

# Report on the application of Directive 2005/29/EC on Unfair Commercial Practices (UCPD)

## Questionnaire for Stakeholders

*As provided for by Article 18 of Directive 2005/29/EC on Unfair Commercial Practices (the "Directive" or the "UCPD"), the Commission should submit to the European Parliament and the Council a report on the application of the Directive (the "Report"). In addition to providing an overview of the implementation of the UCPD in the Member States, the Report will address specific issues such as the application of the Directive in the fields of financial services and immovable property; and the application of the Directive to specific areas of regulation, such as sales promotions. If appropriate, the Report will also identify possible areas for revision.*

*The Commission will take into account the feedback received by the Member States, European Consumer Centres ("ECCs"), consumer associations and other stakeholders to prepare the Report.*

*The issues raised by this questionnaire are based on the Commission's experience in cooperating with the Member States and other stakeholders during the transposition and first years of enforcement of the Directive.*

*The questionnaire is divided into 7 parts which focus, inter alia, on the implementation and enforcement of the Directive in the Member States, its scope of application, including in relation to specific areas.*

*Please inform us if you are interested in raising any issue related to the application of the Directive in the areas of financial services and immovable property<sup>1</sup>.*

*An Annex in the form of a table has been enclosed to this questionnaire to gather information on the main unfair commercial practices encountered by stakeholders since the adoption of the Directive.*

Please return your responses to the questionnaire with the reference: "Consultation on the application of Directive 2005/29/EC on Unfair Commercial Practices" by **14 October 2011** to either:

European Commission  
Directorate-General Justice  
Unit A3 – Consumer and Marketing Law  
Rue Montoyer 59  
B-1049 Brussels  
Belgium

or by e-mail to JUST-COMMUNICATION-A3@ec.europa.

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<sup>1</sup> This applies to those stakeholders who have an interest in the areas of financial services and immovable property and who have not yet provided information on this topic/s to CIVIC Consulting (contractor for the Commission).

For any queries or clarifications, please contact either

Mr Angelo Grieco (e-mail: [angelo.grieco@ec.europa.eu](mailto:angelo.grieco@ec.europa.eu) tel: +32 2 2960433) or  
Ms Sophie Ridoux (e-mail: [sophie.ridoux@ec.europa.eu](mailto:sophie.ridoux@ec.europa.eu) tel: +32 2 2993772).

## I. Respondent Profile

1 Please specify whether you are responding to this questionnaire on behalf of / as a:

<ul style="list-style-type: none"><li>• An organisation</li></ul> X	<ul style="list-style-type: none"><li>• an enterprise or other entity</li></ul>	<ul style="list-style-type: none"><li>• a citizen</li></ul>
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2 Please indicate the name of your organisation or entity (for individual respondents, your name):

**Wirtschaftskammer Österreich / Austrian Federal Economic Chamber**

3 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.

Consumer Association
European Consumer Center (ECC Net)
European level association or grouping
Business organisation or chamber of commerce in a Member State X
Advertising standards / self-regulatory organisation in a Member State
If none of the above please specify: <i>free text</i>

4 Please provide the address and contact details of your organisation / entity (for individual respondents, your address and contact details), including the country where you and/or your organisation is established. If need be can we contact you by e-mail to obtain further information about your submission? In the affirmative please also provide an e-mail address where we can contact you.

**Austria, 1045 Vienna, Wiedner Hauptstraße 63, [rp@wko.at](mailto:rp@wko.at)**

5 Contact person: (Ms/Mr, Name, Job Title)

**Ms Huberta Maitz-Straßnig, Legal Policy Department**

## II. The Implementation of the Directive in the Member States

- 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*).

**The Directive has been sufficiently transposed into Austrian law (Amendment of the Federal Act Against Unfair Competition, Federal Gazette I , 79/2007 ).**

- 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.*

**The scope of application is broader than assumed as judgements of the ECJ have shown. It was not foreseeable that e.g. sales promotion practices like extra benefits that were expressly covered by a - later withdrawn - Commission proposal on sales promotion are included in the UCPD. Other rulings on the scope of application are still pending e.g. on the question whether an ex-ante permission in specific cases of announcements of sales is compatible with the UCPD. From the point of view of legal security it is highly questionable that such crucial aspects have to be cleared step by step by court rulings and are not definitely decided in the law making process itself.**

- 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.*

- 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.

- 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.*

- 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 concepts<sup>2</sup>? *In reply to this question, please list the provisions / concepts that should be clarified.*

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.*
- 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.*

**In practice it is rather unlikely that an unfair commercial practice is exactly of that kind as described in the Annex. In principle unfair practices can hardly be “listed” as there are always new kinds or slightly different practices that have then to be evaluated on the basis of a general rule. The list offers primarily indications for interpretation of what is to be considered unfair and has to be seen in the light of the aim of the UCPD to harmonize 27 different legal systems in the field of unfair commercial practices.**

- 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?

### **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.*
- 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.*

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<sup>2</sup> 3 December 2009, SEC(2009) 1666, Commission staff working document "Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices".

In specific cases of public advertisements which allow drawing the conclusion that a business intends to clear in the form of a retail sale large quantities of goods, and which are likely to make the impression that the business is forced by special circumstances (e.g. liquidation) to sell quickly and therefore offers the goods at extraordinarily advantageous conditions or prices an ex ante permission by a competent authority would be reasonable, because an ex post evaluation makes usually no sense in such cases.

#### **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.*

#### **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.*

**Problematic are in practice unjustified negative evaluations by customers.**

- 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*

#### **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?

**According to Art 7 (5), information requirements established by Community law in relation to commercial communication including advertising or marketing shall be regarded as material which means that if these information requirements are not completely and flawlessly fulfilled a commercial practice has to be regarded as a misleading omission.**

Businesses are confronted with an ever increasing number of information requirements towards consumers. Even experts lose track of all the different duties to inform spread and regulated in an incoherent way in different directives. The Consumer Rights Directive is a current example, the Service-Directive and the Directive on Consumer Credits can also be mentioned in this context as further examples. This being the situation, the concept of the UCPD that any EU-information requirement shall be regarded “material” is not adequate.

A huge problem for businesses are misleading practices giving the impression of a free of charge registration in a business directory. Later businesses who signed up receive invoices.

Since the introduction of a specific provision in the Austrian Federal Act Against Unfair Competition in the year 2000 there are almost no such practices from companies based in Austria, because a specialized association called "Schutzverband gegen unlauteren Wettbewerb" ([www.schutzverband.at](http://www.schutzverband.at)), where several hundreds of our trade associations are members, has successfully solved a lot of such cases on the basis of this provision either via mediation but at last also via legal action.

But the cross-border problem with offers coming from abroad and other EU-countries is still big, relevant and steadily growing. Stopping those misleading activities now coming from abroad is almost impossible with civil law means.

## **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?

**The enforcement powers are sufficient.**

- ii) Are the available sanctions and remedies adequate to prevent unfair commercial practices?

**Yes. From a private law point of view the sanctions and remedies ( e.g. cease-and-desist orders, actions for injunctions) are adequate.**

The problem lies in the fact that a libellant will have to bear the cost for the court procedure even if he is successful because the opponent is not able to pay. This makes the efficient enforcement especially in cases of cross border law suits against the above mentioned misleading practices with registrations in business directories risky for associations fighting against such practices like the Schutzverband.

Another problematic aspect that can hamper access to justice is a considerable increase in law charges.

- b) Please indicate whether there are any measures that, in your opinion, would allow a better enforcement of the UCPD.

#### 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 adhere 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.

The Professional Association Advertising and Market Communication industry of the WKO is founding member of the Austrian Advertising Self Regulation Organisation (Österreichischer Werberat). The Austrian SRO is the national body re. self regulation in Austria. The Austrian Advertising Code includes a special section re. unfair commercial practises. As in nearly all other European Countries a dual system is in place in Austria for the restriction of advertising, made up of statutory regulations on the one hand and self-restrictive regulations on the other. Clients, agencies and media outlets show confidence in the Austrian SRO, a trust that is illustrated by the mutual commitment to ethical and moral guidelines in the segment of commercial advertising.

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

Enforcement is effective in Austria. The most important media companies in Austria (i.e. public TV, private TV, most newspapers and magazines) have a clause in their "General Terms and Conditions". If the Austrian SRO stops a campaign, they have the right to refuse to continue this business relation. Every year the Austrian SRO has to sent an annual report to the Austrian Federal Chancellery including all stats re. complaints, cases and enforcement.

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

Encouraged by Parliament, the Austrian advertising industry has committed itself to self regulation. The legal anchoring of self regulation in commercial

communication, taking effect with the amendment of the KommAustria Act in June 2009 constituted another important step in self regulation. The Austrian SRO integrated the Coalition Agreement of the Austrian Federal Government concerning “Combating sexism in advertising and the media” in the Self-restriction-Code. When Austria implemented the AVMS-Directive into national law in 2010 (Austrian Public Broadcasting Act and Austrian AVMS Act, ORF-Gesetz, AMD-Gesetz), the Austrian Code was amended, including now a special section re. food advertising in children`s TV-programms.

- 17 Most frequent unfair commercial practices Please indicate whether there are specific aspects of your activity / area of interest where, to your knowledge, there is frequency or risk of unfair commercial practices. Please use the table in the Annex to provide information on the most frequent unfair commercial practices you have encountered.

## ANNEX

### Overview of the most frequent Unfair Commercial Practices encountered

Please provide a brief description of the unfair commercial practices most frequently encountered in your activities. *In response to this question: (i) please identify the provision(s) of the Directive to which the practice can be associated; (ii) the sector involved (in broad terms); (iii) and, if possible, go into greater detail as to the marketing method used (e.g. if the relevant practices took place on-line or off-line) and as to whether it is a national or cross-border practice. If precise data are not available, please provide estimates (e.g. approximately 20% of cases involved deceptive information, 60% of the practices was on-line etc...). Whenever possible, please provide some examples on concrete cases encountered.*

Practice (in relation with the provisions of the Directive)	Frequency <sup>3</sup>	Sector <sup>4</sup>	Off- line <sup>5</sup>	On- line <sup>6</sup>	National (N) or Cross- border (C) <sup>7</sup>	Examples  <i>(Please describe the <u>concrete</u> cases encountered)</i>
Unfair commercial practices under the General Clause (Art. 5)						
Misleading actions (Art. 6)						
Misleading omissions (Art. 7)						
Aggressive practices (Art. 8-9)						
Annex I – the Black List						
Claiming to be a signatory to a code of conduct when the trader						

3 % of total case if you have data. Otherwise: F (frequent); A (average); V (Few); NO (no case at all).

4 For example, within telecoms: mobile and fixed telephony, premium line services; or within financial services: consumer credit, loans etc.

5 Please see footnote n. 6.

6 Is the practice more frequent on-line? E.g. 60% of the practices were online etc...

7 Please mark "N" (National) or "C"(Cross-border) as applicable.

is not (n.1)						
Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation (n.2)						
Claiming that a code of conduct has an endorsement from a public or other body which it does not have (n. 3)						
Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation (n. 4)						
Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable						

<p>grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising) (n. 5)</p>						
<p>Making an invitation to purchase products at a specified price and then:</p> <p>(a) refusing to show the advertised item to consumers;</p> <p>or</p> <p>(b) refusing to take orders for it or deliver it within a reasonable time;</p> <p>or</p> <p>(c) demonstrating a defective sample of it, with the intention of promoting a</p>						

different product (bait and switch) (n. 6)						
Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice (n. 7)						
Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer						

before the consumer is committed to the transaction (n. 8)						
Stating or otherwise creating the impression that a product can legally be sold when it cannot (n. 9)						
Presenting rights given to consumers in law as a distinctive feature of the trader's offer (n. 10)						
Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial) (n. 11)						
Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the						

<p>consumer or his family if the consumer does not purchase the product (n. 12)</p>						
<p>Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not (n. 13)</p>						
<p>Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products (n. 14)</p>						
<p>Claiming that the trader is about to cease</p>						

trading or move premises when he is not (n. 15)						
Claiming that products are able to facilitate winning in games of chance (n. 16)						
Falsely claiming that a product is able to cure illnesses, dysfunction or malformations (n. 17)						
Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions (n.18)						
Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent (n. 19)						

<p>Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item (n. 20)</p>						
<p>Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not (n. 21)</p>						
<p>Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer (n.</p>						

22)						
Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold (n. 23)						
Creating the impression that the consumer cannot leave the premises until a contract is formed (n. 24)						
Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation (n. 25)						
Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent						

justified under national law to enforce a contractual obligation (n. 26)						
Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights (n. 27)						
Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them (n. 28)						
Demanding immediate or deferred payment for or						

<p>the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling) (n. 29)</p>						
<p>Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy (n. 30)</p>						
<p>Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:  — there is no prize or other equivalent benefit,  or  — taking any action in relation to claiming the prize or other</p>						

equivalent benefit is subject to the consumer paying money or incurring a cost (n. 31)						
Other (please specify)						