



Sections 1 and 2 of the revised UCPD guidance: Scope, Lex Specialis and Key Concepts

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



Scope & Lex Specialis

Scope of the UCPD

Article 3(1)

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

Article 2(d)

- 'business-to-consumer commercial practices' (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.

Very broad scope:

- All "B2C" commercial practices (offline and online).
- Both goods and services.
- Important aspects have been clarified by the Court of Justice of the EU

Scope: Key case-law (I)

- Article 1: Purpose of the UCPD is to harmonise MS laws on unfair commercial practices **"harming consumers' economic interests"**
- Provisions **not protecting also the economic interests of consumers** fall outside the scope of the UCPD. **Key case-law:**
- C-559/11, ***Pelckmans Turnhout NV*** (4 October 2012)
National rule prohibiting a trader from opening his shop seven days a week: such a provision **only aims to protect the interests of workers and employees** in the distribution sector and does not intend to protect consumers.

Scope: Key case-law (II)

- National provisions aiming at protecting **economic interest of consumers along with other interests** fall within the scope of the UCPD.

Key Case-law:

- C-540/08, **Mediaprint** (9 November 2010):
National rules banning sales with bonuses: UCPD **precludes** general national ban on sales with bonuses designed to achieve **consumer protection as well as other objectives** (such as the pluralism of the press).

Scope: Key case-law (III)

- UCPD does not apply to commercial practices relating to **B2B transactions** or **only harming competitors' interests**.
- But: Only provisions which protect **exclusively competitors' interests** fall outside the UCPD. National provisions with **dual aim** of protecting consumers and competitors are covered by UCPD.
- Clarified in C-304/08, **Plus Warenhandelsgesellschaft** (14 January 2010):
*"As is evident from recital 6 in the preamble to that directive, 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".*

Scope: Key case-law (IV)

➤ National rules regulating sales at loss

C-343/12, **Euronics** (Order of 7 March 2013):

UCPD precludes a national provision which aims at prohibiting sales at loss, **only if** this provision **also** follows the aim of protecting consumers.

➤ Prohibition of price reductions during pre-sales period

C-126/11, **Inno** (Order of 15 December 2011):

Such a 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"*

Full harmonisation character: Key case-law

- **UCPD is based on the principle of full harmonisation.**
- Most recently confirmed by the Court of Justice in Case C-421/12, EC v Belgium (10 July 2014): In relation to **sales promotions**:
*"national rules of this nature, which place a **general prohibition on practices not referred to in Annex I** to Directive 2005/29, without providing for an individual analysis as to whether the practices are 'unfair' **run counter to the complete harmonisation objective** pursued by that directive, even where they seek to achieve a higher level of consumer protection".*
- **For example:** National provisions requiring traders to **display price reductions in specific ways** are likely to be contrary to the UCPD. In Case C-421/12, national law stipulated that any announcement of a price reduction had to refer to the price of reference defined as the lowest price applied throughout the previous month and had to last no less than a day and no more than a month. This was contrary to the UCPD.

Lex Specialis (I)

Article 3(4) and Recital 10 are key features of the Directive:

- UCPD: **complements other EU legislation** applicable to commercial practices harming consumers' economic interests.
- UCPD: a **safety net** that ensures a high common level of consumer protection against unfair commercial practices in all sectors, by **filling gaps** in other EU legislation.
- **For example**: Art. 4 of the Consumer Credit Directive (CCD) lays down **specific information requirements** about costs in relation to consumer credit contracts. UCPD **complements** these requirements, e.g. by requiring that all advertising materials for consumer credit contracts also contain any other **material information that an average consumer needs** to take an informed transactional decision (see Article 7 UCPD).

Lex Specialis (II)

UCPD Art. 3(4):

- In general: UCPD is **not excluded** just because more specific EU legislation is applicable
- A provision of sector specific EU law will **prevail over the UCPD only if**:
 - It has the **status of EU law** ("Community rules")
 - It regulates **specific aspects of unfair commercial practices**, and
 - There is a **"conflict"** between the UCPD and this specific rule
- In any other case, more specific EU law requirements **add to the general requirements** set out in the UCPD

Lex Specialis (III): When will other EU law prevail?

UCPD Art. 3(4): "conflict" refers to:

- The **opposition or incompatibility** between a given **UCPD provision** and a given **provision** in another piece of EU law, to the extent that the other EU law provision regulates a **specific aspect of unfair commercial practices**.

For example:

- Article 12 of the Mortgage Credit Directive: **Prohibits *per se*** the sale of credit agreements for mortgages **linked** with other financial products, without making the credit agreement available separately. This could be understood as a **conflict** with the UCPD, which provides that tying practices can only be unfair and prohibited on the basis of a **case-by-case assessment**.

Lex Specialis (IV): When will other EU law prevail?

For example:

- Article 13 of the ePrivacy Directive on **unsolicited communications** provides that the use of automatic calling machines, fax, or electronic mail for the purposes of direct marketing **may only be allowed in respect of subscribers who have given their prior consent**. This provision conflicts with Annex I No 26 UCPD, which **prohibits**, in all circumstances solicitations by distance medium **only if they are persistent** and unwanted. On the basis of Article 13 of the ePrivacy Directive, Member States can adopt rules aimed at **prohibiting solicitations as from the first call or email**, without the requirement of UCPD Annex I No 26 of an element of **persistence**.

Lex Specialis (V): Consequences of the omission of information required by other EU law

- Recital 15 clarifies: There is a difference between information requirements "introduced by Member States **over and above what is specified in Community law**, on the basis of minimum clauses" and "information **required in Community law**".
- Only information required in EU law has the status of "material information". The omission of such information constitutes a misleading omission according to Article 7(5) of the UCPD if it is likely to cause the average consumer to take a **transactional decision** that he/she would not have taken otherwise.

Lex Specialis (VI): Consequences on enforcement

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

- Member States should ensure coordination in good faith between the different competent enforcement authorities.
- **For example:** In Member States where different authorities are responsible for the enforcement of the UCPD and of sector specific rules, these should co-operate closely to ensure consistent outcomes of their respective investigations regarding the same trader and/or commercial practice.

The general concepts of the Directive: Key points

Article 2(b): "trader"

- Covers not only traders who act on their own account but also **"anyone acting in the name of or on behalf of a trader"**.
 - **For example**: A company which placed advertisements in the media upon instructions and in the interests of another company which is the ultimate service provider, was considered as a trader in the sense of the national provisions transposing the UCPD by a Latvian Court in 2012.
- C-59/12 – **BKK Mobil Oil** (3 October 2013):
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"**: *"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"*.

Article 2(k): "Transactional decision"

- Refers to **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**.
- Very broad concept, most recently confirmed by the Court of Justice in: C-281/12 – **Trento Sviluppo** (19 December 2013)
"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**.

Article 2(i): "Invitation to purchase"

- Defined as *"a commercial communication which indicates **characteristics of the product** and the **price** in a way appropriate to the means of the commercial communication used and thereby **enables the consumer to make a purchase**"* (Article 2(i) UCPD). In general: The "characteristics of the product" are present as soon as there is verbal or visual reference to the product.
- C-122/10 – **Ving Sverige** (12 May 2011):
"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." CJEU also confirms: Not necessary to provide a **mechanism to purchase** (e.g. a phone number or a coupon) - sufficient that the given information enables consumers to **take a transactional decision**, in its wide meaning.

Invitation to purchase vs pre-contractual information

- Pre-contractual information requirements = information to be provided **just before the consumer enters into a contract.**
- Invitation to purchase = **a wider concept.** Does not imply that the next step is entering into a contract. Indicates characteristics of the product and the price in a way that **enables the consumer to take a transactional decision**, notably whether or not to make a purchase.
- **For example: Radio advertising** that includes the characteristics of the product and the price is an invitation to purchase, but normally not pre-contractual information.

Invitation to purchase vs pre-contractual information (II)

- Why important?
- **Article 7(4) UCPD**: lists a number of information requirements which are considered material in the case of an invitation to purchase.
- The **Consumer Rights Directive (CRD)**:
 - Harmonises **pre-contractual information requirements** for distance and off-premises contracts, while allowing Member States to adopt or maintain additional **pre-contractual information requirements** for on-premises contracts.
- **Article 5(4) CRD**: Member States may adopt or retain **information requirements** beyond those laid down by the CRD, provided that such national rules apply only to **on-premises contracts** and only at **pre-contractual stage**, as opposed to the wider advertising and marketing stage.

Invitation to purchase vs pre-contractual information (III)

➤ In practice:

A national requirement for traders in brick-and-mortar shops to mention on a product the previous price next to the promotional one goes beyond the UCPD. But: provided it applies only to **on-premises sales** and only at the **pre-contractual stage**, it is likely to be compatible with Article 5(4) CRD.



Thank you!

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