

# UNFAIRNESS IN CONTRACTUAL AND COMMERCIAL PRACTICES.

EUROPEAN CONSUMER PROTECTION LAW

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This teaching material has been made at the University of Szeged, and supported by the European Union by the project nr. EFOP-3.6.2-16-2017-00007, titled Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

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	<p><b>UNFAIRNESS IN CONTRACTUAL AND COMMERCIAL PRACTICES.</b></p> <p>•</p> <p>READING LESSON</p> <p> 40 MINUTES</p>	<p><i>Dr. Kitti Bakos-Kovács PhD.</i> <i>assistant professor</i></p> <p>University of Szeged Faculty of Law and Political Sciences Institute of Civilistic Sciences</p>
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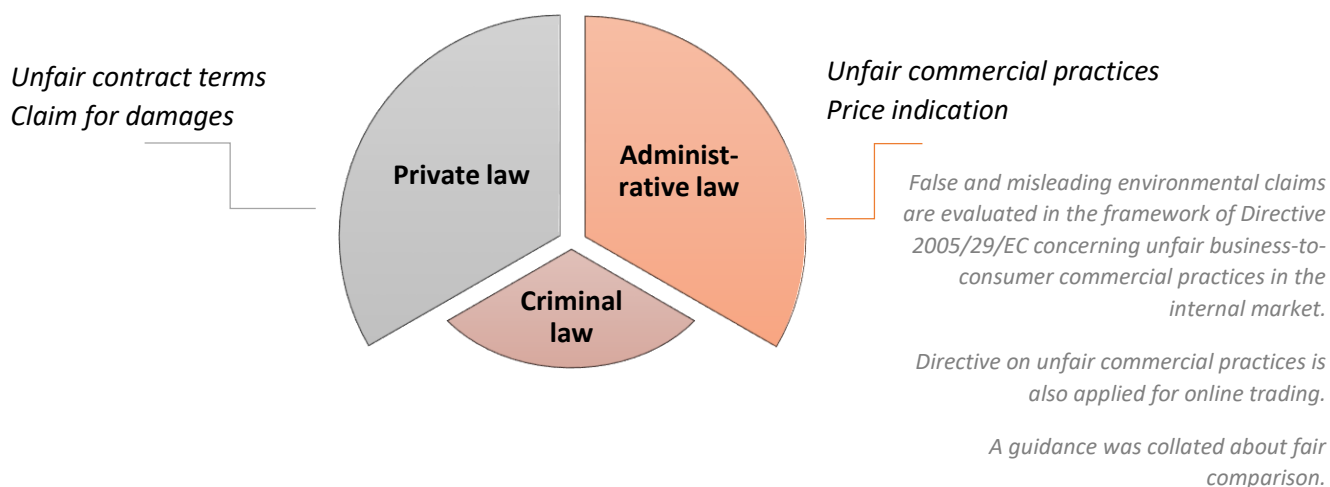
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### 1. Introduction

Misleading of consumers is prohibited by law. These rules serve not only purposes of consumer protection but also help the operation of transparent competition on the market, because unfair contractual and commercial practices infringe indirectly the interests of other traders and competitors.<sup>1</sup>

Misleading and unfairness *can be realized in many ways* on the market, so **legal rules of the European Union are multipartite**. Misleading and unfairness occur both in contractual law and in the field of administrative law by commercial communication and practices, for example advertising, marketing activities and sales promotion.

Some unfair commercial practices may not constitute violation of private law rights. *Private law* has role to avoid unfair contract terms and claim damages or tort. Besides private law defence the *national administrative authorities* can conduct investigating. Unfair commercial practice can be also adjudicated as a **crime**.<sup>2</sup>



1. diagram: Fields of legal regulation of unfairness market behaviours in the EU law.

In order to ensure the high level of consumer protection, *rules on unfair contract terms, unfair commercial practices, obligation of price indication prevail in business-to-consumer relationship* on the market. *Other legal acts are applied for the misleading and comparative advertising in business-to-business relations and to protect traders or distributors from unfair trading practices in food supply chain.*<sup>3</sup>

**Guidance and not legally binding documents were composed** ensuring further transparent functioning of the market such as granting and fostering *fair comparison*. Commission ordered a study to map how comparison websites operate on the market where consumers can compare products and services by price, quality or other criteria.<sup>4</sup> Key principles were summarized in order to grant impartiality, transparent, user-friendliness and accessibility of comparison tools.<sup>5</sup>

**2. Unfair contract terms**

Undertakings often use pre-formulated standard contractual terms. At first, this practice results occlusion from bargain for the position of consumers by contracting, especially where terms are buried in small print or the consumer is informed in a separate document which is not available. **Consumer cannot take participation in bargaining over contractual terms;** choice of consumer reduces for accepting the pre-formulated contractual conditions or leaving the undertaking as a future contractual partner. Otherwise, undertakings can cut costs by using standard form contracts and contractual terms, so consumers can receive economic benefits, because he or she can buy the product or resort services by lower price.

**Contractual terms cannot be unfair and one-sidedly disadvantageous for either party, namely for consumers.**

Freely negotiated contractual terms represent the parties' wishes that is the base of the balance between parties by concluding contract. Legal intervention is necessary **by judicial way** in order to eliminate the imperfect operation of the market if contractual terms are unfair. Applying unfair contractual terms results imbalance in contractual relationship between undertaking and consumer other than that consumer takes part in an inequality and a weaker position by contracting that fact arises from his or her economic role in the market.

The European Economic Community adopted the **Directive 93/13/EEC on unfair terms in consumer contracts** in order to establish common legal framework and foundation to help Member States with developing national rules of regulation of legal consequences if undertaking applies unfair contractual terms in consumer contracts. Provisions required by the directive was necessary to implement into the national laws. Method of the legal regulation lies down on **minimum harmonisation**, so Member States could adopt stricter requirements than it is required in the directive.



*Prunus triloba*

*In the meaning of the directive a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*

*Examples of terms prescribed in the list of the annex of this directive are regarded as unfair ex lege.*

A term shall always be regarded **as not individually negotiated** where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.<sup>6</sup>

[https://en.wikipedia.org/wiki/Prunus\\_triloba](https://en.wikipedia.org/wiki/Prunus_triloba)

Unfairness of contractual terms is to be adjudicated with regarding *the nature of goods or services* for which the contract was concluded or taking into consideration *all circumstances attending to the conclusion of contracts*.

**Unfair contractual terms are not legally binding for consumers.**

If the contract can fulfil without the unfair contractual terms, **other terms of the contract**, that cannot be qualified as unfair, **are furthermore binding for the parties**. Initiation of effective dispute resolution possibilities in case of unfair contractual terms concerns to the competence of Member States.<sup>7</sup>

As **interpretative principle** regulates the directive that it is required where the contractual terms are in *writing*, these terms must always be drafted *in plain, intelligible language*. Where there is *doubt* about the meaning of a term, the *most favourable interpretation shall prevail to the consumer*.<sup>8</sup>

\* For detailed knowledge and interpretation of this directive you can reach a Commission notice, that contains guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts. This guidance is available at the following website in different languages:  
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2019.323.01.0004.01.ENG&toc=OJ:C:2019:323:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.323.01.0004.01.ENG&toc=OJ:C:2019:323:TOC).

\* You can read a study for further information how to apply this directive for **digital services** on the following link:  
 Update the Unfair Contract Terms Directive for Digital Services  
[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL\\_STU\(2021\)676006\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pdf)

### 3. Unfair commercial practices

Undertakings offer products or services for sale, so commercial communication, included advertising, is a suitable instrument and information technique to influence the decision-making of consumers. Commercial practices take many forms not only advertising, and may be false, offend, that distort the preferences of consumers. False description of the product or service can cause damages or tort for consumers. Disparities that existed between divergent rules of national laws composed restriction and caused uncertainty on cross-border trade. Harmonization measures served the re-regulation of common framework and community standards of unfair commercial practices on the base of **maximum harmonisation** in 2005. Stricter or divergent rules that avoid from provisions prescribed by the regarding directive cannot be accepted by national laws in order to ensure the effective and practical impact of the directive.<sup>9</sup> **Case-law of courts of the European Union** plays significant role by practical application of legal requirements of the directive contributing to uniformed and effective legal interpretation.

**Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market** (abbreviated: *Unfair Commercial Practices Directive – UCPD*) initiated common uniformed principles and criteria for commercial practices directly related to influencing consumers' transactional decisions in relation to products.<sup>10</sup> Since the directive on unfair commercial practices is in place, another directive has been applied for misleading and comparative advertising to business-to-business relations.<sup>11</sup>

Legal defence extends for a **broad range of unfair business practices** at marketing, contractual and post-contractual stage, such as giving buyers misleading information or using aggressive behaviour. **Provisions of regarding directive are also applied to online trading**.<sup>12</sup>

**Nature of unfair commercial practices can be legally categorized according to the results of a three-stages examination.**

### 1) General prohibition

*According to the Article 5 of the directive unfair commercial practices shall be prohibited.*

This directive establishes **general prohibition** unfair commercial practices distorting consumers' economic behaviour. Legal defence extends such commercial communications that have effect and aim to get attention of consumers for purchasing or resorting services before contracting.

**Unfairness is defined in the directive:** *it is contrary to the requirements of professional diligence, and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*

**Conditions of the definition shall be fulfilled jointly and conjunctival.** At first **(1)** the commercial practice infringe the requirements of professional diligence. Legal measure of professional diligence is regulated by definitions of the directive in Article 2. Secondly **(2)** it is suitable to distort the economic behaviour of an average consumer. The directive recognizes interests of special vulnerable groups of consumers. Please repeat and control your knowledge how define the average consumers and special groups of consumers in Lecture 2 about Legal definitions of consumer protection law in the EU.

### 2) Particular prohibitions

*In particular, commercial practices shall be unfair which are misleading or aggressive according to the regarding articles of the directive.*

Besides the general prohibition of unfair commercial practices, the directive defines the misleading and aggressive commercial practices.

**Three types of misleading commercial practices** are regulated in the directive:

- A commercial practice shall be regarded as misleading if a) it contains *false information* and is therefore untruthful, or b) *deceives* the average consumers, or c) *the information is factually correct, but in relation to one or more of the following elements, mislead the consumers.* Jointly existence of these conditions is not legally required, the alternative qualification is enough to state the infringement.
- A commercial practice shall also be regarded as misleading, if the practice, – *in its factual context* – taking account of all features and circumstances of the practice, *leads* to a transactional decision on the site of consumer that he or she wouldn't like to take.
- During **misleading omissions**, a) the trader omits material information, or b) the trader *hides information* or provides material information *in unclear, unintelligible, ambiguous or untimely manner*; c) the trader *fails to identify the commercial intent* of the commercial practice if not already apparent from the context.

The directive mentions some circumstances by all types of misleading commercial practices to help with judgment whether questionable commercial practice is misleading or not. In all cases it is required that misleading commercial practice causes or is likely to cause the consumer to take a transactional decision that he or she would not have taken otherwise. Transactional decision may extend how and on what terms consumer concludes contract in order to purchase some products, how

make payment. Exercising contractual rights regarding the products and acting or refraining from acting are also transactional decisions.

**Aggressive commercial practices mean harassment, coercion, physical force or undue influence.** All features and circumstances of behaviours shall be taken into consideration to qualify a commercial practice as aggressive. Here it is also required that commercial practice significantly impairs or is likely to significantly impair the average consumer's freedom of choice and leads to a transactional decision that the consumer would not have taken otherwise.

### 3) Ex lege special prohibitions

*Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.*

The directive contains **an exhaustive 'black' list** about such behaviours that can be qualified *ex lege* as unfair in all circumstances and infringe in all cases the regarding legal norms. Member States is obligated to impose the list into the national law on the same way as that is prescribed in the directive.

#### APPLICATION METHOD

**Adjudication of each commercial behaviours becomes in reversed sequence from the special rules moving towards the general clause.**

**(1)** Commercial practice shall be compare against the **list** on the end of the directive, because practices named in this list consider as unfair in all circumstances. If the market behaviour exhausts either statement of facts prescribed in the list of the directive, *other circumstances or general conditions shall not be examined.* **(2)** Secondly, if the commercial practice doesn't occur on the 'black' list of the directive, it is necessary to examine that commercial practice can be qualified or not as **misleading or aggressive** business practice on the particular level of protection. **(3)** At last, **general clause** is applied that prohibits generally unfair commercial practices according to the Article 5.

#### LEGAL CONSEQUENCES

Sanctions are regulated in domestic law, if a trader infringes the legal prohibition and exercises unfair commercial practices against consumer. Member States are entitled to determine legal consequences and punishment.

National administrative authorities are entitled to examine the infringement of national rules regarding unfair commercial practices. Damages can also be demanded before courts by taking individually actions referring to contractual or non-contractual liability in case of unfair commercial practices.<sup>14</sup> Article 11a of the directive orders that price reduction and renunciation of contract can also function as proportional and effective redress.

\* Guidance on the implement and application of this directive supplies helping with legal interpretation in the field of scope of this directive, interplay between the directive and other legal acts of the EU law and self-regulation, general concepts for definitions used by this directive, application of the UCPD generally and in special sectors, included environmental claims, online trading, travel and transport contracts, financial services. The document is available and can be downloaded from the following website <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN>.

### 4. Price indication

**Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers** prescribes common measures for Member States in order to inform consumers correctly about the price of goods. On the grounds of **minimum harmonisation** Member States adopted

domestic legal regulation in the framework of the directive. Member States are entitled to prescribe detailed and more benefit regulation than it is stated in the directive.

It is required to provide **precise, transparent and unambiguous information** for consumers **on the prices of products** offered to them.<sup>15</sup> Common principles were laid down for indication of the **selling price and unit price of products**. Obligation to indicate the price on the product helps consumers to make a well-founded decision, because they can evaluate and compare easier the goods on the grounds of price. National law can state immunities and exemptions for small- and medium enterprises. Special rules are valid for food products.

#### EXERCISE

- Please read the annex of Directive 93/13/EEC and mention some examples for unfair contractual terms.
- Please search the Directive 2005/29/EC at the official website of the European Union. Download also the consolidated version of the legal text after amending in 2019.
  - a) What is the definition of professional diligence?
  - b) Why is it important to defend legally the special groups of consumers?
- Please collect some circumstances prescribed in the directive regarding all types of misleading commercial practices. Make a diagram or a table and illustrate your answers with pictures.
- Please mention some commercial practices from the list of the directive that have to be qualified as unfair without examination of other circumstances.

#### QUESTIONS

- What are economical hazards of using unfair contract terms?
- How can you define unfair contract terms?
- What are the legal consequences of using unfair contract terms?
- Please introduce the interpretative principle how to interpret the terms in contracts concluded by consumer and undertaking.
- What does unfairness mean in the Unfair Commercial Practices Directive? Please present the conditions in details.
- What types of misleading commercial practices are regulated in the regarding directive? Please present the conditions in details.
- What does aggressive commercial practice mean?
- How can you adjudicate whether the commercial practice infringe the rules of the directive and can be qualified as unfair?
- What requirements are laid down in the directive regarding the legal consequences of unfair commercial practices?
- What is the scope of price indication directive?

<sup>1</sup> Preamble 6 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market

<sup>2</sup> Howells, Geraint –Weatherill, Stephen „Consumer Protection Law” (Ashgate; Aldershot; 2006.) 395-397.

<sup>3</sup> *Unfair treatment – policy information* available at [https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information\\_en#protecting-businesses-from-misleading-marketing](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information_en#protecting-businesses-from-misleading-marketing)

<sup>4</sup> *Unfair treatment – policy information* available at [https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information\\_en#comparison-tools](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information_en#comparison-tools)

<sup>5</sup> *Key principles for comparison tools* available at [https://ec.europa.eu/info/sites/info/files/key\\_principles\\_for\\_comparison\\_tools\\_en.pdf](https://ec.europa.eu/info/sites/info/files/key_principles_for_comparison_tools_en.pdf)

<sup>6</sup> Article 3 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market

<sup>7</sup> Article 6 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market

<sup>8</sup> Article 5 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market

<sup>9</sup> Weatherill, Stephen „*EC Consumer Law and Policy*” (European Law Series; Longman; London and New York; 1997.) 103-105., 109.;

Howells, Geraint –Weatherill, Stephen „Consumer Protection Law” (Ashgate; Aldershot; 2006.) 395.

<sup>10</sup> Preamble 7 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market

<sup>11</sup> *Unfair treatment – policy information* available at [https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information\\_en#protecting-businesses-from-misleading-marketing](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information_en#protecting-businesses-from-misleading-marketing)

<sup>12</sup> *Unfair treatment – policy information* available at [https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information\\_en#protectingconsumersfromunfairpractices](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/unfair-treatment/unfair-treatment-policy-information_en#protectingconsumersfromunfairpractices)

<sup>13</sup> Miskolczi-Bodnár Péter „*A tisztességtelen kereskedelmi gyakorlatok tilalma*” In: Szikora Veronika (szerk.) „*Magyar fogyasztóvédelmi magánjog – európai kitekintéssel*” (Fogyasztóvédők Magyarországi Egyesülete; Debrecen; 2010.) 291-299.

<sup>14</sup> Howells, Geraint –Weatherill, Stephen „Consumer Protection Law” (Ashgate; Aldershot; 2006.) 396.

<sup>15</sup> See detailed information at [https://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-pricing/index\\_en.htm](https://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-pricing/index_en.htm);  
<https://www.consumerombudsman.dk/marketing-practices-act/price-information/how-to-indicate-prices/>