



Module 4

Unfair commercial practices and unfair contract terms

January 2018

consumerlawready.eu

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“Rules on unfair commercial practises and unfair contract terms allow for fair and healthy competition within the EU.”

Trader

“It is important to know that I am protected against traders that use unfair tricks to sell their products.”

Consumer

“Rules on unfair commercial practises and unfair contract terms provide clear guidance on what practises are or are not acceptable.”

Trader

Introduction

Dear entrepreneur,

This Handbook is part of the ConsumerLaw Ready project addressed specifically to micro, small and medium-sized companies that interact with consumers.

The ConsumerLaw Ready project is a European-wide project managed by BEUC (the European Consumer Organisation) in a consortium with UEAPME (the Voice of SMEs in Europe) and Eurochambres (the association of European Chambers of Commerce and Industry). It is funded by the European Union with the support of the European Parliament and the European Commission.

The objective of the project is to assist you in complying with the requirements of EU consumer law.

EU consumer law consists of different pieces of legislation adopted by the European Union over the last 25 years and transposed by each EU Member State in their respective national law. In 2017, the European Commission has concluded an evaluation to check whether the rules are still fit for purpose. The result was overall positive¹. The main finding was that the existing rules need to be better enforced by authorities and better known by businesses and consumers. The ConsumerLaw Ready project aims to enhance the knowledge of traders, in particular of SMEs, regarding consumer rights and their corresponding legal duties.

The Handbook consists of five modules. Each one deals with one particular topic of EU consumer law:

- Module 1 deals with the rules on pre-contractual information requirements,
- Module 2 presents the rules on the consumer's right to withdraw from distance and off-premises contracts
- Module 3 concentrates on the remedies which traders must provide when do not conform with the contract
- Module 4 focuses on unfair commercial practices and unfair contract terms
- Module 5 introduces alternative dispute resolution and the Online Dispute Resolution (ODR) platform, an official website managed by the European Commission dedicated to helping consumers and traders resolve their disputes out-of-court.

This Handbook is just one of the learning materials created within the ConsumerLaw Ready project. The website consumerlawready.eu contains other learning tools, such as videos, quizzes and an 'e-test' through which you can obtain a certificate. You can also connect with experts and other SMEs through a forum.

¹ You can find more information about the evaluation, its findings and follow-up actions on the website of the European Commission: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

The Module 4 of this Handbook aims to make you familiar with the rules on unfair commercial practices and unfair contract terms. As regards commercial relations between businesses to consumers (B2C), the EU rules on fairness and transparency of commercial practices have been established by Directive 2005/29/EC on unfair commercial practices. This is dealt with in the first part of the module. The second part of the module deals with Directive 1993/13/EEC on unfair contract terms, which lays down the EU requirements to ensure that standard contract clauses used by traders are fair and understandable for consumers.

Moreover, Directive 2006/114/EC on misleading and comparative advertising which applies to business-to-business (B2B) situations, protects traders, especially SMEs, against misleading advertising of other traders and lays down the conditions under which comparative advertising is permitted.

For more in-depth information about the provisions of the Directive 2005/29/EC on unfair commercial practices and in particular their application in the different EU countries, please consult the [Guidance document of the European Commission](#)². The [Consumer Law Database](#)³ and the [Your Europe Business Portal](#)⁴ can help you find the relevant information.

We hope that you find the information provided in the Handbook useful.

² See http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm

³ See <https://e-justice.europa.eu/home.do?action=home&plang=en&init=true>

⁴ See <http://europa.eu/youreurope/business/>

Section I – Unfair Commercial Practices

What is a commercial practice?

Under the Directive on Unfair business-to-consumer Commercial Practices, a commercial practice is any act, omission, behaviour or representation, commercial communication (as advertising) by a trader which may affect the consumer's economic decision to buy or not to buy a product or to use or not to use a service.

The definition of a commercial practice is a very broad notion, meant to cover the widest possible number of real life situations and business behaviours that may affect consumer's choices. These rules apply to both online and offline commercial practices and to all types of goods and services. They are thus relevant for you, no matter whether you sell books in a shop or provide different types of services online.

What is an unfair commercial practice?

A commercial practice is unfair, under EU law, when it prevents the consumer from taking a fully informed and free economic decision. Unfair commercial practices are prohibited across the EU.

How can I enable my customer to take 'a fully informed economic decision'?

All your commercial practices, such as advertisements, oral offers, product pages on your website, which may affect the consumer's decision to buy your products or adhere to your services must contain all the information consumers need to decide, and the provided information must be true and accurate.

For example, if you offer a product claiming that it enables losing 10kg weight in 2 months, that product must have a proven capacity to make consumers lose 10kg in 2 months.

How can I enable my customer to take 'a free economic decision'?

In all your commercial practices, you must make sure that you do not exert any disproportionate pressure on the consumer, when you attempt to convince him/her to buy your products or adhere to your services.

The trader who offers for sale vacuum cleaners at consumers' doorsteps must never ignore a consumer's request to leave his home.

Are the standards of fairness the same in all Member States?

All Member States must, under EU law, have the same standards of consumer protection against unfair commercial practices. Indeed, the rules in this area have been fully harmonised (with the only exception of those applicable to financial services and real estate property, for which Member States may impose more stringent requirements). This means that the rules must be the same across the EU and that thus, if you comply with the rules in one Member State, you automatically comply with the rules in all other Member States. In practice, this means you can freely operate in the other Member States without being worried about compliance with national law.

What about regulation of practices towards my competitors?

The commercial practices that may affect other businesses are outside the scope of Unfair Commercial Practices Directive. However, please note that some EU Member States have extended their national rules

transposing the Unfair Commercial Practices Directive to business-to business situations or may have adopted specific rules on unfair business-to business practices. These Member States are: Austria, Belgium (partially), Czech Republic, France (partially), Germany, Italy (microenterprises only), Netherlands, Portugal (partially), Sweden⁵.

Moreover, at European level, the Directive 2006/114/EC on Misleading and Comparative Advertising⁶ protects traders against misleading advertising by other traders and lays down the conditions under which comparative advertising is permitted (i.e. advertisements that involve a competitor or products offered by a competitor).

The misleading advertising is any advertising which, in any way, including in its presentation, is capable of deceiving the persons to whom it is addressed; of distorting their economic behavior; or as a consequence, of harming the interests of competitors. For instance, the directory scams would be prohibited under the provisions of this Directive.

Moreover, the rules established by this Directive will apply when you advertise your product by comparing it with a similar product of a competitor. For instance, as a trader you need to make sure that the product you are comparing with the product of your competitor meets the same needs or that it is intended for the same purpose. For example, you can compare the electrical efficiency of your fridge only with the electrical efficiency of another producer's fridge, and not with the electrical efficiency of an oven. Moreover, the product you advertise can never present imitations or replicas of goods or services bearing a protected trade mark or trade name of your competitor.

⁵ See Pages 363-368 of the Study for the Fitness Check Main report http://ec.europa.eu/newsroom/document.cfm?doc_id=44840

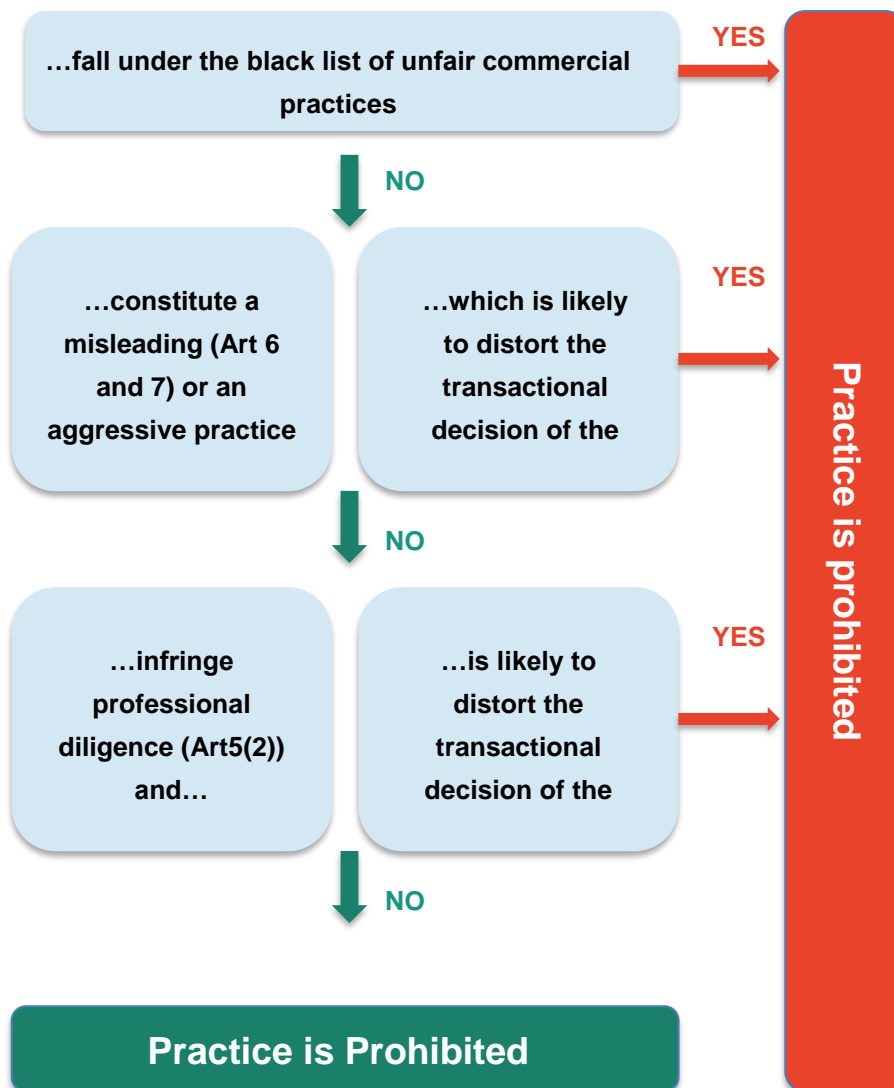
⁶ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0114>

How to check whether a commercial practice is (un)fair?

The functioning of the UCPD – Directive flowchart

This flowchart illustrates the relationship between the 'black list' of commercial practices in the Annex and the general clauses of the UCPD, namely Articles 6 to 9 and Article 5 respectively. In order to be considered unfair and therefore prohibited under the UCPD, it is sufficient that a commercial practice fulfils only one of these tests.

Does the commercial practice:



What are the concrete forms of unfair commercial practices which are always prohibited?

The 31 black-listed practices include both online and offline commercial conducts which may negatively impact a consumer's free and fully informed economic decision. The first 23 black-listed practices concern misleading behaviour of the trader and last 8 are prohibited aggressive practices.

1) Claiming to be a signatory to a code of conduct when you are not.

Example: a trader that sells fruits claims to be a member of an Association of producers of organic fruits, when in reality he is not part of it. This provision protects the consumer from the misleading statement related to the codes of conducts as forms of private regulation developed by the group of traders united in various associations such as the Association of producers of organic fruit or the Association of travel agencies.

2) Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

Example: the trader which uses EU or national eco-labels (e.g. EU ecolabel) without authorisation.

3) Claiming that a code of conduct has an endorsement from a public or other body which it does not have.

Example: an Association of supermarkets claims that their code of conduct was endorsed by a national consumer organisation, when it is not true.

4) 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.

Example: put on the packaging of a toy the sentence 'products safety tested' by a renowned certification body although it was not.

5) Making an invitation to purchase a product at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer sufficient supply or to procure another trader to supply the product or an equivalent product 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")

Example: a trader luring consumers with attractive special offers or discounts, when the trader knows or should know that he can either not offer these products at all or only an inadequate number thereof. Moreover, products are offered under special conditions without the trader making it clear that the offer is valid for only a limited quantity of products or limited period of time.



6) Making an invitation to purchase products at a specified price and then:

- a) refusing to show the advertised item to consumers;
or
- b) refusing to take orders for it or deliver it within a reasonable time;
or
- c) demonstrating a defective sample of it,

with the intention of promoting a different product (“bait and switch”).

Example: a shop-owner advertises a camera of a renowned German producer for the total price of 100 EUR. However, when the consumer goes to the shop to buy this camera, the trader:

- a) refuses to show that camera to the consumer;
or
- b) refuses to sell it to the consumer,
or
- c) shows only a defective sample of that camera.

All these three alternative actions have to be done by the trader with the intention of inducing the consumer to buy another product, e.g. a camera other than the advertised one.



7) 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.

Example: an offer which states: *Buy the advertised mobile phone in the next 24 hours and you'll pay half the normal price! Don't delay! Offer expires today at midnight. This product will never be offered again. Buy now!*

In case such an offer would be valid also after the expiry of the mentioned period of time, this conduct would amount to a black-listed commercial practice.

Other example: an online advertisement for a hotel room saying “book now, last room available” whilst in reality several more rooms are still available.

8) 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 this service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.

Example: the trader claims that buying any of his computers includes free after-sales technical support for one year after their purchase. However, following the purchase, the consumer realizes that all after-sales services are offered in English only and not in the language the consumer could have expected based on his prior communication with the trader, which is something the trader did not inform the consumer of.

9) Stating or otherwise creating the impression that a product can legally be sold when it cannot.

Example: the trader advertises that he is selling a protected species of a plant whose sale is prohibited under the law.

10) Presenting rights given to consumers in law as a distinctive feature of the trader's offer.

Example: the trader presents a legal guarantee (which is required by law – see Module on consumer sales) for a product, claiming that it is a particular, additional feature of a specific product that the trader offers for sale.

11) 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”).

Example: the trader provides the scientific-like descriptions of the virtues of a new toothpaste by a doctor, without making clear that the trader has actually paid for the scientific-looking editorial.

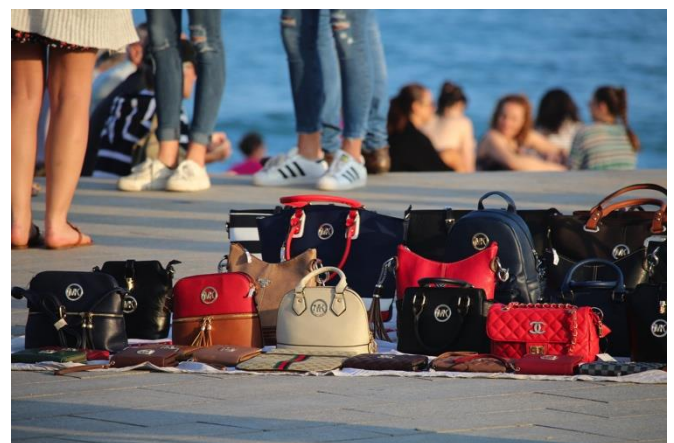


12) Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product; unduly playing on fear of security risks.

Example: the trader presents false or inaccurate statistics of burglaries or crimes in the area to attract consumer to buy an alarm system in order to protect their homes.

13) 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.

Example: creating confusion over brand names through the usage of a similar presentation or labelling than the ones of other producers. For example, that would be the case when selling a bag that resembles so much to the bag of another producer that the average consumer cannot easily distinguish between the branded and the other bag.



14) 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

Example: a network marketing scheme that works like a pyramid: a person wishing to join as a seller a network selling beauty products must pay an entry fee and their main remuneration comes from recruiting other people into this same network.



15) Claiming that the trader is about to cease trading or move premises when he is not.

Example: the trader falsely claims that his shop is about to close down in order to attract consumers to buy his products (e.g. *End of lease – everything must go by this Friday; Closing down sales*).

16) Claiming that products are able to facilitate winning in games of chance.

Example: trader's offer which states: *Finally, you can win the lottery! Buy the new algorithm system that will help you win the lottery.*

17) Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.

Example: a trader states that a certain product can cure baldness, when in fact it cannot: *"How would you feel with a full head of hair? 10 years younger? MiracleGrow Hair Gel is a tried and tested product for hair rejuvenation⁷!"*.

18) 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.

Example: the trader falsely presents himself as an exclusive seller so that he can charge a higher than market price for a certain product: *"This tennis racket brand is used by a famous and successful tennis player! You can buy it too – only on our website. Buy it now, as long as the supply is available!"* whereas in reality, the brand is available on multiple websites from different retailers and at a much lower price.

19) Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

Example: the trader advertises that the consumer who buys a specific tub of ice cream will automatically participate in a lottery that offers numerous prizes. However, in reality, no prize is offered to anyone; it is a misleading statement to encourage people to buy the tub of ice cream.

This provision applies whenever competitions or prize promotions are used as commercial tactics to attract

⁷ Please note that the health-related claims in advertising could also be covered by other sector-specific EU and national health and pharmaceutical legislation

consumers into buying a particular product, although eventually no prize at all – or no prize comparable to the one described - is eventually awarded to any consumer.

20) Describing a product as free if the consumer has to pay anything other than the cost of responding to the commercial practice and collecting or paying for delivery of the item.

Example: The bookseller advertises that the books are given for free when actually the consumer needs to pay for the books and only every third book is given for free.

21) Including in marketing material an invoice seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.

Example: the trader sends a brochure about a newly published encyclopaedia to the consumer together with an invoice to be paid, in a way which makes the consumer believe that he has ordered the book and is now supposed to pay for it.

22) Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade or falsely representing oneself as a consumer.

Example: the trader presents himself as a consumer when drafting positive on-line reviews about a certain hotel, when actually he is the hotel-owner.

23) 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.

Example: the trader is selling a computer to the consumer in France, saying that telephone support for

any questions related to the product is available free of charge in all other Member States of the European Union when in fact telephone support exists only in France and in French.

24) Creating the impression that the consumer cannot leave the premises until a contract is formed.

Example: the consumer enters in a shop and the trader claims that he has locked the door of the shop, saying that the consumer will be allowed to leave only if he buys one of the offered products. It is sufficient that the trader gives the consumer the impression that he cannot leave the premises; it is not required that he physically locks in the consumer.

25) 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.

Example: a trader who sells cutlery at the doorstep and who insistently tries to persuade the consumer to buy cutlery, although the consumer has made it clear he does not wish to buy any product from the trader. Such persistent commercial behaviour may press consumers into buying the offered product as a way to get rid of the trader.



It will not be considered that this form of unfair commercial practice is taking place in a situation in which the trader continuously returns to consumer's home despite his request not to do so, when it is about seeking payment from the consumer for something that the consumer has actually ordered and not yet paid.

26) 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.

Example: the trader sends a number of emails or SMSs to the consumer regarding a particular product although the consumer clearly requested that this practice stops. This does not necessarily prevent a trader from making persistent solicitations to seek payment from the consumer for something he has ordered and not yet paid.



In some Member States, 'cold calls' are prohibited, in line with the e-Privacy Directive⁸. Several Member States, for instance Germany, require that consumer opts in to allow traders to make unsolicited calls. This is also the case in Denmark, where contacting the consumer by phone, email, SMS, at his doorstep or at work without the consumer's permission is strictly limited and possible only if they have given their permission previously (with few exceptions regarding

phone sales). For the few situations where it is allowed, it is possible to be added to a special list to avoid unsolicited contacts like in Italy and Belgium.

27) 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.

Example: the insurer requires that the consumer, who wishes to claim compensation for the theft or loss of personal items from luggage, presents receipts for all items to which the claim is related. Requiring the receipts for all items would not be reasonably considered as relevant. This provision secures that the consumer can easily and efficiently enforce his insurance policy.

28) 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.

Example: "This video is now on the market – be the first one to have it among your friends, so tell immediately your mum to get it for you as soon as possible! Hey kids! Get your parents to buy the Batman Trilogy DVD! Read about the adventures of Fluffy the Bunny in this new comic book – ask your mum to buy it for you."

This rule aims to protect children (and their parents) to be targeted by direct advertisements. A necessary element for the unfairness of this practice is the "direct exhortation" aspect, which means that the advertisement must aim to put pressure on the children or their parents.

⁸ Directive 2002/58/EC on privacy and electronic communications.

29) Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer (inertia selling).

Example: a trader provides a consumer with goods or services which have not been ordered beforehand (e.g. the trader sends a book to the consumer, without the consumer having asked for it, and then asks for the relevant payment).

Please note that according to the Consumer Rights Directive, consumers are not obliged to pay for any unsolicited supply of goods or services. Consumers are also not obliged to contest or to send the unsolicited good back.

30) Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

Example: the trader who comes to the consumer's home selling a vacuum cleaner would claim that he will lose his job if the consumer does not buy the vacuum cleaner. For the application of this provision, it is irrelevant whether this is true or not.

31) 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 equivalent benefit is subject to the consumer paying money or incurring a cost.

Example: the trader informs the consumer that he has won a car as a prize when in fact there was no such prize, or when in order to obtain a prize the consumer needs to buy another product or make a payment such as calling a premium rate hotline.

What are misleading actions?

The prohibition of misleading actions secures that every commercial practice contains only information which are true and accurate and that the information is not provided in a misleading context to the consumer. The fairness of the commercial practice is always to be assessed by analysing whether it would be misleading for an average consumer.

For example, the following cases would qualify as misleading actions based on false information:

1. Food products advertised as containing no additives, when they actually do;
2. A hotel room advertised as having a direct view on the sea, when it does not;
3. A car advertised to produce less CO₂ emission than it does in reality;
4. Incentivizing the consumer to buy a commercial guarantee together with a new fridge, stating that otherwise the consumer would have no available remedy in case the fridge does not work, although by law the seller is liable for the conformity of the product under the EU rules on the legal guarantee⁹.

For the following cases would qualify as misleading actions based on true information which is however provided in a misleading manner:

1. Offering a small portion of chocolate in a significantly bigger package that gives the impression that the package contains substantively more chocolate than it contains in reality.
2. Offering dry cleaning services in a way that makes the consumer believe that professional ironing of the clothes is included in the price, when this is not the case.

⁹ See the Module 3 on consumer rights and guarantees

The misleading actions test should be based on the information related to the following elements of a commercial practice:

1. the existence or the nature of the product; (e.g. used product being sold as a new one);
2. the main characteristics of the product or service; geographical or commercial origin or the results to be expected from its use; (e.g. composition: sugar-free, preservative-free, nutritional allegations; availability of complaint handling procedures; methods of production: free of hormones, bio-products; quantity of the product advertised: 1 l bottle, while the bottle only contains 90 cl; technical specifications: fuel consumption, energy consumption);
3. the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product (e.g. the purchase of the product will financially support a humanitarian organization, when this is not true);
4. the price or the manner in which the price is calculated or the existence of a specific price advantage (e.g. presentation of a fake price, for instance a train ticket for 59 EUR, when the price in reality is 109 EUR);
5. the need for a service, part, replacement or repair (e.g. falsely claiming that spare parts for the sold model of the car will be available for the next ten years);
6. the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and

distinctions (e.g. false claim that the trader has been awarded with the best tailor prize);

7. the consumer's rights, including the right to replacement or reimbursement or the risks he may face (e.g. any of the consumer rights secured by different pieces of legislation such as the legal guarantee)¹⁰.

What are misleading omissions?

Misleading omissions are forms of unfair commercial practices whereby the trader fails to give 'material' information to the consumer, i.e. information that the average consumer needs to make an informed economic decision. All relevant information need to be presented to the consumer while advertising the product and before selling it.

Example of a misleading omission: *Fly to Paris for 99 EUR*, but the advertisement does not say that there are additional charges, such as a significant airport surcharge, so that the total price ends up being over 150 EUR. Similarly, a misleading omission would be advertising a high-speed Internet connection for 29 EUR per month, whilst omitting to inform that, to benefit from such an offer, the consumer must subscribe to a 3-year contract.

A commercial practice will also be classified as a misleading omission if the trader provides the consumer with all material information, but does so in an unclear, unintelligible, ambiguous or untimely manner. Therefore, improper presentation of information from which the consumer cannot benefit,

¹⁰ See Module 2 on the right of withdrawal

such as using hardly legible letter fonts, is equal to the situation where information is not provided at all¹¹.

Please note that the information requirements are stricter if the trader's commercial communication represents a so-called "**invitation to purchase**", a narrower concept than the advertising. With an 'invitation to purchase', the trader provides information about the characteristics of the advertised product and its price in a way that enables the consumer to make a purchasing decision.

Whenever you make a commercial communication which amount to an 'invitation to purchase', you must necessarily disclose, unless it is already apparent from the context:

1. the main characteristics of the product or service;
2. your geographical address, identity and trading name, or the geographical address and identity of the economic operator on whose behalf you are acting;
3. the final price (i.e. inclusive of taxes and all additional charges for e.g. transport, delivery, postage); where the price cannot be calculated in advance (due to the nature of the product or service) you need to explain the manner in which the price is calculated; when the additional charges cannot be calculated in advance, you need to indicate the fact that such charges will or may have to be paid;
4. specific arrangements for payment, delivery, performance and/or complaint handling; and
5. the right of withdrawal, if applicable¹².

¹¹ To find out how to provide information in a clear manner, please refer to the Module on pre-contractual information duty and the part on how to provide the required information to the consumer.

¹² See Module 2 on the right of withdrawal

What are aggressive practices?

Aggressive practices are the forms of unfair commercial practices where the trader impairs the consumer's freedom of choice or conduct in an illegitimate manner.

In practice, the occurrence of aggressive practice is the consequence of some of the following forms of trader's behaviour: harassment (e.g. irritant, constant phone calls), coercion (threatening the consumer to buy a product), including the use of physical force, or undue influence (i.e. exploiting a position of power in which the consumer is not free to decide).

Possible examples would be:

1. If a trader makes it practically very difficult for the consumer to terminate a long-term service contract or to switch to another operator, by trapping them into automatic contract renewals.
2. If the trader asks a consumer who urgently needs a new door lock to pay a significantly higher price for than its normal price in the same shop.

The standards of the average and the vulnerable consumer

The assessment of the fairness of a commercial practice under the general fairness clause or under the rules on misleading practices, misleading omissions and aggressive practices is to be performed against the standard of expected behaviour of the average consumer. In case a trader would be targeting vulnerable consumers, the standard of the expected behaviour of the vulnerable consumer is relevant.

EU legislation considers that there are two different types of consumers: the *average consumer* and the *vulnerable consumer*. Depending on the consumer you

are dealing with, you need to adjust the manner in which you deal with the consumer.

EU legislation defines a *vulnerable consumer* as the consumer who is vulnerable because of his/her age, mental or physical infirmity, age or credulity, such as children, elderly people or persons with disabilities.

Vulnerable consumers have special needs when it comes to the protection from unfair commercial practices. It is therefore important that you pay more attention to the commercial practice you use when targeting vulnerable consumers.

In order to avoid the engagement into a misleading omission, you can adapt the methods through which you provide the information to the particularities of the vulnerable consumers. For example, if you sell products to elderly persons, you can increase the font size of the information provided. The information provided has to be clear, comprehensible and accessible.

Similarly, in the case of a visually impaired consumer, the information should be provided using appropriate media and symbols. There are experts that can help you find out what the appropriate media and symbols are. You can find their contacts online.

What happens if you do not comply with the fairness obligation?

EU Law requires that the sanctions for the breach of the rules on unfair commercial practices are proportionate, effective and deterrent. The sanctions themselves differ among Member States.

In broad terms general administrative fines under Article 106 of the Maltese Consumer Affairs Act states that *“A person guilty of an offence against this Act or of any regulation made thereunder shall, unless a*

different punishment is prescribed therefor, on conviction be liable to a fine (multa) or not less than four hundred and seventy euro (€470) and not more than forty-seven thousand euro (€47,000).”

Nevertheless, for the purposes of unfair commercial practices other fines will apply. Indeed, the law says that for infringements under Art 51(f) – which relate to unfair commercial practices – the basic amount of the fine should be two thousand, three hundred and fifty euro (€2,350). Nevertheless, other provisos apply and it would be ideal that you review the second schedule of the same Act.¹³

Sanctions normally include the annulment of a contract that was concluded under the impact of an unfair commercial practice. Likewise, the sanctions for the engagement into unfair commercial practices can be criminal law sanctions, e.g. that the responsible person in a company engaged in unfair commercial practices may be criminally liable and charge with a prison sentence. However, most common sanctions are pecuniary fines of different amounts. Some examples here:

- In Italy, Art. 27 of the consumer code sets out the minimum fine of €5,000 and a maximum financial penalty of €5,000,000. These amounts apply both to infringements in respect of either the Unfair Commercial Practices Directive, Consumer Rights Directive or both in parallel. In the event of repeated non-compliance, the trader may be asked to suspend trading for a period which shall not be more than thirty days.
- In Belgium the maximum fine that can be imposed is € 600,000.

¹³ Consumer Affairs Act – see second schedule entitled ‘Infringements under article 51F’ – pages 59-60.
<http://www.mccaa.org.mt/en/information>

- Germany can fine up to €300,000 for “cold calling”.

For more in-depth information on the rules on business-to-consumer unfair commercial practices and how they are interpreted by the European Court of Justice, national courts and national authorities, you may consult [the guidance published by the European Commission](#)¹⁴:

The guidance contains a chapter that specifically explains how the rules apply to new business models that have been emerging in the online sector, such as platforms, collaborative economy, comparison tools, user reviews etc.

¹⁴ See http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf

Section 2 – Unfair Contract Terms

What is a consumer contract and a contract term?

A consumer contract is any contract that a trader concludes with a consumer, irrespective of whether it has as its object the supply of goods, services and/or digital content.

For instance, a contract concluded online with the consumer for the sale of books.¹⁵

Most contracts contain as their integral part standard Terms and Conditions (T&Cs), which set out standardized (non-negotiable) rules and procedures on which the consumer needs to agree. Often they are complex and voluminous legal texts. Studies show that most consumers do not read them, especially when stipulated online. Even when formal acceptance of T&Cs is required online, such as ticking a box, most consumers take no notice of the content.

When you use T&Cs in your contract with consumers, you should, as a first step, clearly identify their purpose. Maybe T&Cs are not needed at all because the default legal situation under national or EU rules constitutes an adequate and sufficient framework for the contract performance.

If however you consider T&Cs necessary, please consider them as a means to enhance consumer trust rather than to exempt yourself from as much liability as possible. In case of dispute, T&Cs are subject to a fairness control by the judge following the rules that are explained in the following sections.

What are rules on fairness of contract terms and when do they apply?

EU Directive 93/13/EEC on unfair contract terms requires that the terms in consumer contracts need to

fulfil certain standards, in particular to be in line with the principle of good faith and not to cause a significant imbalance in the rights and obligations between the contractual parties to the detriment of the consumer.

The Directive applies to all consumer contracts; however it does not apply to all contract terms. Contract terms which reflect mandatory statutory or regulatory provisions, as well as provisions or principles of international conventions to which the EU Member States or the EU are party, such as those in the transport area, are not covered.

These EU rules only cover **standard** contract terms and conditions, i.e. contract terms which have been drafted in advance and the content of which the consumer has not influenced/negotiated individually. However, please note that some Member States have extended the application of the EU fairness requirements also to individually negotiated contract terms. These Member States are: Austria, Belgium, Czech Republic, Denmark, Finland, France, Luxembourg, Malta, UK. In Malta's case, PART VI of the Consumer Affairs Act¹⁶ entitled Unfair contract terms stipulates the above.

The EU fairness requirements do not apply to the contract terms related to the main subject matter of the consumer contract and to the adequacy of the price and remuneration stipulated therein, provided that these terms are in plain intelligible language.

Please be aware that some Member States have extended the application of these EU fairness requirements also business-to-business contracts. These Member States are: Austria, Bulgaria (according to case law), Croatia, Czech Republic (only if the entrepreneur's act is unrelated to his business), Denmark, Estonia, France, Germany, Greece,

¹⁵ See Module 1 on Pre-contractual information requirements

¹⁶ See Articles 44-17 of the Consumer Affairs Act

Hungary, Luxembourg, The Netherlands, Poland, Portugal, Slovenia, Sweden¹⁷.

Are the rules on unfairness of contract terms the same in all of the Member States?

The rules on unfair contract terms at EU level only set a minimum standard of protection. Member States are free to adopt additional rules to provide for a higher – but never for a lower – level of consumer protection. Therefore, while the guiding principles are always the same, there may be, depending on the country where you offer your products, more specific rules on unfair contract terms in place. This concerns in particular national laws that establish so called 'black' or 'grey' lists of contract terms that are always or generally considered to be unfair. You can find the information about which Member States have adopted such rules on the [website of the European Commission](#)¹⁸. If you want to check how the individual EU countries have transposed the Unfair Contract Terms Directive in their national legal order, you can also use the [European Commission's new Consumer Law Database](#)¹⁹.

Need to respect the consumer law standard of another country

When you sell products or offer services to the consumers outside your country, you need to respect the consumer law standard of the Member State in which the consumer lives. So you need to check compliance of your consumer contracts with all of the Member States separately if you operate your business activities in these countries. This is especially important

when it comes to the list of unfair contract terms. If you include in your standard contract terms a choice of law clause, specifying that the law of your country applies to the contract, you need to inform consumers from other Member States that you will still respect their rights ensured by mandatory rules of the country of their residence²⁰.

The full list of unfair contract terms under Maltese law can be found under Article 44(2) of the Consumer Affairs Act.

What are the principles of good faith and the notion of significant balance?

The principle of good faith requires that the contract term should be such that the consumer would have agreed to it had he/she individually negotiated it. Accordingly, this means that, for the principle of good faith does not allow you to stipulate a term by which you oblige the consumer to use the gym services you provide for a ten years' period without possibility to terminate it earlier. Likewise, that would be the case with a term which prescribes arbitration as the only way to solve a dispute related to a consumer contract.

The main element of the general fairness criterion is that an unfair contract term causes a **significant imbalance** in the parties' rights and obligations, to the detriment of the consumer. The notion of *significant imbalance* means that the trader is abusing his position of power vis-à-vis the consumer – the trader is typically in a stronger position than the consumer as it has more knowledge in relation to the products and services at stake.

In order to ascertain whether a term causes a 'significant imbalance' to the detriment of the consumer, it must in particular be considered which

¹⁷ See pages 372-374 of the Study for the Fitness Check Main report

http://ec.europa.eu/newsroom/document.cfm?doc_id=44840

¹⁸ http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/notifications/index_en.htm

¹⁹ https://e-justice.europa.eu/content_consumer_law-505-en.do

²⁰ See Module 3 on consumer sales: the part on cross-border sale

rules of national law would apply in the absence of an agreement by the parties in that regard. The aim is to check whether the contract places the consumer in a legal situation less favourable than that provided for by the national law in force.

An example would be a contract term authorizing the trader to terminate the contract without reason, where the same possibility is not granted to the consumer. Another example would be a contract term allowing the trader to retain the sums paid by the consumer for goods/services not yet supplied, where it is the trader himself who terminates the contract.

For a contract term to be deemed unfair, the intention of a trader is irrelevant: it does not make a difference whether he intentionally wanted to stipulate an unfair contract term or whether this happened as a consequence of negligence or ignorance of the applicable rules.

How should the contract terms be written?

The terms included in the consumer contracts must be written in plain and intelligible language, both in terms of form and content.

An example of a contract term which has not been written in plain and intelligible language would be that of contract terms in a very small font size.

The European Court of Justice has consistently held that the requirement for contract terms to be "written in plain and intelligible manner" cannot be reduced to the fact that they have to be formally and grammatically intelligible. Indeed, this transparency requirement means that the consumer must be put in a position to fully understand the legal and economic consequences of agreeing to a specific term.

Be also aware that, if the meaning of a contract term is ambiguous, unclear or imprecise, the interpretation of

that term which is the most favourable to the consumer will always prevail.

For example, if you include in your contracts a term whereby the deadline for payment by the consumer is 15 days, but you do not clarify as from when this deadline runs, the moment of the actual delivery of your product to the consumer will be taken as the starting point, rather than the day of conclusion of the contract.

Are there any terms which are always unfair?

The answer to this question is: it depends. EU law itself does not lay down any lists of contract terms which are always to be considered as unfair, under any circumstances. However, some of the Member States have introduced in their national laws 'black-lists' of terms which under any circumstances are to be considered as unfair²¹.

The Member States that have extended the fairness control to individually negotiated terms are the following: Austria, Belgium, Czech Republic, Denmark, Finland, France, Luxembourg, Malta, UK. Therefore, in order to be on the safe side, get familiar with what are the rules of your relevant national legislation and whether there are any contract terms which are always to be considered as unfair. For Malta's specificities see footnote 16 of this module.

For example, some Member States have 'black-listed' the use of contract terms whereby the competent court in case of dispute can only be the one where the trader has his principal place of business.

This is not applicable to Malta.

²¹ See http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332, Report on the fitness check of consumer and marketing law

What are the terms which are likely to be unfair?

The Directive 93/13/EEC on unfair contract terms lists a number of contract terms which are usually, but not automatically, considered to be unfair. Please note that this is an indicative and non-exhaustive list.

Their fairness still needs to be assessed on a case by case basis through the general fairness test. However, in practice, it is likely that these terms will be considered as unfair, so the best is to simply avoid using them.

The indicative list includes the following contract terms:

- a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury resulting from an act or omission of that seller or supplier;

Example: A contract term that limits the producer's liability for death or personal injuries caused by a defective product he made available to cases of deliberate action or gross negligence while the law provides for strict liability (i.e. responsibility regardless of negligence or intention)[1].

- b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations;

Example: a term that says that the consumer has no right to remedies (e.g. repair, replacement) if the oven he bought turns out to be defective and thus cannot be used.

- c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;

Example: a term whereby the trader reserves himself the right to perform the contract only if and when that trader wishes to do so.

- d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

Example: a term which makes any substantial prepayment or deposit entirely non-refundable, whatever the circumstances. However, when a consumer cancels without any justification and the trader suffers loss as a result, the consumer cannot expect a full refund of all prepayments.

- e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

Example: a term whereby the consumer is required to pay very high storage costs if he/she fails to take delivery as agreed.

- f) authorising the seller or supplier to terminate the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who terminates the contract;

Example: a term whereby the consumer cannot

cancel the contract in any circumstances, or can only do so with the supplier's agreement. The logic behind this provision is that consumers and suppliers should be on an equal footing as regards rights to end or withdraw from the contract.

- g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

Example: a term whereby the trader reserves himself the right to end a contract on the provision of access to Internet without notice, which would not allow the consumer enough time to find another provider before the contract expires. With the exception of serious circumstances entailing a real risk of loss or harm to the trader or others if the contract continues even for a short period (for instance, in case a fraud is detected), a unilateral right for the trader to terminate contracts of indeterminate duration will usually be qualified as unfair.

- h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;

Example: a contract term indicating that the consumer can cancel the automatic extension of a contract expiring on 1 July 2019 by 1 February 2019. The term would add that the contract is automatically extended if the consumer fails to do so. In principle, it is allowed to have a contract term which automatically extends a contract of fixed duration; however, to pass the fairness test such a term must give the consumer a reasonable time to express his wish to extend the contract;

here it is not the case.

- i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

Example: a term which refers to the terms in another document (which is not accessible to the consumer) and states that the consumer is irrevocably bound by these (other) terms.

- j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

Example: a term whereby a trader reserves himself the right to unilaterally change the costs of a daily newspaper's subscription without any valid reason that would be mentioned already in the contract itself

- k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

Example: a term whereby the trader reserves himself the right to provide the consumer with the Internet service with significantly lower speed than initially agreed without any valid reason.

- l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

Example: a term which leaves it up to the trader alone to double the gym's monthly fee after the consumer has concluded an annual subscription

contract, without granting the consumer the right to cancel the contract.

- m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

Example: a term which allows a trader to decide by himself whether he is liable for the performance of a fridge he sold to the consumer.

- n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

Example: a contract term stating that the seller will not be liable for any commercial guarantees sold by his agents.

- o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

Example: a term whereby consumers are required to continue paying even when the relevant goods or services are not provided as agreed.

- p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

Example: a term whereby the trader reserves himself the right to transfer his business to a different trader, allowing the other trader to shorten the duration of the commercial guarantee given initially to the consumer for the acquired

product (e.g. from 5 years to 3 years).

- q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract;

Example: a term whereby the consumer is obliged to have to resort to arbitration to solve a dispute (for instance: "In case of complaint, the consumer will first submit the case to the arbitration court designated in the contract, before he has the right to bring action before the court.").

Example: a term whereby the consumer is obliged to have to resort to arbitration to solve a dispute (for instance: "In case of complaint, the consumer will first submit the case to the arbitration court designated in the contract, before he has *the right to bring action before the court.*").

Likewise, a compulsory mediation clause (for instance: "*In case of complaint, the consumer will first submit the case to the mediation system run by ABC*") could be considered as unfair. The use of mediation schemes must remain voluntary and the consumer must have (as well as the trader) a free choice as to whether to go to mediation.

Moreover, the consumers should not be prevented from starting legal proceedings before their local courts. An example would be, if a consumer lives in Rome and a trader has his seat in Athens: "*For the settlement of disputes arising from this contract, only the courts of Athens are declared competent*". Likewise, you may not stipulate

contract terms which reverse the burden of the proof.

What are the legal consequences of the unfairness of contract terms?

The contract term which is found to be unfair is not binding on the consumer and will be declared null and void by a court. The consumer contract which contains an unfair contract term will continue to bind the parties if it can continue to exist without the terms which are deemed unfair. For instance, if the contract term which establishes the place of the competent court in case of dispute is declared unfair, this will typically not affect the validity of the contract as a whole, so the remaining contract will continue to exist without the unfair term.

If the consumer contract can no longer exist without a certain term which was found to be unfair, the legal consequences (e.g. that each party is obliged to return what they have received under the contract) are defined by the national laws of the Member States.

In Malta's case Article 46 of the Consumer Affairs Act states that *"A consumer contract that includes a prohibited or unfair term shall not be binding on the consumer unless the contract is capable of continuing in existence without the unfair term."*

Other sanctions, such as pecuniary fines, for the breach of the rules on the fairness of contract terms differ across the Member States.

In the Maltese scenario, the general administrative fines under the Consumer Affairs Act, apply²²

Cross-border sales: what happens when I offer my products or services to consumers outside my country?

Below you will find some information concerning specific rules applicable if you proactively reach out to consumers living in another country.

These provisions are relevant to take into account where national rules protecting consumers may be different, such as on unfair contract terms. For those issues that are fully harmonised, such as unfair commercial practices, these elements are of less importance.

Please note however that in case of cross-border disputes, specific provisions are applicable across all areas, please read carefully the paragraph below.

Specific treatment of sales that you direct to consumers from other Member States

Under EU law²³, if you direct your business activities to consumers in EU countries different from your own, it is usually the law of the country in which the consumer lives that applies to your contract with the foreign consumer. If you have both chosen a different law, that choice cannot deprive your foreign consumer of the protection granted by the mandatory provisions of his country of residence.

Therefore, if, for example and as seen in Module 3, your website is directed at the consumers in a Member State where a free choice of remedies is available under Article 3 of the Consumer Sales and Guarantees Directive, you must, in case of a lack of conformity, enable your customer to choose between a repair of the product, its replacement, a price reduction or a full refund, unless one or the other of such options is materially impossible or disproportionately difficult for you. More generally, whenever you advertise or offer your goods or services in other Member States, you must respect the standard of consumer law protection of the countries you target.

²² Consumer Affairs Act -Article 106A

²³ Notably the so called "Rome I" Regulation 593/2008.

When are you considered to direct your marketing to foreign consumers?

The Court of Justice of the European Union has laid down a number of non-exhaustive criteria for establishing whether your marketing activities are 'directed' at a specific Member State. Such criteria entail, for, the use of languages or currencies other than those generally used in the Member State of your company's place of establishment, the mention of telephone numbers with an international code, the use of a top-level domain name other than that of the Member State in which your company is established²⁴.

If you are not directing your activities to other EU countries, however, and a consumer from another EU Member State approaches you on his own initiative, then your national law applies.

What does this mean for you in practice?

What law will be applicable to your cross-border contracts?

At first sight, it might appear complex for a small trader to comply with the law of the country of its different customers, in different countries. It might prevent some traders to offer their goods or services across the border. However, in practice:

1. EU legislation provides, as we describe under the Consumer Law Ready modules, for an important amount of harmonized provisions of consumer protection. These rules apply all over the EU.
2. Even if, on some elements, there are differences left between Member States, this does not mean that you are not allowed to have your contracts with consumers designed under your own legislation: as explained above, you can agree with the consumer that another law should be

applicable, in which case you only have to respect the mandatory consumer law of the State where the consumer lives.

3. In practice, the mandatory consumer legislation of another State will only be relevant if its rules are more protective than those of your legal system or the law you have agreed upon with the consumer. This might be the case where, for the legal guarantee period of the consumer's law is longer than the one under your own law.
4. Also thanks to the ConsumerLawReady training modules, you will be able to know in advance which additional requirements may apply in which other Member State to which you're considering to direct your business activities.
5. The question of the applicable law will often be relevant only if there is a disagreement with the consumer. Many misunderstandings can be solved amicably or by using your in-house complaint service.

When you have a dispute in such a cross border contract, which court is competent?

If you offer your products or services to consumers in other EU countries and happen to have a dispute with one of your foreign customers, be aware that the competent court to decide over such a dispute will always be, under EU law, notably the so called "Brussels I" Regulation, that of the country in which the consumer lives. You cannot sue the consumer before a court of another country and if you stipulate such an option in your terms and conditions, you would risk a severe fine. The consumer, by contrast, has the option to sue you before your home court as well. For cross border cases, in order to make it easier to solve disputes, the EU has set up an ODR platform that

²⁴ For more information, see joined cases C 585/08 and C 144/09 Peter Pammer and Hotel Alpenhof GesmbH the Court

makes it possible to liaise between Alternative Dispute Resolution systems in different Member States²⁵.

Example: if you are a French trader based in Lille selling your products to Belgian consumers, you cannot establish in your terms and conditions that, in case of a dispute, the only competent courts to solve the case are the courts in Lille.

²⁵ See Module 5

Annexes

Checklist for the trader

1. Do you use standard contract terms? ☐
2. Are your contract term(s) indeed not on any list of potentially/always unfair contract terms? ☐
3. Are the contract term(s) written in an easily legible and comprehensible manner? ☐
4. Are the contract term(s) not causing significance imbalance between your rights and obligations and the consumer's rights and obligations to the disadvantage of the consumer? ☐

The European Commission will issue a guidance document on the rules on unfair terms in consumer contracts based on the interpretation of the rules by the European Court of Justice, national courts and national authorities. It will be available on the website of the European Commission.

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