

## Addressing digital challenges—fresh guidance on the UPCD

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**Commercial analysis:** The European Commission recently published updated guidance on the implementation and application of Directive 2005/29/EC on Unfair Commercial Practices (UPCD). Roelien van Neck, partner, and Lisette den Butter, associate at Bird & Bird LLP, examine the guidance in more detail, which clarifies, among other things, the application of the rules on unfair commercial practices in respect of online commercial practices.

### What are the rules on unfair practices?

The UPCD prohibits business-to-consumer commercial practices which are contrary to the requirements of professional diligence and are materially distorting or likely to materially distort the economic behaviour of the average consumer. In other words, it prohibits practices which are 'unfair' towards consumers. Commercial practices are in particular unfair if these practices are misleading or aggressive.

The UPCD stipulates that a commercial practice can be regarded as a misleading commercial practice if it contains false information (or omits information) and deceives or is likely to deceive the average consumer. For example, if misleading information is given with regard to the consumer's rights to replacement or reimbursement.

A commercial practice can be regarded as an aggressive commercial practice if it includes the use of harassment or coercion and significantly impairs or is likely to significantly impair the average consumer's freedom of choice. Both misleading and aggressive practices qualify as an unfair commercial practice when the misleading or aggressive practice has caused or is likely to have caused the average consumer to take a transactional decision that they would not have taken otherwise.

The UPCD, moreover, contains a list of those commercial practices which are in all circumstances regarded as unfair—for example, displaying a quality mark without having obtained the necessary authorisation or presenting rights given to consumers in law as a distinctive feature of an offer.

### What are the key takeaways from the guidance on unfair practices?

First, the new guidance does not change the existing legislation. The guidance basically explains how the UPCD should be applied in practice. Moreover, the guidance gives a lot of examples of court cases and decisions by national regulators. This makes it easier to assess whether a commercial practice is unfair under the UPCD.

Second, the guidance also addresses some new subjects 'to respond, among others, to the challenges presented by the digital world', according to the European Commission. The guidance clarifies how the UPCD must be applied in the online sector, and more specifically what qualifies as an unfair commercial practice in the digital world. Other new topics/businesses addressed by the guidance are environmental claims, the travel and transport sector and financial services and immovable property.

#### *Online platforms*

With regard to the online sector, online platforms are addressed by the guidance. The guidance clarifies that not only sellers, but also online platforms which qualify as a trader or promotor, or sell products, services or digital content to consumers must act in accordance with the UPCD.

The following types of platforms are also addressed by the guidance:

#### *Search engines*

With regard to search engines, the guidance makes clear that paid inclusion and paid placement are permitted as long as these search results can be clearly distinguished from 'natural' search results. Failing to clearly distinguish the search results could be regarded as an unfair commercial practice.

#### *Social media*

Consumers may experience social media just as services for the exchange of information between consumers and may not be aware that traders use social media for marketing purposes. This difference needs to be clarified, in order to avoid 'hidden marketing'. Also, standard contract terms and personal data issues are addressed by the guidance.

#### *User review tools*

The guidance makes clear that the UPCD does not apply to consumers who provide information about their experience, unless they are acting on behalf of a trader. A platform operator is, nevertheless, required to provide truthful information on the main characteristics of its services. In particular, a platform should not mislead its users as to the origin of the review.

#### *Comparison tools*

The guidance sets out the criteria which can be used to assess whether providers of comparison tools comply with their transparency obligations. Moreover, the guidance gives some examples of misleading practices (eg omitting information about the criteria for the 'best deal' claim).

#### *Collaborative economy platforms*

These enable suppliers to make their offers available to users and may also intermediate the placing and fulfilment of orders on their behalf. The guidance makes clear that the Commission will adopt a communication on the collaborative economy with guidance on how EU law applies to collaborative economy business in June 2016. As an example of collaborative economy platform, the guidance names Airbnb, Uber and BlaBlaCar.

#### *E-commerce platforms/marketplaces*

With regard to online marketplaces, the guidance addresses the issue of non-conformity of products bought via the marketplace. The guidance makes clear that, notwithstanding that the person liable for non-conformity is the person with whom the consumer concluded the sales contract, the provisional diligence and transparency requirements are in fact applicable to online marketplaces.

#### *Collective buying websites*

The guidance stipulates that the information provided to customers should be clear and accurate and that the information about the quality of the product or service obtained following a group purchase should not be misleading.

Another main theme of the guidance is the interplay between the UPCD and other consumer laws and EU legislation. According to the Commission, the UPCD can be regarded as a safety net, 'ensuring a high common level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law'.

### **What should lawyers be advising their clients?**

The UPCD is an important legal reference for businesses to understand which commercial practices are permitted in the EU. Businesses active in the (digital) B2C field are advised to review their current practices against this new guidance. According to the Commission, the guidance provides legal certainty which allows businesses to design their commercial practices in a way that should be accepted across the EU. Moreover, the Commission states that there will be less unfair competition due to clearer application of the rules.

The guidance can be found in full [here](#).

*Interviewed by Susan Ghaiwal.*

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