation, Les pneus verts tiennent ils leurs promesses ?, '60 millions de consommateurs' edition n° 476, November 2012.

⁽³⁰¹⁾ See also Article 3(2) of Regulation (EC) No 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 89/109/EEC (OJ L 338, 13.11.2004, p. 4), which requires that the labelling, advertising and presentation of a material or article shall not mislead the consumers.

Such unsubstantiated claims are likely to, in some cases, convey the impression to the consumers that a product or an activity of a trader has no negative impact or only a positive impact on the environment. They could fall under Article 6(1)(a) and 6(1)(b) UCPD if they are likely to deceive the average consumers and to cause them to take a transactional decision they would not have taken otherwise.

Since terms such as ‘conscious’ and ‘responsible’ can refer to numerous aspects, including social or economic conditions, such claims could be considered misleading even if they are qualified, since they are vague and ambiguous.

If vague and ambiguous claims are used, the qualifications need to be sufficiently detailed so that the claim cannot be understood in any other way than the way the trader intended.

For example:

- Claim that electric car hire is ‘ecological’ can be found misleading without providing information to put the claim into perspective. In particular, if the electricity needed to recharge the cars does not come from renewable energy sources, the car hire service would still have a negative impact on the environment ⁽³⁰²⁾.
- Traders increasingly make claims about carbon neutrality by investing in projects that compensate for CO₂ emissions. For example, a car rental company offers consumers the possibility to ‘drive CO₂ neutral’ by choosing an option that compensates for emissions. This practice may be problematic if the underlying carbon credits are of low environmental integrity or are not accounted for appropriately, so that they do not represent real and additional emission reductions. Carbon removals claims should be authentic, robust, transparent, reported, monitorable, verifiable, credible, certified, should not undermine near-term emission reduction action in emitting sectors, should guarantee additionality and should ensure an appropriate accounting of carbon removals in national GHG inventories. A national consumer authority considered in its guidelines that consumers should be properly informed about the functioning of the measures that compensate for CO₂ emissions, such as the number of kilometres that are fully compensated and the manner in which this is achieved, how and where the compensation is accounted for ⁽³⁰³⁾.
- A court considered that the marketing of hair and skin care products, where the trader had stated that their products are organic with claims such as ‘eco’ and ‘organic’, were vague and without clear qualifications. The court also assessed that it is not clear enough with only the graphic symbol/logo/label of a third-party certification label as a qualification of what organic and/or eco means ⁽³⁰⁴⁾.
- A trader advertised the sale of bags of sweets by stating that for each bag sold, it would plant one tree. However, the trader had already agreed to plant a certain number of trees, independently from the number of bags of sweets sold. A national court upheld a claim by the relevant ombudsman that this statement qualified as misleading advertising which took advantage of the credulity of consumers who were concerned about the environment ⁽³⁰⁵⁾.

Claims should be **reassessed and updated as necessary**, in view of technological developments, and the emergence of comparable products or other circumstances that may affect the accuracy or relevance of the claim. Environmental claims should not relate to an improvement compared to a product from the same trader or a competitor that is no longer available on the market or the trader no longer sells to consumers, unless this improvement is significant and recent.

If a trader uses environmental statements in its company name, brand name, product name etc., and the name is used for marketing purposes, such **marketing is subject to the same substantiation requirements** as those which apply to other environmental claims in marketing communications, unless the company can prove that this name has no environmental connotation or existed already before. However, in order to be contrary to the UCPD, a name used in marketing will need to mislead the average consumers and be likely to cause them to take a transactional decision that they would not have taken otherwise.

⁽³⁰²⁾ Jury de déontologie publicitaire (JDP), 26 June 2014.

⁽³⁰³⁾ ACM, Guidelines: Sustainability claims, 28 January 2021, p. 15.

⁽³⁰⁴⁾ Swedish Patent and Market Court PMT 697-20, Midsona, judgment of 18 January 2021.

⁽³⁰⁵⁾ MAO: 157/11, the Market Court of Helsinki, 8 April 2011.

For example:

A court has addressed the marketing of an oil product, stating that the terms 'environmental' together with 'plus' in the product name gave the impression that the product had certain environmental advantages, even though fossil oil always causes damage to the environment. In this respect, the court judged that the term 'Environment' could not be used in the product name ⁽³⁰⁶⁾.

When assessing an environmental claim, **the product's main environmental impacts over its lifecycle, including its supply chain**, are relevant. An environmental claim should relate to aspects that are **significant in terms of the product's environmental impact**.

Highly polluting industries should ensure that their environmental claims are accurate in a sense of being relative, e.g. 'less harmful for the environment' instead of 'environmentally friendly' (see also section 4.1.1.7 on comparative environmental claims). This enables the average consumer to better understand the relative impact of the product. An environmental claim should in any case relate to aspects that are significant in terms of the product's total environmental impacts over its life cycle. Highly polluting industries may be required by courts or authorities to make it clear to the consumer in their environmental claims that the product has an overall negative impact on the environment.

For example:

A self-regulatory body found that a claim on a website presenting fossil gas as an 'environmentally friendly energy source' was in breach of the applicable advertising regulations, as the wording was too absolute and without explanations or contextualisation ⁽³⁰⁷⁾.

Moreover, claims should be clear and unambiguous regarding which aspect of the product or its life cycle they refer to ⁽³⁰⁸⁾. If a trader makes an environmental claim by **highlighting just one of several impacts** the product has on the environment, the claim could be misleading within the meaning of Article 6 or 7 of the UCPD.

Furthermore, traders should not distort claims about the **composition of the product (including raw materials), or its use, manufacturing process, transport or end-of-life impacts**, for example by unduly emphasising the importance of positive aspects, which are in reality only marginal or whereas the overall environmental impact resulting from the product's life cycle is negative.

For example:

- *A claim 'using 100 % renewable energy' may be misleading if it does not specify that renewable energy was used only during a certain stage in the life cycle of the product. In contrast, a claim '100 % renewable material (except fittings)' makes it clear which components of the product were not made of renewable materials ⁽³⁰⁹⁾.*
- *Advertising a product as containing 'sustainable cotton' could be misleading if the origin of the cotton is neither traceable nor separated in the production chain from conventional cotton.*
- *Advertising a product such as artificial turf as environmentally friendly because it does not need water, fertiliser or maintenance during its use phase, might not justify the claim if the manufacturing and end-of-life stages have a severe negative impact on the environment.*
- *Misleading information on sources of energy indicated in billing information, such as abstract information on national energy mix or misleading information on environmental impact/the actual contribution of renewable energy sources to the electricity purchased by the final customer (e.g. unduly emphasis on RE share).*

The benefit claimed should not result in an undue transfer of impacts, i.e. the creation or increase of other negative environmental impacts at other stages of the product's life cycle should be avoided, unless the total net environmental benefit has been significantly improved, for example according to a life-cycle assessment and recognised or generally accepted methods applicable to the relevant product type and should be third-party verified.

⁽³⁰⁶⁾ Swedish Market Court, 1990:20 Norsk Hydro Olje AB.

⁽³⁰⁷⁾ Belgian Advertising Ethics Board (JEP), Gas.be - décision de modification/arrêt, 21 May 2021.

⁽³⁰⁸⁾ See also MDEC 'Compliance Criteria on Environmental Claims', para. 2.1.

⁽³⁰⁹⁾ Hungarian Competition Authority, Green marketing – Guidance for undertakings from the Hungarian Competition Authority (2020), p. 5.

For example:

A manufacturer claims that its product consumes little water. However, at the same time the product consumes more energy than a comparable product of the same category, which increases the product's overall environmental impact significantly. Under such circumstances, the claim could be misleading either in relation to the nature of the product (Article 6(1)(a)) or its main characteristics (Article 6(1)(b) UCPD).

Codes of conduct may include voluntary commitments in relation to environmental protection or 'green behaviour'. An average consumer would expect such code signatories to sell products which comply with that code. A trader who has announced to be bound but does not comply with such a code may be considered to be misleading if the claimed adherence to the code affects or is likely to affect the consumers' transactional decision. This situation is covered by Article 6(2)(b) UCPD.

For example:

A trader has subscribed to a code of practice that promotes sustainable use of wood and displays the code's logo on its website. The code of practice contains a commitment that its members will not use hardwood from unsustainably managed forests. However, it is found that the products advertised on the website contain wood from exactly such a forest. Under such circumstances, the claim could breach the Annex I point 4 or be misleading under Article 6(2)(b) UCPD.

Certain misleading commercial practices in relation to codes of conduct are considered unfair per se under Annex I to the UCPD (see section 4.1.1.6).

An average consumer is not expected to know the meaning or significance of various public and private **codes of conduct, labelling schemes, certificates or logos**. Traders should inform consumers about these elements and the relevant characteristics in relation to the claim in question, with a reference to where all information about the certification can be found, including whether the certification is done by a third party or not. Traders should also ensure that consumers have the possibility to receive additional information in an accessible and clear manner, e.g. through a link or an information section in the vicinity of the claim. For example, traders should inform consumers about the private certification schemes whose logos they are displaying. In general, it is not enough to only briefly refer to a third-party certification.

If a trader or industry chooses to use **private labelling schemes, symbols or certificates** for marketing purposes, they must only be applied to the products/services or traders which meet the criteria set to qualify for their use. The criteria should demonstrate clear environmental benefits compared with competing products or traders and should be easily publicly accessible. Otherwise, such labelling is likely to be misleading. The labelling may have to be further qualified, so that the meaning and the most relevant criteria of the labelling is highlighted (e.g. highlight if the use of water is the most relevant criterion for a given product). Moreover, traders should consider third party verification to ensure the credibility and relevance of the label. The private nature of the label (if that is the case) and its meaning or significance must also be made clear to the consumer. Finally, such labels must not be capable of being confused with other labels, including, for example, labels of publicly run labelling schemes or schemes of competitors.

4.1.1.4. Application of Article 7 of the UCPD to environmental claims

Article 7 UCPD lists specific elements that are relevant when assessing whether a commercial practice involves a **misleading omission**.

Green claims can be misleading if they consist of vague and general statements of environmental benefits (see also previous section 4.1.1.3 on misleading actions). Such claims are less likely to be misleading under Article 7 if they are **supplemented by prominent specifications or explanatory statements on the product's environmental impact**, for example by limiting the claim to specific environmental benefits.

Providing such supplementary information helps ensuring compliance with Article 7(4)(a) (in the case of an invitation to purchase) which forbids to provide consumers with material information related to the 'main characteristics of the product' in 'an unclear, unintelligible, ambiguous or untimely manner'.

If the trader provides supplementary information to consumers, e.g. on their website, the information should be clear and understandable for the average consumer. The complexity and technical nature of the information should not be used to mislead consumers about the veracity of the green claims.

In case environmental claims are made on the **packaging of products and/or other communication channels** (e.g. posters, billboards, magazines), which have limited space for specifications, the location of the main environmental claim and supplementary information about the claim should enable an average consumer to understand the link between both. If supplementary information is not provided or provided in an unclear or ambiguous manner, it may be considered misleading, depending on the assessment of the circumstances of the individual case. If there is no space to specify the environmental claim, then the claim should generally not be made.

By analogy, in the area of **nutrition and health claims on foods**, point 3 of the Annex to Commission Implementing Decision 2013/63/EU⁽³¹⁰⁾ provides that when referring to general, non-specific health benefits, it is required to accompany such references by a specific health claim from the lists of permitted health claims in the Union Register. For the purposes of the Regulation, the specific authorised health claim accompanying the statement making reference to general non-specific health benefits, should be made 'next to' or 'following' such statement. According to the Court, when a reference to general, non-specific health benefits of a nutrient or food appears on the front of the packaging, whereas the specific health claim intended to accompany it appears only on the back of that packaging, there should be a clear reference, such as an asterisk, between the two, to ensure the consumer's comprehension⁽³¹¹⁾.

For example:

- Traders sometimes provide information about environmental claims in a way that requires the consumer to take additional action to access (e.g. a consumer may have to click once more in the context of a social media post or a product list to get the necessary supplementary information), which may be misleading in some cases. Representatives from the CPC network of national consumer authorities considered that, depending on the circumstances of the case and in particular the limitations of the medium, it may be misleading to require the consumer to take such action to obtain the relevant information, especially if it is possible to provide that information in a more prominent way, e.g. next to the claim⁽³¹²⁾.
- Traders might choose to display certain environmental claims prominently (e.g. at the front of a product packaging), while leaving additional information about the claim in a less prominent location (e.g. at the back of the product packaging). Representatives from the CPC network of national consumer authorities that, depending on the circumstances of the case and in particular the limitations of the medium, this may be misleading⁽³¹³⁾.
- A court considered that the qualifications for vague claims such as 'eco' and 'organic' for certain products should be placed directly next to the claims. It is not enough to place the qualification on another page on the website (one click away from the claim)⁽³¹⁴⁾.
- Claims that a product is 'compostable' on the packaging are likely to be misleading if it is only compostable through industrial means and if the packaging do not specify the actions the consumer needs to take for the product to compost.

The **use of a general benefit claim (without further qualifications) may be justified** in some cases.

This is the case for products with an 'organic' claim covered by Regulation (EU) 2018/848 on organic production and labelling of organic products.

This could be also the case if a product is covered by a license to use the **ecolabel of a publicly run ecolabel scheme** (such as the EU Ecolabel, the Nordic Ecolabel 'the Swan' or the German 'Blue Angel') or other robust and reputable labelling schemes subject to third party verification (e.g. Article 11 of the Ecolabel Regulation refers to nationally or regionally officially recognised EN ISO 14024 type I ecolabelling schemes).

⁽³¹⁰⁾ Commission Implementing Decision 2013/63/EU of 24 January 2013 adopting guidelines for the implementation of specific conditions for health claims laid down in Article 10 of Regulation (EC) No 1924/2006 of the European Parliament and of the Council (OJ L 22, 25.1.2013, p. 25).

⁽³¹¹⁾ Case C-524/18, *Dr. Willmar Schwabe*, 30 January 2020, para. 40, 47-48, interpreting Regulation (EC) No 1924/2006 on nutrition and health claims made on foods.

⁽³¹²⁾ Swedish Consumer Agency – Consumer Ombudsman, Recommendations for developments of the Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices, 29 October 2020, s. 3.1.

⁽³¹³⁾ *Ibid.*

⁽³¹⁴⁾ Swedish Patent and Market Court, *Midsona*, judgment of 18 January 2021.

This could also be the case if the **life cycle assessment studies of the product have proven its environmental performance** ⁽³¹⁵⁾. These studies should be made according to recognised or generally accepted methods applicable to the relevant product type and should be third-party verified. Such environmental performance evaluations may involve comparisons (see also section 4.1.1.7 on comparative environmental claims). If such methods have not yet been developed in the relevant field, traders should refrain from using general benefit claims. For such products, traders should nevertheless **ensure transparency concerning the relevant environmental aspects**, and make sure that such **information is easily available to consumers**, including by displaying the relevant logo.

Similarly, an environmental claim could be misleading under Article 7(2) if it is presented in an unclear, unintelligible or unclear manner. On the basis of a case-by-case assessment, this could be the case if the scope and boundaries of the claim are not made clear.

For example:

It is not clear whether the claim covers the whole product or only one of its components, or the company's overall environmental performance or only certain of its activities or which environmental impact or process the claim addresses.

When making an environmental claim, the product's **main environmental impacts** are relevant. Furthermore, an environmental claim concerning a product must relate to an actual environmental **impact of that specific product** and should be distinguished from more general environmental claims regarding the trader, its practices and sustainability policies.

For example:

A trader displays various general environmental claims on its website, such as statements about its corporate social responsibility programme and a sustainability label that is relevant for certain product ranges. In order to avoid misleading consumers, the trader should ensure that environmental claims that are displayed on the product landing page concern the actual environmental impact of the specific product and are distinguished from other, broader claims regarding that trader and its practices ⁽³¹⁶⁾.

4.1.1.5. Application of Article 12 of the UCPD to environmental claims

Article 12:

'Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11:

- (a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case;*
- (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 12 of the UCPD clarifies that any claim (including environmental claims) should be **based on evidence which can be verified by the relevant competent authorities**. Traders must be able to substantiate environmental claims with appropriate evidence. Consequently, claims should be based on robust, independent, verifiable and generally recognised evidence which takes into account updated scientific findings and methods. There is no equivalent obligation in the UCPD for the trader to provide documentation or other supporting evidence to consumers.

The burden of proof regarding the accuracy of the claim rests on the trader. Article 12(a) of the UCPD provides that enforcement authorities should have the power *'to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice'*.

⁽³¹⁵⁾ Traders could perform a life cycle assessment (LCA) taking into account the Recommendation 2013/179/EU on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations and any updates thereof. See <http://ec.europa.eu/environment/eussd/smgp/>.

⁽³¹⁶⁾ Swedish Consumer Agency – Consumer Ombudsman, Recommendations for developments of the Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices, 29 October 2020, s. 3.2.

The application of this requirement must take into account the legitimate interests of the trader, such as in the case of **trade secrets or the protection of intellectual property**, which authorities may have to treat confidentially.

For example:

A mineral water company presented its products with the claim 'Zero Impact', stating that the manufacture and sale of the bottles of water had no impact whatsoever on the environment. However, the company could not demonstrate that it was involved in specific activities reducing the environmental impact of its products, other than participating in a project to compensate environmental damage. On this basis, the national consumer enforcement authority concluded that the 'Zero Impact' campaign constituted an unfair commercial practice capable of influencing consumers' transactional decisions ⁽³¹⁷⁾.

In order to ensure that environmental claims are substantiated, **traders should either have the evidence necessary to support their claims from the time the claims are put into use or be certain that it can be obtained and presented upon request.**

Although a claim may be correct and relevant to a product when the claim is first made, it could become less meaningful with time. In order to ensure that they are in a position to provide necessary documentation to national authorities in line with Article 12 of the Directive, traders should make sure that **documentation for claims is up to date for as long as the claims remain in use in marketing.**

The presented evidence should be clear and robust. Independent third party testing should be made available for the competent bodies if the claim is challenged. If expert studies give rise to significant disagreement or doubt over environmental impacts, the trader should refrain from the claim altogether. The content and scope of the documentation to be supplied will depend on the specific content of the statement. The complexity of the product or activity will be of relevance in this respect.

4.1.1.6. Application of Annex I to environmental claims

The following practices listed in Annex I are particularly relevant to environmental claims:

Point No 1 of ANNEX I

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

For example:

A trader falsely displaying on its website that it is a signatory of a code of conduct on the product's environmental performance.

Point No 2 of ANNEX I

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

For example:

Using any EU or national label (e.g.: EU Ecolabel, Nordic Swan Label, Blue Angel or other logo) without authorisation.

Point No 3 of ANNEX I

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

⁽³¹⁷⁾ Decision by the Italian Competition Authority, 8 February 2012, ref. PS7235.

For example:

A trader falsely claiming that the code of conduct of its car-manufacturing company is endorsed by the national environment agency, ministry or consumer's organisation.

Point No 4 of ANNEX I

'Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.'

For example:

Falsely claiming that a car complies with the terms of type approval legislation, while using illegal defeat devices.

Point No 10 of ANNEX I

'Presenting rights given to consumers in law as a distinctive feature of the trader's offer'.

This provision clarifies that traders should not mislead consumers by unduly emphasising attributes that come from regulatory requirements.

For example:

Traders should not claim that a product is free of certain substances if such substances are already prohibited by legislation.

4.1.1.7. Comparative environmental claims

Environmental claims may suggest that a product has a more positive impact on the environment or is less damaging to the environment than competing goods or services, or previous versions of their own goods or services. Products bearing such comparative claims should be assessed against similar products (or, where appropriate, against a previous version of the same product) and the same assessment method has to be applied in a consistent manner to allow for such a comparison.

National enforcement authorities and self-regulatory bodies usually interpret this principle to mean that **comparisons should refer to products within the same product category**. However, it would seem equally important that **the method used to produce the environmental claim is the same**, that it is applied in a consistent manner (i.e. the same methodological choices and rules are applied, results are reproducible), and that the method applied allows comparisons, otherwise any comparison becomes misleading⁽³¹⁸⁾. For example, depending on the products in question, comparative environmental claims are likely to be misleading if they exclude factors, such as transportation in particular where such factors contribute the most towards a product's environmental footprint.

For example:

— *A company makes a comparative claim that a razor A contains less plastic than other razors on the market. This claim is likely to be misleading if the other razors selected for the comparison are not representative of the market on the whole, and the amount of plastic in razors generally is on average lower than that of razor A.*

⁽³¹⁸⁾ The conditions for making comparative claims related to specific environmental impacts are discussed as part of the Commission's green claims initiative: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12511-Environmental-performance-of-products-&-businesses-substantiating-claims_en

- An airline claims that it is the ‘greenest airline’ and that it has ‘the lowest CO₂ emissions of all major airlines’⁽³¹⁹⁾. In its advertising the airline compares its CO₂ emissions per passenger-km with those of four other ‘major’ European airlines, and shows that it has the lowest CO₂ emissions per passenger-km. This claim could be misleading if the emissions compared were not calculated in the same way, if the airline’s total CO₂ emissions are higher than other airlines and if emissions have increased significantly over the past years. It would be clearer to claim more specifically that it has the lowest CO₂ emissions per passenger-km in comparison with the four other major European airlines, provided that the method allows for such comparison and that the airline does not hide the fact that its emissions have increased in absolute terms. If climate-related claims are based on carbon/greenhouse gas emission offsets, these need to be transparent and detailed, given the associated greenwashing risks. Furthermore, comparison across all relevant transport modes, not just air travel, would be even more objective and informative. Consumers’ mobility needs may be met not only through a flight but with other means of transport, depending on the route. Therefore, a comparison of average passenger-km emissions between rail, road and air modes would prevent misleading consumers that their choice is ‘green’, when viable alternatives with lower emissions exist.
- A company makes a comparative claim that their ‘remanufactured good’ is more environmentally friendly than a ‘new good’. This claim could be misleading if the applicable recycling or take-back solutions are comparatively worse and the overall environmental footprint is thereby more significant.

Directive 2006/114/EC on misleading and comparative advertising, which covers business-to-business relations, lays down the conditions under which comparative advertising is permitted. These conditions are also relevant for assessing whether comparative advertising is lawful in business-to-consumer relations in the UCPD context. Comparisons of the environmental benefits of products should, among other things:

1. not be misleading within the meaning of Articles 6 and 7 of the UCPD;
2. compare goods or services meeting the same needs or intended for the same purpose;
3. objectively compare one or more material, relevant, verifiable and representative features of those goods and services.

For example:

A court considered misleading an advertising claiming that filtered water was more environmental friendly than mineral bottled water, giving consumers the impression that consuming filtered water instead of mineral water would contribute to the protection of the environment. In particular, the reference to greater protection of the environment was deemed misleading since the comparison was not based on any objective basis such as an impact study⁽³²⁰⁾.

4.1.2. Planned obsolescence

Consumers can encounter early obsolescence practices whereby goods last less than their normal ‘lifespan’ should be according to consumers’ reasonable expectations. **In particular, the premature failure of the goods can be due to planned obsolescence**, or built-in obsolescence in industrial design, which is a commercial policy involving deliberately planning or designing a product with a limited useful life so that it will become obsolete or non-functional after a certain period of time. As explained under 2.3.1 above, the UCPD also covers commercial practices which occur after the transaction has been made. Regarding smart and connected goods, such commercial practices after the purchase can consist of reducing the functionality or slowing down the operation of the goods through **software updates** without a valid reason.

UCPD does not have provisions specifically addressing obsolescence. However, where the trader, including manufacturer, engages in commercial practices towards the consumer, **its failure to inform the consumer that a product has been designed with a limited lifetime** might, subject to a case-by-case assessment, be considered as omission of material information under Article 7 UCPD. Furthermore, such practices may also be contrary to the requirements of professional diligence under Article 5(2) UCPD if they are likely to materially distort the economic behaviour of the average consumer.

⁽³¹⁹⁾ ACM, Guidelines: Sustainability claims, 28 January 2021, p. 10.

⁽³²⁰⁾ Juzgado de lo Mercantil de Barcelona, Sentencia 63/2014.

For example:

- Omitting information that a **smartphone's battery** (which is subject to particular wear and tear) cannot be replaced or that a **printer ink cartridges** are programmed so that their replacement is needed before they are actually used up could be in breach of Article 7 of the UCPD, even if there may be technical justifications for designing the good in this way.
- A national consumer protection authority fined a printer producer for misleading and aggressive practices, including not adequately highlighting the limitations on the use of non-original printer ink cartridges on sales packages ⁽³²¹⁾.
- National consumer protection authorities took action concerning the premature obsolescence of smartphones ⁽³²²⁾. Certain smartphone models were negatively affected by the installation of a new operating system and subsequent updates, leading to reduced battery life and slowed down performance. Consumers were not adequately informed about the purpose of the updates and their consequences on the performance of the product under Article 7 UCPD.

Other EU legislation provides additional means of combating planned obsolescence for specific product categories.

The **Ecodesign Directive** ⁽³²³⁾ allows the Commission to establish mandatory minimum requirements to improve the environmental performance of products, including in relation to reparability and durability. There are Ecodesign **durability** requirements already in place for vacuum cleaners (for some components) ⁽³²⁴⁾, and for light bulbs ⁽³²⁵⁾, and **ecodesign reparability** requirements for washing machines ⁽³²⁶⁾, dishwashers ⁽³²⁷⁾, refrigerators ⁽³²⁸⁾, televisions ⁽³²⁹⁾ etc. New **ecodesign** requirements are in preparation for other consumer goods, such as for example smartphones and tablets ⁽³³⁰⁾, in line with the Circular Economy Action Plan and the underlying Ecodesign Working Plans ⁽³³¹⁾. Ecodesign requirements often go hand in hand with new or updated energy labels for the same products, which provide information on energy efficiency of the product but also other parameters ⁽³³²⁾.

In the context of the Sustainable Product Initiative, an amendment of the Ecodesign Directive is being examined to widen its scope beyond energy related products, and make it applicable to the broadest possible range of products ⁽³³³⁾.

⁽³²¹⁾ PS11444 – HP, 9 December 2020, <https://en.agcm.it/en/media/press-releases/2020/12/PS11444>.

⁽³²²⁾ PS11009-PS11039 – Apple, Samsung, 25 September 2018, <https://en.agcm.it/en/media/press-releases/2018/10/PS11009-PS11039>. DGCCRF, Press release of 7 February 2020, https://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communiqu/2020/CP-Ralentissement-fonctionnement-iPhone200207.pdf.

⁽³²³⁾ Directive 2009/125/EC. The Commission's Sustainable Products Initiative will propose additional legislative measures as appropriate, to make products placed on the EU market more sustainable, including by amending the Ecodesign Directive to extend it to additional product categories.

⁽³²⁴⁾ Commission Regulation (EU) No 666/2013 of 8 July 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to **ecodesign** requirements for vacuum cleaners (OJ L 192, 13.7.2013, p. 24).

⁽³²⁵⁾ Commission Regulation (EU) No 1194/2012 of 12 December 2012 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to **ecodesign** requirements for directional lamps, light emitting diode lamps and related equipment (OJ L 342, 14.12.2012, p. 1).

⁽³²⁶⁾ Commission Regulation (EU) 2019/2023 of 1 October 2019 laying down **ecodesign** requirements for household washing machines and household washer-dryers pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EU) No 1015/2010 (OJ L 315, 5.12.2019, p. 285).

⁽³²⁷⁾ Commission Regulation (EU) 2019/2022 of 1 October 2019 laying down **ecodesign** requirements for household dishwashers pursuant to Directive 2009/125/EC of the European Parliament and of the Council amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EU) No 1016/2010 (OJ L 315, 5.12.2019, p. 267).

⁽³²⁸⁾ Commission Regulation (EU) 2019/2019 of 1 October 2019 laying down **ecodesign** requirements for refrigerating appliances pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulation (EC) No 643/2009 (OJ L 315, 5.12.2019, p. 187).

⁽³²⁹⁾ Commission Regulation (EU) 2019/2021 of 1 October 2019 laying down **ecodesign** requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) No 642/2009 (OJ L 315, 5.12.2019, p. 241).

⁽³³⁰⁾ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12797-Designing-mobile-phones-and-tablets-to-be-sustainable-ecodesign>

⁽³³¹⁾ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12852-Energy-efficiency-and-circular-economy-ecodesign-and-energy-labelling-working-plan-2020-2024_en

⁽³³²⁾ https://ec.europa.eu/info/news/focus-improved-eu-energy-label-paving-way-more-innovative-and-energy-efficient-products-2021-lut-16_en

⁽³³³⁾ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en

The **Ecolabel Regulation** ⁽³³⁴⁾ establishes a voluntary ecolabel award scheme intended to promote products with a reduced environmental impact during their entire life cycle and to provide consumers with accurate information on the environmental impact of products. The Ecolabel criteria consider the potential to reduce environmental impacts due to durability and reusability of products, for example in case of textile products, electronic displays and furniture.

The **Sale of Goods Directive (EU) 2019/771** protects consumers against the lack of conformity with the contract (a defect) that exists at the time of delivery of the goods and that becomes apparent within 2 years from the delivery of the good ('**legal guarantee**' – Article 10(1) and (2)). To provide for stronger consumer protection, Member States may maintain or introduce even longer time limits for seller's liability. The legal guarantee can apply where the non-conformity is caused by obsolescence practices.

In the event of a dispute, the consumer has to prove the lack of conformity. Article 11 clarifies that within 1 year from the delivery, the consumer does not have to prove that the lack of conformity already existed at the time of delivery. Member States may maintain or introduce a 2-year period for this reversed burden of proof.

Article 7(3) also obliges the seller to ensure that **updates are provided to consumers for 'smart goods'** for the period of time that the consumer can reasonably expect (for single act of supply of the digital element), or throughout the legal guarantee period (for continuous supply of the digital element). In addition, if the contract provides that the digital content or service of the smart good will be supplied continuously for a period longer than the legal guarantee period, then the seller is obliged to provide updates for that longer period.

Moreover, Article 7(1)(d) adds **durability as an objective conformity requirement** (defined as 'the ability of the goods to maintain their functions and performance through normal use' in Article 2(13)). While product-related requirements in relation to specific types or groups of products is left for product specific Union legislation, the Directive provides in a general manner that the goods must possess the durability which is normal for goods of the same type and which the consumer may reasonably expect, given the nature of the goods and any public statement made by or on behalf of any person in the chain of transactions.

Article 17(1) also refers to the '**commercial guarantee of durability**' offered by a producer as a specific form of voluntary 'commercial guarantee'. A producer offering such a guarantee is liable directly to the consumer during the entire period of the commercial guarantee of durability for repair or replacement of the goods in accordance with Article 14 of the Directive, i.e. free of charge, within a reasonable period and without any significant inconvenience to the consumer.

The **New Consumer Agenda** ⁽³³⁵⁾ and the **Circular Economy Action Plan 2020** ⁽³³⁶⁾ foresee further proposals to tackle premature obsolescence.

4.2. Digital sector

The Directive has a broad scope of application as it covers the totality of business-to-consumer transactions, whether offline or online. It is technology-neutral and applies regardless of the channel, medium or device used to implement a business-to-consumer commercial practice. It applies to **online intermediaries, including social media, online marketplaces and app stores, search engines, comparison tools** ⁽³³⁷⁾ and various other traders operating in the digital sector.

The Directive applies also to practices and products that involve the use of technologies such as **algorithms, automated decision-making and Artificial Intelligence (AI)**. This includes all business-to-consumer practices taken by traders towards consumers in the advertising, sales and after-sales phases, such as the use of **tracking and targeting technologies, algorithmic personalisation, dynamic optimisation and distributed ledger technologies**.

⁽³³⁴⁾ Regulation (EC) No 66/2010.

⁽³³⁵⁾ Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening consumer resilience for sustainable recovery (COM(2020) 696 final), 13.11.2020.

⁽³³⁶⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A new Circular Economy Action Plan: For a cleaner and more competitive Europe (COM(2020) 98 final), 11.3.2020.

⁽³³⁷⁾ In 2015-2016, the Commission set up a multi-stakeholder group on comparison tools bringing together industry representatives, operators of comparison tools, NGOs and national authorities, which developed non-binding principles specifically aimed at helping comparison tool operators to comply with the UCPD. Comparison tools is to be understood in a broad manner, covering functionalities on online marketplaces, review tools etc. Available at: https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information_en#comparison-tools.

4.2.1. Online platforms and their commercial practices

Online platforms generally provide infrastructure and enable interactions between suppliers and users for the provision of goods, services, digital content and information online. Online platforms' business models range from merely allowing users to look for information supplied by third parties to directly enabling contractual transactions between third party traders and consumers. Platforms can also advertise and sell, in their own name, different kinds of products.

The UCPD applies to the commercial practices of the platform and of the traders using the platform to promote their products to the consumers. Given that the UCPD only applies in B2C situations, the first step in assessing its application to an online platform provider should be to evaluate **whether it qualifies as a 'trader' or 'acting in the name of or on behalf of a trader'** under Article 2(b) UCPD. According to a case-by-case assessment, a platform provider may be acting for purposes relating to its business whenever, for example, it charges a commission on the transactions between suppliers and users, provides additional paid services or draws revenues from targeted advertising.

For example:

- A grocery price comparison service was considered by a national court to be a trader's website and a tool for comparative advertising ⁽³³⁸⁾.
- A consumer organisation running a comparison tool offering information to consumers against payment of a subscription would, in principle, have to comply with the requirements of the UCPD. This service could be part of the organisation's strategy to gain commercial profit from its services to consumers, making it a 'trader' within the meaning of Article 2(b) of the Directive.

The second step in assessing whether the UCPD is applicable should be to evaluate whether the platform provider engages in **'business-to-consumer commercial practices'** within the meaning of Article 2(d), towards users (suppliers and recipients) who **qualify as 'consumers'** within the meaning of Article 2(a) UCPD.

A platform qualifying as a trader must always comply with EU consumer law as far as its **own commercial practices are concerned, regardless of the fact that these practices may concern products supplied by third parties and not the platforms themselves**. This is possible due to the very broad definition of 'commercial practice' in Article 3(1) UCPD as a 'practice directly connected with the promotion, sale or supply of a product to consumers', without setting additional requirements as to the origin of the product.

In *Verband Sozialer Wettbewerb* case the Court confirmed this large scope of 'commercial practice' in a case concerning advertising by an online platform in a printed medium:

'31. Lastly, it must be stated that **the obligation to include** in an invitation to purchase [products] the information referred to in Article 7(4)(b) of Directive 2005/29 **does not depend on the issue of whether the supplier of the products concerned is the author of that invitation [i.e. the online platform] or a third party**. Consequently, where an advertisement [by an online platform] in a print medium promotes products from different suppliers, the information required by that provision remains necessary, subject to the limitations of space mentioned in paragraph 29 above.' ⁽³³⁹⁾

Transparency obligations

In particular, platforms are subject to the **transparency requirements** of Articles 6 and 7 UCPD, which requires them to refrain from misleading actions and omissions whenever engaging in the promotion, sale or supply of a product to consumers.

For instance, online platforms should be transparent **about the main characteristics of their services** under Article 7 UCPD. Depending on the specific business model of the platform, different elements could be relevant for the consumer, such as the **coverage of the platform's offer** (e.g. sectors and types of and number of suppliers), the frequency of updates of the information (in particular on the price and availability of products), how it selects the suppliers operating through it and whether and, if so, what checks it performs in relation to their reliability.

⁽³³⁸⁾ Tribunal de commerce de Paris – 29 mars 2007 – Carrefour c/Galaec (la coopérative groupement d'achat des centres Leclerc).

⁽³³⁹⁾ Case C-146/16, *Verband Sozialer Wettbewerb*, 30 March 2017.

Such information may enable consumers to understand that the availability of products and suppliers on the platform is not exhaustive and that they may find other offers using a different information channel. It will also help to avoid the risk of consumers being misled by listings marked as a 'best deal' or 'recommended choice'.

Promoting prices or products where the platform is reasonably aware of the fact that they are not actually available could be in breach of Articles 6 and 7 UCPD and, according to the circumstances, several provisions of the black list in Annex I to the UCPD, which prohibit, in all circumstances, **bait advertising** (point No 5), **bait and switch** (point No 6) and passing on materially **inaccurate information on market conditions** with the intention of inducing the consumer to acquire that product at conditions less favourable than normal market conditions (point No 18). Misleading statements about **limited availability** of a product may be in breach of Article 6(1)(b) of the UCPD.

Where a platform allows consumers to purchase products together at a more favourable price ('collective buying' platforms), they should clearly inform the consumers about the characteristics and price of the offer and its supplier. In particular, the characteristics of the product/service obtained following a group purchase should not be inferior to those available at the regular price, unless consumers are clearly informed that this is the case. The conditions under which consumers can benefit from the product (e.g. minimum number of buyers, duration of the offer) should be clearly spelled out.

For example:

- An offer for a specific treatment in a wellness centre is advertised at a 50 % reduction if bought from a group buying platform. Such an offer is likely to fall under Article 6(1)(b) and (d) (as a misleading indication of a price advantage) if the treatment offered lasts only 30 minutes whereas at full, ordinary price it lasts 60 minutes, unless consumers were clearly informed otherwise.
- In the case of package offers, i.e. a combination of several products or services, when the price may vary depending on the number/volume of products or services acquired, the total package price must be indicated to avoid any impression that a larger number of products or services may be acquired at a lower price when they may not ⁽³⁴⁰⁾.

Professional diligence

Furthermore, under Article 5(2) UCPD, no platform qualifying as a trader should act contrary to the requirements of **professional diligence** in its commercial practices towards consumers. Under Article 2(h) UCPD, 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith **in the trader's field of activity**.

The professional diligence duties of these traders vis-à-vis consumers under the UCPD is different from, whilst complementary to, the regime on exemptions from liability established under Article 14 of the e-Commerce Directive for **illegal information hosted by service providers at the request of third parties**. Furthermore, Article 15(1) of the e-Commerce Directive prevents Member States from imposing on such hosting service providers a general obligation to monitor the stored information or to actively engage in fact-finding.

In this respect, Article 1(3) of the e-Commerce Directive makes it clear that the e-Commerce Directive 'complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services'. This means that the e-Commerce Directive and relevant EU consumer acquis **apply in principle in a complementary manner** ⁽³⁴¹⁾.

As a result of their professional diligence obligations under the UCPD, platforms should **take appropriate measures** which – without amounting to a general obligation to monitor or carry out fact-finding – enable relevant third party traders to comply with EU consumer and marketing law requirements.

⁽³⁴⁰⁾ Latvian Consumer Rights Protection Centre guidance document on fair commercial practices for group buying, 1 July 2013.

⁽³⁴¹⁾ The same complementary relationship is foreseen in the proposed Digital Services Act, as discussed in section 1.2.8.

For example, such measures could imply that platforms **design their interfaces in a way that enables third party traders to present information to platform users** in compliance with EU marketing and consumer law – especially information required by Article 7(4) UCPD in the case of invitations to purchase and Article 6 of the CRD. For example, online marketplaces must enable the third party suppliers to inform consumers about their identity, contact details, the price of the product and any additional costs that the consumer may face such as via in-app purchases.

If online platforms falling within the scope of the UCPD fail to comply with such professional diligence requirements or otherwise promote, sell or supply a product to users in an unfair manner, they can be found in breach of EU consumer law. They cannot invoke the intermediary liability exemption under the e-Commerce Directive as far as their own commercial practices are concerned as that exemption relates only to illegal information stored at the request of third parties.

4.2.2. Intermediation of consumer contracts with third parties

Following the amendments by Directive (EU) 2019/2161, the UCPD includes a specific definition of '**online marketplace**', which is an online platform enabling customers to buy products offered by third party suppliers (traders or consumers) directly on the interface of the marketplace. The 'online marketplace' is a technology-neutral concept, including also app stores that provide digital content and services.

Many online marketplaces also offer their own products in addition to the third party traders' products. Some marketplaces only host professional third party suppliers, others have a mixture of offers from private individuals and professionals or only facilitate the relations between peer consumers (certain collaborative or sharing economy platforms where suppliers and users genuinely share assets, resources, time and skills on a not-for-profit basis, such as car rides by splitting the costs).

Online marketplaces must take steps to make sure that the **consumer is duly informed about the identity of the trader** on the basis of the information provided by the trader itself. In fact, if the failure by the marketplace to inform about the identity of the actual trader creates the impression that the marketplace is the actual trader, this may result in it **being liable for the obligations of the trader**.

The Court of Justice analysed the issue of the identity of the trader in the *Wathelet* case⁽³⁴²⁾, which dealt with the responsibility of an offline intermediary (car garage) for the conformity of the goods sold to consumers under the former Consumer Sales of Goods Directive 1999/44/EC of the European Parliament and of the Council⁽³⁴³⁾.

The Court stated (paragraphs 33-34) that, whilst Directive 1999/44/EC does not address the issue of liability of intermediaries vis-a-vis consumers, 'it does not in itself preclude the possibility that **the concept of 'seller', within the meaning of Article 1(2)(c) of Directive 1999/44, can be interpreted as covering a trader who acts on behalf of a private individual where, from the point of view of the consumer, he presents himself as the seller of consumer goods under a contract in the course of his trade, business or profession. That trader could create confusion in the mind of the consumer by giving him the false impression that he is acting as the seller-owner of the goods.**'

The Court also stated (paragraph 44) that *'The degree of participation and the amount of effort employed by the intermediary in the sale, the circumstances in which the goods were presented to the consumer and the latter's behaviour may, in particular, be relevant in that regard in order to **determine whether the consumer could have understood that the intermediary was acting on behalf of a private individual.***

These Court's conclusions concerning the liability of the offline intermediary for the conformity of goods could also be relevant for **other intermediaries and other obligations of traders under EU law**, including in an online context. In particular, online intermediaries could be found **liable for the trader's obligations** regarding pre-contractual information or contractual performance **where, from the point of view of the consumer, they present themselves as traders under the (proposed) contract**.

In the *Wathelet* case, the Court stressed (paragraph 37) that *'it is essential that consumers are aware of the identity of the seller, and in particular whether he is acting as a private individual or as a trader, so that they are able to benefit from the protection conferred on them by the directive.'* However, **even where the actual supplier was also a trader** and the consumer was not, accordingly, deprived of his or her rights, the consumer may not have concluded the contract if the identity of the actual trader was known due to, for example, concerns about the reliability of such a trader and the possibility of enforcing consumer rights towards it.

⁽³⁴²⁾ C-149/15, *Sabrina Wathelet*, 9 November 2016.

⁽³⁴³⁾ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12).

Further guidance on the concept of 'trader' can be expected in the pending Case C-536/20 *Tiketa*, which deals with the question of whether an online intermediary (ticketing platform) can be held liable jointly with the trader actually providing the service, if the intermediary has failed to provide clear information that it is acting merely as an intermediary.

A new point (f) was added to Article 7(4) by Directive (EU) 2019/2161. It specifically requires the providers of an online marketplace to inform the consumer, in any invitation to purchase, whether the third party offering the products **is a trader or non-trader (such as a peer consumer)**, on the basis of the information provided by that third party supplier. Directive (EU) 2019/2161 added the same and further information requirements for online marketplaces in the CRD (Article 6a).

Article 7 – Misleading omissions

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

(f) for products offered on online marketplaces, whether the third party offering the products is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace.

The purpose of this information requirement specifically for online marketplaces is to make sure that consumers always know from whom they are buying a product on the online marketplace – a trader or another consumer. An erroneous assumption that the third party supplier is a trader can cause problems for the consumer if something goes wrong with the online purchase (e.g. non-conformity of the goods), and if it then turns out that consumer protection rules, such as the right to withdraw within 14 days or the legal guarantee, actually do not apply to the contract concluded.

The UCPD (and the CRD) provision specifies that the information about the status of the third party supplier should be based on a declaration of that supplier that the online marketplace then transmits to the consumer. Therefore, the online marketplace may rely primarily on the declaration provided by the third party supplier. This approach is in line with the prohibition on imposing general monitoring obligations on online intermediaries under the e-Commerce Directive, to the extent the relevant provisions of the e-Commerce Directive apply to the online marketplace. At the same time, it is without prejudice to the marketplace's obligations regarding illegal content, such as acting on the basis of a notice making the platform aware of specific fraudulent offers by traders ⁽³⁴⁴⁾.

It should be stressed that this provision is an information requirement to promote clarity for consumers shopping on online marketplaces. The self-declaration is good indicator of the supplier's legal status but it does not replace the definition of a 'trader' that remains to be applied in accordance with the specified criteria. In this respect, reference should be made to point 22 of the UCPD Annex I, which prohibits traders from pretending that they are non-traders. This prohibition applies to any incorrect or inaccurate declaration of being a non-trader under this new information rule.

To stimulate the traders to declare their status correctly, Article 6a(1)(c) of the CRD also requires the provider of the online marketplace to warn the consumer that they do not benefit from consumers rights where the third party supplier has declared its status as non-trader.

Finally, in the *Kamenova* case concerning an individual seller on an online platform the Court provided additional criteria for determining whether a person qualifies as trader (see section 2.2 on the notion of trader).

4.2.3. Transparency of search results

Search engines allow searching for information on the internet according to a specific algorithm. Also other intermediaries, such as online marketplaces and price comparison services, provide for the possibility to search amongst the different products and suppliers that are accessible via their services. Consumers expect search results to be 'natural' or 'organic' and based on sufficiently impartial criteria. However, the providers also include in the search results paid-for advertising or improve the ranking of products due to direct or indirect payment they receive from the relevant third party traders.

Directive (EU) 2019/2161 added to Article 7 of the UCPD a new paragraph 4a laying down a specific information requirement about the main parameters determining the ranking. In addition, a new point 11a was added to Annex I of the UCPD, prohibiting undisclosed advertising and paid promotion in search results.

⁽³⁴⁴⁾ See Article 14 (2) of the eCommerce Directive.

Information about ranking parameters

Article 7

‘4a. When providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material. This paragraph does not apply to providers of online search engines as defined in point (6) of Article 2 of Regulation (EU) 2019/1150 [...]’

The new information requirement in Article 7(4a) applies only to traders that allow consumers to search for products offered by other, third party, traders or by consumers, i.e. online marketplaces and comparison tools. **It does not apply to traders that provide their consumers with a possibility to search only amongst their own offers of different products.**

The information requirement also **does not apply to ‘online search engines’** as defined in Regulation (EU) 2019/1150 (the ‘P2B Regulation’). This is because the P2B Regulation already requires all providers of online search engines to publish ‘an easily and publicly available description’ of their main parameters, which is accordingly also accessible for consumers and not only for business users.

Furthermore, the information requirement in the UCPD applies to traders when the consumer enters a search query. In contrast, **it does not apply to the default organisation of the online interface that is displayed to the consumer and that is not the result of a specific search query on that online interface.**

Directive (EU) 2019/2161 added a similar information obligation also to the CRD that only applies to online marketplaces, i.e. intermediaries enabling the direct conclusion of consumer contracts with third parties (both B2C or C2C contracts).

The notion of ‘ranking’ is defined in Article 2(m) of the UCPD as ‘the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication’. The same definition applies also in the context of the CRD.

Recital 19 of Directive (EU) 2019/2161 further explains it as ‘...including resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof’.

As regards the content of the information, the platform must provide ‘general’ information about the main parameters determining the ranking of products and about the ‘relative importance’ of those parameters as opposed to other parameters.

According to recital 22 of Directive (EU) 2019/2161 ‘Parameters determining the ranking mean any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking.’

Information on ranking is without prejudice to Directive (EU) 2016/943 of the European Parliament and of the Council⁽³⁴⁵⁾ on trade secrets. As explained in the parallel ranking transparency obligation for all online platforms and online search engines laid down in Article 5 of the P2B Regulation, this means that a consideration of the commercial interests of the relevant providers should never lead to a refusal to disclose the main parameters determining ranking. At the same time, neither Directive (EU) 2016/943 nor the P2B Regulation requires disclosure of the detailed functioning of the ranking mechanisms of the relevant providers, including their algorithms⁽³⁴⁶⁾. The same approach applies to information requirement under the UCPD.

The description of the default ranking parameters can remain at a general level and does not have to be presented in a customised manner for each individual search query⁽³⁴⁷⁾. The information must be provided in a clear and comprehensible manner and in a way appropriate to the means of distance communication. It is further specified that it has to be in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented.

⁽³⁴⁵⁾ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016, p. 1).

⁽³⁴⁶⁾ See recital 23 of Directive (EU) 2019/2161 and recital 27 of the P2B Regulation.

⁽³⁴⁷⁾ See recital 23 Directive (EU) 2019/2161.

The information obligation also applies where a trader enables **searches on an online interface by voice commands** (via 'digital assistants'), rather than through typing. Also in this case, the information must be made available for consultation on the trader's website/application on 'a specific section of the online interface'.

The new rules on ranking transparency towards consumers (in CRD and UCPD) define 'ranking' in materially similar terms as the P2B Regulation. The P2B Regulation requires platforms to inform their business users through information in the platform's business-to-business Terms and Conditions, or make information available in the pre-contractual stage.

Although the respective information requirements are similar, their 'audiences' are different. For this reason, the new provisions in the UCPD (and in the CRD) only require 'general' information about the main ranking parameters and their relative importance. This difference from the P2B Regulation reflects the information needs of **consumers who require concise information that is easy to understand**. For the same reason, the UCPD and CRD rules also do not require an explanation of the 'reasons' for the relative importance of the main ranking parameters that is required by the P2B regulation.

Practically speaking, the providers of online intermediation services will be able to use the more detailed information that they provide to their business users under the P2B Regulation as a basis for designing a consumer-oriented explanation of the ranking parameters. The Commission has issued guidelines on ranking transparency pursuant to the P2B regulation⁽³⁴⁸⁾. These guidelines address several questions that are also relevant in the application of the rules of the UCPD and CRD on ranking transparency, such as the concept of 'main parameters', 'relative prominence' and 'direct and indirect remuneration'.

Disclosure of paid-for advertising and ranking

Point No 11a of ANNEX I

'11a. Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.'

The new point 11a applies to any trader providing for a possibility to search for 'products' (i.e. goods, services, digital content), including search engines.

It does not ban the inclusion of advertisements or higher ranking due to the payments received from the traders concerned, but requires the provider of the search facility to clearly inform the consumer when search results include products or websites or URLs of traders **who have paid to be included in the search results** (advertisement) or when the **ranking is influenced** by direct or indirect payments.

'**Advertisement**' refers to insertion on top or within the 'natural' results of listings that otherwise would not have been presented to the consumer according to the applicable objective search criteria.

'**Higher ranking**' refers to situations where the position of one or more listings in the ranking has been improved due to direct or indirect payments. Recital 20 of Directive (EU) 2019/2161 provides non-exhaustive examples of indirect payment for the purpose of higher ranking:

- Acceptance by a trader of additional obligations towards the provider;
- Increased commission per transaction;
- Different compensation schemes that specifically lead to higher ranking;

In contrast, **indirect payments** do not cover payments for general services, such as listing fees or membership subscriptions, which address a broad range of functionalities, provided that such payments are not dedicated to achieving higher ranking.

Advertisements within search results and search results that are the object of payment specifically for achieving a higher ranking must be **clearly and prominently** highlighted as such. Information about the advertisement or payment specifically for achieving a higher ranking must be presented in **immediate affiliation** to the relevant search result in a **visually salient** way, that stands out from the rest of the general online interface, and in a way that the consumer cannot avoid noticing when seeing the search result.

However, where payments which are made specifically for achieving a higher ranking are part of the ranking parameters and influence the ranking of **all the results displayed, information about such payments can also be provided by means of a single clear and prominent statement** on the search results page. Such statement should be separate and in

⁽³⁴⁸⁾ Commission Notice – Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council (OJ C 424, 8.12.2020, p. 1).

addition to the general information about ranking parameters that traders must provide in accordance with Article 7(4a) UCPD discussed above.

The Commission and national consumer authorities in the CPC network addressed the disclosure of advertising and paid ranking within search results in the joint actions regarding the Booking.com and Expedia platforms⁽³⁴⁹⁾ (see also section 4.3.6). As a result of these actions, these platforms accepted to show on the search results page when payments affect the ranking of accommodations. They also added a link for further explanation and clearly labelled such properties. Moreover, the previous indication 'sponsored' was replaced with the more telling labels 'Ad', 'Advert', 'Advertisement', or similar equivalent text in local language, and those indications were made more prominent.

For example:

- A price comparison website offered to top rank the products of traders paying an additional fee. A national court ruled that consumers' transactional decisions can be influenced by a comparative display that they might believe has no commercial intent or objective. On this basis, the comparison website's commercial practice was qualified as misleading. The court found that the comparison tool's failure to clearly identify this top ranking as a paid one was likely to materially distort the economic behaviour of consumers⁽³⁵⁰⁾.
- A national court found that the practice of a major comparison and booking service provider to enable hotels to manipulate the ranking by paying higher commission fees was misleading⁽³⁵¹⁾.

4.2.4. User reviews

Many online platforms and also individual traders provide the possibility for consumers to inform other consumers about their experience with different products or traders. Review facilities are often included in online marketplaces, search engines, specialised travel review sites, comparison tools and social networks. Various studies demonstrate **the importance of reviews for consumers' purchasing decisions**. It is therefore, important that the traders that give access to consumer **reviews** take reasonable and proportionate steps to ensure that they reflect the experience of real consumers with the relevant product. The notion of 'reviews' should be interpreted broadly, including practices related to ratings.

However, a number of unfair practices have been identified in this area. Traders use different techniques to increase the number of positive reviews for their products on platforms or to reduce or downplay the number of negative ones. To boost their products, some **traders organise the posting of fake positive reviews** by, for example, engaging specialised companies that recruit actual consumers through social networks or other means. These consumers then purchase the products of the respective traders on online platforms and leave five-star ratings in exchange for specific benefits. Or they **incentivise consumers to test their products in exchange for posting their reviews** (sponsored reviews) without disclosing the fact of sponsorship.

Moreover, the **incentivised/fake reviews can influence the product's ranking** and hence visibility on the platform if the platform's search parameters take into account the review score.

Such practices distort the consumers' choices. Although some platforms report taking measures to limit false reviews, the problem appears to grow bigger and has prompted an increasing amount of public enforcement activity. The effect of these misleading practices is exacerbated by the constant supply gap of ordinary reviews, in particular for new products or for newcomers on the market⁽³⁵²⁾.

The UCPD applies not only to the commercial practices of online platforms and other traders that make available or provide access to consumer reviews but also to **any trader that organise the supply of reviews for the benefit of other traders**. As explained in section 2.3 on the definition of commercial practice, a trader's commercial practices are subject to the UCPD regardless of the fact whether such commercial practices promote their own products or products supplied by other traders.

⁽³⁴⁹⁾ Press release of 18 December 2020: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2444.

⁽³⁵⁰⁾ Cass. Com. 4 décembre 2012, 11-27729, Publicité Sté Pewterpassion.com c/ Sté Leguide.com.

⁽³⁵¹⁾ LG Berlin, 25.08.2011, Az.16 O 418/11.

⁽³⁵²⁾ For example, German Bundeskartellamt estimated that only 1 % of consumers post reviews after their purchasing experience, see 'Konsultationspapier zur Sektoruntersuchung Nutzerbewertungen,' point E 1.2. https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2020/18_06_2020_SU_Nutzerbewertungen_Konsultation.html

In contrast, the UCPD does **not apply to consumers who provide information about their experience** with products or services, unless they can be considered as acting 'in the name of or on behalf of a trader' (see further section 4.2.6 on influencer marketing).

Misleading practices regarding consumer reviews and endorsements may breach Article 7(2) UCPD, which requires traders to identify the commercial intent of the commercial practice if not already apparent from the context.

Directive (EU) 2019/2161 strengthened the UCPD by introducing **specific provisions in the area of consumer reviews and endorsements**. Specifically, Point 23b of Annex I prohibits traders from stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable steps to check that they originate from such consumers. Point 23c expressly prohibits submitting or commissioning another legal or natural person to submit false consumer reviews in order to promote products. It also prohibits misrepresenting consumer reviews in order to promote products. Finally, traders giving access to reviews must inform consumers about whether and how they ensure that the published reviews originate from consumers in accordance with Article 7(6).

The UCPD applies to business-to-consumer practices directly connected with the promotion, sale or supply of a product to consumers. Therefore, the reference to 'products' in these new UCPD provisions on reviews aims to underscore that they do not apply to other kinds of reviews unrelated to the promotion, sale or supply of a product.

Accordingly, these provisions apply also to those reviews that, while not addressing products or their features 'strictu sensu', have as their main object the **qualities and performance of traders** when offering or selling those products. Where reviews about the performance of 'traders' in that framework are used as a tool to promote their products, those reviews could also be considered material for the consumer in taking the transactional decision regarding the products of that trader. In particular, where the reviews assess the trader on parameters such as quality, reliability or speed of delivery of products, such reviews can aim at or be intertwined with the promotion of the trader's products. Consequently, the new UCPD provisions can be applied to such reviews.

In contrast, reviews that assess the trader's qualities outside the business-to-consumer context, such as social responsibility, employment conditions, taxation, market leadership, ethical aspects etc. would likely fall outside the scope of the UCPD, including the new provisions on consumer reviews.

Information about the handling of the reviews

Article 7(6)

6. Where a trader provides access to **consumer reviews of products**, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as material.

The new information obligation applies to any trader that provides access to consumer reviews, including where a trader promotes on its online interface the reviews made available by another trader, such as a specialised review tool. Recital 47 of Directive (EU) 2019/2161 explains the scope of the requirement in a broad manner. Namely, the information must cover not only the specific measures to check that reviews originate from consumers who have actually used or purchased the product **but also the processing of reviews more generally**. This includes information on whether all reviews are published, how they are sourced, how average review scores are calculated and if they are influenced by sponsored reviews or by contractual relations with the traders hosted on the platform.

Traders' information about the steps taken to ensure that the published reviews originate from consumers who have actually used or purchased the product is important also because it will be analysed to assess whether the trader can actually present reviews as consumer reviews in line with the new point 23b of Annex I.

This information must be clear, intelligible, and made available 'when providing access to consumer reviews', i.e. information should be made available from the same interface where reviews are published for consultation, including via clearly identified and prominently displayed hyperlinks.

Prohibited practices

Annex I point No 23b

23b. *Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers.*

The new point 23b of Annex I prevents traders from misleading its users as to the origin of the reviews: they must not state that reviews they make available originate from real users, unless they take reasonable and proportionate steps which – without amounting to a general obligation to monitor or carry out fact-finding (see Article 15(1) e-Commerce Directive) – **increase the likelihood for such reviews to reflect real users' experiences.**

Whether the trader's presentation of reviews amounts to stating that they 'are submitted by consumers who have actually used or purchased the product' depends on how it is perceived by the average consumer. The reviews do not necessarily have to be presented in these terms – also more general references to 'consumer' or 'customer/user' reviews may lead the average consumer to perceive them as reviews by other consumers who have used or purchased the product

The necessary 'reasonable and proportionate' steps are to be assessed taking into account, inter alia, the trader's business model – an online marketplace that presents the reviews of its own customers may have to apply different measures than a specialised review service that invites reviews from the wider public without having a contractual relation. Also the scale of the trader's activity and the level of risk should be taken into account for establishing what is 'reasonable and proportionate' for that given trader. For example, large platforms with a high risk of fraudulent activity and larger resources would be expected to deploy more significant means to counter the fraud with consumer reviews than smaller traders.

However, the steps to check the origin of reviews should be proportionate also in the sense that they should not make the posting of reviews excessively difficult thus discouraging consumers who have actually purchased or used the product from submitting reviews.

Recital 47 to Directive (EU) 2019/2161 explains that reasonable and proportionate steps could include '*requesting information to verify that that the consumer has actually used or purchased the product*'. Such information could be, for example, a booking number. Other 'reasonable and proportionate steps' could include:

- requiring the reviewers to register;
- using technical means to verify that the reviewer is actually a consumer (e.g. IP address check, verification by email);
- setting clear rules for reviewers prohibiting fake and non-disclosed sponsored reviews;
- deploying tools to automatically detect fraudulent activity;
- having adequate measures and resources to respond to complaints about suspicious reviews, including where the trader concerned by the reviews provides evidence that they are not submitted by consumers who actually used or purchased the product.

Thanks to the information that traders will publish in accordance with Article 7(6), it is expected to be possible for both the users and the enforcement authorities to assess and to evaluate the steps taken by the trader, also comparing those with the industry best practices that may develop over time. An ISO standard is available in this area - 'Online consumer reviews: Principles and requirements for their collection, moderation and publication' (ISO 20488:2018).

Annex I point No 23c

23c. *Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, **in order to promote products.***

The new point 23c covers two types of unfair commercial practices:

- The first element aims at traders who submit or commission, including buying from others (e.g. from 'likes factories' or natural persons) false reviews or endorsements. It covers, in particular, the practice of engaging actual consumers who purchase the product and get remuneration for posting positive reviews. This part of point 23c applies both to the professionals and the consumers involved in these misleading activities insofar as they qualify as 'acting in the

name of or on behalf of the trader'. It does not, however, apply to those traders, in particular online platforms, that host and give access to consumer reviews without being involved in their submission (posting).

- The second element aims at traders, including online platforms, that give access to consumer reviews or social endorsements and misrepresent them, such as by only soliciting and making available positive reviews and obtaining the withdrawal of negative reviews.

The notion of 'endorsements' should be interpreted broadly, covering also practices related to fake followers, reactions and views.

The first element aims at ensuring that consumer reviews **reflect real consumers' opinions, findings, beliefs or experience**. It therefore prohibits the practice for traders to submit, or engage other persons, such as real consumers, to submit false reviews.

As regards the second element prohibiting the misrepresentation of consumer reviews or social endorsements, Recital 49 of Directive (EU) 2019/2161 gives the following examples of prohibited manipulative practices:

- Publishing only positive reviews and deleting the negative ones;
- Linking the consumer endorsements to different content than the one intended by the consumer.

Further examples of manipulative practices are situations where the trader:

- provides consumers with pre-filled positive review templates;
- engages with consumers during the moderation process to incentivise them to change their reviews or withdraw the negative reviews;
- presents consolidated review ratings on the basis of undisclosed and/or opaque criteria.

The prohibition of misrepresenting consumer reviews is without prejudice to the rights and obligation of the trader that makes reviews available to suppress fake negative reviews as part of the measures to ensure that reviews originate from consumers who have actually used or purchased the product.

Whilst the new provisions in Annex I of the UCPD prohibit the respective commercial practices concerning user reviews in all circumstances, it can be noted that traders that make available reviews but **suppress negative consumer reviews** without valid reason may also cause the average consumers reading the online reviews to continue using the trader's services or, in case of platforms, to take a decision to contact a trader which they would not have taken had they known that negative reviews had been suppressed.

Furthermore, traders that engage with consumers and/or other traders that make reviews available **to prevent negative reviews about them from being published or removing them after publication** can also cause the average consumer (who has not yet been in contact with this trader) to select this trader rather than a competitor who has not engaged in such unfair commercial practices.

For example:

A trader posted 'likes' for its dental products on its own website claiming 'guaranteed real customer reviews' and then linked the 'likes' to a review site, on which the positive customer reviews were favoured over neutral or negative reviews. A national court found it misleading of the trader to claim 'guaranteed real customer reviews' ⁽³⁵³⁾.

4.2.5. Social media

Social media platforms such as Facebook, Twitter, YouTube, Instagram and TikTok enable users to create profiles and communicate with each other, including sharing information and content. Social media platforms increasingly feature commercial practices that may be problematic under the UCPD and EU consumer law more broadly, such as:

- hidden advertising by the social media platform or by third party traders, including misleading influencer marketing;
- unfair standard contract terms;
- social media services being presented to consumers as 'free' when they rely on an advertising model processing large amounts of personal data in exchange for access;

⁽³⁵³⁾ OLG Düsseldorf, 19.02.2013, Az. I – 20 U 55/12.

- problematic algorithmic practices, such as manipulative targeted advertising or practices to capture the consumer's attention to continue using the service (see also section 4.2.7);
- unfair practices related to in-platform purchases, such as virtual items;
- commercial practices put in place by third party traders through social media platforms, including scams and fraud, fake or misleading user reviews or endorsements, direct exhortations to children, spam and subscription traps.

Some social media platforms have become environments for advertising, product placement and consumer reviews. Therefore, they can present increased risks for **hidden advertising**, given that commercial elements are mixed with social and cultural user-generated content. Furthermore, consumers may not always be aware that traders use social media for marketing purposes.

Social media platforms feature different types of advertising, such as **native advertising**, which involves blending commercial content with non-commercial content and is often displayed with the same format and in the same position as user-generated content (e.g. in a user's personal feed). It is also more prominent in mobile environments because the content may take up the full display of a smaller screen. The content is often developed by advertisers using the publishing options available within the advertising platform. Another common type of advertising involves the use of **influencers**, which is further explained in the next section.

All forms of commercial communications on social media platforms must be clearly disclosed. The prohibitions against hidden advertising in Article 7(2) and point No 22 of Annex I UCPD could be invoked both against social media platforms and third party traders using social media platforms. A similar disclosure requirement stems from Article 6(a) of the e-Commerce Directive and Articles 9, 10 and 28b of the Audiovisual Media Services Directive. The obligations of social media platforms may become further reinforced in relation to online advertising in the proposed Digital Services Act and Digital Markets Act.

Furthermore, many users of social media are **children and young people**. Consequently, Article 5(3) of the UCPD can be relevant as a legal basis for protecting vulnerable consumers and the disclosures of commercial communications must be understandable for the likely target audience, taking into account the specific circumstances of each case and the environment of the specific social media platform. In addition, point No 28 of Annex I prohibits direct **exhortations to children** in commercial communications. Targeted advertising practices that focus on children as the target group therefore cannot contain any direct exhortations to buy the advertised products under the UCPD. Furthermore, there are specific rules under GDPR regarding the validity of children's consent and the provision of information when information society services are offered directly to children. Targeted advertising may also fall under the rules on automated decision-making in Article 22 GDPR ⁽³⁵⁴⁾.

In 2016-2019, the Commission and national authorities obtained commitments from **Facebook, Twitter and Google+** to bring their practices in accordance with EU consumer law. They addressed practices such as the lack of transparency concerning their business model for consumers, and various terms in their terms and conditions ⁽³⁵⁵⁾, which included limiting or totally excluding the liability of the platform in connection with the performance of the service and the identification of commercial communications, waiving mandatory EU consumer rights, and depriving consumers of their EU rights in relation to jurisdiction and applicable law.

4.2.6. Influencer marketing

Influencer marketing involves the promotion of specific brands or products through influencers using the positive impact that influencers are likely to have on consumer perceptions. An influencer is generally described as **a natural person or virtual entity** ⁽³⁵⁶⁾ who has a greater than average reach in a relevant platform. Compared to most other forms of online advertising, influencer marketing bears even fewer characteristics that make it possible for consumers to identify the commercial nature of the content. Even if the influencer uses disclaimers to highlight the presence of commercial communications, the average consumer, particularly children and young people, could assume that the content is presented at least partly as a personal, non-commercial endorsement rather than a direct and clearly identifiable advertisement.

⁽³⁵⁴⁾ European Data Protection Board Guidelines 8/2020 on the targeting of social media users, example 8 and paragraphs 85 to 88: https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf

⁽³⁵⁵⁾ Press release of 9 April 2019: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048; press release of 15 February 2018: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_761; press release of 17 March 2017: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_631

⁽³⁵⁶⁾ A digital character under the responsibility of a trader or a person acting in the name of or on behalf of a trader.

For the purposes of the UCPD, an influencer would qualify as a ‘trader’ or, alternatively, as person ‘acting in the name of or on behalf of a trader’. Persons that frequently carry out promotional activities towards consumers on their social media accounts are likely to qualify as ‘traders’, regardless of the size of their following. See section 2.2 on the notion of ‘trader’ for examples of factors that must be taken into account in this determination. The obligations to be clear about the commercial communication apply to traders regardless of whether they are the suppliers of the products ⁽³⁵⁷⁾.

As with other forms of hidden marketing, the failure to clearly declare the commercial element in an influencer’s content or practice could amount to a misleading practice under **Articles 6 and 7**. The endorsements by the influencer cover various practices, including paid posts, affiliate content (e.g. influencer shares a discount code or link to their audience for a commission fee), retweets or tagging the trader/brand. According to **Article 7(2)** all commercial communications must be clearly indicated as such, unless already apparent from the context. Furthermore, in addition to the application of Articles 6 and 7 that apply in all cases of influencer marketing, **point No 11** of Annex I prohibits practices which do not make it clear that a trader has paid for the promotion of a product in editorial content. The concept of ‘editorial content’ should be interpreted broadly, covering in some cases also **content generated by the influencer or posted by them on social media platforms**. In the *Peek & Cloppenburg* case, the Court confirmed that point No 11 should be interpreted in a manner that reflects the reality of journalistic and advertising practice ⁽³⁵⁸⁾. The case concerned the interpretation of the concept of ‘payment’, which is further explained below. In the context of ensuring the effectiveness of the prohibition, the Court highlighted the relevance of *“covert” advertising on the internet through the dissemination of comments on social networks, forums or blogs, which appear to come from consumers themselves, whereas in fact they are advertising or commercial messages, directly or indirectly created or paid for by economic operators, and insists on the harmful effects of such practices on consumer confidence (...)* ⁽³⁵⁹⁾. Finally, the lack of adequate disclosure by the influencer concerned also increases the risk of breaching **point No 22** of Annex I, which prohibits falsely representing oneself as a consumer.

The disclosure of the commercial element must be clear and appropriate, taking into account the medium in which the marketing takes place, including the **context, placement, timing, duration, language, target audience and other aspects**. The disclosure must be sufficiently salient to adequately inform the average or vulnerable consumer that receives the content. For example, the disclosure cannot be considered adequate in case the information concerning the commercial communication is not displayed prominently (e.g. hashtags at the end of a lengthy disclaimer; merely tagging a trader) or requires the consumer to take additional steps (e.g. click on ‘read more’) ⁽³⁶⁰⁾.

It is also necessary to **individually label** each commercial communication as it reaches consumers, even if the influencer is engaged in a broader endorsement arrangement with a trader/brand.

The commercial element is considered to be present whenever the influencer receives **any form of consideration for the endorsement**, including in case of payment, discounts, partnership arrangements, percentage from affiliate links, free products (including unsolicited gifts), trips or event invitations etc. The presence of a contract and monetary payment is not necessary to trigger the application of these rules. In the *Peek & Cloppenburg* case, the Court confirmed that a trader has ‘paid for’ editorial content also in case of non-monetary payment. The Court considered that there must be ‘consideration with an asset value’ and a definite link between the payment by that trader and that content. However, the specific form of payment has no bearing from the point of view of consumer protection. For example, consideration was found to be present when the trader makes available, free of charge, images protected by copyright on which are visible the commercial premises and products which it offers for sale. The Court also noted that there is no requirement for a minimum amount of payment or the proportion of that payment in the total cost of the advertising campaign concerned ⁽³⁶¹⁾.

Depending on the circumstances of the case, the **breach could be attributed both to the influencer or to the trader/brand** that has engaged the influencer and benefits from the endorsement. The presence of **editorial control** by the trader is not necessary to trigger the application of these rules but could serve as a factor in the determination of its liability. The trader/brand is liable for the breaches of the above-mentioned provisions and in particular the requirement of exercising professional diligence under **Article 5**. Subject to the assessment of the circumstances of the case, such liability is unlikely to be present in the scenario where an influencer does not have any connections to the trader/brand (i.e. misleadingly pretends to act on behalf of the trader). The influencer would be liable for its own obligations under the UCPD, provided that it qualifies as a ‘trader’, as explained earlier.

⁽³⁵⁷⁾ Case C-146/16, *Verband Sozialer Wettbewerb*, 30 March 2017, para. 31.

⁽³⁵⁸⁾ Case C-371/20, *Peek & Cloppenburg*, 2 September 2021, para. 41-42.

⁽³⁵⁹⁾ *Ibid.*, para. 43.

⁽³⁶⁰⁾ For example, further self-regulatory guidance regarding specific considerations and examples of disclosures for influencer marketing have been provided by national advertising self-regulatory bodies.

⁽³⁶¹⁾ Case C-371/20, *Peek & Cloppenburg*, 2 September 2021, para. 41, 46 and 47.

For example:

A trader re-posted social media posts by influencers that promoted their products in return for consideration but failed to adequately label their posts as commercial communications. A national court held the trader liable for not taking necessary measures to ensure compliance with consumer law, such as ensuring transparency, educating influencers and having control mechanisms to bring infringements to an end ⁽³⁶²⁾.

In case the influencer is endorsing its **own products or business**, the same rules will apply. The commercial intent of the communication must always be declared in such cases, in particular in light of **point No 22** of Annex I, which prohibits falsely claiming or creating the impression that a trader is not acting for the purposes of his trade or falsely representing oneself as a consumer. There is a need for adequate disclosure also in case the influencers endorse brands or products that are visibly linked to them, e.g. by bearing their name or face.

For example:

An influencer promoted on Instagram the products of a company where she was the CEO, main shareholder and sole board member. It was found that the relevant Instagram posts were misleading, as the commercial intent was unclear to the average consumer. One post, promoting fish oil, made indirect claims about strengthening immune function and therefore protecting against COVID-19. In absence of evidence for such claims, this post was found to be both misleading and aggressive ⁽³⁶³⁾.

Moreover, given that the relationship that the influencer builds with its audience is often based on trust and a personal connection, their behaviour could in some cases amount to an aggressive commercial practice through the use of undue influence, prohibited by **Articles 8-9**. This is particularly relevant when the main target audience of an influencer includes vulnerable consumers, such as children and young people. Furthermore, **point No 28** of Annex I prohibits direct exhortations towards children in all circumstances.

In addition to the obligations of influencers and brands, the **online platform** that is used for the promotional activities is subject to its own obligations of professional diligence under the UCPD, as discussed in previous sections. This includes the obligation to take appropriate measures to enable third party traders to comply with their obligations under EU law, e.g. to provide **specific and appropriate disclosure tools in the platform's interface** ⁽³⁶⁴⁾.

4.2.7. Data-driven practices and dark patterns

The digital environment is increasingly characterised by the **generation, accumulation and control of an enormous amount of data about consumers**, which can be combined with the use of algorithms and AI to turn this into usable information for commercial purposes. Among other purposes, this data can give valuable insights to socio-demographic characteristics, such as age, gender or financial situation, as well as personal or psychological characteristics, such as interests, preferences, psychological profile and mood. This enables traders to learn more about consumers, including about their vulnerabilities.

Data-driven personalisation practices in the business-to-consumer relationship include personalisation of advertising, recommender systems, pricing, ranking of offers in search results, etc. **The principle-based provisions and prohibitions in the UCPD can be used to address unfair data-driven business-to-consumer commercial practices** in addition to other instruments in the EU legal framework, such as the ePrivacy Directive, the GDPR or sector-specific legislation applicable to online platforms. Existing decisions by data protection authorities concerning a trader's compliance or non-compliance with data protection rules should be taken into account when assessing the overall fairness of the practice under the UCPD.

The UCPD covers the advertising, sales and contract performance stages, including the agreement to the processing of personal data and the use of personal data for delivering personalised content, and the termination of a contractual relationship. Moreover, the Directive has a broad scope of application: it covers all business-to-consumer commercial

⁽³⁶²⁾ Norwegian Market Council, MR-2021-349: Sports Nutrition AS.

⁽³⁶³⁾ Stockholms Tingsrätt Patent- och marknadsdomstolen, Mål nr PMT 5929-20, 10 December 2020.

⁽³⁶⁴⁾ See also the obligation for video-sharing platforms in Article 28b(3)(c) of Directive 2010/13/EU (Audiovisual Media Services Directive).

practices and does not require the existence of a contractual relationship or the purchase of a product. For example, the Directive would also cover commercial practices such as capturing the consumer's attention, which results in transactional decisions such as **continuing to using the service** (e.g. scrolling through a feed), to **view advertising content** or to **click on a link**.

Persuading consumers to engage with the trader's content is an essential part of commercial practices and of advertising in particular, both in the online and offline world. However, the digital environment enables traders to employ their practices more effectively on the basis of consumer data, with high scalability and even dynamically in real time. Traders can develop **personalised persuasion practices** because they benefit from superior knowledge based on aggregated data about consumer behaviour and preferences, for example by linking data from different sources. Traders can also have the possibility to make adjustments to improve the effectiveness of their practices, as they continuously test the effects of their practices on consumers and thereby learn more about their behaviour (e.g. through A/B testing). Furthermore, such practices could often be employed without the full knowledge of the consumer. It is the presence of these factors and their opaqueness that distinguishes, on the one hand, highly persuasive advertising or sales techniques from, on the other hand, commercial practices that **may be manipulative** and, hence, unfair under consumer law. In addition, they may be in breach of transparency obligations under GDPR or the ePrivacy Directive.

Any business-to-consumer practice that materially distorts or is likely to distort the economic behaviour of an average or vulnerable consumer could breach the trader's **professional diligence** requirements (Article 5), amount to a **misleading practice** (Articles 6-7) or an **aggressive practice** (Articles 8-9), depending on the specific circumstances of the case.

For the purposes of this assessment, the **benchmark of an average or vulnerable consumer** can be modulated to the target group and, if the practice is highly personalised, even formulated from the **perspective of a single person** who was subject to the specific personalisation.

These practices may also have a more significant effect on **vulnerable consumers**. As explained in section 2.6, the characteristics that define vulnerability in Article 5(3) are indicative and non-exhaustive. The concept of vulnerability in the UCPD is **dynamic and situational**, meaning, for instance, that a consumer can be vulnerable in one situation but not in others. For example, certain consumers may be particularly susceptible to personalised persuasion practices in the digital environment, while less so in brick-and-mortar shops and other offline environments.

The use of information about the **vulnerabilities of specific consumers or a group of consumers** for commercial purposes is likely to have an effect on the consumers' transactional decision. Depending on the circumstances of the case, such practices could amount to a form of manipulation in which the **trader exercises 'undue influence' over the consumer, resulting in an aggressive commercial practice prohibited under Articles 8 and 9** of the UCPD. When assessing the presence of undue influence, according to Article 9(c) one should take into account the exploitation of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware.

Moreover, if the practice is **targeting children**, then point **No 28 of Annex I** is particularly relevant as it **prohibits direct exhortations to children**. The potential adverse impacts of targeting children also warrant specific protection under the GDPR ⁽³⁶⁵⁾.

For example:

- A trader is able to identify that a teenager is in a vulnerable mood due to events in their personal life. This information is subsequently used to target the teenager with emotion-based advertisements at a specific time.
- A trader is aware of a consumer's history with financial services and the fact that they have been banned by a credit institution due to the inability to pay. The consumer is subsequently targeted with specific offers by a credit institution, with the aim of exploiting their financial situation.
- A trader is aware of a consumer's purchase history with respect to games of chance and random content in a video game. The consumer is subsequently targeted with personalised commercial communications that feature similar elements, with the aim of exploiting their higher likelihood of engaging with such products.

⁽³⁶⁵⁾ See European Data Protection Board Guidelines 8/2020 on the targeting of social media users: https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf. See also Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679, chapter V on children and profiling: <https://ec.europa.eu/newsroom/article29/items/612053>.

Within the category of manipulative practices, the term '**dark pattern**' is used to refer to a type of malicious nudging, generally incorporated into digital design interfaces. Dark patterns could be data-driven and personalised, or implemented on a more general basis, tapping into heuristics and behavioural biases, such as default effects or scarcity biases ⁽³⁶⁶⁾.

The term 'dark pattern' does not have a legal definition in the Directive. The UCPD applies to any 'unfair commercial practice' that meets the requirements of the material scope of the Directive, regardless of their classification. If dark patterns are applied in the context of business-to-consumer commercial relationships, then the Directive can be used to challenge the fairness of such practices, in addition to other instruments in the EU legal framework, such as the GDPR.

As explained above, any manipulative practice that materially distorts or is likely to distort the economic behaviour of an average or vulnerable consumer could breach the trader's **professional diligence** requirements (Article 5), amount to a **misleading practice** (Articles 6-7) or an **aggressive practice** (Articles 8-9), depending on the specific dark pattern applied. The UCPD **does not require intention** for the deployment of the dark pattern. The standard of professional diligence in Article 5 UCPD in the area of interface design may include principles derived from international standards and codes of conduct for ethical design. As a general principle under the requirements of professional diligence in Article 5 UCPD, traders should take appropriate measures to ensure that the **design of their interface** does not distort the transactional decisions of consumers.

Manipulative practices may include **visually obscuring** important information or ordering it in a way to promote a specific option (e.g. one button very visible, another hidden; one path very long, another shorter), as well as using **trick questions and ambiguous language** (e.g. double negatives) to confuse the consumer. Such practices are likely to qualify as a misleading action under Article 6 UCPD or as a misleading omission under Article 7 UCPD by making the information unintelligible or ambiguous. Furthermore, using emotion to steer users away from making a certain choice (e.g. 'confirmshaming' the consumer into feeling guilty) could amount to an aggressive practice under Article 8 UCPD for using undue influence to impair the consumer's decision-making.

For example:

During the ordering process in an online marketplace, the consumer is asked several times to choose 'yes' and 'no': 'Would you like to be kept informed about similar offers? Would you like to subscribe to the newsletter? Can we use your details to personalise our offer?' Halfway through the click sequence, the buttons 'yes' and 'no' are reversed intentionally. The consumer has clicked 'no' several times, but now clicks 'yes' and accidentally subscribed to a newsletter.

Default interface settings have a significant impact on the transactional decision of an average consumer. Traders could not only influence consumers to take certain actions, but also take specific actions in their place, for example by using **pre-ticked boxes**, including to charge for additional services, which is prohibited under Article 22 of the CRD. Such practices can also breach the UCPD as well as data protection and privacy rules ⁽³⁶⁷⁾.

Certain practices that are often labelled as 'dark patterns' are already expressly prohibited in all circumstances in the Annex I to the UCPD:

- So-called '**bait and switch**' practices, which include offering products at a specified price while not disclosing the existence of reasonable grounds for not being able to provide the product or offering the product and then refusing to take orders for it or deliver it within a reasonable time, with the intention of promoting a different product instead (No 5 and 6 Annex I);
- Creating urgency by falsely stating that a product will only be **available for a very limited time**, or that it will only be available **on particular terms** for a very limited time (No 7 Annex I). For example, this includes **fake timers and limited stock claims** on websites;
- Giving **inaccurate information on market conditions** or on the **possibility of finding the product** with the intention of inducing the consumer to buy the product at less favourable conditions (No 18 Annex I);

⁽³⁶⁶⁾ The 'default effect' refers to the tendency of individuals to stick with options that are assigned to them by default due to inertia. The 'scarcity bias' refers to the tendency of individuals to place a higher value on things that are scarce.

⁽³⁶⁷⁾ For example, pre-ticked boxes to purportedly consent to the processing of personal data are not allowed under GDPR. Similarly; the ePrivacy Directive requires the consent of the end-users to the placing of cookies and other identifiers in their terminal equipment, except under very specific circumstances. Additionally, where consent was given, it must be as easy to revoke as it was to give it.

- Claiming that the consumer has **won a prize**, without awarding the prizes described or a reasonable equivalent (No 19 and 31 Annex I) or falsely describing a product as **'free'** (No 20 Annex I);
- Making repeated intrusions during normal interactions in order to get the consumer to do or accept something (i.e. **nagging**) could amount to a persistent and unwanted solicitation (No 26 Annex I) ⁽³⁶⁸⁾.

Furthermore, various misleading practices that breach Articles 6 and 7 UCPD are also labelled as 'dark patterns', such as **misleading free trials and subscription traps** which were further discussed in section 2.9.6. In designing their interfaces, traders should follow the principle that **unsubscribe from a service should be as easy as subscribing to the service**, for example by using the same methods previously used to subscribe to the service or differing methods, as long as the consumers are presented with clear and free choices, proportionate and specific to the decisions they are being asked to make.

For example:

In order to unsubscribe from a digital service, the consumer is forced to take numerous non-intuitive steps in order to arrive at the cancellation link. These steps include 'confirmshaming', whereby the consumer is prompted, without reasoned justification, to reconsider their choice through emotional messages several times ('We're sorry to see you go', 'Here are the benefits you will lose') and 'visual interference', such as prominent images that encourage the user to continue with the subscription instead of cancelling ⁽³⁶⁹⁾. Such practices could breach Article 7 and Article 9(d) UCPD.

4.2.8. Pricing practices

Drip pricing covers situations where traders add costs along the purchase process, for example, by adding charges which are unavoidable and should have been included in the price from the outset or otherwise arbitrarily increasing the final price. This can lead consumers to take transactional decisions they would not have taken, had the full price been provided in the first 'invitation to purchase'. Such practice may hence amount to a misleading action or omission in breach of the UCPD.

Dynamic pricing (also called real-time pricing) means changing the price for a product in a highly flexible and quick manner in response to market demands.

Under the UCPD, traders can freely determine the prices they charge for their products as long as they adequately inform consumers about total costs and how they are calculated if the nature of the product means that the price cannot reasonably be calculated in advance (Articles 6(1)(d) and 7(4)(c) UCPD). However, in some circumstances, dynamic pricing practices could meet the definition of 'unfair' under the UCPD.

For example:

A dynamic pricing practice where a trader raises the price for a product during the booking process, in particular after the consumer has put it in his digital shopping cart or proceeds to payment, without giving the consumer reasonable time to complete the transaction, could be considered contrary to professional diligence or as aggressive practice under Articles 8 and 9 of the UCPD.

Price discrimination is where a trader applies different prices to different consumers or groups of consumers for the same goods or services. The UCPD does not, as such, prohibit traders from price discrimination as long as they adequately inform the consumer about the total price or how it is calculated. However, price discrimination may be prohibited by other rules.

In particular, the Services Directive ⁽³⁷⁰⁾ includes a general prohibition on price discrimination based on nationality and place of residence. Article 20 of the Services Directive stipulates that 'the general conditions of access to a service, which are made available to the public at large by the provider' may not 'contain discriminatory provisions relating to the nationality or place of

⁽³⁶⁸⁾ See also the pending Case C-102/20 *StWL Städtische Werke Lauf a.d. Pegnitz*, which will probably clarify the application of this prohibition to advertising displayed in the email inbox.

⁽³⁶⁹⁾ Forbrukerrådet, You can log out, but you can never leave, 14 January 2021.

⁽³⁷⁰⁾ Directive 2006/123/EC.

residence of the recipient'. However, Article 20 does not preclude 'the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria'.

In addition, direct or indirect price discrimination based on the nationality of the final customer or its residence or on the place of establishment of carriers or ticket vendors within the Union is explicitly prohibited by several sector-specific pieces of EU legislation. This applies to air transport ⁽³⁷¹⁾, maritime transport ⁽³⁷²⁾, rail transport ⁽³⁷³⁾ and bus and coach transport ⁽³⁷⁴⁾.

Price discrimination can take the form of **personalised pricing** based on online tracking and profiling the consumer's behaviour ⁽³⁷⁵⁾.

For example:

A consumer categorised as having 'higher purchasing power' could be recognised either by the computer's IP address or other means when the consumer visits the trader's website from its home computer. Prices proposed to this consumer could be, for example, on average 10 % higher than for a new customer or a consumer categorised as having 'lower purchasing power'.

The UCPD does not prevent traders from personalising their prices based on online tracking and profiling. **Article 6(1)(ea) CRD**, which was added by Directive (EU) 2019/2161, **requires traders to inform consumers about the fact that the price was personalised** on the basis of automated decision-making in case of distance and off-premises contracts. Furthermore, personalised pricing and offers may be combined with different unfair commercial practices, for example if in the context of the data-driven personalisation traders take advantage of 'undue influence' over the consumer under Articles 8 and 9 UCPD.

Traders that personalise prices by using consumers' personal data must also **comply with the GDPR and e-Privacy Directive**. This includes the requirement to only use automatic calling machines, facsimile machines (fax) or electronic mail for direct marketing if the subscriber or users have given their prior consent (Article 13 of the ePrivacy Directive), and the requirement that the data controller must stop sending direct marketing if the individual receiving it objects to its personal data being processed for that purpose, as stipulated in Article 21 GDPR. Furthermore, Articles 12-14 GDPR include information obligations regarding the processing of personal data, including the right to meaningful information on the existence of automated decision-making, and Article 22 GDPR grants the right not to be subject to a decision which produces legal effects concerning them or significantly affects them and which is based solely on automated processing of data, including profiling.

4.2.9. Gaming

Video games, mobile games and online games feature a variety of commercial practices that may raise fairness concerns under the UCPD, in particular for vulnerable consumers such as children and teenagers, who merit special protection under Article 5(3) UCPD (see section 2.6 on vulnerable consumers).

Games could include **in-game promotions and advertisements**, which increase the risk of hidden marketing and could amount to a **misleading practice under Articles 6 and 7 UCPD**, unless the commercial element is made sufficiently clear and distinguishable from gameplay. This concerns both in-game purchases and products available outside of the game. The disclosure has to take into account the medium in which the marketing takes place, including the context, placement, timing, duration, language and target audience.

⁽³⁷¹⁾ Cf. Article 23(2) of Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

⁽³⁷²⁾ Cf. Article 4(2) of Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway.

⁽³⁷³⁾ Cf. Article 5 of Regulation (EU) 2021/782 on rail passengers' rights and obligations.

⁽³⁷⁴⁾ Cf. Article 4(2) of Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport.

⁽³⁷⁵⁾ Traders' practices in this area are still developing. A 2018 Commission study did not find evidence of consistent and systematic personalised pricing across the Member States and markets covered. Price differences between personalisation and 'no personalisation' scenarios were observed in only 6% of situations with identical products. Where observed, price differences were small, the median difference being less than 1.6%. European Commission, Consumer market study on online market segmentation through personalised pricing/offers in the European Union (EAHC/2013/CP/04), https://ec.europa.eu/info/publications/consumer-market-study-online-market-segmentation-through-personalised-pricing-offers-european-union_en.

Furthermore, under **point No 28 of Annex I**, it is prohibited to include direct exhortations to children to buy products. This includes putting pressure on a child to buy an item directly or to persuade an adult to buy items for them. Studies have shown that children are less likely to notice and understand the commercial intent of advertisements in games, as compared to more direct advertisements on television ⁽³⁷⁶⁾.

When offering in-game purchases, traders must ensure that they comply with the information obligations in Article 7 UCPD and the CRD. The **main characteristics of the product** must be clearly described and the prices of **virtual items** must be clearly and prominently **displayed (also) in real currency**. If the price cannot reasonably be calculated in advance, the trader should indicate the manner in which the price is to be calculated. The prices of virtual items must be clearly and prominently displayed in real currency when the commercial transaction takes place.

When offering **‘early access’ games**, meaning games that are still in development, traders should be clear about what the consumer can expect, for example in terms of the content of the early access game and its development prospects.

Traders should make use of **platform-level parental controls** offered by the platform on which the game will be available (e.g. parental control tools that allow parents to disable spending).

Under Articles 7(2) and 7(4)(d) UCPD and Article 6(1)(g) CRD, consumers must be clearly informed about the **arrangements for payment** before each purchase. Under the CRD, any purchase requires the consumer's express consent and the trader needs to provide the consumer with the necessary information. Moreover, Article 64 of the Directive (EU) 2015/2366 on payment services requires payer's consent to execute the payment transaction and states that, in the absence of such consent, a payment transaction is considered to be unauthorised. Furthermore, the default setting for payments should not allow purchases to be made without the consumer's explicit consent (e.g. via a password). When the system provides for time slots for the validity of consent (e.g. a 15 minutes slot), traders should request consumer's explicit consent in relation to the applicable duration.

Certain commercial practices in games, including embedded advertisements, could amount to an **aggressive practice under Articles 8-9 UCPD**. This may be the case if the practices involve the use of behavioural biases or manipulative elements relating to, e.g. the timing of offers within the gameplay (e.g. offering micro-transactions during critical moments in the game), pervasive nagging or the use of visual and acoustic effects to put undue pressure on the player. Furthermore, commercial practices could be personalised and take into account specific information about the gamers' vulnerabilities. The combination of practices in a game (e.g. appeal to children or other vulnerable groups, use of micro-transactions, embedded and non-transparent advertising) exacerbate the consumer impact. In addition to the concerns related to children and young people, the increased susceptibility to commercial communications and manipulative practices could also affect adult gamers, especially during lengthy and immersive gameplay.

A related point of concern regards gaming content with **gambling elements**, such as addictive interface designs involving slot machines, certain loot/mystery boxes or betting. Some Member States consider such elements to fall under gambling legislation, which may entail additional requirements going beyond the UCPD ⁽³⁷⁷⁾, such as licencing authorisations, or banning the use of gambling elements in games altogether.

For example:

An online game uses algorithms to determine, on the basis of the playing habits of the user, its ‘risk taking score’ to personalise the timing of in-game offerings of loot boxes, the chances of obtaining a highly valued item in a loot box, the strength of adversaries in the game, all with the purpose of keeping them glued to the game and increase in-game spending. The algorithms are used to target addiction-prone players in particular. This may constitute an aggressive practice.

⁽³⁷⁶⁾ European Commission, Study on the impact of marketing through social media, online games and mobile applications on children's behaviour (EACH/FWC/2013/85/08), https://ec.europa.eu/info/sites/info/files/online_marketing_children_final_report_en.pdf.

⁽³⁷⁷⁾ Recital 9 UCPD allows Member States to further regulate business-to-commercial practices involving gambling activities. For example, gambling regulators in BE, NL and SK have considered that certain types of loot boxes fulfil the conditions of gambling.

The presence of **paid random content** (e.g. loot boxes, card packs, prize wheels) should be clearly disclosed to the consumer, including an explanation of the **probabilities of receiving a random item**. For example, **loot/mystery boxes** are in-game content that generally include random items that have relevance in the game (e.g. weapons, skins, game currency, advancement options) ⁽³⁷⁸⁾. The sale of loot boxes in games must comply with the information obligations under the CRD and UCPD concerning the price and main characteristics of the product.

For example:

A national authority received commitments from a game producer about the information presented about in-game purchases, including loot boxes. The authority noted that maximum clarity and transparency is needed for consumers and parents as to whether such purchases can be made, especially in relation to loot boxes, where randomness is a main feature ⁽³⁷⁹⁾.

In the area of gaming apps, in 2013-2014 the Commission and national authorities tackled unfair practices concerning **games that offer in-app purchases** and that are likely to appeal to or to be played by children ⁽³⁸⁰⁾. Their common position highlighted that under No 20 of Annex I and Article 7(4)(c) UCPD and Article 6(1)(e) CRD, **only games where in-app purchases are optional can be presented as ‘free’ without misleading consumers**. Conversely, a game cannot be marketed as ‘free’ if the consumer cannot play the game in a way that can be reasonably expected without making in-app purchases. This is to be assessed on a case-by-case basis for each app that includes in-app purchases. It was also underlined that a game found to be in compliance with point No 20 of Annex I as concerns the use of the word ‘free’, can still be assessed under other provisions of the UCPD, such as Articles 6 to 9, to make sure that other elements, like how price information is displayed, are not misleading or aggressive. Furthermore, point No 28 of Annex I and Article 5(3) UCPD prescribe that games targeted at children, or which traders can reasonably foresee to be likely to appeal to children, must not contain direct exhortations to children to buy additional in-game items.

4.2.10. Use of geo-localisation techniques

When shopping in/from another Member State, consumers are sometimes subject to outright refusals by traders to sell, or to price discrimination, based on the place of residence or nationality of the consumer. Such practices can take place online and when shopping over the counter. Traders may use geo-localisation techniques, e.g. on the basis of the consumer’s IP address, residence address, country of issue of credit cards etc., to either deny the sale of a product to the consumer, to automatically reroute them to a local webstore or for price discrimination purposes.

Traders may have different reasons for denying access to a product or to apply different prices based on geographical information, such as higher delivery cost or additional legal obligations for the trader. As regards the denial of sale or rerouting, according to Article 8(3) of the CRD, traders must inform consumers about delivery restrictions at the latest at the beginning of the ordering process. On the basis of Article 7(5) UCPD, this information requirement qualifies as ‘material’ under the UCPD. On the other hand, if a trader complies with the information requirement of Article 8(3) CRD, such denial of sale or rerouting is not an unfair commercial practice *per se* under the UCPD. However, according to the facts of the individual case, such practices could lead to unfair commercial practices.

Such practices may also constitute an infringement of other areas of EU law. Since 3 December 2018, the **Geo-Blocking Regulation** ⁽³⁸¹⁾ prohibits online traders to discriminate between EU customers based on their nationality, residence or establishment. The Commission issued detailed guidance on the regulation in its Questions & Answers document ⁽³⁸²⁾. For online services related to non-audiovisual works protected by copyright (such as e-books, video games, music and software), the non-discrimination provision – i.e. the obligation to allow foreign customers to access and benefit from the same offers as local customers – does not apply under the Regulation. However, other rules in the Geo-Blocking Regulation, such as those prohibiting the discriminatory blocking of access to online interfaces and re-routing without the customer’s prior consent (Article 3) as well as discrimination for reasons related to payment (Article 5), do apply to the aforementioned services.

⁽³⁷⁸⁾ For more information on loot boxes, see the European Parliament’s study ‘Loot boxes in online games and their effect on consumers, in particular young consumers’ (PE 652.727).

⁽³⁷⁹⁾ AGCM, Electronic Arts, bulletin no. 41-20 5 resolution of 30 September 2020.

⁽³⁸⁰⁾ Press release of 18 July 2014: http://europa.eu/rapid/press-release_IP-14-847_en.htm.

⁽³⁸¹⁾ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60 I, 2.3.2018, p. 1).

⁽³⁸²⁾ European Commission, Questions & Answers on the Geo-blocking Regulation in the context of e-commerce, 22 March 2018.

In addition, Article 20 of the **Services Directive** obliges Member States to ensure that companies do not treat consumers differently on the basis of their place of residence or nationality, unless justified by objective criteria. Both laws concern the outright refusal to sell, including automatic re-routing, and the application of different prices taking place online or offline.

Geo-blocking or filtering may also violate **competition law** ⁽³⁸³⁾. For example, on 20 January 2021, the Commission fined five video game publishers and one gaming platform for their geo-blocking practices ⁽³⁸⁴⁾.

4.2.11. Consumer lock-in

Consumers may sometimes find themselves limited in their choice, experiencing a loss of quality of products they bought, unfavourable changes in contractual terms and/or paying inflated prices due a provider lock-in. This is facilitated by products or marketing designed to create lock-in, and markets that lack competition or transparency. This is especially true for digital markets with proprietary standards that foster a lack of interoperability.

For example, when consumers decide on a mobile phone, they also choose the app store that comes with the operating system. They also start a path-dependent process that strengthens lock-in when they buy other internet of things (IoT) products that are only interoperable with their mobile ecosystem. Once this choice is made, it is difficult for consumers to move between ecosystems without financial loss (apps and other (IoT) hardware), loss of time (restoring personal information, settings etc.) and loss of data. Other examples include purchased digital media, which may become inaccessible once the contract with the trader ends, or car repairs, which the consumer must execute at garages certified by the car producer, because only these have access to the full set of diagnostic data. Consumers may also be locked in to a given (national) version of a given ecosystem, for instance on the basis of the location data provided in the registration of the user's profile, so that using the same profile in another version of the interface or ecosystem may entail the loss of all data and content acquired in the original version.

The UCPD generally reduces the risk of lock-in for consumers with Article 9(d) UCPD by **preventing traders from creating barriers to switch or cancel the contract**. For assessing whether a practice is aggressive, it stipulates that account must be taken of '*any onerous or disproportionate non-contractual barriers imposed 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*'. This provision has a broad scope of application that can cover various non-contractual barriers.

The Court has provided further guidance on a specific lock-in scenario. In the *Sony* case, the Court examined the practice of selling a **computer with pre-installed software** (including the operating system) ⁽³⁸⁵⁾. The Court stated that the sale of a computer without the option for the consumer to purchase the same model of computer not equipped with pre-installed software does not in itself constitute an unfair commercial practice within the meaning of **Article 5(2) UCPD**, unless there are additional circumstances at play that make the practice contrary to the requirements of professional diligence and materially distort or is likely to materially distort the economic behaviour of the average consumer with regard to the product. In that regard, the Court has already stated that, particularly if correct information is provided to consumers, a combined offer of different products or services can satisfy the requirements of fairness laid down in Directive 2005/29/EC ⁽³⁸⁶⁾. Moreover, the Court confirmed in *Sony* that the failure to indicate the price of each of those items of pre-installed software in the computer does not constitute a misleading commercial practice within the meaning of **Article 5(4)(a) and Article 7 UCPD** ⁽³⁸⁷⁾.

⁽³⁸³⁾ See section 4.3.2.5 of the Commission Staff Working Document accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry (SWD(2017) 0154 final).

⁽³⁸⁴⁾ Press release of 20 January 2021: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_170.

⁽³⁸⁵⁾ Case C-310/15, *Sony*, 7 September 2016.

⁽³⁸⁶⁾ Joined cases C-261/07 and C-299/07, *VTB-VAB*, 23 April 2009, para. 66.

⁽³⁸⁷⁾ *Ibid.*, para. 47-52.

In addition to EU consumer protection rules, EU competition rules are in place to prevent market imbalances. The possible risks of lock-in for consumers due to the lack of interoperability of IoT devices was part of the motivation for the sector enquiry on the consumer IoT, opened on 16 July 2020 ⁽³⁸⁸⁾. In addition, the Commission's proposal for a Digital Markets Act aims to address consumer lock-in risks through new obligations for gatekeeper platforms ⁽³⁸⁹⁾.

When switching providers, Article 20 **GDPR** and Article 16(4) of the **Digital Content Directive** ⁽³⁹⁰⁾ give individuals the right to take with them, respectively, their personal data and any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, thus limiting the effects of lock-in practices ⁽³⁹¹⁾. Furthermore, Articles 5(1) (g) and (h), and Articles 6(1) (r) and (s) of the **CRD** help consumers identify lock-in situations in advance by requiring the trader to inform the consumer before the conclusion of the contract of the functionality, compatibility and interoperability of goods with digital elements, digital content and digital services. Finally, Article 3 of the Geo-blocking Regulation ⁽³⁹²⁾ ensures that access to the online interface (including app stores) is provided, regardless of the customer's nationality, place of residence or place of establishment.

4.3. Travel and transport sector

4.3.1. Cross-cutting issues

Unfair commercial practices may arise in the pre-booking, booking and post-booking stages of travel and transport services, such as misleading advertising and other manipulative practices, the lack of material information or providing misleading information, drip pricing practices, unfair contract terms, problems related to cancellations, insufficient assistance in case of delays or cancellations, as well as ineffective complaint handling systems.

The UCPD applies not only to the trader who actually provides the travel and transport service but also to '**any other person acting in his name or on his behalf**' (Article 2(b)). The provisions of the UCPD, in particular the information requirements laid down by Articles 6 and 7, are also applicable not only to airlines, hotels or car rental companies, but also to **intermediaries** – such as travel booking websites, comparison tools or metasearch websites – operating between them and consumers.

For example:

Both the airline and the online travel agent offering flight tickets to consumers ⁽³⁹³⁾ in the name of the airline or on its behalf should inform consumers whether luggage is included in the price for the flight or whether it is subject to an extra fee. Both should also inform passengers whether flights can be rebooked or refunded.

Article 7(4) lists certain pieces of information to be regarded as material in **invitations to purchase**, for example, for a flight or train ticket, accommodation or a rental car, if the information is not already apparent from the context. Failing to provide this information could in some cases be regarded as a misleading omission. The types of information covered by this point include in particular:

- the product's main characteristics;
- the trader's identity;

⁽³⁸⁸⁾ Commission Decision of 16.7.2020 initiating an inquiry into the sector for consumer Internet of Things related products and services pursuant to Article 17 of Council Regulation (EC) No 1/2003 (C(2020) 4754 final). See the Preliminary Report published on 9 June 2021, which indicates concerns as to the lack of interoperability, for example regarding certain providers of voice assistants and operating systems: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2884.

⁽³⁸⁹⁾ Proposal for a regulation on contestable and fair markets in the digital sector (COM(2020) 842).

⁽³⁹⁰⁾ Directive (EU) 2019/770.

⁽³⁹¹⁾ The relevant right in the GDPR only applies when personal data is processed based on consent or contract and would be ported between different controllers. However, this right would not apply where the transmission concerns the move to different versions of the service provided by the same trader, that is the same controller under the GDPR.

⁽³⁹²⁾ Regulation (EU) 2018/302. See also the position of the Commission as regards the EP question 470/21: https://www.europarl.europa.eu/doceo/document/E-9-2021-000470-ASW_EN.html.

⁽³⁹³⁾ The concept of 'passenger' is not defined under the sectorial regulations on passenger rights, and is therefore broader than the concept of 'consumer' under the UCPD, in the sense that the passenger rights regulations apply to all passengers, with no distinction as to the purpose of travel. On the other hand, only the consumer of transport services (see Article 2(a) of the UCPD – explained at Section 4.4.2) is subject to the UCPD.

- the price inclusive of taxes;
- the arrangements for payment;
- the complaint handling policy.

Invitations to purchase are further discussed in section 2.9.5.

Article 7(4)(b) requires traders to provide their **geographical address and identity**. Under Article 7(5) in combination with Article 5(1)(c) of the e-Commerce Directive, the trader's email address is also material information under the UCPD. This information should be easy to find (i.e. not in the general terms and conditions or on separate information pages/links) and directly and permanently accessible.

As regards **complaint handling**, under Article 7(4)(d) of the UCPD, it should be clear to the consumer whom to contact in case of queries or complaints. The consumer should be given clear instructions about how to complain in the event of a problem, for example through an email address and telephone number.

For questions on the language of terms and conditions, please see section 2.9.3 on the provision of certain information in another language.

Traders – including any intermediaries facilitating business to consumer transactions – should ensure that the price of tickets is transparent from the outset, already from the advertising stage as well as during the booking process.

For questions on the **discrimination regarding ticket prices**, please see section under 4.2.8 on pricing practices.

In particular, under Articles 6(1)(d) and 7(4)(c), **the total price to be paid must at all times be indicated** and include the applicable charges and taxes which are unavoidable and foreseeable at the time of publication/booking, including payment surcharges. For example, for air transport, as required by sector-specific legislation ⁽³⁹⁴⁾, the final price to be paid shall at all times be indicated and include the applicable air fare or air rate as well as all applicable taxes, charges, surcharges and fees which are unavoidable and foreseeable at the time of publication.

Prices for flights or hotel rooms may change very rapidly. For example, when a consumer looks for a flight ticket on the platform of an online travel agent the price may change between the moment the consumer starts searching for a ticket and the moment they decide to make a purchase. If such price changes are truly due to the dynamic nature of the market and thus outside of the control of the online travel agent, they will have an impact on the online travel agent's possibilities to ensure that the price it advertises is at all times fully correct. The professional diligence obligation in Article 5(2) the UCPD suggests that traders that are aware of the possibility of sudden price changes have to **make this clear to the consumers when advertising prices**.

For example:

- A trader offering package holidays mentioned the price of an insurance policy in the total price of a product. However, the insurance policy was not mandatory but optional. A national authority found this to be misleading ⁽³⁹⁵⁾.
- Charging tourists for supplementary fuel costs without indicating how this charge was calculated and without providing consumers with proper documentation was considered to be a misleading omission, a misleading action and an aggressive practice by a national authority ⁽³⁹⁶⁾.
- A trader offering holiday flats omitted to indicate in the price mandatory costs such as cleaning costs, city taxes and additional service charges for booking. A national court found this practice to be in breach of professional diligence and a misleading omission ⁽³⁹⁷⁾.

In the case where a trader offers additional (optional) services for purchase, the information on **optional charges should be prominently displayed** and distinguished from the main service; traders should **not mislead consumers regarding**

⁽³⁹⁴⁾ Article 23(1) of the Air Services Regulation (EC) No 1008/2008.

⁽³⁹⁵⁾ 1 As 59/2001 – 61, Blue Style s.r.o. v Czech Trade Inspectorate, 22 June 2011.

⁽³⁹⁶⁾ PS3083, Teorema Tour – Adeguamento costo carburante aereo, 26 August 2009.

⁽³⁹⁷⁾ OLG Hamm, 06.06.2013, Az. I-4 U 22/13.

the purchase of additional services. Optional costs may for instance be: the cost for a single room, non-compulsory insurance, choice of seat or checked luggage (as opposed to hand luggage) ⁽³⁹⁸⁾. Consumers should be informed about the existence of non-mandatory costs in invitations to purchase and in any case, **at the latest, at the start of the booking process.** It should also be **made clear that these costs are optional**, and consumers **should not be misled** regarding their decision to purchase additional services ⁽³⁹⁹⁾.

These requirements follow in particular from Articles 6(1)(b) and (d) and 7(4)(a) and (c) UCPD. Practices that contravene these principles could also, depending on the circumstances be considered contrary to the requirements of professional diligence, cf. Article 5(2) UCPD.

In addition to the rules of the UCPD, the CRD precludes the use of default options the consumer has to reject in order to avoid additional payments rather than requesting the **consumer's express consent to extra payments**, such as in the case of pre-ticked boxes on websites. Article 22 of that Directive provides that *'If a trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.'*

Apart from cases of pre-ticked boxes there may be other cases where traders who market their services online offer additional services in an unclear or ambiguous manner, such as hiding the option of **not** booking any further services (see also section 4.2.7 on dark patterns). Such commercial practices may be considered as misleading, aggressive or incompatible with professional diligence.

Since such practices have been observed in particular in the air transport sector and given the existence of additional rules in that sector, examples are given under section 4.3.4.

4.3.2. Package travel

Directive (EU) 2015/2302 on package travel and linked travel arrangements (Package Travel Directive) contains provisions on the combination of different travel services, i.e. carriage of passengers, accommodation, rental of motor vehicles ⁽⁴⁰⁰⁾ and other tourist services, which are offered to travellers.

The Package Travel Directive inter alia regulates the pre-contractual information which traders have to give to travellers, including specific information on the services included in a package and the total price of the package inclusive of taxes and, where applicable, of all additional fees, charges and other costs. Under the Directive, traders also have to **inform travellers prominently whether the offered services constitute a package or only a linked travel arrangement**, with a lower level of protection, and have to provide information on the level of protection applying to the relevant concept, using standardised information forms.

Traders are also obliged to inform travellers on optional or compulsory insurance to cover the cost of cancellation by the traveller or the cost of assistance in the event of accident, illness and death.

The Package Travel Directive does not prevent the application of the **UCPD to packages and linked travel arrangements in complement to its specific rules.**

4.3.3. Timeshare contracts

Directive 2008/122/EC of the European Parliament and of the Council ⁽⁴⁰¹⁾ (Timeshare Directive) grants certain consumer protection rights regarding timeshare, long-term holiday products, resale and exchange contracts. In particular, it lays down:

- strict rules on traders' pre-contractual and contractual information obligations;
- the consumer's right to withdraw from the contract within 14 calendar days;
- a ban on advance payments during the withdrawal period;

⁽³⁹⁸⁾ In Case C-487/12, *Vueling Airlines*, 18 September 2014, the Court found that hand baggage must be considered, in principle, as constituting a necessary aspect of the carriage of passengers and that its carriage cannot, therefore, be made subject to a price supplement, on condition that such hand baggage meets reasonable requirements in terms of its weight and dimensions, and complies with applicable security requirements.

⁽³⁹⁹⁾ For air transport, Art. 23.1 of the Air Services Regulation requires that optional price supplements are communicated in a clear, transparent and unambiguous way at the start of any booking process and that their acceptance by the customer is on an 'opt-in' basis.

⁽⁴⁰⁰⁾ Separate type of travel service only under Directive (EU) No 2015/2302.

⁽⁴⁰¹⁾ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, p. 10).

- a ban on advertising or selling such products as an investment.

The UCPD provides protection to consumers complementary to the protection offered by the Timeshare Directive.

The research undertaken to support the Commission report evaluating the Timeshare Directive⁽⁴⁰²⁾ points to certain recurrent problems in this sector, in particular in some popular holiday destinations in some EU Member States:

- **Misleading information** before the contract is signed, giving buyers the wrong impression that the choice of available holiday places is practically unlimited or that the contract can be easily sold or exchanged. Often consumers discover only sometime after the signature of the contract that this information is incorrect.
- **Aggressive selling methods** consisting in potential buyers being put under considerable pressure, for instance being 'locked' in a room where endless presentations take place and from where they are sometimes not allowed to leave unless they sign the contract.

The UCPD addresses these practices through its provisions on misleading actions (in particular Article 6(1)(b)) and on aggressive commercial practices (Articles 8 and 9).

Furthermore, the Commission report on the Timeshare Directive pointed to recurrent consumer problems with the termination of timeshare contracts. The report concludes that this aspect can be successfully addressed at the level of national law and better enforcement of relevant EU consumer law instruments.

4.3.4. Issues relevant in particular to air transport

When advertising flight options, traders should ensure that statements regarding the **availability of seats and flights** (e.g. 'last seat available') are provided in a clear and truthful manner. Such statements include relevant qualifications, where necessary (e.g. 'last seat available on this website at this amount'). When **advertising specific prices** for flight options (e.g. 'prices starting from 19.99 EUR'), the offered price must be available in quantities that are reasonable, having regard to the scale of the advertising made. Furthermore, traders should only **present offers as time-limited** if they will not be available at the same price afterwards.

In addition to raising concerns about professional diligence under Article 5(2) UCPD and misleading practices under Articles 6 and 7 UCPD, the above-mentioned practices could fall under prohibitions in Annex I point No 5 (bait advertising), No 7 (false or misleading scarcity claims) and No 18 (inaccurate information on market conditions or on the possibility of finding the product).

A **flight's 'main characteristics'** within the meaning of Articles 6(1)(b) and 7(4)(a) UCPD should include the existence of stop overs, the precise indication of the flight's place of destination and estimated flight time.

This is particularly relevant for airlines which sometimes organise flights from airports located at a certain distance from a big city, but use the name of that city in their marketing. In some cases, such commercial practices may mislead consumers as to the airport's actual location and be likely to cause consumers to take transactional decisions they would not have taken otherwise. Indeed, some consumers could prefer paying a higher price in return for arriving at an airport closer to the city of destination.

For example:

Indicating a destination as 'Barcelona' when the airport is actually located in the city of Reus which is 100 km from Barcelona is likely to be considered as deceiving.

On top of the requirements of Articles 6(1)(d) and 7(4)(c) UCPD to display the **price** inclusive of unavoidable and foreseeable fees and taxes, Article 23(1) of the **Air Services Regulation (EC) No 1008/2008** provides that *'the final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication'*.

The Regulation also requires:

- the indication of the **final price to be broken down into components** (e.g. air fare, taxes, airport and other charges and surcharges);
- that **optional price supplements** are communicated in a clear, transparent and unambiguous manner at the start of the booking process;

⁽⁴⁰²⁾ Report on the evaluation of Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (COM(2015) 0644 final).

— that the customer's **acceptance of optional price supplements must be on an 'opt-in' basis**.

The Court has clarified that price elements that are unavoidable and foreseeable under Article 23(1) include passengers' check-in fees whose payment cannot be avoided because there is no alternative method of checking-in free of charge, the VAT applied to fares for domestic flights, and administrative fees for purchases made by means of a credit card other than that approved by the air carrier. By contrast, optional price supplements include passengers' check-in fees whose payment can be avoided by using a free check-in option and the VAT applied to optional supplements relating to domestic flights ⁽⁴⁰³⁾.

Where travel service providers who market their services online breach the CRD or the Air Services Regulation, aspects of the infringing practices that are not specifically regulated by Articles in these sector-specific legal instruments could be considered 'unfair' under the UCPD to the extent that they are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. This must be assessed on a case-by-case basis.

For example:

- A trader uses pre-ticked boxes or offers additional services in an unclear or ambiguous manner by hiding the possibility not to book any further services or by making it difficult for consumers not to select the additional services. By doing so, the trader could cause consumers to accept additional services which they would not have chosen otherwise.
- The price of flight tickets does not in most cases include the price of travel insurance. The practice where consumers who do not wish to buy travel insurance are required to click on the 'no insurance' option when booking a flight ticket is likely to fall under Article 22 of the Consumer Rights Directive and Article 23(1) of the Air Services Regulation. Even before the entry into application of the Consumers Rights Directive, some national authorities had taken action against such practices under the UCPD. Similarly, the practice where consumers who do not wish to purchase travel insurance are required when booking a flight ticket to select a 'no insurance' option hidden among a list of potential countries of residence had been considered as unfair because it was incompatible with professional diligence (Article 5(2) UCPD) or misleading (Article 6 or 7).

The information requirements of the Air Services Regulation qualify as **material information under Article 7(5) UCPD**. They add to the UCPD requirements under Article 7(4) as regards information about the total price of the flight ticket including whether consumers need to pay a development fee at the departing/arriving airport. In addition it should be recalled that, as discussed in section 1.2.1, where sector-specific or other EU law is in place and its provisions overlap with the provisions of the UCPD, the corresponding provisions of the *lex specialis* will prevail.

Information about **mandatory fees to be paid after the booking process**, for instance directly at the airport (e.g. development fee levied for all passengers departing from certain airports e.g. in Ireland and England) must be indicated and should be **prominently displayed by the transport carrier or the travel agent at the start of the booking process**.

If airlines or intermediaries selling flight tickets link the cost of the payment surcharge to the **means of payment** used, the initial price should include the cost of the most common method of payment and, as clarified the *Ryanair* case ⁽⁴⁰⁴⁾, the administrative fees for purchases made by means of a credit card other than that approved by the air carrier. When such surcharges cannot be calculated in advance, consumers should be properly informed about the manner in which the price is calculated or about the fact that they 'may be payable'.

For example:

If paying with an airline's loyalty card incurs a cost of EUR 1,5, while paying with a credit card costs EUR 6, the price indicated in the invitation to purchase and at the start of the booking process should include the price of the credit card. Moreover, most consumers will probably not be able to pay with the airline's loyalty card.

⁽⁴⁰³⁾ Case C-28/19, *Ryanair*, 23 April 2020.

⁽⁴⁰⁴⁾ Case C-28/19, *Ryanair*, 23 April 2020.

In addition, Article 19 of the CRD prohibits traders from **charging the consumer fees for using a particular means of payment that exceed the cost borne by the trader** for the use of such means. This should apply to all kind of fees which are directly linked to a means of payment, regardless of how they are presented to consumers.

For example:

Fees referred to as administration, booking or handling fees, which are commonly used in the online ticketing sector, especially by airlines and ferry companies, and also in online sales of tickets for events, should be covered by Article 19 if they can be avoided by using a specific means of payment.

Article 23(1) of the Air Services Regulation requires that air fares and air rates available to the general public include the applicable conditions when offered or published in any form. The Court also emphasised in the *Air Berlin* case ⁽⁴⁰⁵⁾ that Article 23(1) of the Air Services Regulation requires online booking systems to display to consumers the final price to be paid whenever prices of air services are shown.

Likewise, information concerning the **luggage policy**, including the hand luggage allowance, luggage size and all applicable fees, should also be prominently displayed. Any additional cost or fee in that regard must be clearly indicated ⁽⁴⁰⁶⁾. Changes to pre-existing luggage policies must be carefully communicated to consumers in order to avoid misleading them under in particular Article 7(1), (4) and (5) UCPD. An average consumer may have reasonable expectations on what the luggage policy entails, such as the inclusion of standard hand luggage that meets reasonable requirements in terms of its weight and dimension in the price of the ticket ⁽⁴⁰⁷⁾.

For example:

A national court ordered an airline to refund a customer who was charged for taking a carry-on bag without a special ticket, and told the airline to remove the clause from its terms and conditions. The airline only allowed small bags into the cabin if they can be stowed under the seat in front, but larger bags of up to 10 kilos require a luggage fee, or a fee-paying priority boarding pass. The court ruled that the hand luggage policy generates a serious imbalance in the parties' contractual relationship to the detriment of the consumer ⁽⁴⁰⁸⁾.

Under Article 23(1) of the Air Services Regulation, **optional fees for seat selection** (the alternative being random allocation of seats to different parts of the aircraft) should be communicated in a clear, transparent and unambiguous way at the start of any booking process.

Under the UCPD, where traders advertise a specific flight ticket, they should also indicate the **cancellation policy** that applies to that ticket (e.g. whether there is no refund or whether it is possible to change tickets). This is particularly relevant where administrative fees charged by the air carrier/travel agent to the consumer for cancelling the ticket amount to the actual cost of the ticket itself. When cancellation fees charged by airlines are even higher than the price paid for the ticket, claims by the trader that cancellation is possible are likely to be misleading.

Also, procedures put in place should not make it difficult to **reclaim taxes and charges no longer due**. Otherwise, this could amount to a lack of professional diligence within the meaning of Article 5(2) UCPD and an aggressive practice under Articles 8 and 9, in particular Article 9(d) UCPD.

⁽⁴⁰⁵⁾ Case C-573/13, *Air Berlin*, 15 January 2015.

⁽⁴⁰⁶⁾ Case C-487/12, *Vueling*, 18 September 2014, para. 36.

⁽⁴⁰⁷⁾ *Ibid.*, para. 40.

⁽⁴⁰⁸⁾ Juzgado de lo Mercantil no 13 de Madrid – Juicio Verbal (250.2) 678/2019, 24 October 2019. The ruling was based on unfair contract terms legislation.

In case of **flight cancellations by the airline**, the latter must provide passengers with clear information about the applicable passenger rights under the Air Passenger Rights Regulation (EC) No 261/2004, and the relevant procedures that must be followed by the consumer. The failure to provide this information in a timely and accurate manner could amount to a lack of professional diligence under Article 5(2) UCPD and may therefore be considered misleading under the UCPD. For example, information on applicable rights and procedures should be presented in a clear way giving the same prominence to the different statutory options the passenger has in the event of a flight delay/cancellation. It should be communicated to the passenger in a timely and user-friendly fashion, for example in the form of a hyperlink in email or SMS communication.

For example:

- In 2017, several enforcement authorities took action in response to mass flight cancellations by an airline as a result of **crew and air traffic strikes**. The airline was found to act in a misleading manner when informing the passengers of the cancellations by not providing complete and adequate information on the consumers' rights to compensation pursuant to Regulation (EC) No 261/2004. The airline was requested by several authorities to inform consumers of the relevant rights arising from the cancellation and the procedures to be followed ⁽⁴⁰⁹⁾.
- In 2020, the Commission provided additional guidelines on EU passenger rights as well as a Recommendation on vouchers in response to massive cancellations due to the **COVID-19 pandemic** ⁽⁴¹⁰⁾. In case of cancellations by the airline, the transport provider must reimburse or re-route the passengers. Reimbursement in the form of a voucher is subject to the agreement by the passenger. If passengers themselves decide to cancel their journeys, reimbursement of the ticket (in cash or in the form of a voucher) is not regulated by Regulation (EC) No 261/2004 and therefore depends on the terms and conditions of the air carrier ⁽⁴¹¹⁾.
- In 2021, a consumer authority fined three airlines EUR 8,4 million in total due to breaches of the UCPD in the context of the COVID-19 pandemic. The airlines were found to breach the professional diligence rules when continuing to cancel flights for reasons of health emergency in periods when travel restrictions were lifted, proceeding to issue vouchers rather than offering passengers reimbursement for their tickets. The authority also found that the airlines provided misleading information and omissions, including through the use of procedures that encouraged or forced consumers to choose vouchers over reimbursement in money. Some of the airlines fined were found to also impose additional obstacles on voucher holders, such as requiring them to call a telephone number to redeem their vouchers ⁽⁴¹²⁾.
- The CPC network of consumer authorities launched a coordinated survey of a number of airlines in 2021 in respect of their flight cancellation and reimbursement practices during the COVID-19 pandemic, identifying problematic industry-wide practices. In particular, the CPC network found that reimbursement was often presented to consumers less prominently than vouchers and airlines were not proactively informing affected consumers about their rights, including information required under Regulation (EC) No 261/2004 ⁽⁴¹³⁾.

Practices related to **corrections of names on tickets** should be transparent and proportionate, taking into account the circumstances of the case. In addition to concerns regarding the misleading nature of the practices, the imposition of additional fees may in some cases amount to an aggressive practice under Articles 8 and 9 in particular, for example, the consumer is only informed about such fees at the airport, with the flight imminently leaving. If the practice stems from contractual terms, the Unfair Contract Terms Directive may be applicable (see section 1.2.4).

⁽⁴⁰⁹⁾ AGCM, PS10972 - Ryanair, 29 May 2018; Belgian Economic Inspection issued an injunction on 5 October 2017.

⁽⁴¹⁰⁾ Commission Notice – Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19' (C(2020) 1830 final) (OJ C 89 I, 18.3.2020, p. 1); Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic (OJ L 151, 14.5.2020, p. 10).

⁽⁴¹¹⁾ See also: the European Court of Auditors' Special Report 15/2021 on Air passenger rights during the COVID-19 pandemic: https://www.eca.europa.eu/Lists/ECADocuments/SR21_15/SR_passenger-rights_covid_EN.pdf

⁽⁴¹²⁾ AGCM, PS11865-PS11830-PS11821 – Ryanair, easyJet, Volotea, 24 May 2021, <https://en.agcm.it/en/media/press-releases/2021/6/PS11865-PS11830-PS11821->

⁽⁴¹³⁾ Press release of 28.6.2021: https://ec.europa.eu/commission/presscorner/detail/en/mex_21_3283

For example:

A consumer authority fined an airline for the application of a penalty to consumers - initially consisting in payment for a new ticket to be able to use the service already purchased and, subsequently, a fee of EUR 50 per route - in cases of incorrect registration of the passenger's name at the time of booking, specifically for cases of omission of any middle names or surname or in the case of alteration/lack of some letters. The airline did not provide any advance information regarding the consequences of incomplete registration and some of the discrepancies were due to the airline's own system, e.g. limited space available for inserting all names/surnames of passengers or misalignment between operating interfaces with websites of intermediaries ⁽⁴¹⁴⁾.

4.3.5. Issues relevant in particular to car rental

The provisions of the UCPD apply both to the traders offering the car rental service and to intermediaries, such as booking or comparison websites. In 2017, the Commission and national authorities obtained commitments from five car rental companies, in accordance with EU consumer law, concerning the following practices: ⁽⁴¹⁵⁾

- Include all charges in the **total booking price**: a headline price on the website should match the final price consumers have to pay, including all additional costs such as specific fuel service charges, airport fees, 'young driver surcharges', or the 'one way fee' if the return location differs from the pick-up location;
- Clearly description of the **key rental services in the terms and conditions** in all national languages, in particular about the main characteristics of the rental such as **mileage included, fuel policy, cancellation policy and deposit requirements**, etc.
- Clear information in the price offer about the **price and details of optional extras**, in particular for **insurance waivers** that reduce the amount due in case of damage and notably what the driver may still have to pay.

Traditionally, car rental companies provide vehicles with a **full tank and require consumers to return the vehicle with a full tank after rental**. However, consumers complained that some traders make consumers pay an additional cost for the full tank when taking possession of the vehicle and then expect the consumers to return the car with an empty tank, without providing any reimbursement if there is still fuel in the tank when the car is returned.

Under the UCPD, subject to a case-by-case assessment, such commercial practice **could be considered unfair** where traders did not comply with the **information requirements of Articles 6 and 7** of the Directive. When car rental companies rent a vehicle with a full tank, information that the consumer will have to pay for the fuel ahead could in some cases be considered as material information on the basis of Articles 6(1)(b) and (d), 7(1) and 7(4)(a) and (c). The cost will be likely to qualify as **non-optional** and thus be part of the total price of the product under Articles 6(1)(d) and 7(4)(c) of the Directive, information on which must be provided from the beginning of the booking process.

A commercial practice by which consumers have to pay for significantly more fuel than they actually use could also in some circumstances be contrary to the requirements of **professional diligence** laid down in Article 5(2) UCPD.

For example:

The duration of the rental period and the local situation could be taken into account when assessing whether the practice of charging consumers for the full tank is unfair. For example, the fact that a vehicle is rented for a short time (e.g. 2 or 3 days) or the geographical location (e.g. a car rented on a small island) could make it unlikely that the consumer will be able to empty the tank.

⁽⁴¹⁴⁾ AGCM, PS11076 - Blue Panorama Airlines, 31 May 2019, <https://en.agcm.it/en/media/press-releases/2019/5/Blue-Panorama-Airlines-fined-one-million-euro>.

⁽⁴¹⁵⁾ Press release of 19 January 2017: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_86. See also the follow-up press release of 25 March 2019: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1790.

Under Articles 6(1)(b) and (d) and 7 (4)(a) and (c), consumers should be clearly informed about the **main characteristics and the price of the rental service**. The main characteristics and the price of a car rental contract could, for example, include information about the type of vehicle, the costs, the extent of waivers and excesses and possible options (such as winter tyres and child seats).

For example:

- It could be misleading for a trader to claim '0 liability' if, in fact, an excess will always apply to the consumer in the event of damage, even at a small cost.
- It could be misleading to claim 'full insurance included' when, for example, the insurance does not cover damage to the roof and windshield.

Car rental companies must also take **specific national or local requirements** into account.

For example:

National law may require all vehicles to be equipped with snow tyres in winter. A company offering car rental in that Member State during the winter period should therefore provide vehicles with snow tyres. If snow tyres involve an additional cost, consumers should be informed about this non-optional cost right at the start of the booking process.

4.3.6. Issues relevant in particular to travel booking websites

The UCPD is applicable not only to the traders offering the travel service, but also to intermediaries such as travel booking websites ⁽⁴¹⁶⁾, which must comply with the key provisions addressed in previous sections. Consumers need to receive material information about the traders' identity, contact details, applicable cancellation policies and core aspects of travel safety, e.g. whether tourist accommodations are equipped with smoke and carbon monoxide detectors or whether passenger transport services are offered with vehicles that are adequately inspected and insured.

In 2019, the Commission and national authorities received commitments from **Airbnb**, in accordance with EU consumer law concerning the following practices ⁽⁴¹⁷⁾:

- Consumers must see the **total price in the search results page**, including all the applicable mandatory charges and fees (e.g. service, cleaning charges and local taxes);
- Clearly distinguishing if an accommodation offer is put on the market by a **private host or a professional**;
- Providing an easily accessible link to the **ODR platform** ⁽⁴¹⁸⁾ on its website and all the necessary information related to dispute resolution;
- Making it clear that consumers can **bring a case before the courts of their country of residence** and respecting the right to **sue a host** in case of personal harm or other damages;
- **Not unilaterally changing the terms and conditions** without clearly informing users in advance and without giving them the possibility to cancel the contract.

In 2020, the Commission and national authorities received commitments from **Booking** and **Expedia**, in accordance with EU consumer law, including on the following practices: ⁽⁴¹⁹⁾

- Ensuring the **clear presentation of price reductions and discounts**, including not presenting prices calculated in relation to different stay dates as a discount (e.g. by using a strikethrough or terms such as '% off') and making it clear if lower prices are only available to members of **reward programmes**;

⁽⁴¹⁶⁾ A 2020 Commission study investigated the business models of travel booking websites, in particular their advertising and marketing practices and the impact of such practices on the consumers' decision-making. European Commission, Behavioural study on advertising and marketing practices in travel booking websites and apps, 11 August 2020, <https://op.europa.eu/en/publication-detail/-/publication/d79a2522-ddd4-11ea-adf7-01aa75ed71a1>.

⁽⁴¹⁷⁾ Press release of 11 July 2019: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3990; common position of CPC authorities: https://ec.europa.eu/info/sites/info/files/final_common_position_on_airbnb_ireland_4.6.2018_en_002.pdf.

⁽⁴¹⁸⁾ <https://ec.europa.eu/consumers/odr>

⁽⁴¹⁹⁾ Press release of 18 December 2020: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2444.

- Making it clear when **payments** received by accommodation providers have **influenced their rankings in search results** and including information in search results if it **corresponds to the search criteria** (e.g. in case the results show hotels that are not available in the specified dates, then they should only be presented in an appropriate manner);
- Displaying statements about the **number of visitors and availability** in a clear manner and including the relevant qualifications, such as ‘limited rooms on this website’ or ‘for the same stay dates’;
- Not falsely presenting an **offer as time-limited** if the offer will continue to be available at the same price also afterwards;
- Not limiting or totally excluding **liability in connection to the performance of contractual obligations**, and not imposing a general and absolute obligation on the consumer to assume all possible risks.

4.4. Financial services and immovable property

Article 3(9)

In relation to financial services as defined in Directive 2002/65/EC and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.

Recital 9

‘financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers’.

4.4.1. Cross-cutting issues

In explanation of the rationale behind Article 3(9) of the Directive, the 2013 Commission Report on the application of the UCPD ⁽⁴²⁰⁾ noted that:

‘The main reasons are: the higher financial risk in respect of financial services and immovable property (as compared to other goods and services); the particular inexperience of consumers in these areas (combined with a lack of transparency, in particular of financial operations); particular vulnerabilities found in both sectors that make consumers susceptible to both promotional practices and pressure; the experience of the competent financial enforcement bodies with a nationally grown system; and finally the functioning and the stability of the financial markets as such.’

It follows from Article 3(9) UCPD that its rules provide for **minimum harmonisation** only for financial services and immovable property. Member States can therefore adopt more restrictive or prescriptive national rules as long as these rules comply with EU law.

In the *Citroën Belux* case, the Court ruled that Member States may lay down a general prohibition on combined offers made to consumers where **at least one of the components is a financial service** ⁽⁴²¹⁾. In this case, the combined offer made by Citroën was the inclusion of 6 months’ free comprehensive insurance with the purchase of a new Citroën car. Furthermore the Court clarified that Article 3(9):

‘[...] does not impose any limit as regards how stringent national rules may be in that regard or lay down any criteria regarding the degree of complexity or risk which those services must involve in order to be covered by more stringent rules.’ ⁽⁴²²⁾

The Commission’s study on how the UCPD applies to financial services and immovable property ⁽⁴²³⁾ showed that the **exemption has been widely used by Member States**. The study reveals that most of these additional rules consist of

⁽⁴²⁰⁾ See section 3.4.3 of the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, First Report on the application of Directive 2005/29/EC (‘Unfair Commercial Practices Directive’) (COM(2013)0139 final).

⁽⁴²¹⁾ Case C-265/12, *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)*, 18 July 2013, para. 19-23.

⁽⁴²²⁾ *Ibid.*, para. 25.

⁽⁴²³⁾ European Commission, Study on the application of the Unfair Commercial Practices Directive to financial services and immovable property (2011), <https://op.europa.eu/en/publication-detail/-/publication/5550d564-65af-47c8-b7e4-a44020ad4a78>.

sector-specific pre-contractual and contractual information obligations⁽⁴²⁴⁾. It also found that a significant number of bans predominantly concern direct selling and promotional practices⁽⁴²⁵⁾, practices that take advantage of particular vulnerabilities⁽⁴²⁶⁾, or the prevention of conflicts of interest⁽⁴²⁷⁾.

The Commission Report on the application of the UCPD noted that although extensive national rules exist, the UCPD has been cited as the legal basis in at least half of cases concerning unfair practices in the fields of financial services and immovable property⁽⁴²⁸⁾.

Article 5(2)(a) UCPD on the requirements of professional diligence seems particularly relevant to traders acting towards consumers within the fields of immovable property and financial services⁽⁴²⁹⁾. If the trader does not act with the standard of skill and care which can reasonably be expected from a professional within these fields of commercial activity, the consumer might suffer **significant economic consequences**.

The most commonly reported unfair practices (within the meaning of the UCPD) in relation to both financial services⁽⁴³⁰⁾ and immovable property concern a **lack of essential information at the advertising stage** and **misleading descriptions of products**⁽⁴³¹⁾. Online offers can lack information on the main characteristics of the consumer credit, or the initially displayed credit costs do not include all applicable charges or are not presented in a clear, intelligible and unambiguous manner, as required by Articles 7 (1), (2) and (4) of the UCPD⁽⁴³²⁾. These practices may also entail breaches of other consumer legislation, in particular the Consumer Credit Directive and the Unfair Contract Terms Directive.

4.4.2. *Issues specific to immovable property*

Whilst immovable property is traditionally regulated at national level, some important aspects thereof are, since March 2016, regulated at EU level⁽⁴³³⁾. The **UCPD's general rules typically complement both sector-specific EU law, as well as national, sometimes stricter, rules**.

There are some issues specific to the application of the Directive to this sector. Indeed, many consumers invest in real estate as an alternative to a pension fund. They buy a property with a view to letting it and receive rent instead of receiving interest as they would have done if investing in a financial product. This raises questions as to how the **notion of 'consumer' applies to real estate buyers**.

⁽⁴²⁴⁾ E.g. as regards financial services, specific information requirements in the banking sector (such as for the assignment of secured credit to a third person in Germany or an advertisement for money exchange services in Spain), investment services, insurance, financial intermediaries. For immovable property, information requirements related to the purchase of a property, the transaction itself, the real estate agent and construction contracts.

⁽⁴²⁵⁾ E.g. prohibition of cold calling, unsolicited emails, doorstep selling of mortgage loans and for a real estate agent to retain money without legal reason in Austria, doorstep selling of monetary credit in the Netherlands, combined offers in Belgium and France.

⁽⁴²⁶⁾ E.g. prohibition of usurious credit in most Member States, prohibition on advertising that a loan may be granted without documentary proof of the consumer's financial position in France, or on issuing, without prior consent of the legal representative, ATM cards to minors in Austria.

⁽⁴²⁷⁾ E.g. in Denmark, prohibition on banks financing their clients' purchase of shares issued by the bank itself; in France, prohibition on banks stopping their customers from using a credit insurance provider other than the one provided by the bank itself when the level of guarantee offered is similar.

⁽⁴²⁸⁾ With regard to mortgages, Directive 2014/17/EU on credit agreements for consumers (the Mortgage Credit Directive, 'MCD') has introduced specific rules concerning the conduct of business when providing credit to consumers (Article 7 of the MCD) and on the tying and bundling practices by creditors (Article 12 of the MCD).

⁽⁴²⁹⁾ For mortgages, see also the specific rules of the Mortgage Credit Directive (Directive 2014/17/EU) on conduct of businesses when providing credit to consumers (Article 7 MCD) and on standards for advisory services (Article 22 MCD) and the EBA Guidelines on Product Oversight and Governance available at: <https://www.eba.europa.eu/guidelines-on-product-oversight-and-governance-arrangements-for-retail-banking-products>.

⁽⁴³⁰⁾ For retail financial services see also the EBA Consumer Trends Report available at: <https://www.eba.europa.eu/eba-assesses-consumer-trends-20202021> and the Commission's evaluation of the Mortgage Credit Directive available at: <https://op.europa.eu/en/publication-detail/-/publication/e4a1db26-2f94-11eb-b27b-01aa75ed71a1>.

⁽⁴³¹⁾ COM(2013) 139 final, section 3.4.3.

⁽⁴³²⁾ A coordinated check of 118 websites advertising, or directly offering to contract, consumer credit online was carried out by consumer protection cooperation (CPC) authorities and the Commission in 2021. In 45 % of the websites flagged for further investigation, the website was identified with a possible breach of the UCPD. https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en#2021-mini-sweep-on-consumer-credit

⁽⁴³³⁾ Directive 2014/17/EU (Mortgage Credit Directive).

Under Article 2(a) of the Directive, any natural person who is **acting for purposes which are outside his trade, business, craft or profession** will qualify as a consumer. Consequently, the fact that a natural person buys an immovable property for investment purposes should not affect his status as a consumer, **as long as this is done outside the person's professional activities**. Therefore, the Directive will apply and protect, for instance, such a buyer who is misled by a real estate developer over the purchase.

For example:

A teacher in Germany decides to buy two flats in a holiday complex in Spain in order to rent them to other people and, at a later point in time, retire in Spain. As long as they do this outside their professional activities, they will qualify as a consumer under the Directive in relation to his flats in Spain.

The **notion of 'trader' may apply to landlords**. Under Article 2(b) of the Directive, any natural or legal person qualifies as a trader if they are **acting for purposes relating to his trade, business, craft or profession**. Consequently, the mere fact that a person lets an apartment or a house to somebody else should not make that person automatically qualify as a trader vis-à-vis their tenant. However, if that person receives an essential part of his/her income from renting apartments to other people, that person could in certain circumstances be considered a trader under the UCPD (see also section 2.2 on the concept of the trader).

Finally, in view of the importance and uniqueness of the decision that consumers make when purchasing immovable property, traders should pay particular attention to complying with the **information requirements in Article 6 and 7 UCPD**. In the context of the Unfair Contract Terms Directive, the Court has insisted on the importance of a family home as a fundamental right ⁽⁴³⁴⁾.

For example:

- Consumers that have bought apartments in certain property development projects have found that after the buildings were finished, the apartments were connected neither to a water supply nor to electricity. Information that this would be the case would be likely to qualify as material information in relation to the 'main characteristics of the product' both under Article 6(1)(b) and 7(4)(a) UCPD. The fact that an additional service would be necessary to connect the apartment to these facilities could also be material under Article 6(1)(e).
- The surface area of an immovable property could qualify as material information under Articles 6(1)(a), 6(1)(b) and 7(4)(a).
- The price of the property including VAT and all unavoidable charges, such as the selling agent or broker's commission, would be material information under Article 7(4)(c).

4.4.3. Issues specific to financial services

Since a robust set of EU sector-specific legislation exists in this sector, the 'safety net' character of the UCPD is particularly apparent here ⁽⁴³⁵⁾.

Financial services are defined by Directive 2002/65/EC of the European Parliament and of the Council ⁽⁴³⁶⁾ as 'any service of a banking, credit, insurance, personal pension, investment or payment nature' ⁽⁴³⁷⁾. Several types of sector-specific EU legislation are of relevance for consumer protection in relation to financial services. Examples would be:

- Directive 2014/65/EU on markets in financial instruments (MiFID 2);

⁽⁴³⁴⁾ See for example Case C-415/11, Aziz, para. 61 and Case C-34/13, Kusionova, para. 64.

⁽⁴³⁵⁾ Article 12 of the Mortgage Credit Directive prohibits tying practices. Moreover, recent pieces of EU legislation contain specific provisions on cross-selling practices concerning payment accounts (see Article 8 of Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features) and investment services (see Article 24 (11) of the Directive 2014/65/EU on markets in financial instruments). In addition, the Insurance Distribution Directive (Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19)) contains rules on distance selling.

⁽⁴³⁶⁾ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, p. 16).

⁽⁴³⁷⁾ Article 2(b) of Directive 2002/65/EC concerning the distance marketing of consumer financial services.

- Directive (EU) 2015/2366 on payment services;
- Directive 2008/48/EC on credit agreements for consumers;
- Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property;
- Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features;
- Directive (EU) 2016/97 on insurance distribution;
- Regulation (EU) 2015/751 of the European Parliament and of the Council ⁽⁴³⁸⁾ on interchange fees for card-based payment transactions;
- Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

Financial service products are often difficult to understand and can involve significant economic risks, so traders should take particular care to act with the standard of skill and care which can reasonably be expected from a professional within this field of commercial activity **cf. Article 5(2)(a) UCPD**.

For example:

Under Article 5(6) of the Consumer Credit Directive, creditors and, where applicable credit intermediaries should provide adequate explanations to consumers in order to place the consumer in a position enabling them to assess whether the proposed credit agreement is adapted to their needs and to their financial situation, where appropriate by explaining the pre-contractual information to be provided in accordance with Article 5(1) of the Consumer Credit Directive, the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer.

Traders should also not engage in **misleading practices** as set out in Articles 6 and 7 UCPD, such as:

- lack of information in advertising on the annual percentage rate of charge (APR) and the cost of credit;
- offers of misleading bargains for credit contracts with a low interest rate;
- lack of proper information on the legal obligations related to the signing of contracts.

For example:

- Traders should not exaggerate economic benefits, not omit information about financial risks to consumer and not over-rely on past performance on the financial product.
- The main characteristics of a financial product under Articles 6(1)(b) and 7(4)(a) could include information that a financial product will be calculated in a currency which is not that of the country where the contract is concluded ⁽⁴³⁹⁾
- Under Article 6(1)(d) and 7(4)(c), the presentation and calculation of fees and charges should include all costs incurred by the consumers, for example by including costs of the service related to fees for agents or intermediaries, or in relation to overdraft charges. The presentation and calculation of fees and charges should also clearly state that a specific low interest rate and/or charge is only applicable for a limited period of time.

Articles 8 and 9 set out criteria for assessing **aggressive commercial practices**. In particular, **point No 27 of Annex I** to the Directive refers to an aggressive commercial practice in the field of financial services and therefore must be considered **unfair in all circumstances**:

No 27 of ANNEX I

'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, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.'

⁽⁴³⁸⁾ Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ L 123, 19.5.2015, p. 1).

⁽⁴³⁹⁾ In case of foreign currency loans, Article 23 of the Mortgage Credit Directive (Directive 2014/17/EU) provides for specific rules aimed at limiting the exchange rate risk borne by consumers.

For example:

- In some circumstances, obstacles to switching ⁽⁴⁴⁰⁾ may be considered an aggressive commercial practice and therefore unfair on the basis of Article 9(d) ⁽⁴⁴¹⁾.
- In the insurance sector, point No 27 Annex I has been applied to situations where insurers refused to pay claims by compelling consumers who wanted to apply for compensation under an insurance policy to produce documents which could not be reasonably considered relevant to establish the validity of the request. In those cases, the traders systematically failed to respond to pertinent correspondence in order to dissuade consumers from exercising their contractual rights.

National authorities have extensively applied the UCPD in the field of financial services.

For example:

A national authority took legal action against certain banks for providing misleading information on the risks inherent in certain financial products, namely Lehman Brothers' bonds ⁽⁴⁴²⁾. When determining whether such practices were misleading, the authority took into account the fact that the consumers targeted by the banks for the sale of these bonds were ordinary current account holders not being familiar with these types of financial products.

⁽⁴⁴⁰⁾ Directive 2014/92/EU on the comparability of fees related to payment accounts, switching from and access to payment accounts introduces a specific procedure to be followed by payment account providers (Article 10) and requires them to inform consumers about their switching service (Article 14).

⁽⁴⁴¹⁾ On the same topic, see FISMA study on switching of financial services and products available at: <https://op.europa.eu/en/publication-detail/-/publication/a11e1d38-2562-11eb-9d7e-01aa75ed71a1/language-en>.

⁽⁴⁴²⁾ Ministry of Development, Directorate General for Consumers, Directorate for Consumer Protection, fine of EUR 1 000 000 imposed on Citibank PLC, Athens on 27 March 2009.

ANNEX

**List of Court cases mentioned in this Notice
(arranged by the year of the judgment)**

Case number and name	Issue(s)	Section(s) in the Notice
2009		
Joined cases C-261/07 Total Belgium and C-299/07 Galatea BVBA	— The full harmonisation character of the Directive precludes national legislation that provides for a blanket prohibition on combined offers, even if such national legislation affords a greater level of consumer protection. — Member States may provide for general prohibition, without taking into account the specific circumstances, only in respect of practices listed in Annex I of the Directive.	1.1. Material scope of application
2010		
C-304/08 Plus Warenhandelsgesellschaft	— The Directive has a wide material scope of application, including national legislation aimed at restricting anti-competitive practices that also impact consumers. — The Directive precludes a blanket prohibition on commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services, as such practices are not listed in Annex I of the Directive.	1.1. Material scope of application
C-540/08 Mediaprint	— Directive precludes a general national ban on sales with bonuses designed to achieve consumer protection as well as other.	1.1. Material scope of application
C-522/08 Telekom. Polska	— The Directive precludes national legislation that with certain exceptions, and without taking account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer. — This is the case even when such national legislation is permissible pursuant to the Framework Directive and the Universal Service Directive.	1.1. Material scope of application
2011		
C-122/10 Ving Sverige	— For a commercial communication to be capable of being categorised as an invitation to purchase, it is not necessary for it to include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity. — Using ‘entry-level prices’ is not contrary to the UCPD, provided that the final price cannot ‘reasonably be calculated in advance’.	2.9.4. The factual context and limits of the communication medium used 2.9.5. Material information in invitations to purchase – Article 7(4)

Case number and name	Issue(s)	Section(s) in the Notice
	— Extent of the information relating to the main characteristics of a product which has to be communicated in an invitation to purchase must be assessed on the basis of the context of that invitation, the nature and characteristics of the product and the medium of communication used.	
C-288/10 Wamo	— National rules prohibiting price reductions during pre-sales periods not compatible with the Directive in so far as it seeks to protect the economic interests of consumers.	1.1. Material scope of application
C-126/11 Inno	— National provision does not fall within the scope of the Directive 'if it aims solely, as argued by the referring court, at regulating relations between competitors and does not aim at protecting consumers.	1.1. Material scope of application

2012

C-428/11 Purely Creative	— Point 31 of Annex I prohibits any practice where in order to claim a prize, the consumer is required to pay money or incur any cost. — Such practices are prohibited even if multiple ways of obtaining the prize are available to the customer, some of which are free of charge. — It is irrelevant what the cost of claiming the prize is, as this practice is listed in Annex I, and therefore the Directive's intention is to avoid difficult assessments of the individual circumstances of each case, as would be the case when comparing the prize value with the cost of claiming the prize by the customer.	3.8. Prizes – No 31
C-559/11 Pelckmans Turnhout	— National prohibition to open shops 7 days a week found to only aim to protect the interests of workers and employees in the distribution sector and not intend to protect consumers.	1.1. Material scope of application
C-453/10 Pereničová and Perenič	— Erroneous information provided in the contract terms is 'misleading' within the meaning of the UCPD if it causes, or is likely to cause, the average consumer to take a transactional decision that he would not have taken otherwise.	1.2.4. Interplay with the Unfair Contract Terms Directive

2013

C-206/11 Köck	— National law allowing the announcement of a clearance sale only subject to the authorisation of the competent administrative authority considered to be aimed at the protection of consumers, and not solely at the protection of competitors and other operators in the market.	1.1. Material scope of application
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Case number and name	Issue(s)	Section(s) in the Notice
C-435/11 CHS Tour Services	— If a commercial practice satisfies all the criteria in Article 6(1) for being categorised as a misleading practice in relation to the consumer, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article (5)(2)(a).	2.7. Article 5 - professional diligence
C-59/12 BKK Mobil Oil	— A public law body charged with a task of public interest, such as the management of a statutory health insurance fund, can qualify as a 'trader'.	2.2. The concept of trader
C-265/12 Citroën Belux	— MS can lay down a general prohibition on combined offers made to consumers where at least one of the components of those offers is a financial service.	4.4. Financial services and immovable property
C-281/12 Trento Sviluppo	— Broad interpretation confirmed: 'transactional decision' covers not only the decision whether or not to purchase a product, but also decisions directly related to that decision, in particular the decision to enter the shop.	2.4. Transactional decision test
C-391/12 RLvS	— Where an operator's commercial practices are put to use by another undertaking, acting in the name or on behalf of that operator, the UCPD could, in certain situations, be relied on against both that operator and the undertaking, if they satisfy the definition of 'trader'. — The UCPD, in particular point 11 of Annex I, cannot be relied upon against newspaper publishers. The Directive therefore does not preclude the application of a national provision under which those publishers are required to identify specifically, in this case through the use of the term 'advertisement', any publication in their periodicals for which they receive remuneration, unless it is already evident from the arrangement and layout of the publication that it is an advertisement.	2.2. The concept of trader 2.3. The concept of commercial practice
C-343/12 Euronics	— Directive precludes a national provision, which aims at prohibiting sales at loss, only in so far as this provision follows also the aim of protecting consumers.	1.1. Material scope of application

2014

C-421/12 EC vs Kingdom of Belgium	— National rules which place a general prohibition on practices not referred to in Annex I, without providing for an individual analysis as to whether the practices are 'unfair' in the light of the criteria laid down in Articles 5 to 9 of that directive, are not permitted under Article 4 thereof and run counter to the complete harmonisation objective pursued by that directive.	1.2.5. Interplay with the Price Indication Directive
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Case number and name	Issue(s)	Section(s) in the Notice
	— Price promotions and total harmonisation character in light of the Price Indication Directive. — Omission by a trader of information which is required by national provisions allowed by the minimum clauses in the existing EU law instruments will not qualify as an omission of material information and thus not constitute a misleading omission under the Directive.	
C-515/12 ‘4finance’ UAB v Lithuanian Finance Ministry	— A pyramid promotional scheme constitutes an unfair commercial practice only where such a scheme requires the consumer to give financial consideration, regardless of its amount, 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.	3.2. Pyramid schemes – No 14

2015

C-388/13 UPC	— Neither the definitions set out in Articles 2(c) and (d), 3(1) and 6(1) of the Unfair Commercial Practices Directive nor the latter, considered as a whole, contain any indication that the act or omission on the part of the professional must be recurrent or must concern more than one consumer.	2.3. The concept of commercial practice
C-13/15 Cdiscount	— It is for national authorities and courts to decide whether a national provision is intended to protect consumer interests.	1.1. Material scope of application
Joined Cases C-544/13 and C-545/13 Abcur	— The application of the UCPD is not excluded even if other EU legislation also applies to a given set of facts. — Even where medicinal products for human use, such as those at issue in the main proceedings, fall within the scope of Directive 2001/83/EC, advertising practices relating to those medicinal products, such as those alleged in the main proceedings, can also fall within the scope of Directive 2005/29/EC provided that the conditions for application of that directive are satisfied.	1.2.1. Relationship with other EU legislation

2016

C-310/15 Sony	— The sale of a computer without the option for the consumer to purchase the same model of computer not equipped with pre-installed software does not in itself constitute an unfair commercial practice within the meaning of Article 5(2) UCPD, unless the practice is contrary to the requirements of professional diligence and materially distort or is likely to materially distort the economic behaviour of the average consumer with regard to the product.	4.2.11. Consumer lock-in
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Case number and name	Issue(s)	Section(s) in the Notice
	— The failure to indicate the price of each of those items of pre-installed software in the computer does not constitute a misleading commercial practice within the meaning of Article 5(4)(a) and Article 7 UCPD.	
C-476/14 Citroën	— In the case of conflict between the UCPD and the other rules of EU law regulating specific aspects of unfair commercial practices, the latter are to prevail and apply to those specific aspects. The Price Indication Directive 98/6/EC prevails as it governs specific aspects that relate to the indication, in offers for sale and in advertising, of the products' selling price.	1.2.5. Interplay with the Price Indication Directive
C-611/14 Canal Digital Danmark	— The assessment of a misleading omission in Article 7(1) and (3) must take into account the criteria relating to the context in which that practice takes place, even if not written in the national legislation but only in preparatory works. — Article 7(4) contains an exhaustive list of the material information that must be included in an invitation to purchase. The fact that a trader provides all that information does not preclude that invitation from being regarded as a misleading practice within the meaning of Article 6(1) or Article 7(2). — Where a trader states the price for a subscription so that the consumer must pay both a monthly charge and a 6-monthly charge, that practice must be regarded as a misleading omission under Article 7 if the price of the monthly charge is particularly highlighted in the marketing, whilst the 6-monthly charge is omitted entirely or presented only in a less conspicuous manner, if such failure causes the consumer to take a transactional decision that he would not have taken otherwise. — Where a trader divides the price of a product into several components and highlights one of them, that practice must be regarded as a misleading action under Article 6(1), since that practice would be likely to give the average consumer the false impression that he has been offered a favourable price and cause him to take a transactional decision that he would not have taken otherwise. The time constraints that may apply to certain communication media, such as television commercials, cannot be taken into account.	2.8.2. Price advantages 2.9.4. The factual context and limits of the communication medium used 2.9.5. Material information in invitations to purchase – Article 7(4)
C-667/15 Loterie Nationale	— A commercial practice to be classified as a 'pyramid promotional scheme' under Point 14 of Annex I even if there is only an indirect link between the contributions paid by new members of the scheme and the compensation paid to existing members.	3.2. Pyramid schemes – No 14

Case number and name	Issue(s)	Section(s) in the Notice
C-149/15 Wathelet	— Intermediary can qualify as ‘seller’ if it has not duly informed the consumer that the seller of goods is a different person and thereby created the impression that it is the seller. The case deals with Directive 1999/44/EC on the Sale of consumer goods and associated guarantees but Court’s conclusions are of broader relevance for contractual relations	4.2.2. Intermediation of consumer contracts with third parties
2017		
C-562/15 Carrefour	— Advertising that compares the prices charged in shops having larger sizes or formats in its retail chain with those displayed in shops having smaller sizes or formats in the retail chains of competitors (e.g. hypermarkets and supermarkets) could be unlawful within the meaning of Article 4(a) and (c) of Directive 2006/114/EC, read in conjunction with Article 7(1) to (3) of the UCPD, unless consumers are informed clearly and in the advertisement itself that the comparison was made between the prices charged in shops in the advertiser’s retail chain having larger sizes or formats and those indicated in the shops of competing retail chains having smaller sizes or format.	1.2.6. Interplay with the Misleading and Comparative Advertising Directive
C-146/16 Verband Sozialer Wettbewerb	— The UCPD is applicable to an advertisement made by a platform, showing different products that are not provided by the platform itself but by third party sellers on the platform. — The advertisement must be assessed to verify whether all the material information was provided under Article 7(4), while taking into account the limitations of space and specific circumstances of the case. In the context of advertisements made by online platforms with a large number of sales options offered by various third party sellers, there may be limitations of space within the meaning of Article 7(3) that could justify omitting the geographical address and identity of each trader. Such information must nevertheless be supplied simply and quickly, upon access to the platform.	2.9.5. Material information in invitations to purchase – Article 7(4) 4.2.1. Online platforms and their commercial practices 4.2.6. Influencer marketing
C-339/15 Luc Vanderborght	— The UCPD does not preclude a national provision, which protects public health and the dignity of the profession of dentist, first, by imposing a general and absolute prohibition of any advertising relating to the provision of oral and dental care services and, secondly, by establishing certain requirements of discretion with regard to signs of dental practices.	1.1. Material scope of application
C-357/16 Gelvora	— Debt collection practices fall within the material scope of the UCPD.	2.3.1. After-sales practices, including debt collection activities

Case number and name	Issue(s)	Section(s) in the Notice
C-295/16 Europamur Alimentacion	— National general prohibitions on offering for sale or selling goods at a loss and which lay down grounds of derogation from that prohibition that are based on criteria not appearing in the UCPD, are precluded.	1.1. Material scope of application
2018		
C-632/16 Dyson v BSH	— The lack of information, which is not required by the sector-specific legislation, on the testing conditions that resulted in the energy classification indicated on the label relating to the energy class of vacuum cleaners does not constitute a misleading omission.	1.2.1. Relationship with other EU legislation
C-54/17 and C-55/17 Windtre, Vodafone	— The sale of SIM cards with pre-loaded and pre-activated services without adequately informing the consumers of these services and their costs, could be a prohibited aggressive practice of inertia selling under point 29 of Annex I. — For the purposes of the assessment, it is not relevant whether the use of the services required conscious action by the consumer or whether the consumer could have deactivated the services, since without sufficient information, such action cannot be deemed as exercising free choice in relation to the services.	2.10. Articles 8 and 9 - aggressive commercial practices
C-105/17 Kamenova	— A person publishing eight sales advertisements for new and second-hand goods on a website is not necessarily a 'trader'. The classification must take into account different non-exhaustive criteria listed in the case.	2.2. The notion of trader
C-109/17 Bankia	— Article 11 does not preclude national legislation which prohibits the court hearing mortgage enforcement proceedings from reviewing, of its own motion or at the request of the parties, the validity of the enforceable instrument in light of the existence of unfair commercial practices and, in any event, prohibits the court having jurisdiction to rule on the substance regarding the existence of those practices from adopting any interim measures, such as staying the mortgage enforcement proceedings. — Article 11 does not preclude national legislation which does not confer a legally binding nature on a code of conduct such as those referred to in Article 10.	1.2.4. Interplay with the Unfair Contract Terms Directive 2.8.4. Non-compliance with codes of conduct
2019		
C-628/17 Orange Polska	— The signing a contract in the presence of a courier cannot be considered in all circumstances as an aggressive practice using undue influence under Articles 8-9. Account must be taken of the conduct of the trader in the specific case, the effect of which is to put pressure on the consumer so that his freedom of choice is significantly impaired, and that makes that consumer feel uncomfortable or confuses his thinking concerning the transactional decision to be taken.	2.10. Articles 8 and 9 - aggressive commercial practices

Case number and name	Issue(s)	Section(s) in the Notice
	— The fact that the consumer was not given the opportunity to read the standard contract terms beforehand is not by itself indicative of an aggressive practice. However, it could be aggressive if combined with the announcement that any delay in signing the contract or amendment would mean that the subsequent conclusion thereof would be possible only under less favourable conditions, or the fact that the consumer would risk having to pay contractual penalties or, in the event of the contract being amended, would risk the trader suspending the service, or if the courier informs the consumer that he could receive an unfavourable assessment from his employer in case of delays or refusals to sign.	
C-393/17 Kirschstein	— There is a difference between the trader's practices that are closely linked to the promotion and sale or supply of products to consumers and practices that relate to the product itself (e.g. authorisation of service providers that can issue university degrees). — A national rule which aims to determine the operator who is authorised to provide a service in a commercial transaction, without directly regulating the practices which that operator may subsequently implement to promote or dispose of the sales of that service, cannot be considered to relate to a commercial practice in direct connection with the provision of that service, within the meaning of the UCPD.	2.3. The concept of commercial practice
Joined cases C-708/17 and C-725/17 EVN Bulgaria Toplofikatsia	— The CRD and UCPD do not preclude a national law that provides that the owners of an apartment in a building in co-ownership connected to a district heating network are required to contribute to the costs of the consumption of thermal energy by the common parts and the internal installation of the building, even though they did not individually request the supply of that thermal energy and they do not use it in their apartment.	1.2.3. Interplay with the Consumer Rights Directive
2020		
C-393/19 Mezina	— In case of conflict between the provisions of Regulation (EC) No 1924/2006 and Directive 2005/29/EC, the provisions of that regulation take precedence and apply to unfair commercial practices in relation to health claims.	1.2.2. Information established by other EU law as 'material' information
2021		
C-922/19 Waternet	— The CRD and UCPD do not regulate the formation of contracts, with the result that it is for the referring court to assess, in accordance with national legislation, whether a contract may be regarded as concluded between a water supply company and a consumer in the absence of the latter's express consent.	1.2.3. Interplay with the Consumer Rights Directive 2.10. Articles 8 and 9 - aggressive commercial practices

Case number and name	Issue(s)	Section(s) in the Notice
	— The concept of ‘inertia selling’ in point 29 of Annex I to Directive 2005/29/EC does not cover a commercial practice of a drinking water supply company consisting in maintaining the connection to the public water supply network when a consumer moves into a previously occupied dwelling, since that consumer does not have the choice of the supplier of that service, that supplier charges cost-covering, transparent and non-discriminatory rates that are proportionate to the water consumption, and the consumer knows that that dwelling is connected to the public water supply network and that water is supplied against payment.	
C-371/20 Peek & Cloppenburg	— Point 11 of Annex I must be interpreted as meaning that the promotion of a product by the publication of editorial content is ‘paid for’ by a trader in the case where that trader provides consideration with an asset value for that publication, whether in the form of payment of a sum of money or in any other form, provided that there is a definite link between the payment thus made by that trader and that publication. That will, inter alia, be the case where that trader makes available, free of charge, images protected by copyright on which are visible the commercial premises and products which it offers for sale.	4.2.5. Influencer marketing

COMMISSION NOTICE**Guidance on the interpretation and application of Article 6a of Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers****(Text with EEA relevance)**

(2021/C 526/02)

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INTRODUCTION

Directive 98/6/EC of the European Parliament and of the Council ⁽¹⁾ ('PID') aims to enable consumers to easily evaluate and compare the price of products on the basis of homogenous and transparent information. Thus, consumers are able to make better informed choices ⁽²⁾.

The PID requires traders to indicate in an 'unambiguous, easily identifiable and clearly legible' manner the selling price and the price per unit of measurement (i.e. the price per kilo, litre, or any different single unit of quantity widely and customarily used in the Member State concerned). Directive (EU) 2019/2161 of the European Parliament and of the Council ⁽³⁾ amended the PID adding specific rules – Article 6a – on price reduction announcements. Directive (EU) 2019/2161 will become applicable across the EU from 28 May 2022.

The new Article 6a of the PID addresses the issue of transparency of price reductions ⁽⁴⁾ by introducing specific rules to ensure that they are genuine. Article 6a aims at preventing traders from artificially inflating the reference price and/or misleading consumers about the amount of the discount. It increases transparency and ensures that consumers actually pay less for the goods when a price reduction is announced. The new provision on price reductions also enables the enforcement and market surveillance authorities to control more easily the fairness of price reductions, as it set clear rules on the reference 'prior' price on which the announced reduction must be based.

The purpose of this Notice is to provide guidance on how these new provisions on the announcements of price reductions should be interpreted and applied. To ensure legal certainty and facilitate enforcement, this Notice highlights issues that are common to all Member States, including the interplay between the PID and other EU legislation.

The Notice does not analyse the application of the Directive in the individual Member States, including the decisions of national courts and other competent bodies. In addition to different information sources available in the Member States, information on the national provisions transposing the PID, on case law and on legal literature is available in the Consumer Law Database accessible via the E-justice portal ⁽⁵⁾.

Where not specified otherwise, articles referred to in this Notice are those of the PID, as subsequently and most recently amended by Directive (EU) 2019/2161. Where quotations from the text of the Directive contain visual highlighting, such emphasis has been added by the Commission.

This Notice is addressed to the EU Member States and to Iceland, Liechtenstein and Norway as signatories of the Agreement on the European Economic Area ⁽⁶⁾ (EEA). References to the EU, the Union or the Single Market should therefore be understood as references to the EEA or to the EEA market.

This Notice is intended purely as a guidance document – only the text of the Union legislation itself has legal force. Any authoritative reading of the law has to be derived from the text of the Directive and directly from the decisions of the Court of Justice of the European Union (hereinafter: 'CJEU' or 'the Court'). This Notice takes into account rulings of the Court published until October 2021 and cannot prejudice further developments of the Court's case law.

The views expressed in this Notice cannot prejudice the position that the European Commission might take before the Court. The information contained in this Notice is of a general nature and does not specifically address any particular individuals or entities. Neither the European Commission nor any person acting on behalf of the European Commission is responsible for any use that may be made of the following information.

⁽¹⁾ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers ('the PID') (OJ L 80, 18.3.1998, p. 27).

⁽²⁾ See recitals 6 and 12 of the PID.

⁽³⁾ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7).

⁽⁴⁾ In 2018, under the coordination of the Commission, national consumer protection authorities carried out an annual EU-wide screening of e-commerce websites ('sweep') in the framework of the Consumer Protection Cooperation ('CPC') network. This Sweep dealt with price transparency including price reductions. For more than 31 % of the 431 screened e-commerce websites offering discounts, consumer authorities suspected that the special offers were not authentic or they found unclear the way the discounted price was calculated. Commission's press release of 19 February 2019: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1333.

⁽⁵⁾ https://e-justice.europa.eu/591/EN/consumer_law_database

⁽⁶⁾ OJ L 1, 3.1.1994, p. 3.

As this Notice reflects the state of the art at the time of drafting, the guidance offered may be modified at a later date.

1. SCOPE OF ARTICLE 6A

Article 6a

1. Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.
2. The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction.
3. Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly.
4. Where the product has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2.
5. Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction;

1.1. Meaning of 'price reduction announcement'

Article 6a applies to promotional statements by the seller that it has reduced the price that it charges for the good(s). For example, price reduction could be announced:

- in terms of percentage (%), e.g. '20 % off' or specific amount, e.g. 'EUR 10 off';
- by indicating a new (lower) price together with the indication of the previously applied (higher) price. The previous price can be presented in crossed-out form. E.g. 'now EUR 50, was EUR 100' or 'EUR 50/~~EUR 100~~';
- by any other promotional technique such as 'buy today without paying the VAT' that tells the consumer that the price reduction is equal to the value of the VAT (not meaning that the VAT is not collected);
- presenting the current price as 'starting' price or similar and indicating a higher price as the upcoming normal price.

Article 6a applies to price reduction announcements both when they concern a specific good(s) in the seller's offer and when they are made by a general price reduction announcement (see sections 2.2. and 3).

Article 6a does not deal with, and **does not restrict in any way, price fluctuations and price decreases** that do not involve a price reduction announcement. Indeed, Article 6a is aimed at addressing 'announcements' of price reduction. Therefore, it does not cover long-term arrangements that allow the consumers to benefit systematically from reduced prices and specific individual price reductions (see section 2.3 on loyalty programmes and personalised price reductions).

Article 6a applies regardless of whether the price reduction announcement indicates a measurable price reduction. For instance, announcements such as 'sales' price, 'special offers' or 'Black Friday offers' that **create the impression of a price reduction are also subject to Article 6a** and the 'prior' price has to be indicated for the goods concerned by the announcement (see section 2.2 on general price reduction announcements).

By contrast, Article 6a does not apply to **general marketing claims that promote the seller's offer by comparing it with other sellers' offers without invoking or creating the impression of a price reduction**, such as 'best/lowest prices'. Such statements remain, however, subject to the UCPD (see section 3 on the interplay between the PID and the UCPD).

Article 6a also **does not apply either to other techniques of promoting price advantages** that are not price reductions such as price comparisons and tied (conditional) offers. These other techniques of promoting price advantage continue to be subject to the UCPD (see section 3).

As for the notion of 'price', Article 6a covers the 'selling price' as defined in Article 2 (a) of the PID ⁽⁷⁾. The PID also requires the indication of the 'unit price' as defined in Article 2(b) ⁽⁸⁾. For goods sold in bulk (e.g. fabrics, construction materials, food) ⁽⁹⁾ where the selling price cannot be determined until the consumer indicates how much of the good is required 'only the unit price must be indicated' under Article 3(3) of the PID. Article 6a applies also to price reduction announcements where, regarding such goods, the price reduction announcement concerns the unit price ⁽¹⁰⁾. In these cases, Article 6a applies to the indication of the 'prior' unit price.

The PID applies to 'products', **which have to be construed in the context of this Directive as 'goods'**. 'Goods' are defined in other provisions of EU consumer law ⁽¹¹⁾ as movable goods. Therefore, the PID, including Article 6a, does not apply to services ⁽¹²⁾ (including digital services) or to digital content.

Article 6a of the PID applies to price reductions announcements **in all distribution channels** (e.g. brick and mortar shops, online).

1.2. Traders concerned

The PID applies to the trader, defined in Article 2(d) as 'any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity'. The new Article 6a therefore **applies to the trader who is the actual party in the contract with the consumer**, i.e. to the seller of the goods, including sellers using intermediaries, in particular online marketplaces.

In contrast, Article 6a **does not apply to the intermediaries** that provide the mere means for traders to sell their products ⁽¹³⁾, such as online marketplaces, or that merely aggregate and display information about the prices provided by other sellers (price comparison platforms). These intermediaries remain subject to the general rules on intermediary liability and professional diligence obligations. The intermediary is, however, subject to the PID rules when it is the actual seller of the goods or when it sells on behalf of another trader.

For the same reason, Article 6a does not apply to 'cash-back' announcements whereby third parties, which are not sellers of the goods, such as manufacturers/distributors, promise the consumers who have purchased the good(s) in question, to refund part of the price paid, at the consumers' individual request and during a certain period. Such 'cash-back' practices remain subject to the UCPD and must not be used to circumvent the requirements of the PID for price reduction announcements.

⁽⁷⁾ 'selling price' shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes', Article 2 (a) of the PID.

⁽⁸⁾ 'unit price' shall mean the final price, including VAT and all other taxes, for one kilogramme, one litre, 1 metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member State concerned in the marketing of specific products', Article 2 (b) of the PID.

⁽⁹⁾ 'products sold in bulk' shall mean products which are not pre-packaged and are measured in the presence of the consumer', Article 2 (c) of the PID.

⁽¹⁰⁾ See recital 7 of the PID.

⁽¹¹⁾ Under the Consumer Rights Directive ('CRD') (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64)), as amended by Directive (EU) 2019/2161, goods are defined as '(a) any tangible movable items; water, gas and electricity are to be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity; (b) any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions ("goods with digital elements")';.

⁽¹²⁾ See Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers (COM(2006) 325 final, p. 4).

⁽¹³⁾ Under the Consumer Rights Directive 2011/83/EU consumers must always be informed about the identity of the actual trader (for further information, see the guidance on the CRD).

Article 6a applies also to **traders based outside the EU that direct their sales to EU consumers**, including to traders offering goods via platforms. The applicability of the PID to non-EU traders is regulated by Regulation (EC) No 864/2007 of the European Parliament and of the Council ⁽¹⁴⁾ on the law applicable to non-contractual obligations (Rome II). This regulation applies ‘in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters’.

Article 6(1) of the Rome II Regulation:

The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

Article 6(4) of the Rome II Regulation:

The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

When the conditions of Article 6(1) of the Rome II Regulation are fulfilled, the PID will be applicable to cases of infringement that harm the collective interests of EU consumers. Pursuant to Article 6(4) of the Rome II Regulation, the applicable law may not be derogated from by a choice-of-law agreement.

National authorities will be in charge of enforcing these rules. Where needed, they will be able to use their investigation and enforcement powers under Regulation (EU) 2017/2394 of the European Parliament and of the Council ⁽¹⁵⁾ on consumer protection cooperation.

2. INDICATION OF THE ‘PRIOR’ PRICE

2.1. General rules

Paragraph 1 of Article 6a requires the trader who announces a price reduction to indicate the ‘prior’ price. Paragraph 2 of Article 6a defines the ‘prior’ price as the lowest price applied by the same trader during a period of time not shorter than 30 days prior to the application of the price reduction.

Paragraphs 3 to 5 of Article 6a give Member States regulatory choices allowing them to derogate from this general rule in case of goods that are liable to deteriorate or expire rapidly, goods that have been on the market for less than 30 days and goods for which the price reduction is progressively increased, respectively (see section 4).

Except for the goods covered by the regulatory choices referred to in paragraphs 3 to 5 of Article 6a, **Member States may not provide for a shorter period than 30 days** for establishing the ‘prior’ price. The purpose of this reference period of at least 30 days is to prevent traders from juggling with prices and presenting fake price reductions, such as increasing the price for a short period in order to decrease it afterwards by presenting it as a (significant) price reduction that misleads consumers. The 30-day period for setting the reference ‘prior’ price, therefore, ensures that the reference price is real and not merely a marketing tool to make the reduction seem attractive.

Paragraph 2 of Article 6a **does not prevent traders** from indicating as ‘prior’ price the lowest price applied during an even longer period than 30 days (for example, as part of the marketing strategy). It will not be contrary to the requirements of Article 6a if the ‘prior’ price indicated is actually lower than the lowest price in the 30 days immediately preceding the price reduction announcement.

In contrast, national legislation **requiring a longer period** than 30 days to establish the ‘prior’ price would need to be assessed as to its compliance with EU Law. According to Article 10 of the PID, any national rules going beyond the requirements of this directive must be more favourable as regards consumer information and comparison of prices, without prejudice to the Member States’ obligations under the TFEU ⁽¹⁶⁾.

⁽¹⁴⁾ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

⁽¹⁵⁾ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ L 345, 27.12.2017, p. 1).

⁽¹⁶⁾ See in particular Articles 34 and 36 of the Treaty on the Functioning of the European Union.

To comply with Article 6a, the trader announcing the price reduction must identify the lowest price that it charged for the respective good or goods during at least the last 30 days before the application of the price reduction. Such **lowest price shall include any previous 'reduced' price during that period**. Failure to take into account the prices applied during any previous promotional periods in the 30 days before the price reduction announcement will be contrary to Article 6a of the PID.

The same rule applies where a trader initially presents the price reduction by **referring to a forthcoming increased price**, then applies the increased price for less than 30 days and then announces a price reduction. Regardless of how the price reduction was marketed, the prior price for the subsequent price reduction still has to be the lowest price in the last 30 days, i.e. in this case the initial starting price (see also section 4.2. on 'new arrival' goods).

Accordingly, the **price reduction must be presented using the indicated 'prior' price as reference**, i.e. any indicated **percentage reduction must be based on the 'prior' price as established in accordance with Article 6a**:

- For example, where the price reduction announcement is '50 % off' and the lowest price in the 30 previous days was EUR 100, the seller will have to present EUR 100 as the 'prior' price from which the 50 % reduction is calculated, despite the fact that the last selling price of the good was EUR 160.

At the same time, Article 6a does not prevent the seller from **indicating other reference prices** when announcing the price reduction, provided that such additional reference prices are clearly explained, that they do not create confusion and do not detract the consumer's attention from the indication of the 'prior' price in accordance with Article 6a.

- For example, a trader that practices price reductions more often than once every 30 days could additionally inform the consumer about its other previous prices as follows: '20 % off from [starting date] to [end date]: EUR 80 instead of EUR 100, our lowest price in the past 30 days. Our regular price, outside promotional periods, during the past 30 (or 100 days etc.) was EUR 120'

In general, the manner in which any such other reference prices are presented and calculated are subject to the UCPD. In this respect, traders must always make sure that it is clear to the consumer what the other indicated reference prices represent.

Article 6a of the PID does not require the traders to indicate for **how long they have applied the indicated 'prior' price**. Furthermore, it does not affect **the duration of the price reduction campaigns**. It simply requires traders to indicate the 'prior' price at the start of each price reduction and they can keep it throughout the entire period of the price reduction. Traders may announce a price reduction for the goods over a longer time-period, including for more than 30 days. Also, where the price reduction lasts longer than 30 days without interruption, the 'prior' price to be indicated remains the lowest price applied during at least 30 days before the price reduction.

The fairness of **excessively long price reduction periods** in comparison with the time when the good is sold at the 'full' price remains to be assessed under the UCPD (see also section 3 on the interplay with the UCPD).

Where a trader sells goods through different sales channels/points of sale (e.g. different physical and/or online shops) at different prices and those different sales channels/points of sale are the object of a general announcement of a price reduction, the trader must indicate, as 'prior' price for the relevant goods in each sales channel/point of sale, the lowest price that it **applied in that respective sales channel/point of sale** during at least 30 past days.

Misleading price reduction announcements that create the impression that the reduction applies in all the given trader's sales channels/points of sale whereas in reality only some of the sales channels/points of sale are subject to the price reduction are to be assessed against the UCPD.

Article 6a does not prevent traders from **extending a price reduction campaign** as long as consumers are clearly informed that it is an extension and not a new price reduction campaign and the overall presentation of the campaign is not susceptible to create a false impression on consumers.

2.2. Indication of the 'prior price' in case of general price reduction announcements

Article 6a does not prevent traders from announcing price reductions in a general manner, for example:

- '20 % off on everything today' or

— ‘20 % off on all Christmas decorations this week’.

Where the price reduction (as described in section 1.1) is announced by a general statement, e.g. a physical banner or online communication, **the ‘prior’ price does not have to be indicated on the same medium** as the price reduction announcement itself. Instead, the ‘prior’ price for the individual goods covered by the announcement must be indicated **at the point of sale**, i.e. on the respective price tags in shops or price sections in online shop interfaces.

A trader may also announce a general price reduction providing **different discounts for different categories of goods**. In these cases, the trader must clearly identify the categories of goods concerned and their respective price reduction, for example:

— ‘30 % off on goods with a blue dot and 40 % off on goods with red dot’.

Regarding the indication of the ‘prior’ price for the individual goods covered by the general price reduction announcement, two cases must be distinguished:

- where in the past 30 days, **the trader has not increased the price** of the individual goods covered by the general announcements and has not organised other (general) price reductions during that period. In this case, the ‘prior’ price for the purposes of Article 6a will be the previously applied **selling price of the goods**, i.e. the price already indicated on the price tag or in the price section of the online shop interface. Accordingly, the trader will not need to change the price tags/online information for the goods concerned due to the application of Article 6a of the PID.
- where the **trader has increased the price** or has organised another (general) price reduction in the last 30 days, the selling price on the tag or online will not qualify as ‘prior’ price as it will not be the lowest price in the past 30 days as required by Article 6a. The trader will therefore have to adjust the relevant price tags or online price indication of the goods covered by the general price reduction announcement in order to indicate the correct ‘prior’ price for those goods.

Article 6a of the PID does not prevent **group advertising** of price reductions where central entities, such as franchisors, plan and advertise price reduction campaigns on behalf of the sellers (retailers) that distribute their products. Where such central entity announces price reductions on behalf of its members, it has to make sure that the participating retailers are in a position to comply with the requirements regarding price reductions, e.g. they must enable the participating retailers to respect the rules on indicating the ‘prior’ price. Each participating retailer remains responsible, also in this case, for ensuring that the relevant goods that it sells in the context of the price reduction campaign have the correct ‘prior’ price.

As explained above, where the participating retailer has kept its prices stable during the past 30 days before the announcement of the reduction, no adjustment of the individual ‘prior’ prices will be needed as the previous selling price will constitute the ‘prior’ price for the purposes of Article 6a. Should it not be the case for certain goods covered by the general campaign, the seller must adjust the ‘prior’ price for the goods concerned. This includes cases where price reduction campaigns launched by the respective seller (retailer) for its own goods are followed within less than 30 days by campaigns launched by the central entity. In such cases, for determining the ‘prior’ price, the individual retailer concerned must take into account the reduced price in the previous campaign(s).

2.3. Loyalty programmes and personalised price reductions

Article 6a of the PID does not apply to **seller’s customer loyalty programmes**, such as discount cards or vouchers, which entitle the consumer to a price discount on all seller’s products or on identified product ranges during extended continuous periods (e.g. 6 months, 1 year) or which allow accumulation of credits (points) for future purchases.

Article 6a of the PID does not apply either to **real personalised price reductions** that do not have the nature of ‘announcing’ the price reduction. A typical example of such price reductions are those resulting from the consumer’s prior purchases with the seller concerned, such as when the consumer receives a ‘20 % off’ voucher upon the purchase, valid for the next purchase until end of the month. Other examples of real personalised price reductions falling outside the scope of Article 6a are reductions granted on special occasions for that consumer, such as upon signing up to the loyalty programme or on the consumer’s marriage or birthday, as well as reductions applied at the time of the purchase that have not been ‘announced’ in advance.

Such loyalty programmes and personalised offers continue to be assessed under the UCPD (see sections 2.8.2. and 4.2.8 of the Guidance on the UCPD ⁽¹⁷⁾).

In contrast, Article 6a of the PID will be applicable to those price reductions, which, even though presented as personalised, are in **reality offered/announced to consumers in general**. Such situation could occur where the trader makes available 'vouchers' or discount codes to potentially all consumers visiting the brick and mortar shop or the online shop during specific periods. Examples could be campaigns such as:

- 'Today 20 % off when using the code XYZ'; or
- 'This weekend 20 % off on everything for loyalty members only'.

where the code/the loyalty programme is accessible/used by many or the majority of customers. In these cases, the trader must comply with the requirements of Article 6a, i.e. ensuring that the 'prior' price for all the goods concerned is **their lowest publicly available price** in the last 30 days (see section 2.1. on general price reduction announcements).

3. INTERPLAY WITH THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

The Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and of the Council ⁽¹⁸⁾ ('UCPD') prohibits unfair commercial practices in business-to-consumer transactions ⁽¹⁹⁾. It applies to all commercial practices that occur before, during and after a business-to-consumer transaction has taken place. Article 2(d) of the UCPD defines commercial practices as being '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'. An unfair commercial practice could be a misleading or an aggressive practice (Articles 6 to 9) or an infringement of professional diligence requirements (Article 5(2)) likely to distort the transactional decision of an average consumer.

Article 3(4) of the UCPD provides that, in the case of a conflict between the provisions of the UCPD and other rules of EU law regulating specific aspects of unfair commercial practices, the latter prevail and apply to those specific aspects.

Therefore, insofar as Article 6a of the PID introduces a specific set of rules regarding the definition and indication of the 'prior' price when announcing a price reduction, it prevails over the UCPD regarding those aspects of price reduction that are governed by those specific rules ⁽²⁰⁾.

Accordingly, the correctness of the 'prior' price indicated by the seller and of the corresponding price reduction has to be assessed against the specific requirements of Article 6a of the PID. However, this does not preclude the national enforcement authorities from also applying the UCPD to the practices of traders that infringe Article 6a of the PID when they **also** constitute unfair practices prohibited by the UCPD, in particular misleading actions in relation to the existence of specific price advantage within the meaning of Article 6(1)(d).

Moreover, as mentioned in Section 1.2.5 of the Guidance on the UCPD, the UCPD and in particular Article 6(1)(d) on the misleading claims about the existence of price advantage **remains applicable to other aspects of price reductions**. The UCPD could apply to different misleading aspects of price reduction practices, such as:

- excessively long periods during which price reductions apply compared to the period during which the goods are sold at a price without price reduction;
- advertising a reduction of, for example, 'up to 70 % off' when only a few of the items are reduced by 70 % and the rest are reduced at a significantly lower percentage.

⁽¹⁷⁾ https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en

⁽¹⁸⁾ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22).

⁽¹⁹⁾ Before the amendments to the PID introduced by Directive (EU) 2019/2161, the Court of Justice of the European Union had confirmed the impossibility for Member States to adopt more prescriptive national rules on price reductions on the basis of the UCPD and the (original) Price Indication Directive in Case C-421/12, *European Commission v Kingdom of Belgium*, ECLI:EU:C:2013:769.

⁽²⁰⁾ See also Court of Justice of the European Union, Case C-476/14, *Citroën*, ECLI:EU:C:2016:527.

In that regard, it has to be noted that, apart from price reductions, a seller may use other types of **practices promoting price advantages**, such as:

- comparisons with other prices, e.g. prices of other traders ⁽²¹⁾ or the manufacturer's recommended retail price;
- combined or tied conditional offers (e.g. 'buy one, get two' or '30 % off when buying three'.

Such promotional practices are outside the scope of Article 6a of the PID but remain fully subject to the UCPD.

The UCPD also covers any price reduction announcements or other types of practices promoting price advantages regarding digital content ⁽²²⁾ and all kinds of services, as the PID applies only to movable goods (see section 1.1).

A seller may also combine price comparison with a price reduction announcement regulated by Article 6a of the PID. As stated in section 2.8.2 of the UCPD guidance, a seller presenting a price comparison **must pay utmost attention** to ensure that the average consumer does not perceive the comparison with, e.g. the recommended retail price, as a price reduction. Where, due to its misleading presentation, the price comparison is actually perceived by an average consumer as a price reduction, such practice can amount to the breach of both the UCPD and Article 6a of the PID due to the incorrect presentation of the 'prior' price.

4. REGULATORY CHOICES

Paragraphs 3 to 5 of Article 6a offer Member States the possibility to derogate from the general rule on price reductions in the case of:

- goods which are liable to deteriorate or expire rapidly ('perishable goods');
- goods which have been on the market for less than 30 days ('new arrivals' goods); and
- successive price reductions within a period of 30 days.

4.1. Perishable goods

Article 6a

3. *Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly.*

The option provided in paragraph 3 of Article 6a allows Member States to provide for different rules for goods that are liable to deteriorate or expire rapidly. Such rules may even consist of **completely exempting such goods from the scope of Article 6a** or allowing the seller to indicate as 'prior' price the last price immediately before the price reduction.

Goods which are 'liable to deteriorate or expire rapidly' are perishable goods that may need to be discounted more often in order to sell them faster due to approaching expiration dates. This notion is also used in Article 16(1)(d) of the Consumer Rights Directive ⁽²³⁾ ('CRD'), which provides that consumers do not have the right of withdrawal in respect of distance and off-premises contracts as regards 'the supply of goods which are liable to deteriorate or expire rapidly'.

The CRD does not define the 'goods which are liable to deteriorate or expire rapidly'. The compliance with the objective criteria of being 'liable to deteriorate or expire rapidly' is to be assessed on a case-by-case basis. Examples of goods liable to deteriorate or expire rapidly are fresh food and drinks with short expiry time limits. This possibility for Member States to derogate from the general rule on price reductions cannot be applied to goods that are not perishable because of their physical composition and properties but only 'expire' in the commercial sense, such as seasonal clothing ⁽²⁴⁾.

⁽²¹⁾ A comparison of prices of different traders falls also under Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ L 376, 27.12.2006, p. 21), which lays down the conditions under which comparative advertising is permitted.

⁽²²⁾ Defined as 'data which are produced and supplied in digital form' in Article 2(1) of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

⁽²³⁾ Directive 2011/83/EU.

⁽²⁴⁾ See Guidance on Directive 2011/83/EU on consumer rights: https://ec.europa.eu/info/law/law-topic/consumer-protection-law/consumer-contract-law/consumer-rights-directive_en

The same approach as the one under the CRD is valid when interpreting this notion under the PID.

4.2. 'New arrivals' goods

Article 6a

4. *Where the product has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2.*

The option provided in paragraph 4 of Article 6a enables Member States to allow price reduction announcements also in respect of goods ('new arrivals') that the trader has been selling for less than 30 days before announcing the price reduction. The option is formulated broadly and refers to 'a shorter period of time' (than the default period of at least 30 days).

Unlike the regulatory choice regarding goods which are liable to deteriorate or expire rapidly, for which Member States can provide 'different rules', including the exemption of such goods from the scope of Article 6a, this regulatory choice only refers to 'a shorter period of time'. Accordingly, it cannot not be interpreted as including also the possibility of complete exemption of these goods from the requirement to observe a reference period for establishing the 'prior' price.

Therefore, where Member States choose to apply this possibility to derogate from the general rule, they must set out a **specific period of time** for the determination of the 'prior' price, or, alternatively, **allow traders to determine the period of time by themselves and to indicate this period along with the corresponding 'prior' price**. In this latter scenario, where the specific reference period is not established by the national rules, the fairness of price reduction announcements for the goods in question will continue to be assessed on case-by-case basis under the UCPD.

The notion of being on the 'market' needs to be interpreted in the context of the general rule set out in the first and second paragraph of Article 6a, which refer to the actions of the specific trader who announces the price reduction. Therefore, 'market' in this context refers to the selling of the goods by the given trader, as defined by Article 2(d) of the PID.

Goods should be considered as having already been on the 'market' where the **seller resumes the offer** of the **same** goods after a period of interruption, e.g. after the goods were temporarily out of stock or in case of seasonal goods, such as winter/summer clothes. In that case, since such goods would not be, strictly speaking, new arrivals, the exception provided for in Article 6a(4) would not apply.

However, in these situations, the trader can choose, as a reference period for setting the 'prior' price, **a longer period of time** during which the good was offered for sale for a total of at least 30 days. Therefore, where the seller offers again a good for sale after a period of interruption, the seller can announce a price reduction indicating as the 'prior' price the lowest price applied in the reference period before the interruption (for example, in the past year) provided that:

- the good has been offered for sale for a total at least for 30 days during that reference period; and
- the 'prior' price indicated is the lowest price in the whole reference period.

Subject to a case-by-case assessment, the trader may be required, in accordance with Article 7 of the UCPD, to inform the consumer when the indicated 'prior' price is a price that was applied not in the period immediately preceding the price reduction but e.g. in the previous season.

4.3. Progressive price reductions

Article 6a

5. *Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction;*

The regulatory choice provided in paragraph 5 of Article 6a applies when the price is gradually reduced, **without interruptions**, during the same sales campaign. In this case, the 'prior' price is the lowest price during the 30 days before the application of the first price reduction announcement and it remains the 'prior' price for all subsequent price reduction announcements during the sales campaign.

- For example, the lowest price of the good for the last 30 days before the sales campaign started was EUR 100. The seller indicates EUR 100 as its 'prior' price when it announces the first price reduction (e.g. 10 % off) and can then keep the same 'prior' price also when announcing the following 20 % and 30 % reductions.

The situation is different in the case of successive sales campaigns during a 30-day period (e.g. in promotions such as '20 % off every Sunday in December' or during successive 'Singles day', 'Black Friday', 'Cyber Monday' or Christmas sales campaigns in November/December). In the context of such successive sales campaigns, where the price is increased in intermittent (short) periods, the general rule of Article 6a applies and the 'prior' price for each successive price reduction is the lowest price during at least the past 30 days, i.e. including the reduced price during the previous promotions.

To avoid a circumvention of paragraphs 1 and 2 of Article 6a, paragraph 5 shall be interpreted narrowly. Accordingly, it is only applicable when the price is reduced progressively, without interruptions and without increasing the indicated 'prior' price in the course of the continuous price reduction.

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