



Sections 3 and 4 of the revised UCPD guidance: Main provisions & the blacklist of Annex I

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**Unit E2 - Consumer and Marketing Law
DG Justice and Consumers
European Commission**

Main provisions: Key points

Article 5: Requirements of professional diligence

➤ New section in the UCPD guidance: Focus on Article 5 UCPD:

Article 5 - Prohibition of unfair commercial practices

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.*

Article 5: Requirements of professional diligence (II)

- Article 5 prohibits commercial practices that are **contrary to the requirements of professional diligence**, on the condition that 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.
- C-435/11, **CHS Tour Service** (19 September 2013):

"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)"

Article 5: Requirements of professional diligence (III)

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;

- The notion of "**professional diligence**" encompasses principles such as 'honest market practice', 'good faith' and 'good market practice'. They express normative **values that apply in the specific field of business activity** in question.
- **For example**: Financial services are often complex and can involve significant economic risks for consumers. Therefore, traders are expected to act with the specific standard of skill and care which can reasonably be expected from a professional within this field of commercial activity and commensurate to good faith.

Article 6: Misleading actions

- This section expands the similar section in the 2009 UCPD guidance
- Article 6(1): Information provided to the consumer should be **truthful** and should not **deceive or be likely to deceive the consumer** in any way, including in the overall presentation, even if the information is factually correct.
- In order to be misleading, an action must be likely to cause the average consumer "to take a transactional decision **that he would not have taken otherwise**".

Article 6: Misleading actions (II)

- Updates of this include some new guidance related to:
 - Geographical origin claims
 - “Up to claims” (traders marketing products with the maximum benefit consumers can expect from the use of a product)
 - Ethical claims
 - Corporate social responsibility (CSR) claims
- **For example:** A company from the Dominican Republic was marketing its rum by making several references to Cuba on bottles/commercial materials. The Court of Appeal of Paris held that mentioning a famous geographical location on a product whereas the product does not originate from that location, constitutes a misleading commercial practice (Court of Appeal of Paris 10 May 2012, case 10/04016)

Article 6: Misleading actions (III)

For example:

- A trader was prominently advertising a one year free commercial guarantee on its smart-phones, in order to promote a payable extension of this commercial guarantee up to 3 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 1999/44/EC. This legal guarantee includes free repair or replacement (or reimbursement) of products if any lack of conformity appears within 2 years of delivery of the product. This commercial practice was found misleading, in particular on the basis of Article 6(1)(g) UCPD, by the Italian Antitrust Authority (21 December 2011, PS7256)

Article 7: Misleading omissions (I)

- Article 7(1) establishes in very general terms a positive obligation on traders to provide all **material information** that the average consumer needs to take an **informed transactional decision**.
- Except for the specific case of an "invitation to purchase" (Article 7(4)) the **UCPD does not define "material information"**.
- In order to be misleading, an omission of material information must be "likely to cause the average consumer to **take a transactional decision that he would not have taken otherwise**".
- Article 7(2): **Failing to identify the commercial intent** of a commercial practice is a misleading omission, when this failure is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

Article 7: Misleading omissions (II)

- 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** and of any **measures taken by the trader** to make the information available to consumers by other means.
- C-122/10 – **Ving Sverige** (12 May 2011):

"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."



The blacklist in Annex I

The black-list in 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 black-list in Annex I (II)

- Annex I contains a **list of commercial practices** which are to be considered unfair in all circumstances and which are therefore **prohibited per se**.
- If it can be proved that the trader has carried out the practice in actual fact, national enforcers do not need to consider the impact of the practice on the average consumer's economic behaviour.

Key provisions on black-listed practices

- **Annex I No. 14:** aims at preventing traders from luring consumers into **pyramid schemes** promising them compensation when the consumer will be compensated for bringing new members into the scheme, rather than from the sale or consumption of products.
- C-515/12, **4finance** (3 April 2014):
*"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."* In this case, the CJEU had doubts that a Lithuanian company which was granting small bonuses to its customers for every new recruited customer, hence not representing the primary part of their overall compensation, was in breach of No. 14 of Annex I as such.

Key provisions on black-listed practices (II)

- **Annex I No. 20:** aims at preventing a misleading **use of the word "free"**, if the consumer has to pay anything other than the unavoidable cost of responding to the promotion.
- Also applies to conditional-purchase promotions
 - For example:** Competition Council of the Republic of Lithuania (11.11.2010, 2S-27) found a breach of No 20 of Annex I where a trader launched a promotional campaign offering two free car tyres when buying two new ones. In reality, the price given for the two tyres in the campaign was two times higher than the previously applied retail price.
- Increasing awareness of economic value of consumers' data: marketing products as "free" where trader derives its revenues from the processing of those data in the absence of due information to consumers could possibly, depending on the circumstances, be considered as breach.

Key provisions on black-listed practices (III)

- **Annex I No. 31:** aims at preventing traders from luring consumers into transactions by falsely **creating false impressions about the fact that they have won or may win a prize**. It also precludes traders from charging consumers for claiming a prize (by "incurring a cost").
- C-428/11, ***Purely Creative*** (18 October 2012):
Several UK companies had distributed information, including scratch-cards that were placed into newspapers and magazines, informing the recipients that they had won a prize. To claim the prize, the consumer had to either call a premium rate number, send a text message or apply by post. CJEU found such practices to be in breach of No 31 of Annex I **even when the cost imposed on the consumer for claiming the prize 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**.



Thank you!

In case of further questions, please
contact:

Magnus.NOLL-EHLERS@ec.europa.eu,
Joachim.NILSEN@ec.europa.eu or
Martins.PRIEDITIS@ec.europa.eu

