

# New unfair commercial practices 'Guidance'

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## What happened

By June 2011, the European Commission has to submit to Euro MPs and the Council of Ministers a Report on the 'application' of Directive 2005/29/EC on Unfair Commercial Practices.

The 'UCPD' was implemented in the UK back in May 2008 in the form of the Consumer Protection from Unfair Trading Regulations 2008 ('CPUT Regs').

Apparently, in support of this 2011 Report, the Commission has published a 'Staff Working Document' entitled 'Guidance on the Implementation/application of [the UCPD]'.

In this report we will pull out of the 'Guidance' a few nuggets of particular interest, but for all those involved in advising in this area, a full read of the Guidance itself is recommended.

## Social media

The Guidance notes that blogs and social networking sites have become important avenues for commercial practices, 'especially hidden ones'. It cites cases in several member states where cosmetic companies have paid bloggers to promote their products on a blog aimed at teenagers, unbeknown to other users.

These have been considered by state regulators, the Guidance continues, to be 'hidden commercial practices'. No more information is given, which is a tad frustrating as the author has not come across any reports of these cases.

It is also disappointing that no further guidance is given on precisely how such practices would fall foul of the UCPD. Help on this would have been good as currently it is unclear which of the unfair commercial practices the cosmetics companies (as opposed to the bloggers) would be guilty of, given that they have not themselves published the 'user comments'.

For example, based on the UK's CPUT Regs, it is not crystal clear how the cosmetic companies themselves could be:

- omitting material information – Reg 6 (1)(a);
- failing to identify commercial intent – Reg 6 (1)(d);
- using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear – Schedule 1 #11;

**Guidance issued ahead of 2011 report on Unfair Commercial Practices Directive**

**Social media and 'hidden commercial practices'**

- 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 – Schedule 1 #22.

Later on in the Guidance, it is indicated that in these circumstances the bloggers are likely to be regarded as ‘traders’, but just how useful is it going to be for the enforcement authorities to pursue these individuals while the real culprit and the beneficiary of the practice potentially escapes liability under the Directive?

### Price comparison sites considered as traders

#### Price comparison websites

The Guidance takes the position that operators of price comparison sites should be considered as traders and therefore be bound by the UCPD to be transparent about their relationships with the traders whose prices and products they are comparing and as to the criteria and methodology they use.

#### The concept of ‘trader’

The Guidance points out that charities and not-for-profit organizations will be caught by the UCPD as ‘traders’ if they are found engaging in commercial activities such as selling ethical products.

#### The ‘average consumer’

The Guidance expatiates at some length on the concept of the average consumer, an understanding of which is key to determining whether many unfair commercial practices are occurring.

Reference is made to case law of the European Court of Justice in areas as disparate as free movement of goods, misleading advertising of cosmetics and the likelihood of confusion between trade marks.

Such cases show, the Guidance reports, that social, linguistic and cultural factors peculiar to a member state may justify a different interpretation of the message communicated by the commercial practice. For instance, the term ‘lifting’ in the context of a skin firming cream might mean something different to an average German compared with a consumer elsewhere in the EU.

It would have been interesting (though not in a legal way) to be told how and why our German colleagues diverge from the denizens of all other EU states in this crucial area of human understanding. Whatever the gruesome details, however, being told that member state cultural idiosyncrasies could mean different nationalities of the average consumer understanding ad claims quite differently, seems dangerously close to undermining the entire thrust and point of the UCPD.

The Guidance is also distinctly snuffy about statistical evidence being used to support a particular likely meaning to the average consumer. Surveys are subject to various frailties, the Guidance says, and do not absolve the court from the need to exercise its own judgment based on the standard of the average consumer as defined in the UCPD.

### Cultural considerations are important in determining impact of message

## Vulnerable consumers

Vulnerable consumers may be more susceptible to certain practices and the UCPD requires that this is taken into account.

Examples cited by the Guidance include wheelchair-bound consumers who might be a more vulnerable group in relation to ad claims about the ease of access to a holiday destination or those hard of hearing who might be more vulnerable to claims about 'hearing aid compatibility' in a telephone ad.

Teenagers may be particularly vulnerable to advertisers who exploit their lack of attention or reflection due to their immaturity. An example cited is that of a mobile phone services ad conveying the message that by subscribing to a particular loyalty plan you can easily make and maintain friends.

But is this right? These examples suggest that vulnerability comes solely from being particularly interested in product types or attributes because of age or disability. Surely an advertiser cannot be put in a high-risk situation purely because it understands the special needs of consumer types and addresses these.

### Guidance on vulnerable customers questioned

## Invitation to purchase (ITP)

Under the CPUT Regs, if a marketing communication classifies an 'ITP' as defined by Regulation 2(1), it has to include a number of disclosures as required by Regulation 6 (4) in order to avoid being an unfair commercial practice.

These disclosures are not unduly onerous, including as they do, the main characteristics of the product, the geographical address of the trader and the existence of any right of withdrawal or cancellation. However this could prove tiresome in the context of a marketing text message or a banner ad online, and tiresome or not, it is important for advertisers to be able to easily understand when their marketing communication might classify as an 'ITP'.

The CPUT Regs copy out Directive 2005/29/EC by defining an ITP as:

'a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase'.

### Defining ITPs

## The OFT narrows down the ITP definition

The Office of Fair Trading's examples of ITPs in its Guidance imply that to qualify as an ITP, a marketing communication must not only provide the consumer with all the information he or she needs to be able to make a purchase, but also be an integral part of a mechanism facilitating direct response and purchase in one seamless action, viz:

- an interactive TV ad through which orders can be directly placed;
- a page on a website where consumers can click to place an order;
- a newspaper ad which includes a direct response order form.

## The European Commission takes a different tack

So far, so reasonably clear, but now we have the EC's Guidance, which seems to take a different tack.

Focusing on the 'thereby enables the consumer to make a purchase' limb of the ITP definition, the Guidance ventures that this 'does *not* [our italics] require that the [ad] provides the consumer with a mechanism to purchase (eg a phone number or a coupon). It means that the information given ... must be sufficient to enable the consumer to take a purchasing decision'.

Therefore, we are potentially thrown back to the position before the OFT's guidance, where the mere quoting of a price created a risk of classifying as an ITP and triggering the other disclosure obligations.

## Environmental claims

By far the longest section of the Guidance, and some might say disproportionately so, is devoted to environmental claims.

There is an overview of all other EU legislation impacting on environmental claims, a section dealing with such of the 'always misleading' practices as are relevant in the context of environmental claims, a section looking at the UCPD's general unfair commercial practice provisions affecting environmental claims, a section looking at product comparisons involving environmental claims and a section looking at enforcement action against misleading environmental claims and the burden of proof.

It is unclear why the Commission chose to place such emphasis on this sector in general guidance, but certainly those looking for a thorough and up-to-date overview of EU regulation of environmental claims in advertising should look no further.

## The 'always unfair' practices

A useful section looks in detail at many of the 31 'always unfair' commercial practices.

The section focusing on the use of the word 'free' looks suspiciously like a copy out of the latest guidelines on this topic put out by our own CAP/BCAP.

## Why this matters

Albeit late in the day, not entirely in harmony with our own OFT's Guidance on the topic and in some areas stopping short of giving more helpful insights, the Guidance gives welcome practical help on how to comply with the most important marketing-related measure that Brussels has ever produced.

The Guidance can be found at [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf).

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## The 31 'always unfair' practices