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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE**

On the application of the Unfair Commercial Practices Directive

**Achieving a high level of consumer protection
Building trust in the Internal Market**

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1. INTRODUCTION

Directive 2005/29/EC on Unfair Commercial Practices¹ ("the Directive") was adopted on 11 May 2005 to help consumers benefit from the Internal Market by removing regulatory barriers, deriving from divergent national rules, which discouraged firms from selling and undermined consumers' trust in buying across the EU.

The Directive constitutes the main general body of EU legislation regulating misleading advertising and other unfair practices in business-to-consumer transactions. It has a broad scope of application, applying to all business-to-consumer transactions ("B2C") and in all sectors. It applies not only at the advertising or marketing stage of a transaction but also *"...during and after a commercial transaction in relation to a product"*².

The Directive provides for a high level of consumer protection in all sectors. It works as a safety net which fills the gaps which are not regulated by other EU sector-specific rules. It ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, thus enabling consumers to make informed and meaningful choices.

Together with other Internal Market legislation³ and the "CPC Regulation" on cooperation between national authorities responsible for the enforcement of consumer protection laws⁴, the Unfair Commercial Practices Directive contributes to achieving market transparency and to preventing unfair competition across the EU. All Member States have implemented its rules in their national legislation.

This Communication outlines the main conclusions which can be drawn based on the initial period of experience in enforcing the Unfair Commercial Practices Directive, as required by its Article 18, and sets out what action is needed to maximise the benefits of the Directive for Single Market integration and consumer protection.

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.

² See Article 3 (1) of the Directive.

³ E.g. the 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"); and Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

⁴ Regulation No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

A detailed Report⁵ on the application of the Directive in the Member States is published together with this Communication. This is part of the European Consumer Agenda⁶, which aims to maximise consumer participation and trust in the market, thereby boosting confidence and growth.

Consumer expenditure accounts for 56 % of EU GDP and is essential in meeting the objective of smart, inclusive and sustainable growth. As outlined in the European Consumer Agenda, stimulating this demand can play a major role in bringing the EU out of the crisis.

To make this possible, the potential of the Single Market must be realised.

Data show that consumers shopping online across the EU have up to 16 times more products from which to choose, but 60 % of consumers do not yet use this channel. As a result of this reluctance, they do not fully benefit from the variety of choice and price differences available in the Single Market.

Policy actions improving consumer confidence in cross-border shopping online can provide a major boost to economic growth in Europe.

2. ASSESSING THE BENEFITS OF THE DIRECTIVE

2.1. Achieving a high level of consumer protection and a level playing field for traders

First experience of the Directive's implementation shows that it has considerably improved consumer protection in and across the Member States, while better protecting legitimate businesses from competitors who do not play by the rules.

The benefits of the Directive mainly stem from two of its specific features, namely, its horizontal "safety net" character and its combination of principle-based rules with a "Black List" of specific prohibitions of certain unfair practices.

The Unfair Commercial Practices Directive's principle-based rules have allowed national authorities to adapt to fast-evolving products, services and sales methods. They function as "catch all" provisions providing criteria which can be used, with a certain flexibility, to prevent unfair behaviour that is not covered by specific prohibitions.

In turn, the "Black List" of practices banned in all circumstances has provided national authorities with an effective tool to tackle common unfair practices like bait advertising, fake free offers, hidden advertising and direct targeting of children.

Below are some examples of prohibited practices under the Directive.

Attracting consumers to the trader's premises or web-site by offering products or services which cannot be supplied ("Bait advertising")

Sabine from Germany found an advert in a magazine offering a special promotion: "Fly to Barcelona for just €1!" But when she tried to book the flight online the prices were much higher. When she contacted the company's customer service centre she learned that only a small number of seats had been offered at the reduced rate. The majority of customers could not take advantage of this deal.

⁵ See Report accompanying this Communication "First Report on the application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')".

⁶ See "A European Consumer Agenda – Boosting confidence and growth", COM(2012) 225 final of 22.05.2012 - http://ec.europa.eu/justice/consumer-marketing/index_en.htm.

The Unfair Commercial Practices Directive outlaws the practice of offering a product at a specified price without clearly disclosing that its availability may be limited in relation to the scale of advertising and the price offered.

Fake free offers

*Marit from Estonia received the following email from a on-line beauty products retailer: "Call now and get your **FREE** gift, a pair of designer sunglasses!". When she called, she was informed that this offer was available only when ordering products valued at €2,000 or more.*

The Unfair Commercial Practices Directive prevents a trader from falsely describing a product as free where, in fact, the consumer has to incur a cost other than the cost of responding to the commercial practice or paying for the delivery of the item.

Obstacles to switch

Filip decides to change his house insurance and to enter a more convenient contract with a new company. When he calls his insurance company, they tell him that he has to fill out various different forms to terminate his existing contract. Unfortunately, it will take over two weeks before they are able (or willing) to provide the necessary forms and the lady on the phone also mentions that it will take 3 months to process the request. Filip gives up in frustration. So much for good intentions.

Under the Unfair Commercial Practices Directive traders cannot impose any onerous or disproportionate non-contractual barriers 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.

Direct exhortation to children

*Alain was surprised when his daughter suddenly started pestering him to buy a collection of movies with her favourite book character. Alain understood what happened when he noticed a TV advertisement for the release of the movies stating: "**Your favourite book is now out on DVD – tell your dad to buy it for you!**"*

It is an unfair practice, under the Unfair Commercial Practices Directive, for sellers to exhort children to ask an adult to buy advertised products. This ban is valid for all media, including television as well as internet advertising.

Thanks to the Unfair Commercial Practices Directive, national consumer protection watchdogs have been able to curb and sanction a broad range of unfair business practices, including *misleading environmental claims* and *aggressive practices*.⁷ However:

- Stakeholders suggest that, despite the current legal framework, green claims (such as for instance "eco-friendly", "biodegradable", "sustainable" and "natural") are still not used responsibly and are often very general, vague and not well-defined. Consumer Associations signal that it is in addition difficult to verify the truthfulness of the claims, especially in the energy, cosmetics, cars and detergents sectors.
- A few Member States signal aggressive practices targeting children, in the field of on-line games, as well as the elderly. Further efforts need to be made to strengthen the enforcement of the Directive in relation to these categories of vulnerable consumers who find themselves in a situation of weakness. In particular, it must be ensured that, taking into account also the progressive ageing of the population,

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See Section 4 on enforcement of the accompanying Report on the application of the Directive.

vulnerable consumers are protected from the risks deriving from the effects of the economic crisis and the complexity of digital markets.

2.2. Building trust in the Single Market

By replacing the divergent regulations of the Member States on unfair commercial practices with one set of rules, the Directive has simplified the regulatory environment and helped to remove obstacles to cross-border commerce.

The Directive has also been widely used to tackle cross-border cases. Almost 50% of mutual assistance requests dealt with by the CPC Network⁸ over the last 5 years (requests for information, alerts and enforcement requests) concerned infringements of the Unfair Commercial Practices Directive. In addition, several joint surveillance actions ("sweeps") have been carried out by the CPC-Network on the basis of the Directive's provisions (digital products / services, websites selling airlines tickets, online mobile phone services, websites selling consumer electronic goods).⁹

A substantial part of the Directive aims at ensuring that information on the main characteristics of a product or service, on the price and key conditions are provided to consumers in a truthful, complete and timely manner. This makes it easier for consumers to understand and compare offers and has a direct impact on the marketing and advertising techniques developed by traders.

Advertising plays a vital role in a functioning Single Market and is the main tool for companies to sell their products and services cross-border. Advertising allows companies to differentiate themselves openly: it stimulates competition, decreases prices and increases quality.

Accurate and more transparent information for domestic and cross-border offers has also been identified in the recent E-commerce Communication as one of the key factors to increase consumer trust and to encourage retailers to sell on-line¹⁰.

Recent evidence reveals that more consumers are now interested in making cross-border purchases (52%, +19 percentage points) and are willing to spend more money cross-border (18%, +5 percentage points) than in 2006, when the Directive had not yet been transposed in the Member States.¹¹ The Unfair Commercial Practices Directive has played its part in generating this more open attitude amongst European consumers, as it is one of the main EU legislative tools devised to boost their confidence and stimulate cross-border trade.

⁸ The CPC Regulation No 2006/2004 established a framework enabling enforcers to work closely together in order to stop cross-border commercial practices breaching consumer laws. Since 2007 the CPC-Network has been dealing with cross-border cases involving a breach of the Unfair Commercial Practices Directive.

⁹ http://ec.europa.eu/consumers/enforcement/index_en.htm

¹⁰ See Commission Staff Working Paper, *Bringing e-commerce benefits to consumers*, document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services*, COM (2011) 942 final of 11.01.2012 - http://ec.europa.eu/internal_market/e-commerce/communication_2012_en.htm.

¹¹ See Flash Eurobarometer 332 *Consumers' attitudes towards cross-border trade and consumer protection*, May 2012, p. 8. http://ec.europa.eu/public_opinion/flash/fl_332_en.pdf A growing proportion of consumers, 50%, are willing to purchase goods or services using another EU language (+ 17 points in comparison to 2006). The percentage that would be totally unwilling to shop in a different language has fallen from 42% in 2008 to 30% in 2011. The proportion of Europeans who say they know where to get information and advice about cross-border shopping has also risen significantly, from 24% in 2006 to 39% in 2011.

Nevertheless, it has to be recognised that growth in on-line cross-border shopping lags far behind on-line domestic growth thereby highlighting that more needs to be done.

Financial services and immovable property are critical sectors, by reason of their complexity and inherent serious risks. Several unfair practices, such as the lack of essential information at the advertising stage and misleading description of products, have been reported in these fields. Most Member States have put in place national rules that provide consumers with safeguards which add to and complement those laid down in the Unfair Commercial Practices Directive. The results of the investigation reveal that it would not be appropriate, for the time being, to remove the possibility, foreseen by the Directive, for Member States to go beyond the level of harmonisation set by it in these specific sectors.¹²

2.3. Adequate and effective enforcement of the Directive

As a whole, the legal framework of the Unfair Commercial Practices Directive is proving well suited to assess the fairness of new on-line practices that are developing in parallel with the evolution of advertising sales techniques, such as price comparison and collective booking web-sites or in relation, for example, to the increasing involvement of advertising in social networks.

Member States and stakeholders appear to consider national enforcement of the Directive, in general terms, adequate and effective but signal that the lack of resources, the complexity or length of internal procedures and the lack of deterrent sanctions threaten to undermine its proper application.

In cases of cross-border unfair commercial practices, it is a real challenge for enforcers to provide a rapid and efficient response. This also bears an impact on the enforcement of the legislation at a cross-border level and, as shown by the outcome of the consultation, it has become apparent in the area of administrative cooperation based on the CPC-Regulation.

The enforcement experience confirms that one of the major problems concerning customer review tools and, especially, *price comparison websites* is that they do not clearly disclose the identity of the trader operating the site and /or whether retailers pay to have their products and services displayed (i.e. whether the site is sponsored or not).

Feedback from stakeholders suggests that the obligation to provide clear and complete price information is often neglected in commercial offers, especially in the *travel and transport sector*.

In both cases, stakeholders do not call for legislative measures, but for a more stringent and coherent enforcement action.

3. KEY PRIORITIES FOR FURTHER ACTION

In line with what has been outlined in the European Consumer Agenda and in the Commission Communication on a better functioning of the Single Market,¹³ ensuring a better implementation and enforcement of existing rules is a "quick win" for growth and jobs.

¹² See Article 3(9) of the Unfair Commercial Practice Directive and the *Study on the application of the Unfair Commercial Practices Directive to financial services and immovable property* conducted by Civic Consulting on behalf of the European Commission, DG Justice 2012, available at: <http://ec.europa.eu/justice/consumer-marketing/document>.

¹³ See Communication of the European Commission *Better governance for the single market*, COM(2012) 259/2. http://ec.europa.eu/internal_market/strategy/docs/governance/20120608-communication-2012-259-2_en.pdf

In this context, the Directive has a crucial role to play and the Commission has identified retail trade (including e-commerce), the travel and transport sector, financial services, the digital economy, energy and sustainability as key priority areas for unlocking the Single Market's growth potential.¹⁴

To ensure that the Directive maintains a high level of consumer protection and delivers its internal market benefits, **intensified national enforcement and reinforced cooperation in cross-border enforcement** are needed. This particularly applies in case of unfair practices simultaneously arising in different Member States. In such cases, an efficient coordination between the Commission, national authorities, consumer organisations and businesses is key to tackle practices that have an EU-wide impact.¹⁵

The need to step up enforcement at both cross-border and national levels calls for the Commission to take **a more prominent role**, joining forces with the Member States and supporting them in the application of the Directive across the EU. In this respect, the Commission will consider how, in accordance with the Treaties, it can play a more active role in encouraging a coherent application of the Directive in particular with regard to unfair practices having a cross-border dimension such as those taking place in the on-line environment and which raise common questions for enforcers. Promoting converging practices in the implementation of the Directive is key for securing a level playing field for traders, notably when they act in a cross-border context, and ultimately for ensuring a high level of consumer protection across Europe.

3.1. Ensure the full conformity of national laws with the Directive

In its role as guardian of the Treaties, the Commission will continue to closely monitor the correct transposition and application of the Directive in all Member States. It will perform conformity checks and conduct in-depth reviews to see how rules work in practice and define corrective action where needed. The current analysis indicates that in several Member States discrepancies between national laws and the Directive still exist. The Commission services are therefore in contact with the Member States concerned. The Commission will take the necessary actions under Article 258 of the TFEU, whenever a Member State fails to comply with its transposition and enforcement obligations.

3.2. Ensure uniform and adequate application of the Directive in the Member States

To ensure that the Directive is applied in an appropriate and consistent manner the Commission will:

- further develop the **Guidance** document in response to the input received from national enforcers and other stakeholders, the emergence of new practices, including on-line, and the development of EU and national case-law¹⁶.
- improve, expand and up-date the Unfair Commercial Practices Directive **Database**.¹⁷

¹⁴ See the *European Consumer Agenda*.

¹⁵ See the accompanying Report on the application of the Directive, Section 3.3.3., for example in relation to the decision of the Italian Antitrust Authority (AGCM) PS7256 – *Comet-Apple Prodotti in Garanzia*, Provvedimento n. 23193 of 27 December 2011.

¹⁶ Amongst others, the Commission plans to further develop its Guidance on misleading environmental claims, based on the results of a specific study to be conducted in the course of 2013 and the on-going work on the Sustainable Consumption and Production Action Plan.

¹⁷ See <https://webgate.ec.europa.eu/ucp/>. This database is based on Decision No 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007-2013).

3.3. Enhance enforcement and administrative cooperation between Member States

Taking into account the feedback received from Member States and stakeholders as well as the available data, the Commission has identified key sectors where detriment and lost opportunities for consumers have been found and where the Single Market's growth potential is the biggest.

In these areas, the Commission will launch specific initiatives aimed at strengthening enforcement, in line with the objectives set out in the European Consumer Agenda.

The Commission will take the following measures:

- establish regular thematic **workshops** between national enforcers and organise **training** for enforcers and the judiciary
- strengthen the efficiency of the CPC-Network and continue to promote coordinated **enforcement actions ("sweeps")**
- assist Member States in ensuring an **effective application of the Directive** by further developing the **Guidance document** and sharing best practices with Member States
- develop **enforcement indicators**, in cooperation with the Member States, specific to the application of the Unfair Commercial Practices Directive, which will detect shortcomings and failures that require further investigative and/or corrective action.

These measures will concentrate on the following key sectors / areas:

- Travel and transport
- The digital / on-line markets
- Environmental claims
- Financial Services
- Immovable Property

*In all of these sectors specific consideration will be given in relation to practices which target **vulnerable consumers**, in particular the elderly and minors.*

3.4. Monitor market developments and raising awareness

The Commission will closely monitor market developments to ensure that the regulatory framework continues to provide a high level of protection to consumers in their domestic and cross-border purchases.

A specific focus will be given to the suitability of the legal framework to keep up with the rapid development of marketing and sales techniques, products and services in the on-line world.

Alongside strengthened enforcement, awareness raising initiatives are important in order to put consumers in a position to properly assert their rights. In 2013, as part of the European Year of Citizens, an *EU-wide campaign* to increase knowledge of consumer rights, including under the Unfair Commercial Practices Directive, will be launched in close cooperation with all stakeholders, including businesses and consumer associations.

4. CONCLUSIONS

The Unfair Commercial Practices Directive is proving to be a valuable tool to increase consumer welfare. It has simplified the regulatory environment and helped eliminate obstacles to cross-border commerce. Experience has shown the usefulness and flexibility of this

principle-based and horizontal legislation. The simplified regulatory environment is making it easier for businesses to engage in cross-border activities, while enabling consumers and businesses to increasingly benefit from the untapped potential of the Internal Market.

The Commission considers that it would be inappropriate to amend the Directive at this stage, not least because the enforcement experience in the Member States is still too limited in time for such an encompassing body of legislation. The Commission will now focus its attention on the coherence of the implementation of the Directive, taking concrete actions to make enforcement work better in key areas to the benefit of consumer confidence and growth.