



The Consumer Voice in Europe

# European Commission's report on the application of the Unfair Commercial Practices Directive

**BEUC position paper**

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## Summary

On March 14 the European Commission published the report<sup>1</sup> on the application of the Unfair Commercial Practices Directive<sup>2</sup> (hereafter 'UCPD'). This is the result of a consultation carried out in August 2011 to which BEUC contributed<sup>3</sup>.

The UCPD has demonstrated potential to protect consumers against unfair commercial practices via different enforcement actions. However, certain aspects require improvement.

Although we would have preferred a limited revision of the Directive on the most problematic areas, we hope that the announced revision of the guidelines will address some of the most relevant concerns in the short term.

I) Our main general concerns relate to:

1. The **full harmonisation effect of the Directive** precluded national bans of unfair practices not included in the annex of the Directive (e.g. in the field of sales promotions). This means that Member States as of June 2013 (Article 3 (5)) cannot maintain or introduce better standards of consumer protection in the field of unfair commercial practices, except in the area of financial services and immovable property.
2. The definition of '**average consumer**' and consumers in a situation of 'vulnerability'. It is necessary to rethink this concept by taking into account the social and economic reality of consumers and the way they make consumption choices.
3. The requirement of **professional diligence** requires further guidance as to the role of this element in the unfairness test under Article 5(2) of the Directive.
4. In relation to advertising which targets **children**, the Commission's guidance document<sup>4</sup> should clarify how the general clauses can be used to protect them against unfair commercial practices, especially online.
5. Regarding how the UCPD interplays with **sectoral legislation**, it is necessary to clarify what is the role of the Directive in audiovisual advertising and how it interplays with the Audiovisual Media Services Directive<sup>5</sup>.

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<sup>1</sup> COM (2013) 139 final, 14 March 2013.

<sup>2</sup> Directive 2005/29/EC of 11 May 2005.

<sup>3</sup> BEUC's response to the European Commission's questionnaire on the application of Directive 2005/29/EC, Ref: x/2011/109 – 26/10/2011, available at [www.beuc.eu](http://www.beuc.eu)

<sup>4</sup> SEC (2009) 1666.

<sup>5</sup> Directive 2010/13/EU of 10 March 2010.

6. Some practices in the annex of the Directive are difficult for the consumer to prove due to the inclusion of a subjective element in the relevant practice (e.g. trader's intention). In such cases the **burden of proof** should be reversed.
7. Clarification is needed in relation to the status of consumers under the prohibition of '**pyramid promotional schemes**' (practice number 14 of the annex of the Directive) since the definition of consumer of article 2 (a) of the Directive would exclude consumers with a commercial interest, which are generally the victims of such an unfair practice.
8. The Directive should provide a link to **contract law remedies** for consumers in order to obtain redress when a contract has been concluded as a consequence of an unfair commercial practice.

II) Regarding the application of the Directive in **specific sectors**, our concerns are:

1. **Marketing of commercial guarantees:** The *Apple case*<sup>6</sup> showed the need to clarify the information obligations of businesses on consumer rights under the Consumer Sales Directive.
2. **Online bookings in air transport:** Consumers are frequently exposed to misleading advertising of prices for flight tickets. The recent developments in the UK - notably the investigation carried out by the Office of Fair Trading upon request of BEUC member Which? - showed that the application of the UCPD combined with specific sector legislation (e.g. Regulation 1008/2008/EC on common rules for the operation of air services in the Community or Directive 2007/64/EC on payment services in the internal market) is sometimes uncertain when it comes to the advertising of prices and the inclusion of costs consumers cannot avoid e.g. payment surcharges.
3. **Misleading environmental claims:** BEUC believes that the UCPD does not sufficiently address the specificities linked to misleading environmental claims. Additionally, the full harmonisation effect of the Directive does not allow Member States to adopt stricter legislation (e.g. a general ban of misleading 'eco' terms). Thus, the European Commission should assess the appropriate policy options to better protect consumers against misleading green claims.
4. **Financial services:** The full harmonisation effect of the UCPD does not apply to financial services legislation. This is welcomed and should be maintained as the complexity of this market requires specific legislation which can be developed at national level or in a targeted manner in EU legislation.
5. **Telecommunications:** Contrary to the financial services sector, the preclusion effect of the UCPD fully applies in other markets like telecoms. This causes problems because it prevents from prohibiting practices not included in the annex of the Directive and which are particular to this sector.

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<sup>6</sup> See below point 1, section II.

- III) Finally, the general problem of **enforcement of the UCPD** and the respective role of national competent authorities, consumer associations, and the European Commission: It is necessary to develop an “integrated” approach to consumer protection encompassing public and private enforcement to realise the UCPD’s potential to protect consumers and ensure a level playing field for business at national and transnational level.

## I. General remarks

The UCPD is the legal framework applicable to unfair commercial practices in business-to-consumer transactions. This horizontal legislation applies to all sectors and its full harmonisation nature (with the exception of financial services and immovable property) has provided a uniform set of rules for all practices occurring before, during and after the conclusion of a consumer contract.

The Directive has shown its potential to protect consumers against misleading commercial practices. For example, the UCPD has given a pan-European perspective to the enforcement of consumer law against unfair practices of multinational companies operating in different member states. The *Apple case*, in which 11 consumer organisations co-ordinated actions to fight against misleading information given by the company to consumers in relation to their legal guarantee rights, is a clear example of it (see Section II, point 1). This case also showed downsides of the directive, for example, a lack of clarity as regards the consumer information that has to be given on the legal guarantee rights (article 6 (1) (g)). It also brought to light the fact that full harmonisation of substantive law can still lead to different results in different Member States as regards decision by national authorities.

The Court of Justice of the European Union (hereafter 'CJEU') has confirmed in several rulings<sup>7</sup> that the UCPD precludes national legislation from prohibiting commercial practices not listed in the annex of the Directive and intending at protecting consumers' interests. In the joined cases *Wamo*<sup>8</sup> and *Inno*<sup>9</sup> the CJEU ruled that the protection of consumers is a pre-condition for the preclusion effect of the Directive over national laws, while Member States could still maintain or introduce prohibitions which go beyond the annex of the Directive if they aim to protect competition.

This approach illustrates the absurdity of eliminating national protection measures which are aimed at protecting consumers due to the full harmonisation character of the Directive while at the same time they could be upheld in case they protect competitors.

Similar problems have been found in relation to misleading environmental claims because Member States are unable to introduce specific legislation (e.g. a general ban on the use of certain terms which are vague and difficult to substantiate such as:

- 'environmentally-friendly';
- 'eco-friendly';
- 'carbon neutral';
- 'green';
- 'sustainable' etc....

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<sup>7</sup> e.g. joined cases C-261/07 and C-299/07; C-522/08; C-304/08; C-540/08.

<sup>8</sup> C-288/10.

<sup>9</sup> C-126/11.

As indicated in the report<sup>10</sup> of the Multi-Stakeholder Dialogue on Environmental Claims the analysis of misleading environmental claims on a case-by-case basis in application of the general clauses, makes it difficult for national authorities to enforce the UCPD in this area (see section II, point 3).

The European Commission in the Communication on the application of the UCPD<sup>11</sup> (hereafter 'Communication') assessed the benefits of the Directive and concluded that there is no need to revise at this stage mainly because the enforcement experience is still too recent for such an encompassing body of legislation.

Instead, the European Commission proposes to improve the implementation of the Directive by better enforcement. One of the measures to achieve that objective includes further developing the guidance document on the implementation/application of the UCPD<sup>12</sup>. This could indeed help clarify uncertainties of the application of the Directive, but it is necessary to assess in the first place the usefulness of such an instrument on how it can help enforcers better apply the provisions of the UCPD.

Indeed, there are a number of elements which still need to be clarified or further considered in the Guidance document or in an eventual revision of the Directive.

- The transposition of the UCPD has shown the negative impact of **full harmonisation** over pre-existing national bans on unfair practices - in particular in the field of sales promotions - not included in the annex of the Directive. Taking into account the strict interpretation of the full harmonisation effect of the Directive in the case law of the CJEU, it is important that the European Commission provides information on existing practices related to sales promotion not covered in the annex of the Directive in order to assess the impact of the sunset clause and extend the list of unfair practices on sales promotions in a future revision of the UCPD.

**In addition to that, the European Commission should list unfair practices reported by national authorities/competent courts, which were considered unfair under general clauses, to evaluate an extension of the annex in an eventual revision of the UCPD. This could easily be done in the frame of the current UCPD database.**

- The notion of the '**average consumer**' in the Directive, as somebody who is "reasonably well informed and reasonably observant and circumvent"<sup>13</sup> does not always correspond to the reality of consumers. Consumers' choices are defined by personal (emotions), economic (incomes, wealth) and social (culture, education) backgrounds. Thus, a behavioural economics based approach would be necessary to assess how consumers make transactional choices. Furthermore, consumers are usually exposed to situations of vulnerability, which are not taken into account in the parameters provided by the Directive. This occurs for example in the area of financial services (e.g.

<sup>10</sup> Environmental Claims - Helping consumers make informed green choices and ensuring a level playing field for businesses, report from the Multi-Stakeholder Dialogue presented at the European Consumer Summit on 18-19 March 2013.

<sup>11</sup> COM (2013) 138 final, 14 March 2013.

<sup>12</sup> SEC (2009) 1666, 03 December 2009.

<sup>13</sup> Recital 18.

purchase of a house, subscription to an insurance contract, etc...) or in regulated industries such as energy (e.g. switching of energy suppliers) where due to the complexity of the market even a 'reasonably well informed' consumer would find it difficult to understand the implication of his or her consumption choice.

In a recent opinion the European Consumer Consultative Group (ECCG)<sup>14</sup> suggested the adoption of a two-fold approach regarding the definition of **vulnerable consumer** which should consider:

(1) the situation of specific groups, which are more structurally vulnerable (e.g. minority groups, people with poor numeracy and literacy skills, elderly, children, people at risk of poverty and people with disabilities). This is "the personal dimension or horizontal approach" of the definition of vulnerable consumers. It depends on the personal characteristics of consumers and it is valid in all situations and;

(2) consumers being exposed to situations of vulnerability, ("situational vulnerability" or "sectoral approach") in which they would in some markets be considered 'average consumers', in others due to complex market conditions are in a difficult position to make informed consumption choices.

**BEUC believes that the European Commission should consider these elements in an eventual revision of the Guidance document (point 2.2) in order to clarify that the criteria to define an average consumer shall consider the situation of vulnerability the consumer might be exposed to in certain markets.**

- The requirement of **professional diligence** is a very important part of the unfairness test in the general clause of Article 5. However, the definition of Article 2(h) is very general and would require clarification regarding situations that are not covered by the sub-general clauses (misleading actions and omissions (Articles 6 and 7) and aggressive practices (Articles 8 and 9)) or by practices which are not listed in the annex of the Directive. As highlighted by the Commission's report, the CJEU<sup>15</sup> still needs to indicate whether a separate examination of the requirement of professional diligence is necessary when assessing unfair commercial practice<sup>16</sup>.

Once the Court has ruled, **the European Commission should provide clarification as to the role of this element in the unfairness tests in the application of Article 5 of the UCPD.**

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<sup>14</sup> European Consumer Consultative Group Opinion on Consumers and Vulnerability. Adopted 7 February 2013, available at:

[http://ec.europa.eu/consumers/empowerment/docs/eccg\\_opinion\\_consumers\\_vulnerability\\_022013\\_en.pdf](http://ec.europa.eu/consumers/empowerment/docs/eccg_opinion_consumers_vulnerability_022013_en.pdf)

<sup>15</sup> Pending case C-435/11.

<sup>16</sup> Point 3.3.

- The Directive does not include a **definition of 'child'** although some of its provisions aim at protecting children against specific unfair practices (Practice 28 of the annex). In addition, the guidance document indicates that children and teenagers can be considered vulnerable consumers, but without giving any age-range<sup>17</sup>. The Guidance document in this area should include an additional reference on how the unfairness test under the general clauses should consider the situation of children (e.g. when teenagers are targeted via mobile applications, or are victims of 'cost-traps').
- Regarding the **interplay of the UCPD with sectoral legislation**, the European Commission rightly points out in the report<sup>18</sup> that the Directive applies to all aspects not covered by a *lex specialis* (Article 3(4)). However, when the latter overlaps with the rules of the UCPD, it is important to clarify that the UCPD still applies to all aspects of commercial practices in that sector which are not *explicitly* covered by the *lex specialis*. Special attention needs to be paid to the role of the UCPD in audiovisual advertising. In this regard, it is necessary to clarify how the derogation of Article 3(4) applies in relation to the Audiovisual Media Services Directive (hereafter 'AMSD'), which specifically regulates television advertising and teleshopping (Articles 19 to 26), but does not directly protect the consumer's economic interest against unfair commercial practices. It would be discriminatory if the audio-visual practices regulated in the respective provisions of the AMSD would be excluded for the UCPD unfairness control in this respect.
- It is very **difficult for the consumer to prove certain practices of the annex**. For example, unfair practice number 7 of the annex requires the consumer to prove the trader's intent to elicit an immediate decision from the consumer. Similarly, practice number 13 requires them to prove if the trader had the intention (i.e. was deliberate) to make consumers believe a product was made by a manufacturer who did not. The same problem is identified in Practice 18 ("with the intention of"). **BEUC suggests that when it is necessary to prove the intention or a subjective situation of the trader, the burden of proof should be reversed.**
- The application of practice number 14 of the Annex on the prohibition of **pyramid promotional schemes** presents difficulties in relation to the reference in that provision to consumers giving 'consideration for the opportunity to receive compensation' and the definition of consumer of article 2 (a). In this respect, the definition of consumer of the UCPD would exclude individuals with a commercial interest (a pre-condition for the application of this provision), which are generally the victims of such an unfair practice. Thus, the protection intended to consumers could be twisted by a formalistic interpretation of this provision vis-à-vis the restrictive definition of consumer of the Directive.

**BEUC suggests that the European Commission in the Guidance document includes a section on pyramid promotional schemes and clarifies the status of consumers under practice number 14 of the Annex.**

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<sup>17</sup> Point 2.3.2.

<sup>18</sup> Point 2.5.



- Finally, it would be necessary to clarify the interplay between the UCPD and the **contract law remedies** in case of a contract concluded as a consequence of an unfair commercial practice. Some Member States have regulated this matter when transposing the Directive into their national laws, but this is not the case in all countries, or the results differ significantly. For example in Belgium and Luxembourg consumers are entitled to terminate the contract if it was concluded as a consequence of an unfair commercial practice, while this element alone would not necessarily grant the consumer the right to terminate the contract in other countries.

## II. Application in specific sectors

The European Commission in the Communication indicates that the different measures to improve the application of the UCPD will concentrate on different key sectors, which include: travel and transport, the digital/online markets, environmental claims, financial services and immovable property<sup>19</sup>.

In this section, we provide feedback in relation to the main problems identified in the application of the Directive in relevant areas which include many of the sectors listed by the European Commission as problematic in terms of enforcement of the UCPD: marketing of guarantees; online advertising of prices for flight tickets; misleading green claims; financial services and telecommunications.

### 1) Marketing of commercial guarantees

In December 2011, the Italian Competition Authority (*Autorità garante della concorrenza e del mercato*) fined the US-based company Apple for misleading practices and information as to the guarantee on its hardware products<sup>20</sup>. This case was initiated by our member, the Italian consumer association *Altroconsumo* who had received complaints from consumers that Apple was in breach of consumer protection rules.

The matter concerned two aspects of Apple's commercial strategy:

- On one hand, the advertising of a 1 year limited 'manufacturer's warranty', which was found to mislead consumers about their benefits from the EU-wide minimum 2 year legal guarantee established by Directive 99/44/EC on consumer sales.
- And, on the other hand, the promotion of the extension of this 1 year limited 'manufacturer's warranty' through the sale of the *AppleCare Protection Plan*<sup>21</sup> for which consumers pay a considerable amount of money for protection they would anyhow have had under the law (e.g. right to repair or replacement in case the product becomes defective during the two year guarantee period), was also found to mislead consumers.

*Altroconsumo* filed a complaint against Apple before the AGCM (Italian Consumer Protection Authority), the first instance authority in Italy in charge of enforcement of the rules on unfair commercial practices. The national authority confirmed the misleading nature of the company's commercial strategy and fined the three incumbents: Apple Retail Italy, Apple Italy and Apple Sales International. The decision of the AGCM was also confirmed in the prevailing part by the Regional Administrative Court of Lazio (*Il Tribunale Amministrativo Regionale per il Lazio*).

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<sup>19</sup> Point 3.3.

<sup>20</sup> Decision of 21 December 2011, available at/  
[http://www.agcm.it/trasp-statistiche/doc\\_download/3042-ps7256chiusura.html](http://www.agcm.it/trasp-statistiche/doc_download/3042-ps7256chiusura.html)

<sup>21</sup> *Altroconsumo* performed investigations (including video recording of the behaviour of shop assistants in Apple stores throughout Italy) and discovered that Apple pursued a commercial strategy aiming to mislead consumers as to their legal guarantee rights in order to promote and sell the Apple Care Protection Plan.

After verifying that Apple's unfair behavior was found in different countries across the EU, eleven consumer associations<sup>22</sup> decided to launch a coordinated action to call on the company to cease and desist these unlawful practices and the marketing of their *AppleCare Protection Plan* or, alternatively, called on their respective national authorities to investigate Apple's practices.

As a result of the cease and desist letters, Apple in 2012 modified partially the consumer information on its webpages in different ways - for example by adding country specific legal notices about the national law on legal guarantees. However, most of the consumer organisations considered these changes insufficient to inform consumers in an appropriate way.

Four consumer organisations (*Test-Achats/Test-Aankoop*, Belgium; *DECO*, Portugal; *VZBV*, Germany and *ULC*, Luxembourg) filed injunction actions in court. The Danish (*Forbrugerrådet*), Dutch (*Consumentenbond*), Greek (*EKPIZO*), Spanish (*OCU*) and Slovenian (*ZPS*) consumer organisations filed complaints with their public enforcement authorities.

The *Apple* case has shown the benefits of the UCPD: it was the first time an unfair commercial practice of a multinational (US-based) company who operates in several Member States was tackled using a common legal basis provided by the Directive.

However, this exercise revealed several uncertainties as to the information obligation of businesses in relation to the legal guarantee rights of the consumer under the 1999 Consumer Sales Directive<sup>23</sup> as transposed by the Member States in combination with the UCPD and the Consumer Rights Directive (hereafter 'CRD')<sup>24</sup>:

- Article 6(2) of the Consumer Sales Directive establishes that a trader offering a commercial guarantee shall "state that the consumer has legal rights under applicable *national* (italics added) legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee".
- The UCPD in its general clause on misleading actions, set down the conditions for a commercial practice to be misleading by a positive action, and specifies that it might have as an object to mislead consumers as to "the consumer's rights, *including the right to replacement or reimbursement* under Directive 1999/44/EC (italics added)". In addition, the UCPD bans "presenting rights given to consumers in law as a distinctive feature of the trader's offer" (misleading practice n° 10 of Annex I)

<sup>22</sup> 1) Italy: Altroconsumo;

2) Belgium: Test-Achats / Test-Aankoop;

3) Portugal: Associação Portuguesa para a Defesa do Consumidor – DECO;

4) Luxembourg: Union Luxembourgeoise des Consommateurs – ULC;

5) Germany: Verbraucherzentrale Bundesverband – VZBV;

6) The Netherlands: Consumentenbond – CB;

7) Denmark: Forbrugerrådet – FR;

8) Poland: Polish Consumer Federation National Council - Federacja Konsumentów;

9) Spain: Organización de Consumidores y Usuarios – OCU;

10) Slovenia: Zveza Potrošnikov Slovenije – ZPS;

11) Greece: Association for the Quality of Life - E.K.PI.ZO;

<sup>23</sup> Directive 1999/44/EC of 25 May 1999.

<sup>24</sup> Directive 2011/83/EC of 25 October 2011.

- Finally, Article 5(1)(e) and 6(1)(l) of the CRD includes “a reminder of the existence of a legal guarantee of conformity for goods” as pre-contractual information.

In considering these legal provisions, the *Apple* case has put forward the question of what are a business’ information obligations regarding the consumer’s legal guarantee rights when offering a commercial guarantee: *Shall a business inform consumers of the specific guarantee rights of the relevant national law? Or, does a company fulfil its legal obligations under these three Directives by solely indicating that the legal guarantee rights are not affected by the commercial guarantee?*

**The European Commission should address these questions in the Guidance document in order to clarify the pre-contractual information duty related to the consumer’s legal guarantee rights.**

**In addition, the Consumer Sales Directive should be revised *inter alia* to harmonise the minimum content a commercial guarantee should have in order to ensure an added value of a commercial guarantee for consumers and more clarity as to the exercise of it.**

## **2) Online bookings in air transport**

The Guidance document<sup>25</sup> provides information regarding general misleading information (article 6 (1) d)). We have identified this provision to be problematic in the advertising of prices in online bookings, in particular in the air transport sector due to the interplay with the specific sector legislation.

As equally highlighted by the European Commission in the UCPD report, many airlines do not include all costs which are *de facto* unavoidable, such as credit and debit card surcharges.

The UK Office of Fair Trading (hereafter ‘OFT’) have addressed this problem in an investigation opened after a ‘super-complaint’ by BEUC member Which?

The OFT in a decision<sup>26</sup> of June 2011 concluded that:

- It is misleading to separate compulsory charges from the headline prices.
- Retailers should make headline prices meaningful for comparative purposes by not imposing surcharges for debit cards, which are considered the standard online payment mechanism. Consequently, the OFT recommends the government introduces measures to prohibit retailers from imposing surcharges for payments made by debit card.

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<sup>25</sup> Point 2.4.3

<sup>26</sup> OFT response to Which? Super Complaint available at:  
[http://www.oft.gov.uk/shared\\_of/super-complaints/OFT1349resp.pdf](http://www.oft.gov.uk/shared_of/super-complaints/OFT1349resp.pdf)

- Information on how much the consumer would have to pay to use mechanisms other than a debit card is necessary price information which consumers need to know in order to effectively shop around and make purchasing decisions and therefore this information should be easily available.

These recommendations are also based on the existing legal framework, namely:

- UCPD: Article 6(1)(d) prohibits practices which aim to mislead consumers in relation to the “price or the manner in which the price is calculated”. Many airline websites do not sufficiently disclose that the consumer will have to pay additional charges when purchasing his or her travel ticket with a debit (or credit) card. This situation can lead consumers into transaction decisions they would not have made otherwise.
- Regulation 1008/2008 on common rules for the operation of air services in the Community: Article 23 of the regulation provides that all unavoidable and foreseeable costs shall be indicated at all times and included in the final price. This means the advertised price should be the final amount the consumer will have to pay including all unavoidable and foreseeable taxes, fees and charges. In relation to payment surcharges, the experience reported by consumers show that in practical terms, means of payment offered “free of charge” are not in common usage among consumers and they therefore can rarely avoid such additional costs.
- Directive 2007/64/EC on Payment Services in the Internal Market: it allowed Member States to forbid or limit payment surcharges in their national legislations (Article 52(3)). Currently, payment surcharges are limited in the three countries (DE, ES and FI) and prohibited in twelve others (BG, LV, IT, CY, LT, LU, AT, PT, RO, SK, EL, FR (rebates accepted)).
- CRD: Article 19 of the Directive prohibits traders to charge consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means. This is without prejudice to the option given to the Member States in Article 52(3) of the Payment Service Directive. Directive 2011/83/EU is meant to be implemented by the Member States in December 2013.

On 10 April BEUC wrote<sup>27</sup> to the European Low Fares Airline Association (ELFAA) and to the Association of European Airlines (AEA) to draw their attention to the developments in the UK and asked them to recommend their members adapt their business models so all payment costs are included in the headline price. Additionally, we asked that consumers be offered a choice of inexpensive and widely used payment services and that airlines stop applying charges for debit and credit card payments, or where payment costs are allowed under national laws, limit those charges to the actual cost of offering such means of payment (as stipulated in the CRD).

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<sup>27</sup> BEUC letter ‘Price transparency and online booking payment surcharges’ to the European Low Fares Airline Association, Ref: x/2013/026 – 23/04/2013, available at [www.beuc.eu](http://www.beuc.eu)

**It is necessary the European Commission takes this situation into account when revising the Guidance document and specifies in Section 2.4.3 the necessary conditions to advertise prices, notably in flight bookings in order to avoid a breach of Article 6, paragraph 1(d) of the UCPD.**

### **3) Misleading environmental claims**

In relation to misleading environmental claims, the full harmonisation effect of the UCPD has caused difficulties to enforcement authorities when addressing this problem due to two main reasons:

- First, the Directive does not include specific provisions on misleading green claims. As indicated by the European Commission in the implementation report, the general clauses, in particular Articles 6(1)(a) and (b), apply. This means that enforcers would need to perform a case-by-case assessment.
- Secondly, the full harmonisation effect of the Directive does not allow Member States to deviate from the UCPD and introduce specific provisions in the field, in particular general prohibitions on using certain terms in green claims which can be considered misleading.

Several examples of self-regulatory initiatives - mainly developed by the advertising industry - exist in this field. However, to be considered as best practices they must meet certain minimum conditions, such as high binding standards, widespread industry 'take-up', effective monitoring and inspection, robust sanctions in case of violations and real redress for victims.

Other useful initiatives to address misleading environmental claims include guidelines developed by national authorities<sup>28</sup> on how to make a legitimate green claim. From a specific national perspective they seem to be very efficient, but in a pan-European context it is necessary to take into account that not all EU national authorities have the resources necessary to develop and, where applicable, enforce such initiatives.

**The European Commission should explore different consumer protection policy options on the basis of the results of the ongoing EU Consumer Market Study on Environmental Claims (DG SANCO), as suggested by the MDEC<sup>29</sup>.**

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<sup>28</sup> e.g. 'Green Claims Guidance' issued by the UK Department for Environment, Food and Rural Affairs or the 'Guide des allégations environnementales' developed by the French Conseil national de la consommation in co-operation with stakeholders.

<sup>29</sup> MDEC report, point 5.8.

#### 4) Financial services

The UCPD's full harmonisation effect does not apply to the financial services sector. This means that Member States can introduce stricter requirements for the promotion of financial products.

**BEUC agrees on maintaining this exception to the full harmonisation effect of the UCPD, as the complexity of the financial services markets would require a sector-oriented approach in addition to the horizontal framework provided by the consumer *acquis*, notably the UCPD and the Unfair Contract Terms Directive<sup>30</sup>.**

In this sense, specific rules to tackle unfair practices in the financial services sector can be developed at national level or in targeted EU legislation to provide consumers with the necessary protection in the short and medium term. For example, the Council negotiations on the Mortgage Credit Directive introduced a rule prohibiting bundling practices and limiting tying<sup>31</sup>.

However, it would be helpful if the Commission can provide an overview of the national measures taken under the Consumer Credit Directive<sup>32</sup> concerning sales practices.

#### 5) Telecommunications

In contrast to the case of financial services, the UCPD precludes any national legislation regulating unfair practices in telecommunications markets.

The CJEU has already confirmed this principle in the leading case *Telekomunikacja Polska*<sup>33</sup>. The Court indicated that a general prohibition on combined offers (this case concerned the combination of broadband service and fixed telephony) is incompatible with the full harmonisation effect of the Directive. Consequently, this preclusion effect does not allow Member States to introduce general prohibitions of unfair practices identified in the national markets.

BEUC members have reported several practices not included in the annex of the Directive, but which fall within the general clauses. This results in problems with improving consumer conditions in telecom markets as national authorities (e.g. regulators) would not be able to introduce general prohibitions and instead they would need to assess each practice on a case-by-case basis.

In Bulgaria, telecommunications companies offered free gifts to consumers (e.g. a new telephone), frequently to elderly people at the condition they sign a new contract. Consumers accepted the gift without realising the operator had changed the tariff and the agreement to a new contract with a higher applicable tariff. Consequently, when consumers want to terminate the contract then they are asked to pay all subscription fees for the remaining months.

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<sup>30</sup> Directive 93/13/EEC of 05 April 1993.

<sup>31</sup> Article 8a of Council agreement of 3 May 2013, available at: <http://register.consilium.europa.eu/pdf/en/13/st08/st08895.en13.pdf>

<sup>32</sup> Directive 2008/48/EC of 23 April 2008.

<sup>33</sup> C-522/08.

Similarly, in Malta, an Internet Service Provider (ISP) offered to consumers to upgrade internet speed with a free trial period of 6 weeks. However, if the subscriber did not opt-out during that period then the service provider assumed the consumer's agreement to the new contractual conditions which included an increased fee and a contract extension of another 2 years.

The service provider in question sent letters to consumers giving the impression that the service was going to improve for free. However on more careful reading, one would find that this service was free for the first six weeks and after this period the consumer was required to either expressly opt-out of the new contract or face higher tariffs coupled with an extended contractual period.

These cases would be covered by the general clauses of the Directive, notably Articles 7 on misleading omissions and 15 on inertia selling respectively. However, due to the preclusion effect of the Directive it is unlikely any national provision prohibiting this practice could be introduced or maintained.

**BEUC believes that due to the complexity of this sector, it is necessary to establish a list of unfair practices which should be prohibited in telecoms markets and which complement the UCPD.**



### III. Towards better enforcement of the UCPD

**National authorities** have a central role in the effective enforcement of the UCPD. According to Article 13 of the Directive, Member States are responsible for taking the necessary measures to prevent and sanction breaches of its provisions. In this regard, the potential of the UCPD to protect consumers and fight unfair practices across the Single Market can only be realised if public enforcers step up their efforts at a national and also EU level via stronger co-operation.

**Consumer associations** also play an important role in the enforcement of the consumer *acquis*, and in particular of the UCPD, as demonstrated in the co-ordinated actions undertaken by BEUC members in recent years and most prominently against Apple and European airlines.

In this respect, consumer associations can be involved in the enforcement of the UCPD by different means, which mainly include court actions (e.g. via injunction proceedings) and/or co-operation with national competent authorities.

Additionally, projects like the Consumer Law Enforcement Forum (2007-2009) or the recent Consumer Justice Enforcement Forum (2011-2013) have proved useful platforms to discuss enforcement opportunities across the EU, including exchanging best practices. As a result of these projects, many consumer associations have taken up co-ordinated actions in different sectors.

This was also possible thanks to the European perspective of **BEUC**, who without having *a priori* legal status in enforcing consumer law, has taken up the role of co-ordinating consumer law enforcement actions carried out by BEUC's members.

In relation to the role of the **European Commission**, until now it has only enforcement competences in the field of competition law. This means that from a public enforcement perspective, the enforcement of the UCPD depends on what the relevant national authorities do and what the role of the European Commission is by way of voluntary action. For example, the European Commission has already co-ordinated national consumer authority joint control actions under the CPC network in different sectors by way of so-called 'sweeps'.

BEUC supports the Commission's proposal to develop enforcement indicators in order to identify areas where better enforcement is needed and the appropriate actions that need to be taken. In this respect, the European Commission should encourage co-operation between national enforcement authorities and consumer associations in a pan-European context in order to better co-ordinate and multiply efforts against unfair business practices affecting consumers' economic interests across the EU.

In this regard, developing an **integrated approach of public and private enforcement** by combining the different enforcement tools would be a major asset of a more resource efficient and focused enforcement policy. For example, consumer organisations can identify the collective problem behind the individual complaints (e.g. consumers seeking advice) and where applicable start bilateral negotiations with the concerned companies (e.g. with cease and desist letters) or businesses organisations. Statutory entities such as courts and administrative bodies might need to come in to bring the conflict to an end in case voluntary and non-binding attempts fail to settle the matter.

END