

## **The EU Unfair Commercial Practices Directive 2005/29/EC**

Cost - £18.6m per year ([Open Europe](#))

Talking Points

### **ECJ interpretation conflicting with UK law**

A judgement from the European Court of Justice brought into question national laws that went further than the directive. The court overruled a German law that prohibited procedures whereby consumers could win a good by chance with the term of entry dependent on purchasing another good. As this didn't come under the scope of the 31 examples of unfair commercial practices in the directive, the ECJ ruled the German law to be illegal as the ECJ viewed the 31 examples as exhaustive.

According to [Paul Scherlick, a partner at Matthew Arnold and Baldwin LLP](#), this brings into question the validity of our own Gambling Act which prohibits illegal lotteries. In effect, the ECJ ruling could undermine national law that prohibits further unfair practices that may not have been thought commercial but ones that member states have sought to combat.

### **Businesses did not want it**

The UK Government regulatory impact assessment on the UCPD conducted research on how businesses viewed the proposed directive. The findings stated that "businesses (particularly the smaller ones) raised concerns about uncertainty from a move to general principles and felt that where consumer problems arose in future, they could be more costly to address." The research also found that the UCPD was not a priority for businesses. ([UK Regulatory Impact Assessment p.7-8](#))

What is it?

A directive aimed to protect consumers when engaging with business.

This directive is solely aimed at protecting the “economic” interests of consumers, according to legal firm [Kemp Little](#). It therefore doesn’t cover health and safety or any other aspect of consumer protection and covers all industry sectors.

The directive covers pre-transaction dealings, protecting against false or aggressive advertising and marketing. It also protects the consumer post-sale for agreements made before sale that may have been aggressive or misleading. The directive ensures that any after-sale services agreed pre-sale must be provided.

For the first time, the directive brought into UK law the duty for businesses not to practice or trade ‘unfairly’. Fairness, defined in the directive, requires the business to do two things:

1. Meeting a standard of “professional diligence”, i.e. the standards expected by a qualified/trained professional in an industry/field when trading honestly.
2. Not creating conditions for the average consumer to make an irrational choice. Traders should not force or mislead consumers to make choices they would not have otherwise made without the trader’s behaviour.

Consequentially, the directive defines certain practices that are aggressive and misleading:

- Making false claims about a code of conduct or making a false claim about being a signatory to the code of conduct
- “Bait advertising”, i.e. providing a good at a price the trader does not expect to sell at
- Falsely saying that a good will be available for a limited time
- Presenting rights given to consumers in law as a distinctive feature of the trader’s offer
- Using ‘advertorials’, i.e. falsely presenting opinion as an advertisement without declaring it as a paid commercial
- Calling a good or service ‘free’ if the consumer has to pay extra other than the cost of delivery or collection
- Directly inducing children to request their parents to buy a good or service.
- Giving the impression that an ‘after-sale service’ is available in another member state than the one in which the good or service is sold
- For collecting insurance policies, the directive prohibits the trader to demand more paperwork than is relevant or reasonable.

The full list is in Annex I of the [directive](#).

Third Party Opinions

Andy Millmore, a partner at the law firm Harbottle & Lewis in London, said: “What is significant is the sweeping nature of the regulations. They will effectively criminalise actions that might in the past have escaped legal censure, even if they may perhaps have been covered by industry voluntary codes...Personalised services may also come under scrutiny. A tarot pack reader, for instance, cannot just pick one of several templates – it would have to be a proper reading designed for that person.” ([source](#))

