

UNFAIR COMMERCIAL PRACTICES

European Commission's questionnaire on the
application of Directive 2005/29/EC

BEUC's response


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This is BEUC's response to the Commission's questionnaire with the reference: "Consultation on the application of Directive 2005/29/EC on Unfair Commercial Practices" circulated to stakeholders end of August 2011.

BEUC's response only covers questions that can be responded to from a European perspective.

I. Respondent Profile

- 1 Please indicate the name of your organisation or entity (for individual respondents, your name):**

BEUC, the European consumer organisation

- 2 Please provide a description of the area of activity / interest of your entity/ organisation (e.g. direct selling, advertising, on-line retailing etc...) and select the appropriate category from the table below. In addition, please give an indication of the number of members you represent and your geographical coverage.**

BEUC represents 42 national independent consumer organisations across the EU and Europe. We work on all EU policies that have an impact on European consumers' welfare.

- Contact person: (Ms/Mr, Name, Job Title)
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IMPLEMENTATION OF THE DIRECTIVE

- 6. National Legislation** Do you consider that the UCPD Directive has been adequately transposed / implemented in your country? *(In response to this question please indicate whether, in your opinion, the transposition of the Directive in your country created legal gaps / loopholes or inadequacies).*

Some BEUC members report that the provisions of the Directive are fairly comprehensive, but the breadth and flexibility of the rules has led to some uncertainty in their application, by consumers, traders and enforcers alike.

While the publication of the UCPD database is a useful step, an obligation on the Member States to ensure an effective summary of all enforcement action taken, whether informally or formally, is published would be a useful development to ensure there is greater understanding of, confidence in and compliance with, UCPD.

For more details on the implementation in the different countries, we refer to the comments provided by our member associations.

- 7. Issues related to specific provisions of the Directive.** Have you encountered any problems in the interpretation / transposition / application of certain provisions of the Directive in relation to specific situations / practices? *In the affirmative please describe the problems encountered and substantiate your answer with concrete examples.*

Unfair Commercial Practices in the area of sales promotions have been regulated in a rather limited way in the UCPD (i.e. inclusions of some sales promotions practices in the black list) comparing to the existing provisions at national level. The full harmonisation character of the annex has created problems in some countries which provide for general prohibition of certain practices related to sales promotions. As a result, the European Court of Justice issued several rulings precluding the general prohibitions in the legislations of those MS of practices that are not included in the annex to the directive¹.

This situation puts into question certain acquired consumers' rights and causes a situation of legal uncertainty, as a case by case analysis is required.

As a consequence of the full harmonisation character of the directive supported by the interpretation of the European Court of Justice (ECJ), by 2013 Member States would have to stop applying more protective rules regulating aspects of sales promotions that might be linked to "taste and decency" but which at the same time fall within the scope of the UCPD.

¹ i.e. In "Wamo BVBA" (C-288/10) the ECJ held that the UCPD precluded a national provision which provides for a general prohibition of announcements of price reductions or announcements suggesting such reductions during the period preceding sales. In the "Plus Warenhandelsgesellschaft mbH" case (C-304/08) the Court considered that another national provision was precluded by the directive; in this case it was a prohibition of 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. In the same line, the Court ruled in "Total Belgium NV / Galetta BVBA" (joined cases C-261/07 and C-299/07) that the general prohibition over combined offers was also precluded by the UCPD.

Consequently, BEUC considers that it is necessary to provide parameters to identify which commercial practices could be inspired by the “taste and decency” exception (recital 7) and it should be specified in the text of the directive that other traditional means of fair trade protection based on taste and decency may continue to exist.

Moreover, many of the provisions regulating sales promotions at national level might have their “raison d’être” in “taste and decency”. The ECJ clearly indicated that these practices can be subject to the unfairness test on a case-by-case basis under the general clause but that they should not be regarded as unfair “in all circumstances”: *“where a commercial practice falling within the scope of the directive does not appear in Annex I to the latter, that practice can be regarded as unfair, and thus prohibited, only after a specific assessment, particularly in the light of the criteria set out in Articles 5 to 9 of the Directive”*²

The UCPD has been recently transposed by the Member States and it is not clear at this stage what would be its impact on the national laws which might be precluded due to the full harmonisation character of the directive. In this regard, the time limit established in paragraph 5 of article 3, which allowed Member States to continue applying national provisions that are more restrictive or prescriptive than the directive until June 2013, should be extended.

- Definition of consumer

An eventual revision of the UCPD should take into account the definitions included in article 2 of the recently adopted Consumer Rights Directive³. In particular, recital 17 of CRD should be included in the definition of “consumer” (or in a clarifying recital) of the said directive⁴ which states that the notion of consumer can be extended to “mixed purposes” contracts (for partly professional and partly private purposes).

The definition of consumer in the UCPD does not necessarily encompass situations in which a consumer, object of an unfair commercial practice, buys a good or a service partly for personal and partly for professional purposes. Consequently, the limited definition of the UCPD has the result that a person who buys, for instance, a computer for mixed purposes (i.e. he or she works with it but also uses it for personal purposes) would not be considered a consumer and thus would not receive the protection provided by the consumer legislation. The application of the consumer protection rules to such kinds of “mixed purposes” contracts is however a reality in a number of Member States (DE, DK, FI, SE, NO).

Furthermore, many other Member States currently extend consumer protection rules to other persons or entities that are in a similar position as consumers in terms of lack of bargaining power and expertise (i.e. NGOs, start up businesses).

² Paragraph 43, ECJ in “Mediaprint Zeitungs” (C-540/08).

³ DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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: adopted by the Council of Ministers on 10 October 2011, not yet published in the Official Journal.

⁴ *“The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person’s trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.”*

By no means should an eventual extension of the scope to business to business transactions, restrict or reduce the protection provided to consumers in B2C transactions.

- General clause (article 5)

According to the general definition of unfairness (article 5), two conditions are necessary in order to consider a commercial practice as unfair: first, that it is contrary to the requirements of professional diligence, and second, that it materially distorts or is likely to materially distort the economic behaviour of the consumer to whom the practice is addressed or of the average member of the group when a commercial practice is directed to a particular group of consumers.

The requirement of “professional diligence” has been criticised for being vague and for increasing legal uncertainty⁵. The inclusion, in the definition of “professional diligence”, (article 2(h)) of the general principle of “good faith” has different implications among Member States. In the field of contract terms, the reference to “good faith” in article 3.1 of the Unfair Contract Terms Directive⁶ has been problematic in relation to the transposition of its article 3(1). Member States have transposed this notion in different ways due to the diverse possible interpretations of the term “good faith”: 13 Member States have included the notion of good faith in the unfairness test (CY, CZ, DE, HU, IR, IT, LV, MT, PL, PT, SL, ES, UK) while other countries make direct reference to significant balance without mentioning the additional criteria of good faith (BE, DK, GR, FR, LU, LT, SK).

A similar conclusion could be drawn from the reference to the “standard of special skill and care which the trader may reasonably be expected to exercise towards consumers”. In fact, this requirement depends very much on the legal traditions of the Member States in relation to “taste and decency”, in particular when it comes to advertising. The reference to what “the trader may reasonable be expected to exercise towards consumers” does not necessarily mean that the trader shall not take advantage of the consumers’ condition of vulnerability. Consequently, BEUC considers that the focus in the assessment of unfairness of a commercial practice should be the “legitimate expectations” and the “subjective conditions of vulnerability” of the consumer when making a transaction decision.

- Average consumer

In relation to the reference to the “*average consumer*” in recital 18, the notion of the average consumer as somebody who is *reasonably well informed and reasonably observant and circumspect* does not correspond to the reality of the majority of consumers and overstates the qualities of the typical consumer in reality. It seems to describe a particular type of consumer who has better than usual understanding of matters affecting his or her decision-making. The truth is that often consumers do not have the time or the inclination to investigate offers as much as the law expects them to do. As a result, there is often a gap between the practices the law believes, cause consumer detriment and the practices that actually cause consumer detriment in practice.

⁵ See briefing paper prepared for the IMCO committee by F. Alleweldt et al., “State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation”, July 2010

⁶ Directive 93/13/EEC.

This is most common in the context of complex purchases where the decision by the consumer is multi-faceted and each consumer will apply differing degrees of weight to each factor depending (largely) on personality and experience (e.g. when purchasing a car, the economy (km per litre) will be very important to some consumers but not to others). It is also a significant issue in contracts where the consumer invests emotionally in the subject matter (e.g. houses, holidays, wedding arrangements, and funeral arrangements) such that the average person cannot be expected to act rationally.

This is well illustrated by a recent UK case concerning the purchase of a house: a consumer felt she had been misled by the property description which said the house was not prone to flooding; however, shortly after moving in she noticed some water marks at the property and on further investigation discovered that the house had flooded on several prior occasions. Yet, the judge found the description not to be misleading on the basis that the average consumer would have investigated this properly and would have noticed the water marks when visiting the property.

Another concern regarding the average consumer test is whether it is flexible enough to deal with the practical reality of day to day commercial negotiations between businesses and traders. For example, a large number of purchasing decisions take place during or as a result of one-on-one discussions and negotiations (e.g. on the shop floor). In such circumstances, the trader is able to adapt its behaviour to maximise the influence on that individual consumer and may well mislead or unduly pressurise him, though an average consumer may not have been so misled. It is not clear whether the average consumer test could be applied to challenge the trader in such circumstances. Clarification on this point would therefore be welcome.

Finally, since commercial practices are normally aimed at a wide variety of consumer groups, any aiming at an average consumer, who is a combination of all consumer groups, may result in the fact that consumer groups that only have below-average little knowledge and experience, will not be protected and therefore be exploited by unfair practices. This is in particular relevant with regard to areas such as the financial services sector, where consumers have to have knowledge and experience to recognise unfair business practices. In the era of mass media one has to assume that an advert, even if it is only aimed at a certain consumer group, will reach a large number of different consumer groups. This results in the fact that the benchmark figure to establish unfair business practices is being set too high in many cases.

It should therefore be clarified that in cases where an unfair business practice reaches several consumer groups, it is sufficient if the average member of a consumer group is being misled.

- Vulnerable consumer

As regards the specific reference to *vulnerable* consumers in article 3.5, it has been difficult to prove the legal precondition established that the trader *could reasonably be expected to foresee* the particular vulnerability of the consumers addressed. Following this precondition, a given commercial practice can only be reviewed if it is proven that the trader could have reasonably expected the special vulnerability of the consumer of this group.

Moreover, many unfair commercial practices are aimed "at the world at large" and even though it's the case that vulnerable consumers are most likely to fall prey to such

practices, they are not clearly targeted and so it is not clear whether the practice would be reviewed by reference to them.

Similarly, it is often the case that not only vulnerable consumers would fall prey to a practice (although they might do to a far greater extent) or that only one particular group of vulnerable consumers would be affected. A good example arises in the context of long-running sales promotions. Some retailers will operate a sale that never ends or that have a “closing down sale” but in practice never closes. While such practices are misleading, in some circumstances the practices are so well known that the average consumer will be fully aware the sale is not real. However, less well-informed consumers or some vulnerable consumers may be swayed by the belief they are getting a good deal. The practice is not clearly targeted at these consumers, but these are the ones most likely to be affected.

- Material Information in relation to misleading omissions

Material information is defined by reference to what information the consumer “needs” to know in order to make an informed transactional decision. This is much narrower, potentially, than the information a consumer “would like to know” or would reasonably expect to be told. For example, when buying a house, the consumer would like to know whether it has central heating, but given the cost of installing central heating compared to the price of the property itself, it is arguable whether the consumer actually “needs to know”.

We believe this provision should be amended so that the information to be provided is that which the average consumer would reasonably expect to be provided.

- “transactional decision” test (misleading actions and omissions)

One potentially unforeseen consequence of the transactional decision test arises in markets where poor practice is widespread and known to the consumer, at least in principle. For example, in the low-cost airline industry, it is well known that you are unlikely to pay the advertised price as you are more than likely to purchase one or more extras. The cost of these extras is not always disclosed in a timely or transparent manner. This makes price comparison difficult, meaning in practice consumers either do not shop around very much or spend far longer shopping around than they should. However, where the practice is widespread, and consumers are aware of this, there is a behavioural bias against shopping around. It is not clear whether the practices described have in fact caused the consumer to make a different transactional decision.

- Definition of “invitation to purchase” (article 7.4)

The Directive does Not contain a definition of “invitation to purchase” referred to in article 7.4. This leads to difficulties when dealing with the unfairness of advertisements offering eye-catching prices which do not reflect the final price to be paid by the product or service offered. The directive should clarify that an invitation to purchase exists from the moment rates/prices/charges or parts thereof are advertised.

The need for a definition is best illustrated by an Austrian case brought by our Austrian member BAK against a financial service provider. In this case it had been controversial whether an invitation to purchase pursuant to Art 7.4 of the Directive existed. A building society had placed a large and eye-catching advert claiming a particularly low interest rate. Although it was a large-scale advertisement with sufficient unused space and therefore the communication medium did not pose any restrictions, the other

conditions of the loan were not adequately depicted. The argumentation of the financial service provider was that due to the fact that the advertisement was not very informative, no invitation to purchase existed and that therefore the exclusion of the points which are defined as essential information pursuant to Art 7 Section 4 of the Directive, do not represent a misleading omission.

8. In particular, please provide your comments on the following topics:

- a. **Price information.** Have you experienced any problems as concerns the application of the requirements of the Directive to the price of a product / service offered for sale (e.g. in the context of an invitation to purchase), in particular as concerns the requirement that the price be "final", inclusive of all applicable charges and taxes (Art. 6(1) (d) and Art. 7(4) (c))? *Please provide some concrete examples.*

Price information is one of the main concerns among different sectors. Consumers are often not well informed about the final price of the good or service supplied or whether it is an open-ended contract. These commercial practices used to disguise the real/final price of goods and services in order to boost demand can entail market failure and distort the consumer decision-making process.

The lack of transparency in price information is a crucial issue in the air transport sector. Many companies inform consumers only at the latest stage of the booking process that the advertised price did not include additional charges like surcharges for paying by credit cards or extra costs – see response to question 14. Another commercial practice is that of offering flights at fares excessively low while the availability of those fares is so limited that they should not be advertised as a general offer, unless the number of seats available at that fare and other specific conditions applied, are clearly indicated (e.g. timetable).

In relation to subscription contracts concluded on the Internet or by message services (for example concerning horoscopes, IQ tests, ring tones, etc) consumers face problems regarding unclear information about the costs of the subscription, which is for example given per message and per minimum amount of messages per week, without specifying the total price of the service per month.

Very often while the price of a service is advertised upfront, the obligation to make a registration or engage into a subscription before being able to benefit from the fee advertised appears only at a second stage or at the end of the booking process.

Some sellers engage into practices consisting of displaying a high price, followed by a significant discount in order to make the consumer believe the offer is a bargain. This has in particular been observed in the sector of furniture selling.

Another widespread practice refers to the advertising of cheap products/services that are in reality not available in order to make the consumer buy another comparable product/service at a higher price.

The recently adopted Consumer Rights Directive includes now specific pre-contractual price information (articles 5(c) and 6 (e)) that requires the trader to inform consumers of the "total price". Thus, article 7(4 c)) of the UCP directive should be adapted accordingly.

b. Misleading practices (actions or omissions)

i. Price comparisons tools / web-sites. Have you come across any unfair practices in the context of price comparison media / web-sites? *Please provide some concrete examples.*

Markets do not work well if consumers cannot make like-for-like comparison of prices. In particular in the air transport sector, price comparison sites often contain misleading information about the final price of flight tickets, which differs from the price advertised. The rankings presented in the comparison are based on the air fare as well as on charges and taxes. Yet, in particular cheap airlines have adopted the practice of charging extra for luggage or other supplements and adding a surcharge for payment for instance. However, this information is only disclosed when the flight is booked directly with the specific airline. Thus these divergences often stem from the pricing policy of air companies which increasingly rely on ancillary services supplements to form the final price while these supplements are not taken into account in the price comparison sites.

The proliferation of misleading advertising of air fares on the Internet is also addressed in the study carried out for the IMCO committee of the European Parliament of July 2010.

ii. Have you encountered any problems in relation to the interpretation / application of the provision related to the limitation of space and time of the communication medium and the measures taken by the trader to make the information available by other means (Art. 7(3) UCPD)? *In the affirmative please describe the problems encountered and substantiate your answer with concrete examples.*

In many situations consumers face difficulties to understand and access information that is provided in a limited space or time, due to the medium used. This may prevent consumers from realising that they are concluding a contract and that an obligation to make a payment exists. These kinds of problems are very common with the so-called Internet "cost traps". The Consumer Rights Directive which includes new transparency obligations should help overcome these problems.

These scenarios also appear in cases where an offer is made by telephone. The consumer is contacted by telephone and he is not informed of all the contractual conditions due to the limitations of the means of communication. The consumer will only be aware of all the conditions when he receives a pre-signed contract⁷.

In television advertising messages, the information given to the consumer is limited; the advertising refers to specific conditions available at a second stage in the website of the professional.

In all these cases what is crucial is that the information accessible at a second stage is free from restrictive conditions whose nature would be capable of altering the economic decision taken by the consumer.

⁷ The new Consumer Rights Directive allows member states to include the obligation of the trader to send a written contract to be signed by the consumer before the contract can be deemed concluded.

Price information is also potentially an issue, in relation to the unit pricing of goods. Traders will often argue that as long as the price and the number of items or weight are clearly displayed, the unit price can be displayed in very small font due to "limitations of space". This creates problems as the unit price is often difficult to read yet it is frequently important for the consumer to know in order to make an informed decision.

c. Aggressive practices

- i. Have you experienced any problems in relation to the application of the provisions of the Directive to aggressive practices (e.g. criteria for assessing the existence of an aggressive commercial practice; the use of disproportionate non-contractual barriers impeding the trader from terminating the contract or switching from one product / trader to another (Art. 9(d))? *Please provide some concrete examples.***
- ii. Would there be a need, in your opinion, to further develop these concepts⁸? *In reply to this question, please list the provisions / concepts that should be clarified.***

The use of pressure and aggressive practices in order to persuade the consumer to conclude a contract is still an issue. The most prominent practices are:

- making insisting telephone calls at the consumers' home at any time of the day (even late in the evening and week-ends);
- using different methods to alter the decision making process and ultimately the choice of the consumer notably at fairs, exhibitions, open doors days and invitations to visit the business premises; these practices are most common in the sector of timeshare.

In the absence of written documents, it is very difficult for the consumer to proof these aggressive practices.

d. The black list

- i. Have you encountered any difficulties as concerns Annex I of the Directive (the "black list")? *In response to this question please explain the problems encountered, mentioning the specific provision of Annex I to which they relate to, possibly by giving some concrete examples.***

Our Austrian member BAK reports that point 5 of the annex in relation to special bait offers is problematic in some cases. This refers to promotions which are no longer available or sold out already on the first day of the promotion. In Austria, both the BAK and the Consumer Association VKI have in the past brought injunction suits, which, however, were not decided in favour of consumers as the consumer organisations were not able to prove insufficient stock, whereas companies are able to submit stock lists, which cannot be used to prove evidence to the contrary or which contain justifiable

⁸ SEC(2009) 1666, 3 December 2009, Commission staff working document "Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices".

reasons for the promotion being sold out prematurely. Hence, the relevant provision is a "dead law".

Therefore, the respective clause in the "black list" should be specified in such a way that it is a misleading business practice when items have been sold out on the first day of a promotion.

- ii. Would it be appropriate to add / remove / modify the provisions of Annex I in order to solve the possible difficulties or inadequacies identified under questions 7 and 8? In reply to this question, *please provide concrete examples of provisions that should, in your opinion, either be added to, deleted from, or clarified in Annex I of the Directive and for what reasons.***

The full harmonisation of the black list created problems in the countries referred to in our answer to question 6.

- 9. Do you have any suggestions as to whether any of the provisions of the Directive you have identified under questions 7 and 8 above can be improved in a possible future revision process?**

Further consideration should be given to general terms in article 2 in the line of our answer to question 7 in relation to the assessment of the unfairness of certain practices.

III. Scope of Application of the Directive

- 10. Extension of the Scope of the Directive. Is there a need, in your opinion, to extend the scope of the Directive to some business-to-business, consumer-to-business or consumer-to-consumer transactions? *In reply to this question, please provide concrete examples of transactions which, in your opinion, should be included.***

The scope of the Directive should be extended to "mixed purposes" contracts at least in a manner to be in line with the recently approved Consumers Rights Directive (see answer to question 7).

Another extension in scope we think is merited is in relation to so-called civil recovery matters. In fact we believe such cases are already within the scope, but there is some disagreement on this point, so we believe clarification would be useful. These civil recovery cases arise in relation to the collection of a non-contractual debt from a consumer by a business, for example when individuals are asked to pay fixed sums by way of compensation in relation to wheel clamping, unlawful parking on privately-owned land, or as a result of shoplifting. For instance, in the UK we are aware of numerous cases where such sums are pursued aggressively or on a misleading basis (e.g. threatening court proceedings where no such action is possible). Further details can be found in the UK Law Commission report found at:

http://www.justice.gov.uk/lawcommission/docs/cp199_consumer_redress.pdf
(see particularly Part 3).

- 11. Do you consider that there are any legislative gaps in certain areas (e.g. sales promotions) which have affected the effective enforcement against certain unfair commercial practices? Should specific commercial practices be excluded from the scope of the Directive? *In reply to this question, please provide a detailed description of the problems encountered and motivate your response as extensively as possible.***

As referred to in our answer to question 6, a number of commercial practices which were generally banned in some member states have been considered by the ECJ to be contrary to the Directive, due to the full harmonisation character of the black list. Those practices can only be considered unfair on a case by case basis. This complicates enforcement actions and brings about legal uncertainty.

The assessment of the commercial practices that could be affected and eventually banned should be carried out by the national authorities. In this regard, we think that the extension allowed in article 3.5 should be prolonged.

IV. Unfair commercial practices related to specific sectors

- 12. Environmental claims. Have you encountered any problems in the application / interpretation of the Directive in relation to misleading environmental claims? *In the affirmative please describe the problems encountered by giving some concrete examples.***

Consumers are very often confronted with misleading "green claims" which prevent them from making an informed choice for a more sustainable consumption. BEUC has recently published a paper⁹ (attached hereto) with several examples of misleading green advertisements related to areas of daily life of consumers such as electrical appliances, cosmetic products, detergents, cars, drinks and electricity offers.

The UCPD only refers to misleading green claims to a limited extend. Although they would be covered by the general rules (articles 5 to 9), BEUC considers that a case-by-case assessment resulting from actions in court is neither sufficient nor efficient. It is thus necessary to better regulate this area by introducing more specific requirements for green claims and green washing. Also examples of green claims should be included in annex 1 of the UCP Directive.

⁹ BEUC/X/2011/067.

V. The Digital (on-line) environment

13. Social networks and other kinds of digital environments

- a. **Have you come across any unfair practices in the context of social networks (such as, for instance, Facebook or Twitter), in particular in relation to hidden traders / advertising? *In the affirmative please provide concrete examples of the unfair practices encountered.***

Social Networks and e-mail account providers (Yahoo, g-mail, hotmail....) use aggressive and misleading practices in order to entice consumers to adhere to the networks and/or to open up their profiles to ever more contacts. In particular consumers/subscribers do not receive objective information about the use it is made of all the personal data gathered by those service providers. Consumers are thus misled about the features and particularities of these services and in particular on how business models those services are based upon can work against their interests (e.g. protection of personal data and behavioural advertising).

Privacy notices of many websites lack transparency. This opacity may induce consumers to take uninformed decisions in relation to the activities of the website in question¹⁰. Often the privacy policies are "hidden" on websites; when they are more easily found (less often) they are not always clear about the extent to which the personal data of the consumer will be collected and/or processed. The policies are often obscure on issues where clear explanations matter the most, as for instance the question of whether data is shared with or sold to third parties, who these third parties are and what they intend to do with the data, the use of cookies and other data collecting technologies and data retention limits.

Behavioural advertising and targeting refers to a technique used by online publishers and advertisers to increase the effectiveness of their campaigns. Behavioural targeting uses information collected on an individual's web-browsing behaviour, such as the pages they have visited or the searches they have made, to select which advertisements to display to that individual. Most often the consumer does not receive any information on these advertising practices. Besides infringing personal data laws, these practices can be considered misleading (omissions) under the UCPD. Through the various techniques used for tracking consumers' behaviour on the Net, consumers are pushed to take an economically unsound decision often based on biased information.

Yet, the extent to which such practices would be in breach of UCPD is unclear, and guidance on these issues should be provided.

¹⁰ According to Eurobarometer, 64 % of users feel that information on the processing of their data is not yet satisfactory: February 2008.
According to a study by the Norwegian Consumer Council, 73% of users aged 15-30 years seldom read the Terms of Service: <http://www.sintef.no/upload/Konsern/Media/Person%20og%20forbrukervern.pdf>
The research carried out by Which? in March 2010 found that only 6% adults aged 16+ with internet access questioned have read the privacy policies of websites.

- b. Have you come across any (emerging or established) unfair practices in the context of other digital (on-line) environments which should, in your view, be addressed in a possible future revision of the Directive? *In the affirmative please provide concrete examples of the unfair practices encountered***

Some of our members have received complaints from consumers about on line vendors who alter the “feedback” information feature namely deleting negative feedbacks and thus misleading consumers about the quality of the sites in question. Also traders incentivise consumers to provide positive feedback or to remove negative feedback. Whether this practice is prohibited by UCPD is unclear.

Advertising of pharmaceutical products through social networks

Many companies are cleverly entering the social networks to “advertise” pharmaceutical products subject to prescription. Despite of such advertising being legally forbidden, the industry disguises its practices under the cover of “information campaigns” which contain misleading and/or inaccurate statements on the virtues of the products¹¹.

VI. Other issues for consideration

- 14. Is there any other subject you would like to raise in the context of the Report on the application of the UCPD? In particular, have you encountered any (emerging or current) unfair commercial practices (outside the digital (on-line) environments) which should, in your view, be addressed in a possible future revision of the Directive?**

- Air Transport sector

Misleading advertising of air fares is widespread. Despite the adoption of regulation 1008/2008 addressing the transparency of air fares, the proliferation of all kinds of supplements and surcharges not included in the advertised price, makes ever more difficult to compare tariffs and renders impossible for the consumer to make a fully informed decision before buying the ticket.

In 2007, previous to the final adoption of regulation 1008/2008, the Commission carried out a “sweeping” of websites selling air tickets. More than 400 websites were examined. The results were very disappointing, as over 50 percent of websites did not comply with the EU's consumer laws. Misleading pricing was the biggest problem. Tickets were often advertised as free, but the total price was not actually free once mandatory taxes and charges are added. We think that a similar “sweeping” exercise should be carried out regularly as it could help persuade airlines to abide by the rules.

¹¹ On the site www.mapilule.be the firm Bayer targets female teenagers about the virtues of taking the anti-conception pill. On Twitter, Novo Nordisk (the Danish pharmaceutical firm) runs an “advertising campaign” on its insulin products through the famous race-car driver Charlie Kimbal's; the car-racer regularly tweets about taking two of the company's insulin products.”

Our member in the UK, Which?, is still coming across companies that automatically opt people into services such as insurance; this can be flights (no frills airlines particularly) and holidays, but also coach and ferry transport. The more specialist, and therefore smaller travel companies tend not to do this as much as the more mass-agents and operators.

Which? investigations late last year found examples of cruise companies that were not being honest in their advertising. The findings were upheld by the Advertising Standards Authority (www.asa.org.uk).

In Spain, according to the provisional results of the OCU's on-going campaign (oriented to identifying infringements of regulation 1008/2008), some airlines consistently infringe the provisions on air fares' transparency of Regulation 1008/2008. Our member in Denmark reports that many airlines and travel agents are not in full compliance with the legislation and accordingly still have difficulties with transparency in prices.

In the UK, the following links provide for a few references to the OFT and Trading Standards who have attempted crackdowns on companies flouting the regulations.

<http://www.oft.gov.uk/news-and-updates/press/2007/72-07>

http://www.oft.gov.uk/news-and-updates/press/2003/pn_35-03

- Telecom sector

Our members have reported the following unfair practices in the telecom sector:

- Internet service providers often advertise their products misleading consumers as to the real services they can expect, in particular on broadband speeds. According to a research conducted by OFCOM (UK) many services, marketed as up to 20Mbps, actually achieve an average of just 6.8Mbps¹². In particular, more than a third of customers on services advertised as "up to" 24Mbps received speeds of 4Mbps or less.
- Mobile phones are sometimes marketed as "for free", even if the cost is actually included in the monthly payments for the contract time.
- Aggressive selling of telecom services in off-premises situations and distance selling.
- Excessive penalties are charged for earlier rescission of the contract.
- The duration of contracts is extended illegally and unilaterally by the operators.
- Special promotions are offered and ultimately not delivered.
- Unsolicited SMS are charged.

- Food sector

Our French member CLCV reported that despite the existing regulation on food claims and the opinions of EFSA (food safety authority), the sector has still to be monitored as misleading practices are often observed. CLCV introduced court actions against some professionals making misleading food claims (e.g. in 2010 CLCV obtained the condemnation of a professional advertising of chocolate bars which were said to boost

¹² <http://www.bbc.co.uk/news/technology-15105760>

the memory and mental performances of youngsters during exams periods; another action currently in course concerns claims on the supposed slimming effects of dairy products.

- Financial Services

BEUC¹³ supports the adoption of sector specific legislation rather than the review of the UCPD in the field of financial services, due to the specificity of the sector.

- UCPD and International Private Law

Article 3 (7) f the UCPD states that the directive is without prejudice to the rules determining the jurisdiction of the courts. BEUC agrees that the directive should not affect rules of Private International Law and the European legislation seems to have adopted the same approach. However, the reference to the applicable law is still missing because the UCPD was adopted before the so-called Rome II regulation¹⁴ whose article 6 would apply to commercial practices¹⁵. Consequently, the following should be added to article 3(7): **“this directive is without prejudice to rules determining the jurisdiction of courts and to the rules determining the law applicable to non-contractual obligations.”**

- UCPD and the Commission’s proposal for a “European sales law”

On 11 October 2011, the European Commission proposed an optional instrument for European contract law applicable to business-to-consumer contracts. Unfair commercial practices would not be covered by the instrument. However, there is no mention as to the relationship between the self-standing character of this legal regime and the legislation on commercial practices. This has a practical implication because some Member States have established that unfair commercial practices might constitute grounds for “avoidance”. For example, under Belgian law, the consumer can avoid a contract which was concluded as a consequence of an unfair commercial practice and keep the goods or services without any liability to pay (article 41 of the Trade Practices Act). This example of the link between unfair practices and the validity of contracts in some member states demonstrate that the proposed European Sales Law would inject an artificial body of law into the national law, which would complicate contract law and increase legal uncertainty.

¹³ See BEUC response to the European Commission’s consultation on the study on unfair commercial practices in the retail financial services sector.

¹⁴ Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

¹⁵ Unfair commercial practices have been considered prima facie acts of unfair competition under article 6 of Rome II regulation, see: P. Huber (ed), Rome II Regulation. Pocket Commentary, Sellier, Munich, 2011, p. 148.

VII. Issues related to the Enforcement of the UCPD

15. Effectiveness of national enforcement of the UCPD

- a. In general terms, how would you assess the effectiveness of the enforcement action against unfair commercial practices in your country (or in other EU countries in case of a multi-country association or entity):**
 - i. Do you think that your national authorities have sufficient enforcement powers and/or resources at their disposal in this respect?**
 - ii. Are the available sanctions and remedies adequate to prevent unfair commercial practices?**
- b. Please indicate whether there are any measures that, in your opinion, would allow a better enforcement of the UCPD.**

Many of our members, report that the enforcement bodies (be it public or private) do not have sufficient resources to ensure an effective enforcement of the Directive. This has led to a limited number of cases being brought and/or a focus on the cases that are most likely to succeed (i.e. those that are normally clear cut, rather than those having greatest precedent value and/or those likely to have the greatest impact on the market/trader behaviour as a whole).

Legally speaking, we believe the key problems with respect to enforcement relate to the following aspects:

- the proof is often based on oral statements and thus difficult to provide;
- the lack of speedy procedures to deal with elaborated advertising campaigns;
- the difficulties or legal barriers to obtain the name of the companies;
- monetary fines are not persuasive enough as often the gains obtained through the commercial practice overweigh the amount of the fines (the publications of the judgements in the web page of the trader or in newspapers is often more dissuasive than monetary fines);
- what material information means in the context of a complex or multi-faceted transaction, is unclear;
- proving the causal link between the omission of certain material information and a transactional decision is difficult, again in the context of complex or multi-faceted transactions; and
- the rigidity of the black list is problematic; the list should be regularly updated to deal with new practices that arise in the market.

The enforcement against unfair commercial practices obeys to the different legal traditions of Member States recognised in article 11(1) of the UCPD. Three main enforcement systems are identified in the area of unfair commercial practices. First, the administrative enforcement carried out by public authorities (like the Office of Fair Trade in the UK or Ombudsman in Scandinavian countries), second, the judicial enforcement and finally systems combining both elements.

It is indeed important to give flexibility to the Member States when deciding their enforcement systems but it is also necessary to count on minimum standards to guarantee the effective application of the substantive rules.

One important measure to provide better enforcement would be the possibility to collectively challenge unfair commercial practices in court (group actions). Consumers who suffer damages as a consequence of the breach of the unfair commercial practices legislation might be bound by the contract and will not necessarily get compensation for the damage.

Moreover, under the current text of article 11, Member States can choose to give consumers the right to redress in case of damages arising from an unfair commercial practice. Belgium and Luxembourg allow consumers to terminate the contract if it was concluded as a consequence of an unfair commercial practice. However, this is not the case in all countries. For example in the UK under this case consumers are only able to terminate the contract if the unfair commercial practice also contravenes another rule of law.

BEUC considers that the right to redress under the UCPD should be of mandatory implementation by the Member States so that all consumers can benefit from it. In addition, the inclusion of other enforcement tools and in particular collective actions would also improve enforcement in the field of commercial practices, especially when it comes to cross-border cases. This would certainly create an added incentive for traders to comply with the law.

16. Enforcement of the UCPD and Self Regulation/ADR mechanisms

- a. Please indicate whether you or the association (or entity you belong to) owns or adheres to codes of conduct concerning unfair commercial practices (Article 10 of the UCPD). If applicable, please provide a short description of the role of the respective self-regulatory bodies and their competences. In particular, please indicate how well, in your opinion, self-regulatory bodies cooperate with enforcement agencies.**

Not applicable

- b. How effective is, in your opinion, the enforcement and compliance to these codes by the operators in the sector concerned?**

BEUC considers that the enforcement under a self-regulation approach should be avoided in the field of unfair commercial practices. Enforcement should remain under the competence of national administrative authorities and judicial courts. This of course without prejudice to control by code owners; but such a control shall never be deemed equivalent to foregoing a means of judicial or administrative recourse.

- c. Please indicate whether measures have been taken in your country to encourage self-regulation.**

Not applicable

END