European Commission – DG Justice


Part 2 – Country Reports

Final Report

Conducted by:
Civic Consulting
European Commission – DG Justice


Part 2 – Country Reports

Final Report

Conducted by Civic Consulting
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Reported by</strong></td>
<td>Dr. Frank Alleweldt, Dr. Senda Kara (directors),&lt;br&gt;Prof. Peter Rott (lead author comparative legal analysis),&lt;br&gt;Prof. Chris Willett (second reader comparative legal analysis),&lt;br&gt;Harriet Gamper (problem analysis, research and coordination)</td>
</tr>
<tr>
<td><strong>Country reports</strong></td>
<td>Prof. Susanne Augenhofer (Austria),&lt;br&gt;Prof. Antonina Bakardjieva Engelbrekt (Bulgaria),&lt;br&gt;Prof. Willem H. van Boom (The Netherlands),&lt;br&gt;Prof. Giovanni De Cristofaro (Italy),&lt;br&gt;Prof. Fernando Gomez, Ms Marian Gili (Spain),&lt;br&gt;Prof. Axel Halfmeier (second reader Germany),&lt;br&gt;Prof. Maria Rosaria Maugeri (second reader Italy),&lt;br&gt;Prof. Peter Mægling-Hansen (Denmark),&lt;br&gt;Dr. Charlotte Pavillon, Prof. Elise Poillot (France)&lt;br&gt;Prof. Jerzy Pisuliński, Dr. Tomasz Targosz, Dr. Karolina Włodarska-Dziurzyńska, Dr. Michał Wywiński, Michał Bobrzyński, LL.M. (Poland),&lt;br&gt;Prof. Peter Rott (Germany),&lt;br&gt;Prof. Peter Sparkes (UK – immovable property),&lt;br&gt;Prof. Chris Willett (UK – financial services).</td>
</tr>
<tr>
<td><strong>Reviewed by</strong></td>
<td>Dr. Senda Kara, Dr. Frank Alleweldt, Harriet Gamper</td>
</tr>
<tr>
<td><strong>Support team</strong></td>
<td>Rémi Béteille, Jess Dorrance, Kate Fanale, Lenka Filipova, Arabel Luscombe, Neva Nahtigal</td>
</tr>
<tr>
<td><strong>Report finalised on</strong></td>
<td>22 December 2011 (submission of draft final report)</td>
</tr>
</tbody>
</table>
CONTENTS

1 AUSTRIA
2 BULGARIA
3 DENMARK
4 FRANCE
5 GERMANY
6 ITALY
7 NETHERLANDS
8 POLAND
9 SPAIN
10 UNITED KINGDOM
1 Austria

Document Control

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender No.</td>
<td>Invitation to tender n° JUST/2010/JCIV/PR/0018/A4</td>
</tr>
<tr>
<td>Prepared by</td>
<td>Prof. Dr. Susanne Augenhofer, August 2011</td>
</tr>
<tr>
<td>Checked by</td>
<td>Dr. Senda Kara, Dr. Frank Alleweldt, Harriet Gamper</td>
</tr>
</tbody>
</table>
1.1 Introduction

History

In Austria, legal matters governed by the UCPD are regulated in the Gesetz gegen unlauteren Wettbewerb 1984 (UWG, Federal Act Against Unfair Competition)\(^1\). Unlike some other Member States, Austria has a long history of unfair competition law, since the first UWG dates back to 1923.\(^2\) It was inspired by the German UWG from 1906. The UCPD – as well as Directive 2006/114/EC – was implemented by the so-called UWG amendment of 2007.\(^3\) Due to the long history of dealing with unfair commercial practices, the implementation of the UCPD should – in the opinion of the Austrian legislator – not lead to any fundamental changes.\(^4\) In particular, the previous approach of applying the UWG to B2C as well as to B2B relationships was generally kept. This so-called Schutzzwecktrias (which means that the UWG shall protect competitors, consumers and the public alike) was not the main focus of the original legislator, but was applied by courts soon after the passing of the statute.\(^5\) This concept was finally accepted by the Austrian legislator, at the very latest in an amendment to the UWG in 1971.\(^6\)

This concept motivated the general decision of the Austrian legislator to implement the UCPD in the UWG, rather than as a single consumer law statute or in the Austrian Consumer Protection Act (Konsumentenschutzgesetz, KSchG)\(^7\), with the effect that it applies in general to all commercial practices regardless of the personal scope. This effect, however, is not carried through entirely, especially with regard to § 1 UWG (general clause) and misleading omissions (§ 2 para 6 UWG).

---

1 Bundesgesetzblatt (BGBl., Federal Law Gazette) Nr. 448/1984. An English version of the UWG is available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984_448/ERV_1984_448.pdf. When the text of a provision is stated or quoted, this translation has been used.

2 See Handig/Röttinger/Wiebe, in Wiebe/Kodek (ed.), UWG, 2009, Einleitung, no. 8 for further references, also with regard to earlier attempts to pass an act against unfair competition. Prior to the UWG 1923, regulations of unfair commercial practices could already be found in the Trade, Commerce and Industry Regulation Act (Gewerbeordnung, GewO).


4 This is the view of the Austrian legislature expressed in the explanatory remarks to the legislative materials, see Regierungsvorlage (RV.) 144 Beilagen zu den stenographischen Protokollen des Nationalrates (BlgNR.) 23. Gesetzgebungsperiode (GP.) no. 23. These materials can be found at http://www.parlinkom.gv.at. Skeptical if the amendment indeed has only narrow consequences for example Schuhmacher, Die UWG Novelle 2007, Wirtschaftsrechtliche Blätter (wbl) 2007, 557-566, 558.


7 Federal Law Gazette no. 1979/140. An English translation of the KSchG is available at ris.bka.gv.at. This translation has been used when provisions of the KSchG have been cited.
Structure of the UWG

The current structure of the most important sections of the UWG is as follows:

- **General clause (§ 1 UWG)**

  § 1 UWG resembles the general clause of the UCPD (Article 5), but also regulates commercial practices in B2B relationships.

  According to § 1 para. 1 no. 1 UWG, an injunction and a fault-based claim for damages may be available against a party who, in the course of business, resorts to an unfair commercial practice or any other unfair act which will substantially distort competition to the disadvantage of other enterprises.

  § 1 para. 1 no. 2 UWG regulates unfair commercial practices in B2C relationships: An injunction and a fault-based claim for damages may be available against a party who, in the course of business, resorts to unfair commercial practices that are contrary to the requirements of professional diligence and which are sufficient to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.

- **Aggressive commercial practices (§ 1a UWG)**

  Aggressive commercial practices are regulated in § 1a UWG. Para 1 leg cit states that commercial practices shall be regarded as aggressive if – by harassment, coercion, including the use of physical force, or undue influence – they significantly impair or are likely to significantly impair the market participant's freedom of choice or conduct with regard to the product, thereby causing or likely to cause the participant to make a transactional decision that he or she otherwise would not have made. It applies to B2B as well as B2C relationships. Furthermore, commercial practices mentioned in Annex I nos. 24 - 31 should be considered as aggressive under all circumstances (§ 1a para. 3 UWG). By contrast, § 1a para. 2 UWG applies only to B2C relationships. This provision states that to determine whether a commercial practice is aggressive, any onerous or disproportionate non-contractual barriers imposed by the trader on the consumer should be taken into account when that consumer – and not a market participant – wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or to another trader.

- **Misleading commercial practices and omissions (§ 2 UWG)**

  Misleading commercial practices and omissions (para 4 et sequ.) are regulated in § 2 UWG. It applies to both B2C and B2B relationships. However, with regard to misleading omissions, Art 7 no. 4 Directive 2005/29/EC – which lists the information which shall be regarded as material in the case of an invitation to purchase, if not already apparent from the context – has been implemented only with regard to B2C relationships (§ 2 para. 6 UWG). Furthermore, commercial practices mentioned in Annex I nos. 1 - 23 should be
considered as misleading under all circumstances (§ 1a para. 3 UWG).

- **Comparative advertising (§ 2a UWG)**

  Comparative advertising is regulated in § 2a UWG and applies to B2C as well as B2B relationships.

- **Annex I**

  Annex I of the UCPD has been imported directly into the UWG and applies to B2C as well as to B2B relationships.

The above stated provisions resemble the structure of the UCPD. Consequently, the question of whether a commercial practice is unfair has to be solved in the same way as under the UCPD: Thus, one should ask whether a commercial practice violates Annex I. If not, then the next question is whether the commercial practice is misleading or aggressive. If it is neither aggressive nor misleading, the final question is if the commercial practice should be regarded as unfair under § 1 of the UWG. In addition to these provisions, the UWG contains some other provisions (such as bribery of employees, § 10 UWG), which are, however, of no importance with regard to unfair commercial practices concerning immovables and financial services. As a result, these provisions are not dealt with in this country report.

**Enforcement**

With regard to enforcement, it should be stated that the UWG is based on the idea of private enforcement: Suits have to be brought before civil law courts by private parties. There is no administrative agency in charge of enforcement. Competitors are allowed to sue for injunctions (§ 14 UWG) as well as damages, to the extent that the law provides for them. Insofar as it relates to injunctions, the prevailing opinion states that a so-called abstract competition relationship (abstraktes Wettbewerbsverhältnis) between the competitor and the violator of the UWG is sufficient. The fault-based claim for damages also encompasses lost profit (§ 16 para. 1 UWG).

---

8 This is also the consequence of the full harmonisation approach of the UCPD.

9 See for example Koppensteiner, Das UWG nach der Novelle 2007, Wirtschaftsrechtliche Blätter (wbl) 2009, 1-10, 4, who rightly points out that the examination must always be carried out in this order, while the Austrian Supreme Court (Oberster Gerichtshof, OGH) had noted that it has to be done in this order “as a rule”, see OGH 8.4.2008, 4 Ob 42/08t (all cited decisions by the OGH are available at ris.bka.gv.at).

10 But see footnote 7 and below 1.1.1.2.

11 Injunctions include the removal of infringements.

12 See for details Kodek/Leupold, in Wiebe/Kodek (ed.), UWG, 2009, § 16, no. 1 et sequ with further references.

13 See Kodek/Leupold, in Wiebe/Kodek (ed.), UWG, 2009, § 14, no. 87 with further references. According to case law and the prevailing opinion among scholars, anybody who is “directly and concretely” touched by an infringement of law has the right to sue for an injunction (ibidem no. 54 with further references); however, with regard to individual
Under § 14 para. 1 UWG, in the cases set forth in §§ 1, 1a, 2, 2a, 3, 9a, 9c and 10, a claim for an injunction may also be filed “by associations to promote the economic interests of entrepreneurs, provided that such associations represent interests which are affected by the offence”. In addition, “in the cases set forth in Sections 1, 1a, 2, 9a and 9c, a suit for” an injunction “may also be filed by the Federal Chamber of Labour, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture or by the Austrian Trade Union Federation”.

With regard to the violation of certain provisions a claim for an injunction order may also be filed by the Verein für Konsumenteninformation (VKI, the most important Austrian consumer organization).

The UWG itself does not state if a consumer has the right to bring a claim for damages or to sue for an injunction under this statute. The Austrian Supreme Court (Oberster Gerichtshof, OGH) once decided that consumers also have a claim for damages if they suffer loss as result of a violation of the UWG. However, there have been no subsequent decisions on this point and the question is highly disputed in literature. The same is true for the question whether consumers can bring a claim for injunctions. As yet, the OGH has not decided on this matter.

Other remedies mentioned by the UWG are the publication of court decisions (§ 25 UWG, Urteilsveröffentlichung) and temporary injunctions (§ 24 UWG, einstweilige Verfügung), which grant immediate relief by prohibiting a potentially unfair commercial practice until a court judgement is delivered.

Consumer notion

The UWG does not include a definition of the concept of “consumer”. If this statute or other statutes dealt with in this report refer to “consumer”, the definition of § 1 of the Austrian Consumer Protection Act (KSchG) applies, unless otherwise stated. According to § 1 no. 2 KSchG, a consumer is a person to whom the definition of an “entrepreneur” (§ 1 no. 1 KSchG) does not apply. An entrepreneur is defined by § 1 no. 1 KSchG as “a person who makes the transaction in the course of carrying on his business” (hereafter called “entrepreneur”). The concept of “consumer” in the KSchG is slightly broader than the European one as activities carried out by a natural person in

consumers, a more restrictive opinion is expressed by some scholars (ibidem no. 86, 87 with further references).

14 § 1 para. 1 1 no. 2, paras. 2 to 4, §§ 1a or 2.

15 Implementing the Injunctions Directive (98/27/EC), § 14 para. 2 UWG regulates which organizations have the right to bring a claim for an injunction in cases which affect consumers abroad.

16 OGH 24.2.1998, 4 OB 53/98t.

17 Kodek/Leupold, in Wiebe/Kodek (ed.), UWG, 2009, § 16, no. 8 et sequi with further references.

18 See above, footnote 7.

19 § 1 para 2 KSchG defines business as “any organisation, which is intended to be permanent, for the purposes of independent commercial activity, even though it may be a non-profit enterprise. All legal entities governed by public law shall be deemed to be entrepreneurs”.

order to establish a business fall within the scope of the KSchG (see § 1 para 3 KSchG).\textsuperscript{20} In addition, legal entities may also be consumers in terms of the KSchG.\textsuperscript{21}


1.2 Financial services

1.2.1 Legislative framework

1.2.1.1 National implementation legislation(s) of the UCPD

For the implementation of the UCPD into Austrian law please see above. No special implementation provisions have been introduced with regard to banking, investments and insurance.

The implementing provisions of special importance for commercial practices in the area of financial services are § 1 UWG (the general clause), § 2 UWG (misleading actions and omissions), § 1a UWG (aggressive commercial practices) and the corresponding banned commercial practices under Annex I. Commercial practices regarding financial services might also be subject to comparative advertising (§ 2a UWG).

Regarding other national legislation on financial services, there is a fragmented legal approach. This report focuses primarily on relevant legislative provisions only. Provisions dealing with the conditions of establishment or authorisation regimes are not dealt with in this report.

1.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

After the broad interpretation of the notion of “commercial practices” by the CJEU and its qualification of § 9a UWG – which prohibits complimentary bonuses with periodicals and newspapers under all circumstances – as banning a commercial practice, thereby violating the UCPD, it has been debated in Austrian scholarship if there are other national provisions banning commercial practices under all circumstances.

Extension of the Black List in the UWG

§ 30 UWG (reference to the fact that goods originate from a bankrupt estate) and § 33 UWG et sequ. (requirement that announcements of sale as defined under § 33a UWG need to be authorised by the District Administrative Authority) are two provisions which are doubted to be in conformity with the UCPD. However, they do not seem to be necessarily relevant with regard to financial services. The same seems to be true for

22 As a result of this approach, the CJEU considered § 9a UWG to be a violation of the UCPD as this provision prohibits complimentary bonuses with periodicals and newspapers under all circumstances (CJEU 9.11.2010, C-540/08). Currently, another Austrian preliminary ruling is pending before the CJEU (Case C-206/11). The CJEU was asked by the OGH if the UCPD “preclude(s) a national provision under which the announcement of a clearance sale without the authorisation of the competent administrative authority is not permitted and for that reason must be prohibited in court proceedings, without it being necessary in those proceedings for the court to consider whether such a commercial practice is misleading, aggressive or otherwise unfair?”

23 See Schuhmacher (2010), Das Ende der österreichischen per-se-Verbote von "Geschäftspraktiken" gegenüber Verbrauchern. Anmerkungen zu EuGH 9. 11. 2010, Rs C-540/08 (Mediaprint/Österreich), Wirtschaftrechtliche Blätter (wbl) 2010, 613-617, 614 et sequ. For § 33 UWG see the pending preliminary ruling before the CJEU (above supra, footnote 7).
§ 28 UWG, which prohibits marketing of “goods or services in such a manner that delivery of the good or rendering of the service is linked to the result of a lottery or another chance event”.  

Extension of the Black List in the GewO

More relevant are the doubts cast on provisions based on § 69 of the Trade, Commerce and Industry Regulation Act 1994\(^{25}\) (Gewerbeordnung, GewO), which are government codes of conduct for certain trades, published as ordinances. For this report, the government codes of conduct\(^{26}\) for financial intermediaries (Verordnung über Standes- und Ausübungsregeln für Personalkreditvermittler)\(^{27}\) and real estate agents (Verordnung über Standes- und Ausübungsregeln für Immobilienmakler, IMMV)\(^{28}\) are important. As far as these codes regard immovables and financial services, they are in any event in line with the UCPD as they fall under the exception in Article 3 para 9 UCPD. Outside the parameters of this exemption clause, it remains to be seen if the ordinances will be qualified as bans – therefore violating the UCPD – or as mere concretisations of the term “professional diligence” under the UCPD.\(^{29}\)

The government codes of conduct regarding financial intermediaries *inter alia* prohibit misleading advertisements. § 4 para 1 no. 9 IMMV contains a prohibition against doorstep-selling of mortgage loans, unless the visit was requested by private persons.\(^{30}\)

§ 54 para 1 sentence 1 generally allows people to be approached by tradesmen (in the sense of the GewO; *Gewerbetreibende*) and their employees in order to collect orders for services. Under para 1 sentence 2, however, it is prohibited to approach private persons (§ 57 GewO) in order to collect orders for services if the impression is given that...

---

\(^{24}\) Schuhmacher (2010), Das Ende der österreichischen per-se-Verbote von “Geschäftspraktiken” gegenüber Verbrauchern. Anmerkungen zu EuGH 9. 11. 2010, Rs C-540/08 (Mediaprint/Österreich), Wirtschaftrechtliche Blätter (wbl) 2010, 613-617, 616, furthermore qualifies § 28a UWG (dealing with misleading directory companies) as a provision banning a commercial practice under all circumstances. In the opinion of Schuhmacher, ibidem 614, however, § 28a UWG is still in line with the UCPD as it applies mainly to B2B relationships (which are not covered by the UCPD). As the personal scope of § 28a UWG encompasses B2C relationships as well, a better justification for the view that the provision is in line with the UCPD is that its factual scope seems to be narrower than that of no. 21 of Annex I (see for an analysis of § 28a UWG Civic Consulting, Misleading practices of ‘Directory Companies’ in the context of current and future internal market legislation aimed at the protection of consumers and SMES, IP/A/IMCO/FWC/2006-058/LOT4/C1/SC6). Another provision which could be qualified as a ban and therefore not to be in conformity with the UCPD is an ordinance regulating petrol prices (see Schuhmacher, ibidem 616).


\(^{26}\) These codes of conduct are published by the legislator and should not be confused with codes of conduct under Article 10 UCPD.

\(^{27}\) Federal Law Gazette no. 505/1996.


\(^{29}\) Reasoning 20 of the UCPD seems to acknowledge that there are “specific mandatory requirements regulating the behaviour of traders”. See also Article 3 para 8 of the UCPD.

\(^{30}\) § 4 IMMV refers to “private persons” (*Privatpersonen*) as defined under § 57 GewO, not to consumers.
the payment for the services goes to charity.\textsuperscript{31} This provision prohibits such commercial practices under all circumstances and thereby extends the Black List. However, § 54 GewO is outside the scope of the UCPD which does not concern questions of taste and decency.\textsuperscript{32} A violation of this provision may lead to fines up to 2,180 Euro (§ 367 GewO). A violation of § 54 GewO gives the consumer a right to withdraw from the contract under § 3 KSchG (see below). The exemption under § 3 para 3 KSchG does not apply. As a result, the consumer has a right to withdraw from the contract even if he or she initiated the contract.

\textit{Other extensions of the Black List}

§ 20 of the Commercial Code (\textit{Unternehmensgesetzbuch}, UGB) prohibits sole traders and partnerships (\textit{eingetragene Personengesellschaft}) from using as name of the company any other name than the name of the sole trader or of a partner with unlimited liability. The name of a company is one of the elements which may point to a misleading action in terms of Article 7 para 1 lit. f UCPD. Consequently, § 20 UGB might be qualified as a provision prohibiting a commercial practice under all circumstances and thereby violating the UCPD.\textsuperscript{33}

Another provision which might qualify as a ban of commercial practices is § 36 Austrian Banking Act (\textit{Bankwesengesetz}, BWG)\textsuperscript{34} which imposes a special duty of care towards persons under the age of eighteen: Credit institutions (\textit{Kreditinstitute}) may not, without prior consent of the legal representative of the juvenile, issue ATM cards to persons under the age of eighteen. If a juvenile earns a regular income, an ATM card may be issued to him or her at the age of seventeen (§ 36 no. 1 BWG). Furthermore, persons under the age of eighteen may not withdraw more than 400 Euro per week from an ATM (§ 36 no. 2 BWG). § 36 no. 1 and no. 2 BWG do not apply to cards which only enable a juvenile to withdraw money within the credit institute, provided that the withdrawal can be assessed on a case-by-case basis (§ 36 no. 3 BWG). A violation of § 36 BWG leads to administrative sanctions.\textsuperscript{35}

\textsuperscript{31} According to § 54 para 2 GewO, the Ministry for Federal Ministry of Economy, Family and Youth may – if needed to protect the public from particular misleading commercial practices – issue an ordinance under which certain services may not be sold in doorstep-selling situations to private persons. In the event of a violation of such an ordinance, the private person has a right to withdraw from the contract under § 54 para 3 GewO.

\textsuperscript{32} See Reasoning 7 of the UCPD: “Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers’ freedom of choice. Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof”.

\textsuperscript{33} Schuhmacher, Das Ende der österreichischen per-se-Verbote von “Geschäftspraktiken” gegenüber Verbrauchern. Anmerkungen zu EuGH 9. 11. 2010, Rs C-540/08 (Mediaprint/Österreich), Wirtschaftrechtliche Blätter (wbl) 2010, 613-617, 617.

\textsuperscript{34} Federal Law Gazette I no. 532/1993.

\textsuperscript{35} § 36 BWG also refers to cheques; however these provisions are obsolete.
b) National legislation regarding misleading actions and omissions

**Banking (including consumer credit)**

Since the implementation of the Consumer Credit Directive into a (new) Consumer Credit Act (*Verbraucherkreditgesetz*, VKrG),\(^{36}\) this Act is the most important statute with regard to consumer credit. Especially § 5 (advertising),\(^{37}\) § 6 (pre-contractual information),\(^{38}\) § 9 (mandatory information in loan agreements) and § 13 VKrG (right to withdraw from the contract) are relevant with regard to commercial practices. As the content of the VKrG is based on the Consumer Credit Directive,\(^{39}\) one can refer to the Directive. However, it has to be noted that some of the exemptions under Article 2 of the Directive have not been included in the VKrG, for example loans for the purchase of immovables.\(^{40}\) According to the legislative materials this approach ensures a uniform regulation of the consumer credit under Austrian law as well as a high level of consumer protection.\(^{41}\) A violation of § 5 and § 6 VKrG constitutes an administrative offence and may lead to administrative fines up to 10,000 Euro (§ 28 VKrG). In addition, a violation may lead to remedies under civil law and to a violation of the UWG.\(^{42}\)

The Payment Services Directive\(^{43}\) was implemented in the (new) Payment Services Act (*Zahlungsdienstegesetz*, ZaDiG).\(^{44}\) Again, for its content, one may refer to the Directive. However, it is important to note that the concept of “consumer” in the ZaDiG (§ 3 no. 11) is narrower than that found in § 1 of the KSchG: In terms of the ZaDiG, only natural persons can be consumers.

---


\(^{37}\) The Austrian legislator did not use the option provided by the Directive to apply the provisions relating to advertisements to advertisements which do not refer to the costs of the credit. According to § 35 para 1 BWG, credit institutions which have a public office have to put certain information on display (such as their standard term contracts).

\(^{38}\) The VKrG extends information requirements inter alia to foreign currency loans (*Fremdwährungskredite*). See Wendehorst, in Wendehorst/Zöchling-Jud, Verbraucherkreditrecht, 2010, § 6 no. 53 et sequ, for an analysis if these information requirements are in line with the Directive.


\(^{40}\) See Wendehorst, in Wendehorst/Zöchling-Jud, Verbraucherkreditrecht, 2010, § 3 no. 5 et sequ.

\(^{41}\) See Wendehorst, in Wendehorst/Zöchling-Jud, Verbraucherkreditrecht, 2010, § 3 no. 5 for details and with reference to the legislative materials.

\(^{42}\) See Wendehorst, in Wendehorst/Zöchling-Jud, Verbraucherkreditrecht, 2010, § 6 no. 74 et sequ. for details. In addition, a violation of §§ 5, 6 VKrG may lead to a representative action (*Verbandsklage*) under § 28a UWG.

\(^{43}\) Directive 2007/64/EC on payment services in the internal market.

Regarding loans, §§ 25a-25c KSchG establishes a duty to inform a spouse about certain conditions of jointly raised loans or if a spouse is accepting liability for the loan of the other spouse.  

Concerning savings with building societies, the Building Society Act (Bausparkassengesetz, BSpG) also contains certain information requirements; for example according to § 3 BSpG, the standard term contracts which the society has to hand out to the consumer must contain some minimum information.

Financial advisors (gewerbliche Vermögensberater, as defined under § 94 GewO) also have to fulfil the information requirements set out in § 136a GewO. These requirements include inter alia the duty to inform the consumer about the commission to be paid to the financial advisor. In addition, the financial advisor has to work in conformity with §§ 5, 6 and 19 VKrG.

A violation of the identified provisions (including the named codes of conduct) can also constitute a violation of § 1 UWG: According to settled case law, a violation of any law – not only provisions regulating market behaviour – result in a violation of § 1 UWG (Rechtsbruch). This is so provided the violation has a substantial effect on competition, unless the violation of the law occurred due to a reasonable – but with hindsight, false – interpretation of the law. With regard to statutes regulating market behaviour, it is assumed that their violation has a substantial effect on competition. Commercial practices within B2C relationships do not require a substantial effect on competition; the material distortion of one consumer (or its likelihood) is sufficient (§ 1 para 1 no. 2 UWG).

The OGH has also ruled that unlawful standard term contracts constitute a violation of § 1 UWG. This decision may become rather important in the field of financial services

45 A violation of §§ 25a-c KSchG establishes an administrative offence (see § 31 para 1 no. 1 lit. c KSchG); a violation of § 25b para 2 and § 25c KSchG may also have contractual consequences. For details see Kolba, in Kosesnik-Wehrle (ed.), Konsumentenschutzgesetz, 3. Ed., 2010, § 25b, no. 4, § 25c 31. In addition, under § 25d KSchG, the judge may reduce or waive a surety’s debt under certain conditions.


48 For a different approach see § 4 no. 11 of the German UWG. For criticism regarding the Austrian case law see Schuhmacher, Die UWG Novelle 2007, Wirtschaftsrechtliche Blätter (wbl) 2007, 557-566, 651.

49 For an detailed analyses (also with regard to the first case law after the implementation of the UCPD) Burgstaller/Handig/Heidinger/Schmid/Wiebe, in Wiebe/Kodek (ed.), UWG, 2009, § 1 no. 654 et sequ.

50 See Article 2 lit. f UCPD.


52 OGH 23.2.2010, 4 Ob 99i/09a; see for an analysis of this decision Prunbauer-Glaser, AGB-Kontrolle über das UWG?, Recht und Wettbewerb (RuW) 2010, no. 176, 4-9.
(not only banking, but also other financial services) as in the past, standard term contracts often have contained terms which violated the law.

Investments

With regard to investments, the Securities Supervision Act 2007 (Wertpapieraufsichtsgesetz, WAG)\(^{53}\) and the Capital Market Act (Kapitalmarktgesetz, KMG)\(^{54}\) should be mentioned. § 41 WAG\(^{55}\) contains “conditions for fair, clear and non-misleading information”. It implements – according to the legislative materials – Art. 19 para 2 Directive 2004/39/EC\(^{56}\) and Art. 27 paras 1, 2, 7 and 8 of Directive 2006/73/EC\(^{57}\).

Here too, one may refer to the Directives for its content. § 41 para 3 WAG is the basis for an ordinance published by the Austrian Financial Market Authority (Finanzmarktaufsicht, FMA).\(^{58}\) The ordinance has adapted the provisions of the Directive in order to be applicable to the Austrian market. With regard to § 41 WAG, there is some debate in literature if “fair” means “not violating the UWG”.\(^{59}\) A violation of § 41 WAG leads to administrative fees up to 30,000 Euro (§ 95 para 9 no. 2 WAG), but may also lead to a claim for damages under civil law.\(^{60}\)

§ 61 WAG deals with unsolicited communications: § 107 Telecommunications Act 2003 (Telekommunikationsgesetz, TKG)\(^{61}\) applies to unsolicited advertising and communication regarding financial instruments (§ 1 no. 6 WAG) and investments (§ 1 para 1 no. 3 KMG). § 107 TKG implements Article 13 of the Directive on Privacy and Electronic Communications. The WAG explicitly refers to § 107 TKG to ensure that the FMA can act upon a violation of § 107 TKG: A violation of § 62 WAG establishes an administrative offence under § 95 para 2 no. 1 WAG (fines up to 50,000 Euro). In addition, unsolicited communications may violate the UWG (see also no. 26 of Annex I of the UCPD) and personal rights under civil law.

According to § 63 para 1 WAG, legal entities (as defined under § 15 WAG) may not approach a consumer to sell him or her financial instruments (Finanzinstrumente, § 1


\(^{55}\) The WAG applies to legal entities, as defined under § 15 WAG, offering services as defined in § 1 WAG.


\(^{59}\) See Brandl/Klausberger, in Brandl/Saria, Wertpapieraufsichtsgesetz, 2. Ed., 2010, § 41 no. et sequ.

\(^{60}\) See for details and further references Brandl/Klausberger, in Brandl/Saria, Wertpapieraufsichtsgesetz, 2. Ed., 2010, § 38 no. 33 et sequ.

\(^{61}\) Federal Law Gazette I No. 70/2003. The Act was changed in 2005 to ensure its conformity with the Directive.
no. 6 WAG) and investments (Veranlagungen, § 1 para 1 no. 3 KMG), unless the consumer has invited them to do so. § 63 para 2 WAG amplifies the scope of application of § 3 KSchG: § 3 KSchG provides for a right of the consumer to withdraw from a contractual statement or a contract in doorstep-selling situations. However, under para 3 of § 3 KSchG, the right to withdraw is excluded if the business relationship was initiated by the consumer. According to § 63 para 2 WAG, this exclusion does not apply if the contract concerns investments (Veranlagungen, § 1 para 1 no. 3 KMG) or shares on Austrian or foreign capital funds, Austrian or foreign real investment funds or similar institutions. § 63 WAG does not violate Directive 2004/39/EC as doorstep selling situations are beyond the scope of the Directive.62

The KMG implements Directive 2003/71/EC.63 § 4 KMG contains details concerning advertising for public offers,64 § 5 KMG65 deals with consumer contracts, and § 11 KMG sets the conditions for liability for statements made in a prospectus.66 For the content of § 4 KMG, one may refer to the Directive. The liability under § 11 KMG is based on the Directive; however, Member States are free to decide upon the details of the liability.67 § 5 KMG is not based on the Directive. In terms of § 5 para 1 KMG, the consumer may withdraw from the contract or his or her contractual statement if no prospectus was published despite an obligation to do so.68 In addition, consumers may withdraw from the contract (§ 5 para 2 KMG) if no confirmation was issued regarding the investment in real estate (Veranlagungen in Immobilien) as provided for in § 14 no. 3 KMG.69

Insurance
The Insurance Contract Act (Versicherungsvertragsgesetz, VersVG) contains a right to withdraw from the contract – applicable to all customers, not only consumers – if all of

---


63 Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading. The Directive has been recently amended by Directive 2010/73/EU.

64 The scope of § 4 KMG is broader than the Directive as it applies not only to securities but also to investments.

65 See also § 6 KMG which introduces a right to withdraw if certain conditions change after the publication of the prospectus.

66 According to reasoning 7, sentence 2 the UCPD “does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature. It does not address legal requirements related to taste and decency which vary widely among the Member States”.

67 For details see Lorenz, in Zib/Russ/Lorenz, Kapitalmarktgesetz, 2008, § 11.

68 For details see Zib, in Zib/Russ/Lorenz, Kapitalmarktgesetz, 2008, § 5.

the required information\textsuperscript{70} was not given at the time of conclusion of the contract, § 5b VersVG. § 165a VersVG provides for a right to withdraw from a life insurance contract within 30 days of notification of the formation of the contract. There are plans for an amendment of the VersVG. Inter alia the amendment aims at the introduction of a right for consumers to withdraw from the contract without any reason.\textsuperscript{71}

c) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Aggressive commercial practices do not only have the potential to violate § 1a UWG, but undue influence can also lead to invalidity of a transaction under Austrian civil law if such behaviour qualifies as a threat (Drohung, § 870 of the Austrian Civil Code, Allgemeines Bürgerliches Gesetzbuch, ABGB) or as usury (Wucher, § 879 BGB).

With regard to unsolicited communications, § 107 TKG has to be taken account (see also below, 1.2.1.3.)

d) Other national legal provisions on unfair commercial practices in the field of financial services

General civil law\textsuperscript{72}

With regard to misleading actions – as well as misleading omissions – the legal institutions of mistake (§§ 870 \textit{et sequ.} ABGB)\textsuperscript{73} and pre-contractual liability (by analogy based on §§ 874, 878 ABGB), as well as the provision relating to fraud (§ 870 ABGB) may be important. Indeed, the OGH has recently ruled that misleading statements in prospectuses can lead to a right to rescind the contract under the law of mistake.\textsuperscript{74}

Unfair standard term contracts

As noted above, a violation of the prohibition against unfair standard contract terms – especially standard contract terms containing misleading statements – can qualify as a

\textsuperscript{70} § 5b subsection 2 no. 3 VersVG refers to §§ 9a and 18b Versicherungsaufsichtsgesetz (VAG, Insurance Supervision Act) and § 137f subsection 7-8 GewO respectively. The latter provisions implement Directive 2002/92/EC. Further information duties concerning (life) insurance contracts can be found \textit{inter alia} in §§ 9a, 18b and 75 VAG and §§ 137h, 137g and § 137 subsection 1-6 GewO. See also the “minimum standards” published by the FMA (available on its website).


\textsuperscript{72} In addition, some of the cited statutes may be qualified as protective statutes (Schutzgesetz), allowing a claim for damages under tort law.

\textsuperscript{73} Under Austrian law, a party may revoke the contract (wesentlicher Irrtum, major mistake – the mistaken party would not have entered into the contract if not for the mistake) or adopt it (unwesentlicher Irrtum, minor mistake – the party would have entered into the contract despite the mistake, but on different terms) if the mistake can be qualified as a mistake of expression (Erläuterungsirrtum) or a mistake as to the quality of the legal transaction (Geschäftsirrtum). In addition, the mistake must have been caused by the other party, or the mistake should have been noticed by the other party or the mistaken party must have rescinded the contract timeously.

\textsuperscript{74} See for example OGH 31. 8. 2010, 4 Ob 65/10b; OGH 29.03.2011, 10 Ob 10/11k.
violation of § 1 UWG. Furthermore, standard contract terms containing misleading statements may also violate § 6 KSchG, especially subsection 3, which states that “any contractual provision included in the General Terms and Conditions or contractual form shall be ineffective if it is unclear or unintelligible”. In addition, § 879 subsection 3 ABGB deals with standard term contracts, stating that terms not dealing with the main characteristics of a contract may be void, if they greatly disadvantage one of the parties. While the legal institutions of mistake, pre-contractual liability and fraud are not based on European law, § 6 KSchG was slightly amended when the Directive on Standard Term Contracts\(^75\) was implemented into Austrian law. Of particular importance is § 6 subsection 3 KSchG which was introduced in this process.

Further withdrawal rights
Besides withdrawal rights under § 3 KSchG, § 63 WAG and § 5 KMG, a consumer may have a right to withdraw from the contract or a contractual statement in terms of § 3a KSchG:

§ 3a KSchG provides a right to the consumer to withdraw from a contract or a contractual statement within one week\(^76\) if “circumstances which are significant for his consent and which the entrepreneur has represented in the course of the contract negotiations as being highly likely to come to pass are found not to occur at all or only to a substantially lesser degree”.

“Significant circumstances within the meaning of Para 1 above shall be:

1. The expectation of a third party’s contribution or consent as required for the entrepreneur to render performance or the consumer to make use of it,
2. The prospect of tax benefits,
3. The prospect of public subsidies, and
4. The prospect of a loan."

The right to withdraw from the contract is excluded if the consumer knew or should have known during contractual negotiations that “the significant circumstances would not come to pass at all or only to a substantially lesser degree; an exclusion of the right of rescission has been negotiated on a case-by-case basis; or the entrepreneur agrees to make a reasonable adjustment to the contract”.


\(^76\) § 3a subsection 3 KSchG states: "The contract may be rescinded within one week. This period shall commence when it becomes obvious to the consumer that the circumstances listed in Para 1 above have not come to pass at all or to a substantially lesser extent than promised and the consumer has been furnished with written instructions on this right of rescission. At the latest, the right of rescission shall expire one month after the complete performance of the contract by both contracting parties, or, in the case of bank and insurance contracts of a term of more than one year, one month after the contract has been brought about."
In addition, § 9 Distance Financial Services Act (Fern-Finanzdienstleistungsgesetz, FernFinG),\textsuperscript{77} which implements the Directive concerning the distance marketing of consumer financial services, provides for a right to withdrawal. However, this right is \textit{inter alia} excluded, according to § 10 para 1, for “contracts on financial services whose price in the financial market is subject to fluctuations that are beyond the entrepreneur’s control and may occur within the time limit for rescission”, such as tradeable securities (see also Article 6 para 2 lit. a of the Directive) and according to para 2 for certain “contracts on travel and baggage insurances or similar short-term insurances with a duration of less than one month”. Austria did not use the option provided for in Article 9 para 3 of the Directive to exclude the withdrawal right for further contracts, including credit in connection with immovables.

There is some disagreement in Austrian literature if § 3 KSchG can be applied to financial services under the Directive despite its full harmonisation approach. The OGH has decided in favour of the applicability of § 3 KSchG.\textsuperscript{78}

While generally all stated withdrawal rights are applicable in conjunction with each other – provided that their scope of application is fulfilled – § 12 para 5 VKrG states explicitly that if the consumer has a right to withdraw under § 12 VKrG, he or she does not have a right to withdraw under § 8 FernFinG or § 3 para 1 to 3 KSchG.

\textit{Interactions between information duties, withdrawal rights and civil law institutions}

As noted a violation of information duties (as well as any other law) may also constitute a violation of § 1 UWG. In addition, a violation of information duties may be qualified as misleading omissions (§ 2 para 4 UWG), especially if they result from Directives named in the – non-exhaustive – list included in Annex II of the UCPD (see § 2 para 5 UWG, Article 7 para 5 UCPD). In addition, misleading or missing information about the existence of withdrawal rights are also prohibited as misleading commercial practices (see Article 7 para 4 lit. e UCPD). Finally, misleading commercial practices may as well have consequences under civil law (such as law of mistake).

\textbf{1.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general}

There is some debate among Austrian scholars if the notion of consumer applied by the OGH differs from the general consumer concept, or if the applied concept even violates the average consumer notion under the UCPD. Recently the OGH had to decide in a series of cases on the applicability of the law of mistake and the UWG with regard to misleading statements for investment products. In one of the decisions, the OGH differentiated between consumers who had invested before, and consumers who were first-time investors, who wanted to invest their money in something as safe as savings.


\textsuperscript{78} OGH 28. 7. 2004, 7 Ob 78/04b. For further references see Zib, in Zib/Russ/Lorenz, Kapitalmarktgesetz, 2008, § 5 no. 37 et sequ.
accounts.79 While the advertisement in question directly approached “first-time-investors” – by showing the particular investment opportunity as an alternative to a savings account – it could not be excluded that also consumers with prior experience were attracted by the advertisement. Some scholars insist that under the UCPD, different groups of consumers can only be taken into account when a commercial practice specifically addresses different consumer groups, which are furthermore in need of special protection due to their age or other personal attributes.80

The better arguments are in favour of the named OGH-decision: The UCPD indeed refers to the average consumer as point of reference. However, in the case decided by the OGH, the advertising clearly addressed (also) those consumers who previously used only savings accounts. Therefore the average consumer to be taken into account was the average “to this point only savings account user and new to the capital market” consumer. The fact, that an advertisement may have also attracted consumers who are already familiar with the capital market should not have negative consequences for the group of first-time investors. Furthermore, it has to be accepted that there were two groups of average consumers. The decision of the OGH was in any event in line with the UCPD, since the exemption under § 3 para 9 UCPD applied and therefore stricter national rules were allowed. However, the decision by the OGH seems to be in line with the UCPD regardless of the exemption clause.

1.2.1.4 Level of protection provided by national legislative framework compared to UCPD

At first glance, the level of protection provided by the national legislative framework seems to be higher than that of the UCPD. However, it has to be taken into account that some of the provisions are related to contract law and therefore fall outside the scope of the UCPD. However, as the CJEU applies a rather broad concept of unfair commercial practices and the OGH has ruled that for example standard contractual terms are commercial practices, these provisions had to be included in the report.

Upon closer examination, most of the named Austrian provisions have a European background. Only §§ 3a KSchG, 25a-c KSchG, §§ 28a, 30 et sequ. UWG and § 5 KMG as well as most of the provisions in, or based on, the GewO do not implement European law. None of the provisions seem to go further than the UCPD in terms of the level of protection which they offer. However, there are differences when it comes to enforcement, the existence of an individual right to redress for consumers, and due to the fact that some of the stated provisions ban commercial practices under all circumstances.

The main advantage of the Austrian provisions seem to be that, for example, the government codes of conduct based on the GewO are more detailed than the general

79 OGH 20.1.2009, 4 Ob 188/08p.
80 See for example the different opinions expressed by Krejci, Zur Anfechtung von Wertpapierkäufen wegen irreführender Werbung und Beratung, Österreichische Juristenzeitschrift (ÖJZ) 2010/10 and Eilmansberger/Rüffler, Zum bei der Bewerbung von Kapitalanlagen maßgeblichen Verbraucherleitbild, Recht der Wirtschaft (RdW) 2010, 319-324, both articles with further references.
clause of § 1 UWG and therefore their application is easier for stakeholders than the latter clause. Furthermore, the national provisions provide remedies in addition to those found in the UWG. In particular, the law of mistake provides the consumer with an individual right to redress which he or she does not necessarily have under the UWG. The same is true for the different rights to withdrawal from a contract or contractual statement. On the other hand, the UWG is used for enforcement – as it is said to be a fast tool – if other statutes are violated. It should also be noted that misleading information regarding withdrawal rights may constitute a misleading commercial practice under § 2 UWG. Finally, a violation of some of the provisions of the Directives dealt with in this report can lead to misleading omissions under Article 7 para 5 of the UCPD.

1.2.2 Most common unfair commercial practices in the area of financial services

1.2.2.1 Description of the most common unfair commercial practices

The OGH recently dealt with a number of suits concerning misleading information in advertisements for investments. These advertisements included incorrect information about the interest rate, incorrect information about the risk involved and providing incorrect information to the effect that the consumer had invested in immovable property and that the investment was therefore relatively secure. Other unfair commercial practices concern unlawful standard term contracts in insurance, banking and leasing contracts as well as the distribution of life insurance through pyramid promotional schemes, financial products being presented as having lower interest rates than they actually had, and cold calling being used in the sale of financial products.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

1.2.2.2 Enforcement issues

As noted above, the UWG does not explicitly provide consumers with remedies. While some scholars argue that the UWG provides for a right of the individual consumer to claim damages and to bring an injunction, there is little case law to this effect – only one decision of the OGH deals with this point. This uncertainty may prevent consumers

81 See for example OGH 29.09.2010, 7 Ob 106/10d.
82 OGH 8.10.2008, 9 Ob 32/08h.
83 See OGH 6.7.2011, 3 Ob 2/11g.
84 See for example OGH 7.7. 2011, 5 Ob 42/11d (standard banking contract terms); 11.05.2011, 7 Ob 173/10g (standard leasing contract terms); 21.4.2010, 7 Ob 266/09g (insurance contracts).
85 See OGH 9.6.2009, 4 Ob 26/09s.
88 OGH 24.2.1998, 4 Ob 53/98t (with regard to damages).
from bringing claims. Besides this uncertainty about the existence of a claim, consumers may refrain from lawsuits due to costs of court proceedings. Costs may be higher than the loss suffered by the individual consumer. Therefore the introduction of a collective redress mechanism – as planned by the Commission\(^9\) – might prove helpful. However, it has to be noted that a group action might not help to dissolve the “rational disinterest” of the consumer if he or she has suffered a small individual loss only. Thus, additional representative actions are required. As for the status quo, it should be noted that the main Austrian Consumer Protection Organisation (Verein für Konsumenteninformation, VKI) has – unlike the organisation representing the interests of businesses – only a limited standing before court, as it is not allowed to bring a claim if § 2a UWG (comparative advertising) is violated. In any case, representative actions under the UWG exist only with regard to injunctions. Despite the existence of a so-called “Austrian class action”\(^9\) – which means that consumers assign their claims to the VKI – a need for collective redress is said to exist, especially when considering the many hundreds of cases regarding misleading advertising for investments.\(^9\) Despite the importance of such a collective enforcement mechanism, consideration could also be given to the provision of a right of redress to the individual consumer in terms of the UCPD.\(^9\)

---


\(^91\) See for the proposal of the Ministry for Labour, Social Affairs and Consumer Protection to introduce a new provision in the civil procedure order, available at www.verbraucherrecht.at (Entwurf eines Budgetbegleitgesetzes-Justiz 2011-2013). For the failed legislative proposal to introduce collective redress in Austria see for example Lurger/Augenhofer, Österreichisches und Europäisches Konsumentenschutzrecht, 2. Ed., 2008, 259 et sequ. with further references.

\(^92\) For plans in the UK to introduce an individual right of redress see the discussion paper Consumer redress for misleading and aggressive practices. A Joint Consultation Paper, available at http://www.justice.gov.uk/lawcommission/docs/cp199_consumer_redress.pdf.
1.3 Immovable property

1.3.1 Legislative framework

1.3.1.1 National implementation legislation(s) of the UCPD

For the implementation of the UCPD please see above. The implementing provisions of importance for commercial practices in the area of immovable property are § 1 UWG (the general clause), § 2 UWG (misleading actions and omissions), § 1a UWG (aggressive commercial practices) and the corresponding banned commercial practices under Annex I. Commercial practices regarding immovable property might also be subject to comparative advertising (§ 2a UWG).

1.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

As for national legislation banning commercial practices see above.

Similar to the above mentioned § 54 GewO, § 57 GewO deals with the collection of orders for goods. According to § 57 para 1 GewO, it is prohibited to approach private persons in order to collect orders for certain goods, such as food supplements. Furthermore, according to § 57 para 2 GewO, it is also prohibited to approach private persons in order to collect orders for goods if the impression is given that the payment for the services goes to charity. For goods other than those named in para 1 – and therefore this would include immovables – tradesmen and their agents may approach private persons in order to collect orders for goods, in so far as those tradesmen are authorized to sell such goods. Promotional materials may not be linked to prize draws. See § 57 para 5 and 6 GewO for restrictions on promotions (Werbeveranstaltungen) and promotional materials related to those promotions. See also § 59 GewO for local restrictions on where orders may be accepted (for example not in the street). A violation of §§ 57, 59 GewO gives the consumer a right to withdraw from the contract under § 3 KSchG. The exemption under § 3 para 3 KSchG does not apply (initiative for the contract is with the consumer).

These provisions prohibit such commercial practices under all circumstances and therefore extend the Black List. However, § 57 GewO – like § 54 GewO – seems to be outside the scope of the UCPD, which does not concern questions of taste and decency. A violation of this provision may lead to fines up to 2,180 Euro (§ 367 GewO).

---

53 According to § 57 para 5 GewO, it is also prohibited to organize promotion parties for such goods.

54 According to § 57 para 3 GewO, the Ministry for Federal Ministry of Economy, Family and Youth may – if needed to ensure public security and to protect the public from particular misleading commercial practices – issue an ordinance in accordance with the Ministry for Labour, Social Affairs and consumer protection under which certain services may not be sold in doorstep-selling situations to private persons.

55 See Reasoning 7 of the UCPD: “Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban
b) National legislation regarding misleading actions

As noted above, with regard to misleading actions – as well as misleading omissions – the legal institutions of mistake (§§ 870 et sequ. ABGB) and pre-contractual liability (analogy based on §§ 874, 878 ABGB) and fraud (§ 870 ABGB) may be important. In addition, misleading actions as well as omissions may be contained in standard term contracts. In this case, they may – as noted – violate § 6 KSchG, especially subsection 3, which prohibits unclear or unintelligible standard term contracts, or § 879 subsection 3 ABGB.

In addition, as noted above, § 3a KSchG provides a right to the consumer to withdraw from a contract or a contractual statement within one week if “circumstances which are significant for his consent and which the entrepreneur has represented in the course of the contract negotiations as being highly likely to come to pass are found not to occur at all or only to a substantially lesser degree”.

The prospects of tax benefits or public subsidies are particularly important for immovable property, because these are the most probable grounds which would lead to a right to withdraw in this context. There is no European background to § 3a KSchG which was introduced into the KSchG in 1997.

A violation of the identified provisions can also constitute a violation of § 1 UWG: As stated above, according to settled case law, a violation of any law can result in a violation of § 1 UWG (for the conditions which must be met see above).

c) National legislation regarding misleading omissions

The Consumer Protection Act contains some special provisions:

§ 30b subsection I KSchG specifies the general duty of real estate agents under § 3 of the Broker Act (Maklergesetz, MaklerG) if the client is a consumer as defined by § 1 KSchG. It is irrelevant if the consumer wants to sell or buy immovables. Real estate agents are defined in § 16 para 1 MaklerG as agents who act as brokers for transactions regarding immovable property and who do so in the course of their business. According to § 16 para 2 MaklerG, provisions relating to real estate agents are also applicable to persons who are assigned permanently and persons only occasionally acting as agents. Immovable property in this regard includes, inter alia, mortgage loans (Hypothekarkredite), timesharing rights and pre-emptive rights to land, private and business estates, enterprises and real estate investment funds. According to § 30b para 1 KSchG, the real estate agent has to provide the following to the consumer, prior to entering into an agency contract: “a written overview prepared with the diligence of a prudent real estate agent from which it can be surmised that he or she acts as a real estate agent and which states any and all costs, including the commission, expected to

commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers’ freedom of choice. Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof”.

96 Federal Law Gazette no. 262/1996.
arise for the consumer from entering into the brokered transaction. The amount of commission shall be stated separately; any economic or family association within the meaning of the third sentence of Section 6 (4) of the Real Estate Agency Act (Maklergesetz) shall be pointed out. Where the real estate agent may also act as a dual agent by virtue of his business practices, such overview shall furthermore include a note to this effect. If conditions undergo a material change, the real estate agent shall correct the overview accordingly. If the real estate agent fails to meet these obligations by, at the latest, the time the client issues a contractual statement regarding the brokered transaction, Section 3 (4) of the Real Estate Agency Act shall apply”. As § 30b KSchG refers to § 3 para 4 MaklerG, the violation of § 30b para 1 KSchG results in a reduction of the commission which has to be paid by the consumer, and the consumer may have a claim for damages.\footnote{See Kolba, in Kosesnik-Wehrle (ed.), Konsumentenschutzgesetz, 3. Ed., 2010, § 30b, no. 27b.}

The duties of real estate agents are also further elaborated in the already mentioned (see above 1.1.1.2.) Real Estate Agent Ordinance (Verordnung über Standes- und Ausübungsregeln für Immobilienmakler, IMMV)\footnote{Federal Gazette 1996/297; latest amendment by Federal Gazette II no. 2010/268.} and sections 4 and 6 of this Ordinance are particularly relevant with regard to commercial practices. Section 4 determines when a real estate agent acts contra bonos mores, such as when he or she retains money without legal reason. § 6 deals with advertisements by real estate agents. According to § 6, such advertisements have to make clear that they are published by an agent (para 1), the total costs of the transaction and the monthly installments (para 2) and, if the transaction concerns a rental agreement, the details of the rent (para 3).

In addition, § 30b para 2 KSchG provides that the “real estate agent shall furnish to the client the information required under Section 3 (3) of the Real Estate Agency Act in writing. Such information shall in any event include all circumstances that are essential to assess the transaction involved”. § 30c KSchG contains a maximum period for sole agency orders and § 31 KSchG provides that certain agreements under the MaklerG have effect on consumer contracts only if provided in writing.

In addition, § 5 Commercial Developer Act (Bauträgervertragsgesetz, BTVG) might be relevant: The aim of this act is to ensure that the purchaser\footnote{The protected party under the BTVG does not necessarily have to be a consumer. Besides this broad personal scope, the BTVG does not apply to all commercial development agreements – the preconditions set in §§ 1, 2 BTVG have to be met.} is not losing deposits made for buildings which have yet to be constructed. § 5 BTVG specifies pre-contractual information which the commercial developer has to give to the purchaser at least one week before the contract is concluded. If the commercial developer fails to provide the required information, the purchaser has a right to withdraw from the contract within one week. In addition, the purchaser has a right to withdraw from the contract if a subsidy for the housing project – upon which the decision to contract was based – is not paid, either
entirely or to a large extent and for reasons not caused by the purchaser (§ 5 para 4 BTVG). There is no European background to this provision.

Another provision which might be relevant in the area of immovable property is the Time Share Act (Teilzeitnutzungsgesetz, TNG). The TNG was recently amended to implement the Time Sharing Directive 2008/122/EC. As the TNG therefore resembles the Directive it will not be dealt with further in this report.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

As indicated above, aggressive commercial practices not only have the potential to violate § 1a UWG, but undue influence can also lead to invalidity of a transaction under Austrian civil law if such behaviour qualifies as a threat (Drohung, § 870 ABGB) or as usury (Wucher, § 879 BGB).

With regard to immovable property, § 30a para 1 KSchG provides for a right of the consumer to withdraw from his or her contractual statement which aims at “the acquisition of a tenancy right, another usufructuary right or ownership of an apartment, a single-family dwelling or a piece of land suitable for erecting a single-family dwelling on it on the same day that he has inspected the contractual object for the first time, provided that such acquisition was intended to cover an urgent residential need on the part of the consumer or any of his near relatives”. This provision aims at the protection of consumers against undue influence at the initial flat viewing, as more than one consumer is often present at this occasion (thus putting them under pressure to make a decision quickly and possibly to offer to pay more), and accommodation concerns are a vital interest of consumers. It is important to note that the personal scope of § 30a KSchG does not require that the other party should be a business or a real estate agent. Therefore, the right to withdraw also exists if the landlord or seller of the property is a consumer as well. There is no European background to this provision. § 3 KSchG, which provides for the right to withdraw in doorstep-selling situations might not be relevant in the described situations as consumers will have contacted the real estate agent or the landlord / seller of the property themselves, thus excluding the right to withdraw under § 3 KSchG. Contrary to § 3 KSchG, § 30a KSchG does not require that the contractual statement should be made outside the business premises. However, § 30a KSchG


101 § 30a para 2-4 KSchG states: “(2) The contract may be rescinded at the latest one week after the consumer has furnished his contract statement. If a real estate agent has been involved and the statement of rescission is addressed to such agent, the rescission shall also extend to a real estate agent contract entered into within the scope of the contract statement. In other respects, Section 3 (4) shall apply to the statement of rescission. (3) The period set forth in Para 2 above shall commence only upon the consumer receiving a copy of his contract statement and written instructions on his right of rescission. The right of rescission shall, however, expire at the latest one month after the day of the first inspection. (4) Any agreement on the payment of a deposit, forfeit money or downpayment prior to expiry of the rescission period shall be ineffective”.

applies only if the contractual statement is made on the same day as the flat-viewing took place and the immovable property satisfies an urgent lodging need of the consumer or their next of kin.

With regard to aggressive practices, “cold calling” (the calling of consumers in order to sell them something without prior consent), should be mentioned. Besides the mentioning of such practices in Annex I of the UCPD (see no. 26), the Directive on Privacy and Electronic Communications\(^\text{103}\) regulates such practices too. This Directive has been introduced into § 107 Telecommunications Act 2003 (\textit{Telekommunikationsgesetz}, TKG).\(^\text{104}\) In spite of this provision, a large number of situations involving cold calling have been reported, and therefore § 107 TKG was amended in 2011.\(^\text{105}\) First, para 1a now prohibits the suppression or distortion of phone numbers if a call takes place for promotional purposes. A violation of § 107 para 1 TKG can lead to administrative fees of up to 58,000 Euro. Secondly, with regard to contracts concluded in a cold-calling situation, the KSchG was amended as well;\(^\text{106}\)

According to § 5e para 4 KSchG, contracts regarding prizes as well as gaming and lottery services are void. This provision could be of importance for immovables if prize drawings regard for example timesharing rights. In addition, according to the new § 5e para 5 KSchG, the withdrawal period for service contracts concluded in a cold-calling situation only starts with the provision of the service (or, if later, the billing). Finally, the exclusion of contracts regarding newspapers, periodicals and magazines, as well as the supply of goods for fast consumption and leisure services (see Article 3 no. 2 of the Distance Selling Directive) does not apply, if the contract was concluded in a cold-calling situation. While the provisions of the KSchG on distance selling do not apply to immovables, they do apply to tenancy agreements. Consequently, § 5e KSchG can become important for such contracts.

The original aim during the legislative process was to achieve a much broader amendment. However, due to the imminent Directive on Consumer Rights,\(^\text{107}\) the Austrian legislator opted for a limited amendment to avoid any conflict with the new directive (the current Distance Selling Directive is only a minimum harmonized directive and therefore does not constitute an obstacle to the amendment).\(^\text{108}\)


\(^\text{104}\) Federal Law Gazette I No. 70/2003. The Act was changed in 2005 to ensure its conformity with the Directive.


e) Other national legal provisions on unfair commercial practices in the field of immovable property

In addition to the already named provisions, the Trade, Commerce and Industry Regulation Act (Gewerbeordnung, GewO), especially § 117, deals with real estate agents. According to § 117 GewO, such as a real estate agent may draft a contract, but only if it is based on standard term forms.

1.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

There seems to be no differences in the definition of consumer – as set out in § 1 KSchG – in the area of immovable property. However, as noted, under § 30a KSchG, it is not a requirement that the other party to the contract should be a business. It also has to be stressed that consumers acting in order to set up a business are considered to be consumers under Austrian law (see § 1 KSchG). The notion of consumer is, in this regard, broader than the European one. This difference can be of importance for immovable property if a consumer is starting a business and is renting or buying property for that future business.

1.3.1.4 Level of protection provided by national legislative framework compared to UCPD

It seems that the national provisions do not prohibit commercial provisions which would otherwise be allowed under the UWG/UCPD. However, the national provisions might be easier to apply as they contain more precise standards than, for example, the general clause of § 1 UWG. For example, § 30b KSchG and § 5 of the Real Estate Agent Ordinance state in greater detail when the conduct of a real estate agent will constitute a violation of professional diligence. Compared to the UWG/UCPD, the national provisions also have a more elaborate set of remedies, such as the right to withdraw from a contract or contractual statement (§ 3a KSchG, § 30a KSchG, § 5 BTVG), the reduction of the amount paid to the real estate agent as well as a claim for damages (§ 30b KSchG, Real Estate Agent Ordinance in accordance with § 5 MaklerG).

It has to be kept in mind that according to Austrian case law, a violation of all the stated national provisions can also lead to a violation of § 1 UWG (see above).

---

109 In addition, some of the cited statutes may be qualified as protective statutes (Schutzgesetz), allowing a claim for damages under tort law.

110 See OGH 16. 12. 2009, 4 Ob 189/09m. In this decision, however, the OGH held that a commercial practice stating that the real estate agent will set up the whole contract – when, in fact, a third party is involved in the process – is misleading under the UWG. The OGH therefore did not have to decide if the commercial practice violated § 117 GewO and consequently § 1 UWG.
1.3.2  Most common unfair commercial practices in the area of immovable property

1.3.2.1  Description of the most common unfair commercial practices

Few unfair commercial practices were cited by Austrian stakeholders in the area of immovable property. In some cases essential information was either not included or was misleading in advertising for immovable property, but this was considered to be rare.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

1.3.2.2  Enforcement issues

See above.
ANNEX 1: Fact sheet – legal framework and enforcement
## Austria

### Implementing legislation of the Unfair Commercial Practices Directive (UCPD)

Federal Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG)

### National legal provisions on unfair commercial practices

#### Overview of relevant provisions which are not based on EU legislation

**Financial services**
- § 1 UWG, § 2 UWG Annex 1;
- § 5 Consumer Credit Act (Verbrauchercreditingesetz);
- § 41, § 62, § 63 Securities Supervision Act 2007 (Wertpapieraufsichtsgesetz, WAG);
- Relevant sections of the Capital Market Act (Kapitalmarktgesetz, KMG);
- § 107 (Telekommunikationsgesetz, TKG) concerning cold calling by email and fax;
- Relevant sections of the Consumer Protection Act (Konsumentenschutzgesetz, KSchG);
- § 41, § 62, § 63 Securities Supervision Act 2007 (Wertpapieraufsichtsgesetz, WAG);
- Relevant sections of the Capital Market Act (Kapitalmarktgesetz, KMG);
- § 62, § 63 Securities Supervision Act 2007 (Wertpapieraufsichtsgesetz, WAG);
- § 41, § 62, § 63 Securities Supervision Act 2007 (Wertpapieraufsichtsgesetz, WAG);
- Relevant sections of the Capital Market Act (Kapitalmarktgesetz, KMG);
- § 107 (Telekommunikationsgesetz, TKG) concerning cold calling by email and fax;
- Relevant sections of the Consumer Protection Act (Konsumentenschutzgesetz, KSchG);
- § 41, § 62, § 63 Securities Supervision Act 2007 (Wertpapieraufsichtsgesetz, WAG);
- Relevant sections of the Capital Market Act (Kapitalmarktgesetz, KMG).

**Immovable property**
- § 4 Z.2, § 4 Z.9, and § 6 Real Estate Agent Ordinance (Verordnung des Bundesministers für wirtschaftliche Angelegenheiten über Standes- und Ausübungsregeln für Immobilienmakler, IMMV);
- § 57 and 54 Trade, Commerce and Industry Regulation Act 1994 (Gewerbeordnung, GewO);
- § 3a, 30b, 30c, 31 Consumer Protection Act (Konsumentenschutzgesetz, KSchG).

#### Reasons why enforcement bodies apply these national legal provisions

The Federal Ministry of Labour, Social Affairs and Consumer Protection stated that the national provisions in the area of financial services and immovable property go beyond the level of protection provided by the UCPD, are more specific, better known and understood by enforcers and in some cases by consumers, and it is easier to obtain a result under them than the UCPD.

#### Relevant case law

**Financial services**
- Jurisdiction according to §§ 1 and 2 UWG
  - For example: OGH: 4 Ob 188/08p; 5 Ob 18/11z

The Supreme Court, (OGH) noted that: “advertising for investment products may also be misleading even if it does not logically contradict the prospectus. The potential for being misleading is to be examined under general unfair competition law. A formal reference to the prospectus is not sufficient to prevent potential for being misleading. Conversely, not every risk warning in the prospectus has to be included in an advertisement, and whether this is necessary depends on the circumstances of each individual case…An advertisement that is effectively directed at several groups identifiable by objective criteria must be assessed with respect to each of these groups in particular. In this case a prohibition is already justified when the commercial practice in question could potentially mislead only one average member of one of these groups and initiate a transactional decision the (fictitious) person would not otherwise have taken.”

According to the Federal Ministry of Labour, Social Affairs and Consumer Protection, if it is possible to go to court using either the UWG or more specific provisions (such as breach of § 41 WAG; advertisement for bonds), taking action based on § 28a KSchG (Consumer Protection Act), the latter is preferred.

**Immovable property**
- Jurisdiction according to §§ 1 and 2 UWG
  - For example: OGH: 4 Ob 320/80

Real estate brokers must be designated in advertisements as such, and must state in their listings that they are a commercial agent within the meaning of § 259 para 1 GewO 1973.

### Enforcement

#### Responsibility for enforcing the UCPD

**Financial services**
- National Courts are responsible for enforcing the UCPD. The Federal Ministry of Economy, Family and Youth is responsible for implementing the Directive. If certain provisions are violated a claim for an injunction may be filed by certain bodies such as the Verein für Konsumenteninformation (VKI, a consumer organisation), Federal

**Immovable property**
- National Courts are responsible for enforcing the UCPD. The Federal Ministry of Economy, Family and Youth is responsible for implementing the Directive. If certain provisions are violated a claim for an injunction may be filed by certain bodies such as the Verein für Konsumenteninformation (VKI, a consumer organisation), Federal
### Means of enforcement of UCPD

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>By private law</td>
<td>By private law</td>
</tr>
</tbody>
</table>

### Who can bring an action under the national legislation implementing the UCPD

Public authorities, organisations representing consumer interests, competitors and trade associations.

### Main obstacles for enforcing unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Federal Ministry of Labour, Social Affairs and Consumer Protection stated that for misleading actions, misleading omissions and aggressive practices obstacles are not having enough money, problems of proof, and the long duration of court proceedings.</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Problems relating to cross-border enforcement of unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Codes of conduct and self-regulation

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

ANNEX 2: Fact sheet – most common unfair commercial practices reported
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT-FS-1</td>
<td>Some financial products (most often stocks and shares, bonds, derivatives) were presented as having higher interest rates and lower risks than they actually had. Other products (such as consumer credit) were sometimes shown as having a lower interest rate than they actually had once other charges were taken into account.</td>
<td>X X X RF RF RF</td>
<td>2008 2009 2010</td>
<td>Life insurance Health insurance Major insurance Travel insurance Other insurance (home, care, etc.) Stocks or shares, bonds, derivatives, etc. Collective investments Private pension plans Savings account Current account Mortgage Secured loan Credit card (including consumer credit) Other retail financial service Complaints data Court cases Decisions by enforcement bodies Warnings issued by enforcement bodies Decisions or recommendations made by ADR bodies Other</td>
<td>Yes</td>
<td>X X</td>
<td></td>
</tr>
<tr>
<td>AT-FS-2</td>
<td>Misleading advertising was used in the sale of financial services.</td>
<td>X</td>
<td>X X X RF RF RF</td>
<td>X</td>
<td>Yes</td>
<td>X X</td>
<td></td>
</tr>
<tr>
<td>AT-FS-3</td>
<td>Aggressive practices were used in the sale of financial services.</td>
<td>X</td>
<td>X X X RF RF RF</td>
<td>X</td>
<td>Yes</td>
<td>X X</td>
<td></td>
</tr>
<tr>
<td>AT-FS-4</td>
<td>Insurance brokers and salespeople were not qualified to sell their products.</td>
<td>X</td>
<td>X X X RF RF RF</td>
<td>X</td>
<td>Yes</td>
<td>X X</td>
<td></td>
</tr>
<tr>
<td>AT-FS-5</td>
<td>'Cold calling' was used in the sale of financial services. This is prohibited under § 107 of the Telecommunications Act 2003</td>
<td>X</td>
<td>X X X RF RF RF</td>
<td>X</td>
<td>Yes</td>
<td>X X</td>
<td></td>
</tr>
</tbody>
</table>

Source: Federal Ministry of Labour, Social Affairs and Consumer Protection (AT-FS-1); Federal Ministry of Economy, Family and Youth (AT-FS-2; AT-FS-3; AT-FS-4; AT-FS-5).

Note: VF: Very frequently, RF: Rather frequently, S: Sometimes. Complaints concerning stocks, shares, bonds and derivatives were 'rather frequent' whereas complaints concerning consumer credits were reported as occurring 'sometimes'.
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT-IP-1</td>
<td>Essential information was either not included or was misleading in advertising for immovable property.</td>
<td>X</td>
<td>X</td>
<td>2008</td>
<td>Complaints data</td>
<td>No</td>
<td>Referred consumer(s) to relevant enforcement body</td>
</tr>
</tbody>
</table>

Source: Federal Ministry of Economy, Family and Youth (AT-IP-1).
ANNEX 3: References


Tender No. Invitation to tender n° JUST/2010/JCIV/PR/0018/A4

Prepared by Professor Antonina Bakardjieva Engelbrekt, August 2011

Checked by Dr. Senda Kara, Harriet Gamper
2.1 Introduction

Transactions related to financial services and to immovable property are among the most important for consumers’ economic interests, having long-lasting and sometimes crucial effects on the economic situation of individual consumers and consumer households. The products and services are often complex and typically require a high degree of economic literacy and competence as to how financial and real estate markets work. Unfair commercial practices in these sectors in Bulgaria are not uncommon, especially in a period of financial crisis and strained economic resources. Competition between economic operators is fierce and the recourse to questionable marketing methods is one way to win customers and gain (unfair) competitive advantage.

The legal regulation of unfair commercial practices in the sectors under scrutiny in Bulgaria follows two trajectories. On the one hand the general consumer protection laws relating to unfair commercial practices apply horizontally and cover also financial services and immovable property. On the other hand there is sector-specific regulation, which has different scope and intensity. Whereas financial services are densely regulated with comprehensive sector-specific regulative instruments based chiefly on EU legislation, such regulation is still scarce in the immovable property sector.

The main rules on unfair commercial practices are to be found in the Consumer Protection Act (CPA) of 2005.¹ The Unfair Commercial Practices Directive was transposed through amendment of the Act which entered into force on 8 September 2007.²

The enforcement of the CPA is entrusted to a governmental agency, the Consumer Protection Commission (CPC). The Commission is a collective body (consisting of three members) under the supervision of the Ministry of the Economy, Energy and Tourism with regional units across the country (Article 165 CPA). It has far-reaching powers to monitor the market and to investigate unfair commercial practices and other alleged violations of the CPA either ex officio or upon complaints by consumers, competitors and citizens. In case of infringement the Commission can impose administrative penalties (the size of penalties varies from 500 to 15,000 Bulgarian Leva, see Articles 210a and 210b CPA). The Chairman of the Consumer Protection Commission is furthermore empowered to issue cease and desist orders and to require infringing traders to submit written commitments stating they will not commit further infringements. The Chairman can decide to make the order and the written commitment public. The Consumer Protection Commission can also bring injunction proceedings for the protection of consumers’ collective interests before the court (Article 186(3), in conjunction with Article 186(2) CPA). Consumer associations are also granted locus standi to institute injunction proceedings (Article 186(1) and (2) CPA) and to bring collective actions for damages (Article 188 and 189 CPA). Individual consumers can claim damages pursuant to

¹ State Gazette (St.G.) nr. 99 of 9 December 2005, in force since 10 June 2006, with many further amendments, last amended by State Gazette nr. 18 of 1 March 2011.
² St.G. nr. 64 of 7 August 2007.
ordinary rules on civil procedure and can join their claims in collective action (Article 379
Code of Civil Procedure).

Looking more closely at financial services, the regulative regime is considerably
fragmented in terms of substantive law, regulatory oversight and enforcement
modalities. The legislation is divided along the lines of individual financial services
sectors – banking, payment services, investments, insurance, pensions and so on. Many
of these instruments contain general rules on unfair commercial practices in the
respective industry sector, which do not differ much from the standards of fairness laid
down in the Consumer Protection Act. There are, however, also specific standards for
the advertising and marketing of certain financial services, and pre-contractual
information requirements that are more stringent.

In terms of supervision, the Consumer Protection Commission, apart from being the
regulatory authority with general competence for the protection of consumer interests
has also been specifically entrusted with the supervision and enforcement of some
sector-specific legislation like the Consumer Credit Act and the Distance Marketing of
Financial Services Act.

Within the sphere of banking services the regulatory authority is the Bulgarian National
Bank (BNB). The general competences of the BNB are laid down in the Bulgarian
National Bank Act (BNBA). Following Article 2(6) BNBA, the Bulgarian National Bank
exercises supervision over the banks and other payment systems and institutions in view
of maintaining the stability of the banking system and protection of the interests of
depositors. The Management Board of the BNB consists of seven members – a
Governor, three Deputy Governors and three other members. The BNB has three
different departments: Issue Management, Banking and Banking Supervision, each
managed directly by one of the Deputy Governors. The supervision of the banking
system is carried out by the Deputy Governor and Director for the Banking Department,
and the supervision of operators of payment systems and electronic money institutions
by the Governor and Director for the Banking Supervision Department (see Article 20(2)
and (3) BNBA). The Bank carries out prudential supervision, issues and withdraws
license for credit institutions and monitors their activity.

The BNB has together with the Consumer Protection Commission set up a Commission
for out-of-court settlement of disputes between suppliers and users of payment services
(called the Conciliation Commission for Payment Disputes) with representatives of
industry, of the BNB and of the Consumer Protection Commission. The Conciliation
Commission deals only with individual user complaints.

In the sphere of non-banking services (investments, insurance, assurance) – the
competent supervisory authority is the Financial Supervision Commission (FSC). The

3 Закон за Българската народна банка, St. G. nr. 46 of 10 June 1997, with multiple amendments and addendums, last amended St.G. nr. 101 of 28 December 2010. See Bobatinov, Bankovo Pravo (Banking Law), 2000, 14 ff.; see Gancheva, Finances and Law, Issue 1, 2011, p. 76 ff.

4 See Financial Supervision Commission Act (FSCA), Закон за Комисията за финансов надзор, State Gazette nr. 8 of
Commission is an independent regulatory authority, consisting at present of five members, who are appointed by Parliament. One of the members of the Commission has specific responsibility for protection of the interests of investors and of insured and assured persons (Article 3(1), p.3 FSCA). The Commission is empowered to monitor the respective non-banking services markets, to issue the required licenses for financial service operators, to investigate violations of the legislation in force – either ex officio or upon complaints by consumers, competitors and citizens. The FSC has broad rule-making powers and regularly issues guidelines, interpretative notes, instructions and orders regarding the interpretation of the relevant laws, clarifying the obligations of traders and the rights of consumers. In case of infringement of the laws under its supervision the Commission can impose considerable sanctions – penalties and fines, issue injunctive orders, prohibit certain financial instruments and withdraw licenses as a remedy of last resort.

In 2009 a World Bank study of the institutional modalities of consumer protection in the financial services sector in Bulgaria established deficiencies in the area of non-banking services resulting from unclear division of enforcement powers between different enforcement bodies and inefficiency resulting from fragmentation. The so called Diagnostic Review recommended the setting up of a Financial Ombudsman who could act as a one-stop shop for consumer complaints in the area of non-banking financial services and could help coordinate the efforts of the Consumer Protection Commission and the Financial Supervision Commission. The FSC followed up the proposal, but there was no sufficient political support for carrying it through.\(^5\)

Compared to financial services, the marketing of immovable property is scarcely regulated. The general legislation on unfair commercial practices extends also to immovable property, but there is no targeted regulation of commercial practices in this area. The impact of European law is much more limited in this industry sector due to well known competence constraints. Recently there have been appeals for mandatory legislation to control the marketing activity of real estate brokers, including the advertising of their services, and to combat unfair practices in this business sector.\(^6\)

---

\(^5\) Interview with the FSC Member with special responsibilities for consumer protection and with legal expert at FSC.

2.2 Financial services

2.2.1 Legislative framework

2.2.1.1 National implementation legislation(s) of the UCPD

The UCPD is implemented in Bulgarian law through the Consumer Protection Act (CPA) of 2005.

With an amendment of the CPA of 2007 a separate section (Section IV) entitled “Unfair Commercial Practices” was introduced in Chapter 4 of the CPA “Commercial Practices and Methods of Trade”. The Section follows closely the provisions of the Directive, including the “black list” of commercial practices that are unfair in all circumstances (see Article 68g (Bulg. 68ж) CPA for misleading commercial practices and Article 68к CPA for aggressive practices). There are - with few exceptions - no specific provisions concerning commercial practices in the field of financial services in the text of the CPA. However, it is considered that the Consumer Protection Act has horizontal application and is applicable also to financial services, unless some of the lex specialis provisions of sector-specific legislation applies (on sector-specific legislation see below).

Article 68б (Bulg. 686) CPA sets out the general objectives of this section of the Act as ensuring the protection of consumers against unfair commercial practices before, during or after a trader makes an offer to the consumer or a contract for purchase of goods or provision of services is concluded. Article 68c (Bulg. 68a) lays down the general prohibition of unfair commercial practices, whereas Article 68д(1) (Bulg. 68r(1)) stipulates the more detailed criteria for qualifying a commercial practice as unfair, namely the requirement that a commercial practice is contrary to professional diligence (according to the Bulgarian transposition - “requirement of good faith and professional competence”) and that it materially distorts the economic interest of consumers (according to the Bulgarian transposition - “that it changes or is likely to change substantially the economic behavior of the average consumer whom it affects or to whom it is directed”). In the supplementary provisions to the CPA the concepts “substantial change in consumer behavior” and “good faith and professional competence” are defined much in line with the Directive (see § 13, points 25 and 28 of the supplementary provisions of the CPA). Like the Directive the CPA limits the application of the general clause to practices having the potential to exert appreciable influence on the economic conduct of the average consumer, taking also into account the special need of protection of vulnerable consumer groups when commercial practices are targeted at them (Article 68д(2) CPA).

---

7 St. G. nr. 64 of 2007, in force as of 8 September 2007.
8 In the following the original numbering of articles in Bulgarian (with Cyrillic alphabet) is given in brackets to avoid confusion.
9 See Article 68к, p. 4 on insurance practices which stems from the black list of the UCPD.
It may be worth noting that Article 68 CPA, which is placed in the section preceding the one on unfair commercial practices (Chapter 4, Section III, Methods of trade) proclaims quite radically that the use of commercial practices that impair the economic interests or the collective interests of consumers is prohibited. This sweeping prohibition is hardly in line with the European requirements, but has so far not been invoked in practice. Also any act or failure to act that is contrary to the legislation listed in Regulation 2006/2004 is prohibited (see Article 68a CPA). Despite the theoretical possibility for cross-border enforcement, there are no reported cases of foreign qualified entities bringing proceedings before Bulgarian courts and institutions, nor have Bulgarian consumer organizations or consumer protection authorities been active in pursuing enforcement in other Member States, or against foreign traders in Bulgaria.

It should also be noted that the Competition Act (Act for Protection of Competition, CA) of 2008\textsuperscript{10} contains rules on unfair competition that apply to business-to-business relations, but which have an indirect impact on the protection of consumer interests. The Competition Act is of general application and is not specifically directed at financial services. However competitors in the sphere of financial services are expected to comply with the general requirements of fair competition. Chapter 7 of the CA is entitled “Unfair Competition”. Of primary importance is the general clause against unfair competition in Article 29 CA. According to this clause “any act or failure to act in the performance of economic activities, which contravenes good commercial practice and impairs or may impair the interests of competitors shall be prohibited.” Previously, the general clause referred also to the interests of consumers. With the implementation of the Unfair Commercial Practices Directive (UCPD) in Bulgarian law, however, all rules on commercial practices aiming to protect consumer interests in B2C relations are now concentrated in the Consumer Protection Act. The concept of good commercial practice is defined in § 1 Nr. 2 Additional provisions, CA as “the rules on market conduct, which stem from the laws and customary trading relations, and which do not violate \textit{bonos mores}”.

The general clause is complemented by a catalogue of specific factual situations of unfair competition such as disparagement of the good name of competitors, comparative advertising, misleading advertising, counterfeiting, unfair inducement of customers and disclosure of trade secrets (Arts 30-36 CA). While the provisions on misleading and comparative advertising (Arts 33 and 34 CA) transpose Directive 2006/114/EC into Bulgarian law, other provisions, such as on disparagement and unfair inducement of customers, are purely national. It is settled case law that the catalogue of specific unfair competitive practices is not exhaustive. Situations may occur, which do not meet the requirements of the catalogue rules, but which nevertheless can be considered to constitute unfair competition and be prohibited under the general clause of Article 29 CA.\textsuperscript{11}

\textsuperscript{10} Закон за защита на конкуренцията, St. G., nr. 102 of 28 November 2008, last amended St.G. nr. 97 of 10 December 2010.

\textsuperscript{11} See Decision of the Supreme Administrative Court Nr. 8364 of 27.07.2006 in case No. 11337/2003 (MZK “Evropa” v.
The enforcement of the Competition Act is entrusted with the Commission for Protection of Competition which is an independent public agency, consisting of five members and accountable to the Parliament (Articles 3 and 4 CA).

2.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

There are very few provisions in Bulgarian law that can be considered to ban specifically unfair commercial practices in the area of financial services not included in the Black List of the UCPD. Those identified during this study have to do mainly with sales promotion methods.

More generally, and not confined to financial services or immovable property, Article 36 Competition Act introduces restrictions on the use of free gifts, prize competitions and other forms of sales promotions. Article 36(2) CA prohibits combined offers of goods and services. The provision reads:

“Offering or giving of an additional product to the product or service being sold, free of charge or against the fictitious price of that other product or service shall be forbidden, except for:

- Advertising products which have insignificant value where there is an explicit indication of which is the advertising company;
- Products or services which, according to business practice, constitute accessories to the product or service being sold;
- Products or services, which constitute a rebate for the sale of bigger quantities”.

Furthermore the promotion of goods or services through the use of prize competitions of various sorts (for example depending on resolving problems, puzzles, questions, riddles; collection of a series of coupons; or games of chance) with cash or object prizes is likewise prohibited if the value of the prize considerably exceeds the value of the product or the service sold (Article 36(3) CA).

The Commission for Protection of Competition has issued guidelines on the interpretation of these latter provisions.\textsuperscript{12} Article 36 Competition Act is relatively

\textsuperscript{12} According to the latest interpretative guidelines (Decision of the Commission for Protection of Competition nr. 55 of 29 January 2009) an advertising product of insignificant value is a product that can carry the logo and other signs of the company, and the value of which does not exceed 10% of the value of the product or service. A prize competition is deemed to infringe Article 36(3) CPA if the size of the prize exceeds by 100 times the value of the products or by 15
frequently invoked because special offers and promotions are perceived by competitors as hard selling techniques exerting undue pressure on consumers. Especially when the value of the offer is very high such promotional techniques tend to divert consumer choice away from price and product quality, and to distort competition. The rules have occasionally been applied to the marketing of financial services, such as in advertising campaigns for banking services, for complementary pension insurance, or for automobile insurance.  

Although the focus of the CA is the interests of competitors, it is clear that the restrictive provisions mentioned above have their impact on the interests and the protection of consumers. Whereas combined offers, rebates, prize competitions and the like tend to obscure the core elements of the offer and to distort consumer choice, if an offer is sufficiently transparent and clear there may be advantages for the consumer, which have to be weighed in.

Interestingly, the Consumer Protection Act also contains a rule on combined offers which is retained even after the transposition of the UCPD and is placed in Section III, Methods of trade, preceding Section IV, Unfair commercial practices. Article 67 reads:

“The offering for the same price of two or more goods or services without any substantial connection between the goods or services is prohibited unless:

1. Each of the goods or services, offered together can be purchased at the premises separately at its usual price;

2. The consumer is informed about the opportunities under point 1, as well as about the individual price of the goods and services”.

According to the Consumer Protection Commission this provision has been used on a few occasions as the basis for administrative proceedings and sanctions.

The prohibitions of special offers and sales promotions under both the Competition Act and the Consumer Protection Act are formulated in a general manner and would most times the minimal salary for the country. See also decision of SAC Nr. 7482 of 28.7.2005 in case No. 3270/2005 concerning a lottery game by sending bar codes of chocolate desserts, the prizes consisting among others of a Mercedes C-220 and a BMW automobiles. In its judgments the Supreme Administrative Court emphasized that the prizes are in such disproportion to the product sold that the chance of winning them may seriously influence consumer choice and distort the market by using non-market stimuli for influencing buyers’ behavior. See Kodžabašev, Promeni v praktikata na KZK otnosno obeštanijata za nagradi kûm prodavanî stoki ili uslugi (Changes in the practice of the Commission for the Protection of Competition concerning promises to win prizes with the purchase of goods and services), Pazar i pravo, 2006(4), 67 ff.

13 See Decision nr. 3482 of 5 April 2007 (adm. d. nr. 7181/2006), Supreme Administrative Court, division V, concerning the practice of a pension-insurance company to market its pension funds by offering privileges in banking and insurance services; see also Decision nr. 7254 of 9 July 2007, adm. d. 11537/2006 of the Supreme Administrative Court, 5-members, concerning the offer of bonuses and rebates by insurance companies. The Court confirmed the decision of the Commission for Protection of Competition, referring also to the Ordinance of the Financial Supervision Commission nr. 18 of 10 November 2004 (repealed).
probably not withstand a test of compatibility with the Unfair Commercial Practices Directive in light of the recent case law of the Court of Justice of the EU.\(^\text{14}\)

**Insurance**

On the basis of the Insurance Code, the Vice Chairman of the FSC in charge of insurance supervision has issued an order (Order 229/2010) prohibiting any provision of bonuses and rebates on the insurance premium when marketing the mandatory automobile insurance ‘civil liability’. The reason for this restriction is that in the fierce competition for customers many insurance companies tend to provide bonuses at the expense of the funds available for compensation, thus exposing the system to high levels of risk.

The Social Insurance Code sets forth in Article 123i (123и) a prohibition on organising lotteries (point 3) for the promotion of complementary pension insurance. The ban seems to be prompted by a desire to prevent the use of aggressive techniques for the marketing of financial services of substantial social importance for the individual. This unconditional prohibition, irrespective of the conditions for participation, and the information given to the consumer, seems to go beyond the standard of the UCPD.

**b) National legislation regarding misleading actions**

The relevant provision on misleading actions is Article 68е (Bulg. Article 68д) CPA. It follows closely the text of Article 6 UCPD, including the list of elements in relation to which a commercial practice can be misleading (Article 68е(2), points 1-7 CPA). A commercial practice is deemed misleading:

“if it contains false information and is therefore misleading or in any way, including its overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more specified elements”.

In order to be considered as misleading the practice shall furthermore cause or be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. The transaction test of the UCPD is thus incorporated in the provision. Following Article 6(2)(a) and (b) UCPD, Article 68е(3) (Bulg. Article 68д) CPA qualifies as misleading also commercial practices, including comparative advertising, causing confusion with another product, service, trade mark or trade name (passing off), as well as non-compliance by the trader with commitments to follow certain codes of good commercial conduct. Article 68g (Bulg. Article 68ж) CPA transposes the black list of misleading commercial practices prohibited in all circumstances (see Annex I UCPD, points 1-23 and Article 68g CPA, points 1-23). Despite certain minor linguistic discrepancies, the list should be interpreted in the light of the provisions of the Directive.

\(^{14}\) See Joined Cases C-261/07 VTB-VAB NV v Total Belgium NV and C-299/07, Galatea BVBA v Sanoma Magazines Belgium NV; Case C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v ‘Österreich’-Zeitungsverlag GmbH.
The distance marketing of consumer financial services, including both banking and non-banking financial services is regulated by the Act on the Delivery of Financial Services at a Distance (FSDA). The FSDA transposes Directive 2002/65/EC concerning the distance marketing of consumer financial services.

The supervisory authority under the FSDA is the Commission for Consumer Protection. Banking (including consumer credit)

The Consumer Credit Act (CCA) transposes into Bulgarian law Directive 2008/48/EC on credit agreements for consumers. The Directive’s provisions on pre-contractual information requirements and on advertising of consumer credits are incorporated almost verbatim in Chapter 2 (Provision of Pre-contractual Information) and Chapter 7 (Advertising) CCA. Generally, the mandatory standardised information in advertising shall be provided in a clear, concise and prominent way by means of a representative example (Article 25(2) CCA).

The provisions on pre-contractual information and on advertising are also applicable to mortgage credits (see Article 4(1) p. 2 and 3 CCA).

For the settlement of disputes concerning consumer credits, including mortgage credits, there is a Commission for out-of-court dispute settlement set up on the basis of Article 182 ff CPA with representatives of the Consumer Protection Commission, as well as of business and consumer associations.

The Act on Payment Services and Payment Systems (PSA) introduces extensive consumer-friendly requirements for provision of information in Chapter 3 of the Act and contains separate sections on the information to be provided in connection with framework contracts (Ch. 3 Section III) and in individual transactions (Ch. 3 Section II). Following Article 37(2), and in compliance with Directive 2007/64, the mandatory pre-contractual information has to be provided in the form of clear and comprehensive text and in an accessible way, in the official language of the Member State where the payment service is offered or in a language agreed by the parties.

The PSA also transposes in Bulgarian law Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions.

In Chapter 8 PSA an out-of-court dispute settlement scheme is established, called the Commission for the Settlement of Payment Disputes. The scheme is independent although it operates within the auspices of the Consumer Protection Commission. Each payment service provider is obliged to provide consumers and users of payment services

15 St-G. nr. 105 of 22 December 2006, last amended by St. G nr. 82 of 16 October 2009.
18 Закон за платежните услуги и платежните системи, in force since 1 November 2009, St. G. nr. 23 of 27.3.2009, last amended by St. G. nr. 101 of 28 December 2010.
with information on the availability of such a scheme (see Article 127(3) PSA). The dispute settlement commission is composed of chairman and vice-chairman nominated by the Bulgarian National Bank and members nominated by the banking associations and the Commission for Consumer Protection (see Article 128 PSA).

The supervisory authority under the PSA is the Bulgarian National Bank. If the BNB ex officio or upon the notification by customers or other interested persons, including consumer associations, establishes an infringement of the Act, of its implementing regulations or of Regulation 924/2009/EC of the Council and the Parliament on cross-border payments in the EU, it is empowered to undertake appropriate measures and impose penalties to cease the infringement (see Articles 80-83 Directive 2007/64/EC).

The Act on Bank Deposit Guarantees\textsuperscript{19} implements Directive 94/19/EC on deposit guarantee schemes and Directive 2009/14/EC amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay.

\textit{Investments}

The products in this financial services sector - typically securities - are particularly complex and risky and require a higher level of sophistication and financial education than is typical of the average consumer. According to World Bank statistics, the number of holders of securities accounts in Bulgaria is relatively low.\textsuperscript{20}

The Act on Markets in Financial Instruments (MFIA)\textsuperscript{21} regulates the activity of investment intermediaries and transposes Directive 2004/39/EC of the European Parliament and Council and Commission Directive 2006/73/EC into Bulgarian law. The ethical and information requirements for investment companies as stipulated in Article 19 Directive 2004/39/EC are set out in Article 27 MFIA. Article 27(2) MFIA proclaims a general obligation for the investment intermediary to act honestly, fairly and professionally in accordance with the best interest of its clients and to inform its clients of risks involved in transactions with financial instruments. The standard of fairness is similar to the requirement of professional diligence in the UCPD. However, one may say that it is further sharpened by the requirement that the investment intermediary act in accordance with the best interest of the client, and must inform the client of imminent risks.

Article 27(3) MFIA provides that all information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such. This general requirement largely corresponds to the prohibition of misleading commercial practices in Article 6 UCPD, but is then specified in further detail by Ordinance 38 of FSC.

\textsuperscript{19} Закон за гарантиране на влоговете в банките, State Gazette nr. 49 of 29 April 1998, with further amendments, last amended St.G. nr. 101 of 28 December 2010.


\textsuperscript{21} Закон за пазарите на финансови инструменти, St. G. nr. 52 of 29 June 2007, last amended St. G. nr. 43 of 8 June 2010.
Ordinance 25 of the Financial Supervision Commission of 22 March 2006 gives additional requirements regarding the activity of investment firms and contractual funds. Following Article 74 of the Ordinance investment firms and common funds should submit all their sales and promotional materials to the FSC for review. The Commission can prohibit the use of the material if the conditions of national and European law are not met.

The Act on the Public Offer of Securities (POSA) regulates the activity of collective investment undertakings, transposing the previous UCITS Directive 85/611/EEC. This Act also transposes Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (especially Articles 5 to 20).

The newly recast version of the UCITS Directive (Directive 2009/65/EC) is currently in the process of implementation. A Government Bill has been submitted to Parliament for a new Act on the Activity of Collective Investment Schemes and other Undertakings for Collective Investment. Obligations for marketing communications to be presented in a manner that is fair, clear and not misleading are stipulated in Article 65 of this draft Act.

**Insurance**

The activity of insurance intermediaries is governed by detailed provisions in the Insurance Code (IC). The Code implements Directive 2002/92/EC. Article 173 Insurance Code lays down the general requirements that insurance intermediaries act in accordance with principles of freedom of choice and applying a duty of care for clarifying the rights and obligations stemming from the insurance contract in order to protect the interest of the consumers.

The Insurance Code obliges insurance intermediaries to set up procedures for registering and settling complaints (see Article 10 Directive).

The most important instrument in the sphere of social insurance with sector-specific rules on fair commercial practices is the Social Insurance Code (SIC). The Social Insurance Code transposes into Bulgarian law the requirements set forth in Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (IORPs). Article 123i (Bulg. Article 123и) governs the advertising of institutions of voluntary pension insurance. More specifically, Article 123i SIC stipulates that the

---

22 Наредба за изисквания към дейността на инвестиционните дружества и договорните фондове, St. G. nr. 36 of 2006г, most recently amended St. G. nr, 18 of 2010.

23 State Gazette Nr. 114 of 30 December 1999, with multiple amendments, most recently by State Gazette Nr. 57 of 26 July 2011.

24 Проект на закон за дейността на колективните инвестиционни схеми и на други предприятия за колективно инвестиране (102-01-38/08.06.2011).

25 Кодекс на застраховането, St. G., nr. 103 of 23 December 2005, with many subsequent amendments, most recently, St. G. nr,.51 of 5 July 2011.

26 Кодекс за социално осигуряване, St. G. nr. 110 of 17 December 1999, with multiple amendments, title amended St. G. nr. 67 of 2003, latest amendment nr. 100 of 21 December.2010, in force as of 1 January 2011.
pension company shall not advertise products it does not offer and shall not advertise future profitability of investments. Furthermore the companies shall not include in their advertising materials unclear statements as to the results achieved, or incorrect or misleading data.

All expenses related to the advertising of the pension insurance company and the funds for additional pension insurance managed by it shall be for the account of the pension insurance company (Article 123i(3) SIC).

The supervisory authority for the activity of supplementary pension insurance companies is the Financial Supervision Commission. Pursuant to Article 123i(2) SIC the Deputy Chairman of the Financial Supervision Commission shall approve the requirements for the content of the advertisements or written informational materials of the pension funds and pension insurance companies. Such requirements do not seem to have been approved so far. By contrast, the Bulgarian Association of Supplementary Pension Insurance Companies has adopted a Supplementary Pension Insurance Code of Ethics, in which there is a chapter devoted to the relations of the supplementary pension insurance company with its clients and a chapter on advertising and public appearance of pension insurance companies.

c) National legislation regarding misleading omissions

Article 68f (Bulg. Article 68e) CPA extends the prohibition of misleading commercial practices to misleading omissions. The transaction test applies even in this situation. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he or she would not have taken otherwise. The importance of the communication medium is set out in Article 68f(3) CPA. The information that shall be regarded as material in the case of invitation to purchase is specified in Article 68f(4), points 1-5 CPA. In accordance with Article 7(5) UCPD, Article 68f(5) CPA defines as material the mandatory information required by EU legislation on commercial communication, including advertising or marketing, referred to in Annex II UCPD. Contrary to the Directive this provision does not indicate that the list in Annex II is non-exhaustive, but there seems to be no doubt that the same principle would apply to other relevant information requirements set out in EU law or in national law transposing EU law. This “spring-board” approach gives the Consumer Protection Commission competences to actually supervise the financial services market in parallel to the Financial Supervision Commission (see below).

A variety of legislative acts envisage specific information requirements in different sectors of banking and non-banking financial services. The majority of these requirements have been introduced and fine-tuned to correspond to EU legislation in the field. The list below is non-exhaustive:
The information duties that financial service providers have to comply with in distance marketing of consumer financial services, and which are stipulated in Articles 3 and 5 Directive 2002/56/EC, are to be found in Articles 8, 9 and 10 of the FSDA.

**Banking (including consumer credit)**

The Act on Credit Institutions (CIA)\(^{27}\) requires that banks provide in advance detailed information regarding the general conditions for bank deposits and credits (see Chapter 7 Relations between the Banks and their Customers; Article 56 and 57 CIA). The information should be put in a place readily accessible by customers in the premises of the bank (see Article 59 CIA).

The Payment Services and Payment Systems Act regulates among others the prior information requirements that have to be followed vis-à-vis consumers (see Article 1(1), points 1 and 3 PSA). The Act introduces the extensive requirements for transparency of conditions and provision of prior information as laid down in Directive 2007/64/EC (see Title III of the Directive) in Chapter 3 PSA, which contains separate sections on the prior information to be provided in connection with single payment transactions and framework contracts respectively. The pre-contractual information requirements are mandatory in B2C relations, but can be negotiated away in B2B transactions (see Article 31(3) PSA). As a rule the information has to be provided in a clear and intelligible language, in an accessible way and on paper or on another durable medium (see Article 37(2) PSA for individual payments and Article 42 PSA for framework contracts).

The Consumer Credit Act\(^{28}\) transposes into Bulgarian law Directive 2008/48/EC on credit agreements for consumers. This new act replaced the Consumer Credit Act of 2006. The new act has broader scope of application than the previous one and covers all consumer credits between 400 and 147,000 Bulgarian Leva. The Directive’s provisions on pre-contractual information requirements and on advertising of consumer credits are incorporated almost verbatim in Chapter 2 (Provision of Pre-contractual Information) and Chapter 7 (Advertising) CCA. Following Article 25(1), points 1-5 CCA any advertising of a credit indicating an interest rate or any figures relating to the cost of the credit to the consumer shall include mandatory information on a number of elements:

1. The borrowing rate, fixed or variable or both, together with particulars of any charges included in the total cost of the credit to the consumer;
2. The total amount of credit;
3. The annual percentage rate of charge;
4. The duration of the credit agreement;

---

\(^{27}\) Закон за кредитните институции, effective as of 01.01.2007, St. G. nr. 59 of 21 July 2006, with many subsequent amendments, most recently 28 December 2010.

\(^{28}\) Закон за потребителския кредит, CCA, effective as of 12 May 2010, State Gazette Nr. 18 of 5 March 2010, amended State Gazette Nr. 58 of 30 July 2010.
5. In the case of a credit in the form of deferred payment for a specific good or service, the cash price and the amount of any advance payment; and

6. The total amount payable by the consumer and the amount of the instalments.

Article 25(5) CCA further specifies that where the conclusion of a contract regarding an ancillary service relating to the credit agreement, in particular insurance, is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed, and the cost of that service cannot be determined in advance, the obligation to enter into that contract shall be stated in a clear, concise and prominent way in the advertisement, together with the annual percentage rate of charge. This provision implicitly recognizes that banks may be allowed to bundle products and determine from whom the consumer may purchase the bundled product (the insurance), provided the information requirements are met. This is in contrast to the prohibition of enticement of customers in Article 36 of the Competition Act, discussed above. The uncontrolled possibility of bundling has been criticized in the report of the World Bank\(^\text{29}\) and in the special study on tying and bundling in the financial sector by the Centre for European Policy Studies.\(^\text{30}\)

The provisions on advertising in the CCA do not exclude the applicability of Article 68b-1 (68б-1) CPA.

The CPC has accumulated rich administrative practice on enforcing the Consumer Credit Act, partly on the basis of the earlier version of the Act from 2006. Given the similar content of the main provisions of the act this administrative practice and the ensuing case law of the administrative courts can still be considered relevant. In a relatively recent case the Sofia City Administrative Court confirmed that the obligation of stating the annual rate of a credit is equally valid for Internet sites advertising consumer credit agreements as it is for off-line purchase sites.\(^\text{31}\) In another decision the same court held that the trader by omitting to provide a representative example has not informed the consumer of the total cost of a consumer credit adequately.\(^\text{32}\) Likewise, the Court has confirmed the decision of the first instance court and the administrative penalty imposed by the Consumer Protection Commission on the company “Multirama” for advertising purchase on leasing for 24 months without “any cost increase”.\(^\text{33}\) All decisions are reached under the old Consumer Credit Act, Article 15 on advertising. This provision is, however, similar to Article 26 of the now valid CPA discussed above.

Specific provisions exist as to the lending activity of pawnbrokers and pawnshops. Consumers who are in a dire economic situation are often forced to pledge different

---


\(^{31}\) See Decision nr 254 of 17 January 2011 adm.d. nr. 8191/2010 of the Administrative Court Sofia City

\(^{32}\) See decision nr. 283 of 8 March 2010, adm.d. nr. 8128/2009 of Administrative Court Sofia City.

\(^{33}\) Decision of 2 October 2009, kahd (on cassation) nr.4479/2009 of Administrative Court Sofia City.
movables to pawnshops against short-term loans. An Ordinance of 2009 sets forth different requirements as to the activity of pawnshops. The pawnbrokers have to act in accordance with good commercial practice and only within commercial premises (Article 8 Ordinance). The information that has to be provided to consumers by the pawnshops when offering such services shall in particular include the interest rate, the methodology for valuation of the movables, the conditions of the loan, and so on (Article, 4 Ordinance). There are in addition qualitative requirements as to the manner in which the information has to be provided (put down clearly in bright letters against a single-coloured background, and so on), to avoid confusion. Generally, the information must be unequivocal and not misleading.

**Investments**

As mentioned above the Act on Markets in Financial Instruments (MFIA) sets forth obligations for investment intermediaries to provide specific information to investors, transposing Directive 2004/39/EC of the European Parliament and Council (see Article 27 MFIA).

The more detailed information requirements laid down in Commission Directive 2006/73/EC (in particular Articles 27 to 34) are implemented in Ordinance 38 of 25 July 2007 of the Financial Supervision Commission on the requirements as to the business activity of investment firms. Article 7 of the Ordinance contains elaborate provisions on the information that investment intermediaries have to provide to their clients (including potential clients) in respect of identification, ways of presenting prior performance and warnings of risks, rules on comparison of financial investments and ancillary services, information about the investment firm and the financial instrument, as well as information on the costs and associated charges.

Pre-transaction and post-transaction transparency for multi-trading facilities is dealt with in Articles 52(2) and 53 MFIA.

Chapter II of the Act on the Public Offer of Securities (POSA) sets out detailed information requirements with respect to prospectuses. The Bulgarian lawmaker has made use of the possibility to lay down stricter rules with respect to the reporting obligations of investment undertakings. Whereas the Directive requires annual and biannual reports, the Bulgarian Act requires annual and quarterly reports. The time-limits for submitting the reports are also shorter compared to those in the Directive – 90 days after the lapse of the year for the annual report and 30 days after the lapse of the trimester for the quarterly report (see Article 100o POSA, see Article 27 Directive).

In the draft Act on the Activity of Collective Investment Schemes and other Undertakings for Collective Investment this matter is treated in Chapter 7. Article 53 sets out an obligation for the investment company to publish a prospectus and Article 54 contains

35 See Decree of the Council of Ministers nr. 40 of 18 February 2009 on the adoption of Ordinance.
details as to the information to be included in the prospectus. The main novelty is the requirement for providing standardised and condensed “key investor information” (Article 57).

Ordinance 25 of the Financial Supervision Commission of 22 March 2006 sets out additional requirements regarding the activity of investment firms and contractual funds.37

Insurance

The information requirements for insurance intermediaries provided for in Article 12 of Directive 2002/92/EC are transposed into Article 177 of the Insurance Code. Prior to the conclusion of any initial insurance contract, and, if necessary, upon amendment or renewal thereof, an insurance intermediary shall provide the customer with at least the following information: (a) identity and address; (b) the register in which it has been included and the means for verifying that it has been registered; (c) whether it has a holding, direct or indirect, representing more than 10% of the voting rights or of the capital in a given insurance undertaking; (d) whether a given insurance undertaking or parent undertaking of a given insurance undertaking has a holding, direct or indirect, representing more than 10% of the voting rights or of the capital in the insurance intermediary.

When regulating the advertising of pension funds for supplementary pension insurance the Social Insurance Code sets forth a prohibition of misleading by omission. Article 123и (123и) SIC states that the pension insurance company is obliged not to hide or conceal important facts.

Article 123к SIC lays down detailed requirements as to the information that has to be regularly provided by the pension companies to the assured persons, and the information that shall be provided upon request.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

The rules on aggressive commercial practices from the UCPD are implemented through Articles 68н to 68к (Bulg. Articles 68а-k) CPA, including the black list of unconditionally prohibited aggressive practices (Article 68к CPA).

More specifically, the prohibition set out in point 27 of the black list in Annex II UCPD, concerning aggressive methods towards insurance policy holders is transposed in Article 68к, point 4. Following this provision it is prohibited to require 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 or her contractual rights.

37 Наредба за изискванията към дейността на инвестиционните дружества и договорните фондове, Ст. Г. nr. 36 of 2006г, most recently amended Ст. Г. nr. 16 of 2010.
The CPA also contains provisions on doorstep selling and distance selling, including different forms of unsolicited advertising. Article 62 CPA prohibits the supply of goods and provision of services against payment, without the explicit and prior request of the consumer.

The Act on the Delivery of Financial Services at a Distance (FSDA), transposes into Bulgarian law the prohibition of unsolicited provision of financial services at a distance and the restrictions on unsolicited communications at a distance set out in Articles 9 and 10 of Directive 2002/56/EC (see Articles 14 and 17 FSDA). Any means of distance communication which allow for individual communications can only be used subject the prior consent by the consumer (opt-in principle, see Article 17(1) FSDA).

**Banking (including consumer credit)**

The telephone marketing of consumer credits is not excluded, but requires higher levels of information and transparency in addition to the information already required under the FSDA (see Article 5(10) and Article 8(7) CCA for contracts on overdraft).

**Investments**

Ordinance nr. 25/2006 of the Financial Supervision Commission on the activity of investment firms and common funds regulates among others telephone sales of investment services and requires full disclosure of the identity of the person making the call, the purpose of the call and the obligation to send a prospectus (see Article 75 Ordinance 25). This provision is directed towards preventing using telephone calls as an aggressive marketing tool.

**Insurance**

The provisions referred above under 1.1.1.2 are also relevant here.

The first is the prohibition imposed in Order 229/2010 of the Vice Chairman of the FSC on the basis of the Insurance Code on any bonuses and rebates on the insurance premium when marketing the mandatory automobile insurance for ‘civil liability’. The Order has been prompted by mass practices of offering such bonuses that indirectly unreasonably diminish the size of the premiums and ultimately undermine the stability of the system.

Second, the Social Insurance Code sets forth in Article 123i (123и) an unconditional prohibition for the pension insurance companies to organise lotteries (point 3).

Both instruments can be regarded as measures to curb the spread of aggressive practices and the exercise of undue influence on prospective clients in the insurance and pension insurance sector. In the latter industry the situation is all the more sensitive since the customers are often elderly people who are poorly oriented in the new systems.


of supplementary pension insurance and may be susceptible to such high pressure techniques.\textsuperscript{40}

Finally, the rules on free gifts, combined offers, rebates, prize competitions and the like can also be seen as aiming at preventing the exercise of undue influence and pressure marketing. In this regard, the relationship between the Consumer Protection Act and the Competition Act on the one hand, and between horizontal legislation and sectoral regulation, are not entirely clear and need to be streamlined. As mentioned above both the Consumer Protection Act and the Competition Act contain restrictions on special offers, but the rules differ. The provisions in the Competition Act (Art 36(2) CA) are much more detailed and specified further by guidelines issued by the Competition Protection Commission. The provisions in the Consumer Protection Act are more general and are to be enforced by the Consumer Protection Commission. Whereas the provisions of the Competition Act shall apply only in B2B relations, special offers that are directed towards consumers (and not to retailers or other intermediaries) clearly have bearing on consumer interests. A divergent practice between the two authorities may therefore be confusing. The general compatibility of these provisions with the UCPD can be questioned (see above).

\textbf{e) Other national legal provisions on unfair commercial practices in the field of financial services}

On the basis of the Insurance Code, the Chairman of the Financial Supervision Commission has issued guidelines proclaiming as illegal consultancy contracts between insurance intermediaries (brokers) and physical or juridical persons, engaging the latter in recruiting new clients for the insurance company against payment on the basis of percentage of the revenue. The Commission opined that such contracts constituted a means of circumventing the legal requirements as to special qualifications of insurance intermediaries. As a result of such contracts, consumers would enter a transaction with persons lacking the necessary professional qualities and expertise, and their interests would ultimately be jeopardized.\textsuperscript{41}

\textbf{2.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general}

The administrative practice and case law under the Consumer Protection Act (and earlier under the Competition Act) seems to be in line with the European standard of “the reasonably circumspect and reasonably well-informed average consumer” as defined in the case law of the ECJ and in the Preamble of Directive 2005/29.\textsuperscript{42} It acknowledges at

\textsuperscript{40} This was confirmed in an interview with a member of the Financial Supervision Commission with responsibilities for consumer protection and a legal expert at the Financial Supervision Commission.


\textsuperscript{42} See Case C-210/96 Gut Springenheide et GmbH et Rudolf Tusky mot Oberkreisdirektor des Kreises Steinfurt [1998] EEECR.
the same time the importance of the target audience. Particularly strict standards apply to advertising directed at children or at sick or elderly people. Conversely, professional and expert audiences are expected to be more scrutinizing and knowledgeable about accepted terminology.\footnote{See decision of Sofia City Court in case Nr. 1102/07 (Prestige). Although the advertisement was designed with certain humour the Court noted the vulnerability of children as a consumer group. See judgment of the SAC (5 member panel) Nr. 10792 of 26.11.2003, case Nr. 8127/2003. The term “cost-less bread” was considered sufficiently familiar among business partners in the bakery sector. The first decision was issued on the basis of the Consumer Protection Act before the implementation of the UCPD. The second decision is based on the provisions of misleading advertising in the Competition Act.}

Advertising with superlatives is generally allowed. It is considered to constitute a conventional way for sellers to attract attention and to demonstrate confidence, to which consumers relate with certain scepticism.\footnote{See decision Nr. 140 of 19.05.2005 of the Commission for Protection of Competition, confirmed by the SAC (decision Nr. 11176 of 14.11.2006 in case 4927/2006): the statements “only by us”, “only now” about the automobiles “New Rexton” were not considered to represent verifiable statements of exclusive position on the market but general puffing not taken literally by consumers.} However, exaggerated advertising claims may be regarded as misleading if they are verifiable and may be taken seriously by the addressees. The standard of deception tends on the whole to be rather high. This is even more so in the area of consumer financial services, in particular banking services, consumer credits, insurances and supplementary pension insurance where the products are rather complex and consumers cannot be expected to be particularly sophisticated.\footnote{See judgment of the SAC (57 member panel) Nr. 10841 of 03.11.2006, case Nr. 4926/2006 on the misleading character of an advertising campaign for housing loans by a major Bulgarian bank; the SAC confirmed a fine of 100,000 Bulgarian Leva (equivalent to approximately 50,000 Euro); decision on the basis of the Competition Act.}

2.2.1.4 Level of protection provided by national legislative framework compared to UCPD

The level of protection generally corresponds to that established by the UCPD. It exceeds the UCPD standards chiefly in those areas where the European legislator has intervened with special, more detailed and more stringent regulation in the form of sector-specific Directives and Regulations, rather than through national legislation providing higher levels of consumer protection.

2.2.2 Most common unfair commercial practices in the area of financial services

2.2.2.1 Description of the most common unfair commercial practices

Generally, it appears that the majority of complaints and signals from consumers that reach the regulatory authorities concern the post-contractual, rather than the pre-contractual phase of business-to-consumer relations. It is when the consumer is directly and immediately affected by the conduct of the trader that he or she also feels a greater incentive to seek compensation and justice.
However, a number of typical unfair commercial practices are also reported by interlocutors and regulatory authorities in the sphere of financial services, and these do tend to concern the pre-contractual phase.\textsuperscript{46}

Most common practices that trigger consumer reactions appear to be in the area of consumer credit. Both banking and non-banking credit institutions are the targets of the complaints. A common violation of the law is providing misleading information or omitting to provide information on the annual rate and the cost of the credit.\textsuperscript{47}

In the area of banking services, a practice that has prompted the reaction of the Consumer Protection Commission has been the marketing on radio, TV and in the press, for a bank deposit termed “salary account”, and by statements “we guarantee a 5% increase of your salary!”. In the advertising the impression was created that the higher interest rate would apply for the whole sum of the monthly deposit, but in reality it applied only for part of it and under special conditions which were not clearly stated. The Commission found an unfair commercial practice, consisting specifically in misleading by omission (Article 68d (68r) (4) and 68e(2) CPC.

In yet another much debated case of the Consumer Protection Commission, a major bank was found to present the conditions for a credit in a misleading way. In the advertisement the credit rate was described as being formed on the basis of established market indexes (such as EURIBOR), but with an increase, a bonus. The impression the consumers got was that the bonus was stable, but it turned out that it was floating and flexible, being regularly changed by the bank depending on market conditions, with a final result of rendering the credit far less attractive than initially presented (UniCredit Bulbank).\textsuperscript{48}

Other practices sanctioned by the Consumer Protection Commission were the delayed publishing of the standard contract terms, again by UniCredit Bulbank.\textsuperscript{49}

The Financial Supervision Commission also reports considerable number of complaints in the sphere primarily of insurance services and pension funds. For 2010 the FSC has

\textsuperscript{46} Interviews with member of the Consumer Protection Commission, and with Director, Consumer Protection Unit, Ministry of the Economy.

\textsuperscript{47} Consumer Protection Commission (2010) Annual Report, available at www.kzp.bg. See for instance the decision of the CPC in the case “Easy Credit”, Decision Nr. 333 of 30 May 2009 – omission to indicate the annual costs of the credit; Decision Nr. 291 of 18 May 2009, Pireos Bank Bulgaria, infringement of Art. 68c in connection with Art. 68d(4) and Art. 68e(2) CPA – dissemination of misleading information on the housing loans with so called “floating interest rate in Euro”.\textsuperscript{48}

\textsuperscript{48} See also Commission for Protection of Consumers, Order nr. 73 of 26 January 2010 in the case of “Internet Card Finance” where a return of 1% was advertised on all purchase at home and abroad carried out with a certain credit card. However, the offer was not fulfilled. The Commission found that the practice was misleading and issued a cease and desist order.

\textsuperscript{49} See Decision of the Consumer Protection Commission Nr. 17 of 24 February 2011.
received 218 complaints concerning supervision of investment activity, 1095 in the area of supervision of the insurance sector and 513 concerning pension assurance.\textsuperscript{50}

Within the sphere of investment services the most common complaints concerned the transfer of financial instruments without the knowledge of their owners and respectively requests vis-à-vis the FSC to confirm ownership of financial instruments. Other complaints concerned decisions of the managing bodies of the investment companies, allegedly issued in violation of legal rules.\textsuperscript{51}

Within the sphere of insurance services the most common complaints concerned slow processing by the insurance companies of customer compensation claims; refusals to pay compensation, or disagreements as to the level of compensation, as well as omitting to submit adequate and sufficient information. The high number of complaints in the insurance services sector is explained by the FSC by the high number of insured persons. In particular in the area of automobile insurances, given the mandatory character of the civil liability insurance, there are as many as 3,200,000 consumer contracts.\textsuperscript{52}

Within the sphere of supplementary pension insurances according to representatives of the FSC most of the complaints concern fraudulent practices whereby elderly people are forced to undertake commitments or are being misled about basic modalities of the offers. Given the grave nature of many of the violations the FSC tends to refer the cases to the Public Prosecutor’s office.\textsuperscript{53}

In mass cases of questionable practices – like the above described offers of exaggerated rebates, bonuses and other advantages when recruiting clients, leading to a risk for the stability of the whole system, the FSC instead of prosecuting individual infringers uses its rule-making powers and issues Ordinances and Guidelines to clarify and specify the valid sectoral legislation. It may be surmised that this regulatory tool gives the Commission the opportunity to react quickly and efficiently to changed market conditions. On the other hand, there may be a certain risk that such “softer” regulative instruments may go further than European standards even in areas of maximum harmonization.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.


\textsuperscript{52} Interview with member of the FSC in the newspaper “Insurance Press”, Issue 15716 of 17 August to 14 September 2011.

\textsuperscript{53} Interview with member of the FSC with responsibility for consumer protection, and with legal expert at the FSC. See also Aksentieva who regrets the absence of a mediation scheme in the insurance sphere, Aksentieva, Finances and Law, Issue Nr. 11, 2010, p. 75.
2.2.2.2 Cross-border dimensions of most common unfair commercial practices

None of the unfair commercial practices in the area of financial services that were reported in this study had a cross-border dimension. Many of the actors on the financial stage are linked to financial companies having their centre of activity in other EU Member States. However, they typically operate in Bulgaria through a daughter company or related company registered under Bulgarian law.

2.2.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

The financial services market is densely regulated and it seems that rather than filling legislative gaps it is a matter of streamlining available legislation and achieving better division of powers between the regulatory authorities with horizontal and with vertical, sector-specific competence. More can be done in terms of coordinating the efforts of the various authorities and in building one-stop shops for consumer complaints with the joint competence of consumer protection and sectoral regulators.\(^{54}\)

\(^{54}\) See the proposal for a Financial Services Ombudsman, World Bank (2011), pp. 13-14.
2.3 Immovable property

2.3.1 Legislative framework

2.3.1.1 National implementation legislation(s) of the UCPD

The UCPD is transposed into national law through the provisions on unfair commercial practices in Article 68b-l of the Consumer Protection Act. Please see the review under 1.1.1.1. There is no exception for immovable property so the general rules apply also in this sector.

2.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

No such rules have been identified.

b) National legislation regarding misleading actions

Apart from the general rules on misleading actions in the CPA (Article 68e-g, Bulg 68 д-ж CPA), of more direct relevance for immovable property are the rule in Chapter 7 CPA on timeshare, long-term holiday product, resale and exchange contracts. With an amendment of the law from February 2011, the CPA was adapted to implement the new Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

c) National legislation regarding misleading omissions

Article 156 CPA sets out requirements to provide standardized pre-contractual information in accordance with the standard information forms attached to the Timeshare Directive (Annex I-IV). Following Article 159 CPA any advertising shall indicate the possibility for consumers to obtain the information required according to Article 156 and where this information can be obtained.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Article 160 CPA provides that if a timeshare, long-term holiday product, resale or exchange contract is to be offered to a consumer in person at a promotion or sales event, the trader shall clearly indicate in the invitation the commercial purpose and the nature of the event (see Article 4(2) Directive 2008/122/EC). This rule may be seen as aiming to avoid the recourse to disguised promotional events and similar methods to exert undue influence over consumer for the conclusion of time share contracts.

---

55 St. G. nr. 18/2011.
e) Other national legal provisions on unfair commercial practices in the field of immovable property

As mentioned in the outset, apart from the provisions on time share in the CPA, the real estate market remains largely unregulated. The general rules of civil law apply to transactions with immovable property. Recently there have been proposals to introduce mandatory regulation for the activity of real estate brokers. So far their status and marketing activity is only subject to self-regulation. Real estate brokers have their own association, the Bulgarian National Real Estate Association (NREA).  

2.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

There is no particular concept of consumer applicable specifically in the field of immovable property when compared with the concept of ‘consumer’ in general.

2.3.1.4 Level of protection provided by national legislative framework compared to UCPD

Since there is scarce regulation of consumer protection in the area of immovable property the level of protection is that of the UCPD as implemented in the Bulgarian Consumer Protection Act. There are however, no sufficient reported cases of administrative enforcement or case law of the administrative or civil courts to allow for a comprehensive evaluation. The lack of case law is probably indicative of the need for more intense targeted enforcement efforts in this particular sector.

2.3.2 Most common unfair commercial practices in the area of immovable property

2.3.2.1 Description of the most common unfair commercial practices

It appears that the unfair commercial practices in the sphere of real estate markets and in connection with the purchase, rent or use of real estate are very common. The character of these practices is, however, often so serious that they qualify rather as fraud. In the media even the term ‘real estate fraud’ has been coined (имотни измами). It is often a question of offering for sale immovable property that is not actually available, against the knowledge of the real owner; persons presenting themselves as real estate brokers only to get the commission fee, etc. Very often the victims of such practices are elderly people for whom the property is the only source of income and stability. These types of practices, if reported to the Consumer Protection Commission are often referred to the police.  

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

56 See http://www.nsni.bg/?show=home&lang=en&PHPSESSID=ffbf2e3c608643d4b37fc0807bc3ab30.

57 Interview with member of the Consumer Protection Commission.
2.3.2.2 Cross-border dimensions of most common unfair commercial practices

Occurrences of cross-border unfair commercial practices in the sphere of immovable property have been reported by the Bulgarian European Consumer Centre. In 2008 a considerable number of complaints were filed at the Center by British citizens who had concluded contracts for the purchase of immovable property at the seaside or in sea resorts with Bulgarian constructing firms and foreign investors, when the construction had been frozen, allegedly due to the financial crisis. Most of the cases have now been transferred to the general courts. Similar and even graver problems were reported on the BBC Watchdog programme, concerning the, apparently fraudulent practices of the real estate company Bulgarian Dreams which had offices in both the UK and Bulgaria. Defrauded consumers were considering undertaking collective action to recoup their lost investments. These cases have however not reached the Consumer Protection Commission so far. The Commission has itself undertaken action against a web portal for immovable property which provides incorrect information about already sold or rented property.

2.3.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

Given the relatively scarce legislation in this area, the occurrence of unfair commercial practices can partly be linked to legislative gaps. The activity of real estate brokers, but also other parts of the real estate markets seem to be in need of more clear regulatory standards and supervision. There is no public authority or government agency in charge of monitoring the market in this field and maybe the Consumer Protection Commission could take a more active role and enforce the general standards of fair commercial practices in the sector. Legally, there are no barriers to that and the problem may chiefly be an institutional one.


59 See BBC 9 February 2009, Bulgarian Dreams nightmare:
http://www.bbc.co.uk/blogs/watchdog/2009/02/the_bulgarian_dreams_nightmare.html
ANNEX 1: Fact sheet – legal framework and enforcement
### Bulgaria

#### Implementing legislation of the Unfair Commercial Practices Directive (UCPD)

The Directive is implemented in the Consumer Protection Act December 2005. Other relevant implementing legislation:

- Civil Procedure Code
- Competition Act 2008
- Electronic Commerce Act
- Obligations and Contracts Act

#### National legal provisions on unfair commercial practices

**Overview of relevant provisions which are not based on EU legislation**

- Competition Act Article 36 (restrictions on the use of free gifts, prize competitions and other forms of sales promotions)
- Consumer Protection Act Article 67 (restriction on the use of combined offers) and Article 68 (general prohibition of any commercial practice that violates consumers economic interests or the collective interests of consumers)
- Social Insurance Code Article 123i (prohibition of organising lotteries)

These legal provisions of Article 36 Competition Act and Articles 67 and 68 Consumer Protection Act are general provisions which are not confined to the areas of financial services and immovable property.\(^{(a)}\)

#### Reasons why enforcement bodies apply these national legal provisions

Article 36 Competition Act is relatively frequently invoked because the use of special offers and promotions is perceived by competitors as a particularly hard selling technique exerting undue pressure on consumers and distorting consumer choice, especially when the value of the offer is very high.\(^{(a)}\)

Article 123i of the Social Insurance Code seems to be prompted by the desire to combat aggressive marketing techniques for financial services of substantial social importance for the individual.\(^{(a)}\)

#### Relevant case law

**Financial services**

- Decision of the Supreme Administrative Court Nr. 8364 of 27.07.2006 in case No. 11337/2003 (MZK “Evropa” v. ZD “Levski- Spartak”), confirming the decision of the Commission for Protection of Competition No. 176 of 11/11/2003 imposing sanctions on an insurance company for allowing one of its employees to register and maintain an internet site with a domain name identical with that of a competitor and with a purpose of unfairly enticing clients. The Commission for Protection of Competition established no violation of the special provisions on unfair soliciting of customers (then Article 34(1) and Article 33(1) and (2) of the Competition Act) but nevertheless found the conduct to be in conflict with the general clause on good commercial practices.

- Judgment Nr. 10841 of 03.11.2006, case Nr. 4926/2006 on the misleading character of an advertising campaign for housing loans by a major Bulgarian bank. The result was a fine of 100,000 Bulgarian Leva (approximately 50,000 Euro).

**Immovable property**

None reported

#### Enforcement

**Responsibility for enforcing the UCPD**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission for Consumer Protection</td>
<td>Commission for Consumer Protection</td>
</tr>
</tbody>
</table>

**Means of enforcement of UCPD**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>By public law</td>
<td>By public law</td>
</tr>
</tbody>
</table>
### Who can bring an action under the national legislation implementing the UCPD

Public authorities, organisations representing individual consumers, and individual consumers.

### Main obstacles for enforcing unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immoveable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Problems relating to cross-border enforcement of unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immoveable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Companies which carry out questionable practices in Bulgaria may be linked to companies which are based in another EU Member State. However, they typically operate through a daughter company registered in Bulgaria and so cross-border enforcement is not required.</td>
<td>None reported</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immoveable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Codes of conduct and self-regulation

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immoveable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

ANNEX 2: Fact sheet – most common unfair commercial practices reported
### Bulgaria

**Common unfair practices reported in the area of financial services**

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>BG-FS-1</td>
<td>Unsolicited phone calls were made to consumers' cell phones in the attempt to sell financial products, for example insurance products.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>6 1</td>
<td>Life insurance, Health insurance, Major insurance, Travel insurance, Other insurance (home, care, etc.), Stocks or shares, bonds, derivatives, etc., Other financial services</td>
<td>X</td>
<td>Yes</td>
<td>X</td>
</tr>
<tr>
<td>BG-FS-2</td>
<td>Not all information, for example pre-contractual information and contractual information, was given to consumers in advance of the sale of a financial product.</td>
<td>Misleading omission</td>
<td></td>
<td>Complaints data, Other financial services</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BG-FS-3</td>
<td>Consumers were provided with misleading information, or did not receive any information, about the annual rate and the cost of the credit.</td>
<td>Aggressive practice</td>
<td></td>
<td>Warranty issued by enforcement bodies, Decisions or recommendations made by ADR bodies, Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BG-FS-4</td>
<td>Misleading omissions occurred in marketing for some financial products on radio, TV, and in the press. This specifically relates to a bank account that was advertised as a 'salary account' and whose advertising included statements like &quot;we guarantee a 5% increase of your salary!&quot; This advertising created the impression that the higher than normal interest rate would apply for the whole sum of the monthly deposit, but in reality it applied only for part of it and under special conditions which were not clearly stated.</td>
<td>Other unfair commercial practice</td>
<td></td>
<td>Issued a warning about the trader or the practice</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A bank presented the conditions for credit in a misleading fashion. In their advertisements, the bank described the marketed credit rate as being tied to established market indexes (such as EURIBOR) but with a ‘bonus’ increase. Consumers were given the impression that this increase was stable, while in fact it was flexible—the bank changed it regularly depending on market conditions. In the end, this credit offer was therefore far less attractive than initially presented.

A bank delayed publishing standard contract terms.

Investment firms transferred their clients’ investments without their knowledge.

Insurance companies were reluctant to adequately and competently reimburse their clients. For example, claims were processed slowly, compensation was refused, and there were disagreements as to the level of compensation.

Some elderly people were forced into signing pension plan contracts and/or were misled about the basic terms and conditions of the pension plans.

| BG-FS-5 | A bank presented the conditions for credit in a misleading fashion. In their advertisements, the bank described the marketed credit rate as being tied to established market indexes (such as EURIBOR) but with a ‘bonus’ increase. Consumers were given the impression that this increase was stable, while in fact it was flexible—the bank changed it regularly depending on market conditions. In the end, this credit offer was therefore far less attractive than initially presented. | X | X | | X | | X |
|---|---|---|---|---|---|---|---|---|---|
| BG-FS-6 | A bank delayed publishing standard contract terms. | X | X | | | | X | X |
| BG-FS-7 | Investment firms transferred their clients' investments without their knowledge. | X | RF | RF | RF | X | X | X |
| BG-FS-8 | Insurance companies were reluctant to adequately and competently reimburse their clients. For example, claims were processed slowly, compensation was refused, and there were disagreements as to the level of compensation. | X | RF | RF | RF | X | X | X | X |
| BG-FS-9 | Some elderly people were forced into signing pension plan contracts and/or were misled about the basic terms and conditions of the pension plans. | X | X | | | | | | X |


Note: VF: Very frequently, RF: Rather frequently, S: Sometimes.
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>2008</td>
<td>2009</td>
<td>2010</td>
<td>Buying property</td>
<td>Court cases</td>
</tr>
<tr>
<td>BG-IP-1</td>
<td>Apartments were sold to buyers in the UK and Ireland. Buyers paid in full (and some even paid a fee for transfer of the deeds) but did not receive their title deeds. In some cases apartments lacked basic services such as electricity and water. Some buyers paid for furniture from a company recommended by the developer, but only a limited amount of the fixtures and fittings paid for were ever installed. The developer ultimately abandoned the project while still owing money to the bank. The bank then attempted to sell all the apartments, including those which had already been paid for in full but for which the buyer had not received the title deeds.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>BG-IP-2</td>
<td>Misleading, incomplete, or inaccurate information was given in the sale and rental of immovable property. For example, contract terms were written in small print, information requirements were not fulfilled, or information about taxes was not given.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Information provided by European Commission (BG-IP-1); Commission for Consumer Protection (BG-IP-2).
ANNEX 3: References


V. Dzhilizov (2010). Predostavyane na zaemi, obezpecheni sqs zalog na dvizhimi veshti ot zalozhi kqshti (Lending Secured by a Pledge of Movable Property from Pawnshops). Finances and Law. nr. 7 pp. 70-76.


M. Kodžabašev (2006). Promeni v praktikata na KZK otnosno obeštanijata za nagradi kûm prodavanii stoki ili uslugi (Changes in the practice of the Commission for the
Protection of Competition concerning promises to win prizes with the purchase of goods and services), Pazar i pravo, 2006(4), 67-73.


3 Denmark

Document Control

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender No.</td>
<td>Invitation to tender n°JUST/2010/JCIV/PR/0018/A4</td>
</tr>
<tr>
<td>Prepared by</td>
<td>Professor Peter Magelvang-Hansen</td>
</tr>
<tr>
<td>Checked by</td>
<td>Dr. Senda Kara, Harriet Gamper</td>
</tr>
</tbody>
</table>
3.1 Introduction

The Danish implementation of the UCPD in general

The UCPD was transposed into Danish law by Act 1547/2006 (in force from 1 December 2007) amending the Marketing Practices Act.

The rules implementing the UCPD are now found in the Consolidated Marketing Practices Act 839/2009 as amended by Act 535/2010 implementing the Consumer Credit Directive (2008/48/EC) and by Act 621/2011. The latter amendment act abolished the former per se prohibitions against certain discount vouchers and against draws and prize competitions as a direct result of the ECJ rulings of 23/4/2009, stating that the full harmonisation character of the UCPD leaves no room for Member States to prohibit certain trade practices per se in addition to the prohibitions in the Black List in Annex I of the UCPD.

Executive order 1084/2007 on unfair business-to-consumer trade practices, issued under § 3,4 of the Marketing Practices Act, implements the Black List in Annex I of the UCPD and makes violation of any of the 31 per se prohibitions provided in the list a criminal offence.

Whereas immovable property is fully within the scope of the Marketing Practices Act, it applies only partially to financial services. Thus, a number of provisions of the Marketing Practices Act, do not apply to financial institutions, which are instead regulated by the Financial Business Act to the extent that the Minister for Economic and Business Affairs has issued executive orders in the areas concerned. For details, see the following section.

---

1 Cases C-261/07 and C-299/07, VTB-VAB NV v. Total Belgium NV/Galatea BVBA v. Sanoma Magazines Belgium NV.
2 Including mortgage credit.
3 Consolidated Act 885/2011.
3.2 Financial services

3.2.1 Legislative framework

3.2.1.1 National implementation legislation(s) of the UCPD

Generally, the implementation provisions found in the Marketing Practices Act also apply to financial services. However, as indicated above, special rules issued by the Minister of Economic and Business Affairs apply to financial services delivered by financial institutions regulated by the Financial Business Act instead of some of the provisions (specified in § 2.2) of the Marketing Practices Act. This means that financial services performed by banks, insurance companies and mortgage-credit institutions are within the scope of special rules issued by the Minister, whereas retail sellers of goods and other ‘ordinary’ businesses offering financial services are fully within the scope of the Marketing Practices Act.

The exceptions mentioned in the Marketing Practices Act § 2.2 include the general clauses in § 1.1 and § 1.2 of the Marketing Practices Act. The original\(^4\) general clause in the Marketing Practices Act § 1.1 ("exercise good marketing practice with reference to consumers, other traders and public interests") applies not only to B2C but also to B2B practices, and is not limited to the protection of economic interests. In contrast, the general clause of § 1.2 ("marketing concerning consumers’ economic interests must not be likely to distort significantly their economic behaviour") introduced in 2007 in order to implement the UCPD Article 5, applies, as *lex specialis*, to B2C only, and only as far as the protection of the consumers’ economic interests is concerned.

The exceptions mentioned in the Marketing Practices Act § 2.2 also include § 3 (on misleading and aggressive trade practices) implementing UCPD Articles 6-9 and § 12a (invitation to purchase) implementing UCPD Article 7.4.

Rules issued by the Minister of Economic and Business Affairs under the Financial Businesses Act having the effect of replacing some of the provisions of the Marketing Practices Act are found in Executive Order 769/2011 on Good Business Practices for Financial Undertakings and Undertakings for Collective Investment in Transferable Securities (UCITS), issued under § 43,2 of the Financial Business Act,\(^5\) and under § 22,2 of the Act on Undertakings for Collective investment in Transferable Securities (UCITS).\(^6\)

Executive Order 769/2011 applies to Danish and foreign banks, mortgage-credit institutions, insurance companies and UCITS carrying out activities in Denmark (including branches and cross-border services). The executive order does not apply to securities trading.\(^7\)


\(^5\) Consolidated Act 885/2011.


Chapter 2 (§§ 3-6) of Executive Order 769/2011 contains general provisions regarding good business practices applicable to all undertakings within the scope of the order.

According to § 3, “a financial undertaking shall act honestly and loyally towards its customers”. The provision is, within the scope of the Executive Order 769/2011, most likely to be interpreted in line with the general clauses of the Marketing Practices Act § 1,1 and 1,2. The latter provision implements Article 5(1) – 5(4) of the UCPD, see above.

§§ 4 – 5 of Executive Order 769/2011 implement Article 5(5) and Articles 6 to 9 of the UCPD by providing that:

- “A financial undertaking may not use misleading or incorrect statements or omit important information, if this is likely to materially distort the economic behaviour of customers on the market”; (§ 4,1)
- “It shall be possible to document the correctness of statements of actual conditions”; (§ 4,3)
- The facts listed in the UCPD Article 7(4) must be included in invitations to purchase unless they are already clear from the context; (§ 5)
- “Marketing which, in content, form or approach is misleading, aggressive or exposes customers to improper influence, and which is likely to materially distort their economic behaviour is not permitted”; (§ 4,2)
- “The practices listed in annex 1 shall be regarded as unfair in private customer relationships in all circumstances and are not permitted”, (§ 4,4 and Annex I of Executive Order 769/2011. The annex reproduces 21 (of the 31) commercial practices listed in Annex I of the UCPD. The 10 practices in UCPD Annex I, that are not reproduced in the Danish list concerning financial services, are bait advertising, bait and switch, after-sales service in another language, advertorial, claims concerning risk to personal security, ability to cure illness, after-sales service in another Member State, direct exhortation to children, return or safekeeping of products supplied and claims that the trader’s job is in jeopardy. The omission in the Danish list of the said 10 practices seems to be based on the view that these practices have no practical relevance in relation to financial services.

### 3.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

§ 46 of the Financial Businesses Act contains a general (purely national) prohibition against financial institutions’ offers to loan finance their clients’ purchase of shares issued by the bank. The provision is the legislative response to actual cases where bank customers not only lost the amount they invested in the bank, but also had to repay the amount borrowed by the same bank in order to finance the investment. According to its

Annex I, section A and B.
preparatory works, the provision is meant to counteract conflicting interests of a bank with a direct interest in providing capital resources for the bank when advising customers in connection with loan agreements. It also aims to eliminate the risk that the prospect of strengthening the capital resources of the bank through sale of shares outweighs due consideration of the customers’ economic interests:

“§ 46 When a bank, mortgage-credit institution, or insurance company arranges a capital injection under the rules on hybrid core capital and the rules on subordinated loan capital it may not offer retail clients or professional clients loan financing in connection with the capital injection.”

Under the same rule banks are also prohibited from extending loans for the purpose of financing the purchase of shares or warrants in that bank.

The following per se – prohibitions relate to both commercial practices and contract. They may not be within the scope of this study because they concern contract law and, in particular, the rules on the validity, formation or effect of a contract.  

• § 19 of Executive Order 769/2011 on Good Business Practices for Financial Undertakings appears to be purely national: “A bank may not refuse to open an ordinary current account without an individual objective reason. On request the reason shall be provided on paper or in another durable medium.”

• A purely national provision concerning insurance companies’ contracts in general is found in § 3b of the Insurance Contracts Act. According to § 3b an insurance company shall upon request by the customer specify in writing the reason for a refusal to write an insurance as requested. The same rule applies to the company’s termination of an insurance contract.

The following per se prohibitions are not purely national but part of the implementation of other European Directives:

• According to § 16,4 of Executive Order 768/2011 on Investor Protection in connection with Securities Trading a securities dealer must not give advice to the customer on choice of investment or portfolio management unless the dealer receives the information from the client required for the suitability test.

• Under § 18,4 of Executive Order 768/2011 on Investor Protection in connection with Securities Trading a securities dealer is not allowed to

8 Lovforslag nr. L 102, Folketinget 2008 - 09, om statsligt kapitalindskud i kreditinstitutter (Parliamentary Bill 102, 2008 - 09) comment concerning § 16. (download at: www.folketinget.dk).

9 See article 3.2 of Directive 2005/29/EC.

10 Consolidated Act 999/2006.

11 Implements parts, including article 19, of Directive 2004/39/EC on markets in financial instruments (MiFID) and parts of the MiFID Implementation Directive 2006/73/EC.

12 Implements parts, including article 19, of Directive 2004/39/EC on markets in financial instruments (MiFID) and parts
encourage a customer to omit to provide the information required pursuant to the rules on the suitability test and the appropriateness test.

- § 28,1 of Executive Order 768/2011 on Investor Protection in connection with Securities Trading prohibits aggregation of different customer orders or of customer orders with trading for own account,\textsuperscript{13} unless the following conditions have been met:
  
  o It is unlikely that aggregation of the order or transaction will generally disadvantage any customer whose orders are included in the aggregation;
  
  o Customers have been informed that aggregation may disadvantage them with respect to a specific order;
  
  o The securities dealer has laid down and follows an order allocation policy which enables a reasonable allocation of the aggregated orders and transactions, including the significance of the scope and price of orders for allocation and handling part order execution.

Some \textit{per se} prohibitions are not limited to financial services but apply generally. They are most probably not within the scope of the UCPD as they concern the legal requirements related to ‘taste and decency’.\textsuperscript{14}

For example, Act 451/2004 on Certain Consumer Contracts contains a general prohibition against unsolicited communication in person or by telephone with a consumer at the consumer’s residence or workplace or another place to which there is no public access with a view to obtaining, immediately or subsequently, an offer or acceptance of an offer to conclude a contract. Insurance contracts are not within the scope of the Act on Certain Consumer Contracts. However, a similar prohibition against door-to-door selling of insurance contracts is found in the Insurance Contracts Act\textsuperscript{15} § 34b, whereas unsolicited telephone selling of insurance is not prohibited \textit{per se}. The ban on door-to-door sales is purely national and was introduced into Danish legislation in 1978.\textsuperscript{16}

According to the general rule prohibiting spam, see the Marketing Practices Act § 6,\textsuperscript{17} “a trader must not approach anyone by means of electronic mail, an automated calling system or facsimile machine with a view to the sale of products, real property, other

\textsuperscript{13} Implements parts, including article 19, of Directive 2004/39/EC on markets in financial instruments (MiFID) and parts of the MiFID Implementation Directive 2006/73/EC.

\textsuperscript{14} See recital 7 of the preamble in Directive 2005/29/EC.

\textsuperscript{15} Consolidated Act 999/2006.

\textsuperscript{16} Act 139/1978 on Certain Consumer Contracts.

\textsuperscript{17} Implementing the European Directives on Distance Selling (97/7/EC) and concerning the processing of personal data and the protection of privacy in the telecommunications sector (97/66/EC) and on distance sale of financial services (2002/65/EC).
property, labour and services unless the party concerned has requested him to do so”. A supplementary opt-out rule is found in § 6,3 of the same Act:

“A trader must not approach a specific natural person using other means of remote communication with a view to sales as referred to in subsection (1) if the person concerned has declined such communications from the trader, if it may be seen from a list prepared each quarter by the Central Office of Personal Registration (CPR) that the person concerned has declined communications for such marketing purposes, or if the trader, by consulting the CPR, has become aware that the person concerned has declined such communications”.

This provision is part of the implementation of Article 10,2 of the Distance Selling Directive (97/7/EC).

b) National legislation regarding misleading actions

Financial services offered by businesses that are not within the scope of the Financial Businesses Act, are regulated by the general rules of § 1 and § 3 of the Marketing Practices Act and Executive order 1084/2007 on unfair business-to-consumer trade practices, issued under § 3,4 of the Marketing Practices Act, see above.


Specific rules concerning securities trade are found in Executive Order 768/2011 on Investor Protection in connection with Securities Trading, issued under § 43,2 of the Financial Business Act and § 84,6 of the Act on Undertakings for Collective Investment in Transferable Securities (UCITS).

Executive Order 768/2011 applies to Danish securities dealers’ activities in Denmark and in other EU/EEA countries when these are cross-border activities without establishment of a branch, activities in Denmark by securities dealers from third countries, activities in Danish branches of investment firms and credit institutions from EU/EEA countries (but not to cross-border services provided in Denmark carried out by investment firms and credit institutions which have been granted a license in another country within the European Union or a country with which the Community has entered into an agreement for the financial area).

Executive Order 768/2011 contains a general clause in § 5: “A securities dealer shall act honestly and professionally” and rather detailed rules implementing the MiFID

18 Consolidated Act 885/2011.


20 Implements parts of Directive 2004/39/EC on markets in financial instruments (MiFID) and parts of the MiFID implementation Directive 2006/73/EC.
Directive. 21 Thus, § 8 states the general requirement that information which could be received by retail customers shall be clear and not misleading. § 8 also provides more specific requirements concerning special types of information, for example:

- That comparisons of securities transactions, financial instruments or securities dealers, shall be true and balanced, state the source of the comparison and include the key data and assumptions applied;
- That information about historical returns and price developments shall include information on returns and price developments for the previous five years, clearly state the reference period and the source of information, state that the figures are historical and that past returns and price developments cannot be used as a reliable indication of future returns and price developments, and state the consequences of fees, commissions, or other charges, if the information is based on gross returns.

c) National legislation regarding misleading omissions

Financial services offered by businesses that are not within the scope of the Financial Businesses Act, are regulated by the general rules of § 1 and § 3 of the Marketing Practices Act and Executive order 1084/2007 on unfair business-to-consumer trade practices, issued under § 3,4 of the Marketing Practices Act, see above.

Additional specific rules stipulating detailed information requirements are found in the Marketing Practices Act § 14a on information requirements in marketing of consumer credit agreements, Executive Order 1203/2010 on information to consumers about the price of loans and credits and currency rates issued under the Marketing Practices Act § 13,8, and Act 451/2004 on Certain Consumer Contracts § 13 implementing Directive 2002/65/EC on Distance Sale of Financial Services.

Financial undertakings

General rules concerning financial undertakings (banks, insurance companies, mortgage credit institutions and UCITS) are found in Executive Order 769/2011 on Good Business Practices for Financial Undertakings. For details, see section “National implementation legislation(s) of the UCPD” above.

See also the following slightly more specific provisions found in the same Executive Order:

- § 10 (1) A financial undertaking shall provide sufficient information on its own products and services, including differences in prices and terms of alternative products that can meet the customer’s requirements.
- § 10 (2) If there are general differences between customers in determination of interest rates, fees, or other remuneration to the financial undertaking for a given product, said financial undertaking shall inform the customer of this fact before entering into an agreement to supply the

21 Directive 2004/39/EC on markets in financial instruments (MiFID), see the MiFID implementation Directive 2006/73/EC.
service. At the request of the customer, information shall be provided on the customer's conditions that may determine the position of the customer within a given price differentiation.

- § 10 (3) A financial undertaking shall, on the basis of its general knowledge of the market, inform the customer about relevant types of product on the market. Information shall not, however, contain information about competing products or specific prices.

- § 11 In the event that a financial undertaking or its employee/advisor, when providing advice, has a special interest in the result of the advice beyond normal earnings of the undertaking, said undertaking shall, before giving advice, inform the customer of the nature and scope of such special interest.

- § 11 (2) If the financial undertaking receives commission or other remuneration as a result of providing products or services, the customer shall be made aware of this fact. The same shall apply if the attending employee/advisor receives commission or other remuneration and there is a direct link between the specific sale of services or products and the remuneration of the attending employee/advisor.

- § 13 A financial undertaking shall inform a customer of the security measures that should be observed for a given product or service, including the security requirements placed on the customer and the liability of the customer in the event of misuse by a third party.

In addition, reference can be made to the following specific rules stipulating information requirements:

**Banks**

- Executive order 1210/2010 on information to consumers on prices in banks, issued under § 43,3 of the Financial Businesses Act and implementing Directive 2008/48/EC on Credit Agreements for Consumers Articles 4-6;


**Banks and mortgage-credit institutions**

Executive Order 769/2011 on Good Business Practices for Financial Undertakings § 14:

- § 14 (1) Before a bank or mortgage-credit institution enters into an agreement on a loan secured in real estate, the bank or institution shall inform the customer about the relevant types of product on the market and about the advantages and disadvantages of these, see section 10(3).  

---

22 According to Guidelines 86/2009 concerning the interpretation of Executive Order 769/2011 and issued by the
• § 14 (2) For loans offered by the bank or mortgage credit institution or offered on behalf of other banks or institutions, and which can meet the requirements of the customer, advice pursuant to section 7(3) shall include the following:
  o The most important characteristics of the loans supplied or offered by the bank or institution, including the estimated advantages and disadvantages in relation to the customer;
  o The annual costs in per cent (APR) of the relevant loans at the date of the advice;
  o Cancellation and repayment terms, including whether repayment may be by cash payment or by purchasing and submitting bonds;
  o Possibilities and costs for converting the loan or for early repayment;
  o The normal price terms of the institution or bank for its customers and for the relevant loans.

• § 14 (3) For mortgage-credit loans, or loans financed by issuing covered bonds or covered mortgage-credit bonds, advice shall include information about any relationship between the loan and the bond issue as well as about the option for a hedge agreement.

Insurance companies

Executive Order 769/2011 on Good Business Practice for Financial Undertakings §§ 24 and 28:

• § 24 (1) No later than in connection with establishing a non-life insurance contract, an insurance company shall inform the customer about:
  o Important information in the relevant insurance contract, including important elements in the scope of cover of the selected type of insurance, and about the customer's options;
  o The risk of double insurance (where a consumer may already be insured under a general policy);
  o The legislation which shall apply to the contract, if it has been agreed that legislation other than Danish legislation shall apply;
  o The right to complain about the insurance company.

• § 28 When a customer changes insurance company, the recipient insurance company shall inform the customer of all significant limitations in

Financial Supervision Authority, § 14, 1 requires general information only concerning the various types of products on the market, whereas § 14.2 requires specific information concerning loans offered by the financial institution itself.

23 No. 1 and 2 seem to be purely national.

24 § 28 seems to be purely national.
the cover in relation to the previous insurance as well as, on request, advise the customer about specific cover.

- § 28 (2) Before transferring personal insurance the recipient insurance company shall ensure that the customer has been informed about the terms under which the insurance can be taken over by the recipient insurance company.


Concerning securities trade


In addition, purely national specific information requirements are found in Executive Order 345/2011 on Risk-Labeling of Investment Products issued under § 43,3 of the Financial Businesses Act. The Executive Order applies to Danish and foreign financial undertakings that arrange purchases of investment products\(^\text{25}\) for retail investors in Denmark, and to Danish and foreign investment advisors carrying out activities in Denmark.\(^\text{26}\) According to the scheme, the financial undertaking arranging purchases and investment advice must provide information about risk-labeling of the types of investment products they facilitate or for which they provide investment advice. No later than at the time of placement of order, they must inform a retail investor about risk-labeling of the type of investment product to which the order relates.

The types of investment product are divided into the traffic-light categories green, yellow or red, respectively:

- Green applies to investment products where the risk of losing the whole amount invested is to be considered as very small, and if the product type is not difficult to understand.

- Yellow applies to products where there is a risk that the amount invested can be lost wholly or partly, and where the product type is not difficult to understand.

- Red applies to products where there is a risk of losing more than the amount invested, or if the product type is difficult to understand.

---

\(^{25}\) Financial instruments as defined in the Financial Businesses Act Annex A; guarantor certificates and mortgages are within the scope of the Executive Order.

\(^{26}\) It is not applicable to cross-border services provided and carried out by investment firms and credit institutions which have been granted a license in another country within the European Union or a country with which the Community has entered into an agreement for the financial area.
The types of investment products in each of the categories green, yellow and red, are shown in Annex 1 of the Executive Order.

The aim of the scheme is to ensure that retail customers can form a general idea of the possibility of losing the whole investment, or part of it, or more than the amount invested.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

As mentioned above, § 46,1 of the Financial Businesses Act contains a general (purely national) prohibition against financial institutions’ offers concerning loan financing of clients’ purchase of shares in connection with a capital injection.

Executive Order 769/2011 on Good Business Practices for Financial Undertakings § 20 concerning banks seems to be purely national:

- § 20(1) A bank may not attach a progressive beneficial programme to ownership of shares in the bank or deposits of guarantee capital;\(^{27}\)
- § 20 (2) If ownership of shares or deposits of guarantee capital is rendered a requirement for obtaining advantages as a customer, the bank may, as a maximum, require a shareholding with a share price of DKK 30,000 or a deposit of guarantee capital of DKK 30,000 at the date when the customer becomes part of the beneficial program.

e) Other national legal provisions on unfair commercial practices in the field of financial services

Executive Order 769/2011 on Good Business Practices for Financial Undertakings § 21,1 concerning banks seems to be purely national. It states that a bank or mortgage-credit institution may not grant loans against guarantee where the guarantee obligation is out of proportion to the financial situation of the guarantor. The rule aims at protecting individuals, who want to help family members etc. but tend to underestimate the financial risk involved in a guarantee, for example business loans taken out by their children, against ruinous financial collapse.

3.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

Danish legislation normally defines a “consumer” as a person acting mainly outside her or his trade. In the financial legislation exceptions are found in Executive Order 768/2011 on Investor Protection in connection with Securities Trading and in Executive Order 345/2011 on Risk-Labelling of Investment Products which, in accordance with the MiFID Directive, apply the terms “retail customer” and “retail investor” respectively.\(^{28}\) These

\(^{27}\) According to Guidelines 86/2009 concerning the interpretation of Executive Order 769/2011, issued by the Financial Supervision Authority, a “progressive beneficial programme” is a programme which rewards customers who own shares and where the benefits increase gradually the more shares a customer owns. Such programmes are likely to remove the focus of customers from the shares to the benefits connected to the programme so that the customers’ attention is less directed to the risks. Furthermore, the customers may be less inclined to spread their risk.

\(^{28}\) Both concepts are understood as customers who are not “professional customers” or “eligible counterparts” as defined in the MiFID-directive, see Executive Order 768/2011 § 4,1,3) and Tanja Jørgensen and Nina Dietz Legind
concepts are broader than the concept of “consumer” generally applied in consumer protection legislation.

Executive Order 769/2011 on Good Business Practices for Financial Undertakings applies the term “private customer” and defines the general scope of the Order as: “private customer relationships and commercial customer relationships provided these are not significantly different from a private customer relationship” (§ 1.2). However, the rules implementing Directive 2005/29/EC apply to “private customer relationships” only. The term “private customer relationship” is understood in accordance with the concept of “consumer” used in the consumer protection legislation.

3.2.1.4 Level of protection provided by national legislative framework compared to UCPD

The provisions found in Danish legislation implementing the UCPD are supplemented by more specific rules concerning special types of commercial practices in the area of financial services. As indicated, some of these more specific rules are part of the implementation of other European Directives while others are purely national. As also indicated, some of the more specific rules mentioned may be considered, with varying degrees of doubt, to be outside the scope of the UCPD.

The more specific rules, that supplement the provisions implementing the UCPD, can be said to establish a higher level of protection than does the UCPD, in that they specify the content of fairness and/or specify what is typically unfair, misleading or aggressive. On the other hand, this is not necessarily tantamount to saying that the same level of protection could not be reached on the basis of the general, rather vague, criteria of fairness, including the requirements of “professional diligence” and what is “likely to materially distort the economic behaviour with regard to the product of the average consumer”.

Even though the general criteria of the UCPD could lead to the same results as the more specific rules identified, the latter are likely to have greater practical impact, and thus work in a more efficient way, because they more clearly define the requirements to be met by the financial institutions.

3.2.2 Most common unfair commercial practices in the area of financial services

3.2.2.1 Description of the most common unfair commercial practices

In recent years the practices of financial institutions concerning the marketing of investments and advice concerning investments have attracted considerable interest.

In publicised decisions made by the Danish Financial Services Authority (FSA) in 2009 concerning the marketing of Jyske Invest Hedge Markedsneutral - Obligationer the FSA has described in detail the marketing practices used by an investment fund in the summer of 2007.29 In the wake of the financial crisis a dramatic drop occurred in the


29 For a detailed analysis of the cases and their impact in cases brought before the Banking Complaints Board by individual consumers claiming damages covering their loss, see Nis Jul Clausen, Camilla Hørby Jensen and Nina Dietz
prices of investment certificates. The FSA held that the investment fund in its promotional brochure had not given a balanced description of the product, its properties and the risks involved in the investment. The FSA concluded that the investment fund had acted contrary to good business practices.  

The FSA also dealt with the bank that had actually been selling the investment certificates mentioned above to its customers. The FSA concluded that the bank had, in general, not taken steps to redress the imbalance found in the promotional brochure made by the investment fund. Therefore, the FSA held that the bank, when giving advice, had generally acted contrary to its obligation under Executive Order 769/2011 § 7.3, to “provide information on the risks relevant to the customer.”

Stakeholders also mentioned misleading marketing of mortgages and problems with advice given about financial products.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

3.2.2.2 Cross-border dimensions of most common unfair commercial practices

The cases mentioned above and by stakeholders appear to have no significant cross-border dimension.

3.2.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

Generally, misleading practices concerning the marketing of and advice concerning investment products can probably be dealt with adequately both under the general principles and the more specific national rules. It is therefore likely that the cases mentioned above would have had the same outcome if they were decided under the general principles of the UCPD. However, the more specific national rules define the requirements more clearly and therefore can be considered easier to use in practice.


30 See the former rules, now replaced by Executive Order 769/2011, see section “National implementation legislation(s) of the UCPD” above (FSA decision of 8/7/2009).

31 FSA decision of 24/11/2009.

32 Mortgage Credit Complaint Board and FSA responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.
3.3 Immovable property

3.3.1 Legislative framework

3.3.1.1 National implementation legislation(s) of the UCPD

In contrast to financial services, immovable property is fully within the scope of the general rules of the Marketing Practices Act and the Act contains no special rules regarding immovable property. For details concerning the Marketing Practices Act provisions implementing the UCPD, see above.

3.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

Since 1994 the activities of professional real estate agents have been regulated by Real Estate Transactions Act (consolidated Act 1717/2010).

According to § 23 of the Act real estate agents are not allowed to make their services conditional on the seller or buyer buying other services which are not necessary for the proper performance of the agent’s core service. The purpose of this prohibition is to remove pressure against the client and to counteract anti-competitive behaviour by real estate agents who may otherwise use their position vis-à-vis the consumers to insist that they purchase other services, such as house insurance or mortgage-credit, from providers belonging to the same ‘financial supermarket’ as the real estate agent.

b) National legislation regarding misleading actions

Misleading actions are dealt with under the general rules of the Marketing Practices Act.

c) National legislation regarding misleading omissions

In addition to the general rules of the Marketing Practices Act implementing Directive 2005/29/EC, reference is made to the following rules that are purely national:

The Real Estate Transactions Act § 13 requires that a real estate agent gives both parties of the transaction the information necessary for the transaction and its performance, including specific information on the possibility to and need to obtain a technical report on the physical condition of the building from a chartered surveyor according to specific rules, and specific information on the potential need of both parties to take out an insurance covering hidden defects.

According to § 5 of the same Act sales advertisements and other marketing materials must state the cash price.

§ 7 of the same Act requires that real estate agents inform the consumer if the agent has any financial or personal interest in the financing, insurance or other services chosen by the consumer in connection with the transaction.

33 Including mortgage loans.

34 Real estate transactions concerning buildings for accommodation, not including mortgage loans.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

See above information concerning § 23 of the Act of Real Estate Transactions.

No other specific national provisions relating to the immovable property sector have been identified.

3.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

The Marketing Practices Act and the Real Estate Transactions Act apply the concept of “consumer” normally applied in Danish legislation, that is to say a person acting mainly outside his or her trade. See above.

3.3.1.4 Level of protection provided by national legislative framework compared to UCPD

In the area of immovable property the general rules of the Marketing Practices Act, implementing the UCPD, are supplemented by only a few more specific rules, which are purely national, see above. The more specific rules, that supplement the provisions implementing the UCPD, can be said to establish a slightly higher level of protection than does the UCPD, in that they, in certain respects, specify the content of fairness or specify what is typically unfair, misleading or aggressive.

Even though the general criteria of the UCPD could lead to the same results as the more specific rules identified, the latter are likely to have greater practical impact, and thus work in a more efficient way, because they more clearly define the requirements to be met by the real estate agents.

3.3.2 Most common unfair commercial practices in the area of immovable property

3.3.2.1 Description of the most common unfair commercial practices

In recent years – dominated by a drop in prices of immovable property and decreased sales – some real estate agents have used a practice of stating unrealistically high ‘before’ prices which may give the impression that the ‘now’ price is more advantageous to the buyer than is actually the case. Specifically, they stated that a certain property was on the market now for less than it used to be, in order to give the buyer the impression they were getting a bargain. However, this ‘before’ price is not considered relevant because the difference is not actually something the buyer is saving, but rather reflects stagnation in the market.  

Another type of case has been a lack of transparency in pricing by using sales promotions when advertising immovable property. This means including, for example, a ‘free’ car (or other good) in the price to be paid for the immovable property. This causes the price charged for the immovable property itself to be less transparent, since it is unclear whether the car is ‘free’ in reality or is actually included in the price quoted for the

36 Interview with the Danish Consumer Ombudsman, July 2011.
property. However, the number of complaints received about this type of practice has been very low.\(^{37}\)

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

3.3.2.2 **Cross-border dimensions of most common unfair commercial practices**

The cases mentioned appear to have no cross-border dimensions.

3.3.2.3 **Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation**

The practices mentioned seem to be adequately covered by the rules implementing the UCPD.

---

\(^{37}\) Interview with the Danish Consumer Ombudsman, July 2011.
ANNEX 1: Fact sheet – legal framework and enforcement
### Denmark

#### Implementing legislation of the Unfair Commercial Practices Directive (UCPD)

- Executive Order No. 769 of 27/6 2011 on Good Business Practice for Financial Undertaking
- Executive Order No. 1253 of 24 October 2007 on Good Business Practice for Insurance Intermediaries
- Order 1084 of 14 September 2007
- Act no 1547 of 20 December 2006 amending the Danish Marketing Practices Act
- The Marketing Practices Consolidation Act 2005
- Act No. 451 of 9 June 2004 on Certain Consumer Contracts

#### National legal provisions on unfair commercial practices

**Overview of relevant provisions which are not based on EU legislation**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Executive Order no. 769 of 27/6 2011 on Good Business Practices</td>
<td>Real Estate Transactions Act</td>
</tr>
<tr>
<td>Articles 3, 4 and 5 of the Executive Order on Good Business Practices implement the UCPD, while the remaining articles include provisions which are not harmonised in the UCPD such as advice.</td>
<td></td>
</tr>
<tr>
<td>§ 3b and § 34b of the Insurance Contracts Act</td>
<td></td>
</tr>
<tr>
<td>§ 46 of the Financial Businesses Act</td>
<td></td>
</tr>
</tbody>
</table>

**Reasons why enforcement bodies apply these national legal provisions**

According to the Danish FSA, in the area of financial services the Executive Order on Good Business Practices goes further than Article 5(2)(b) of the UCPD. The material distortion test in Article 5(2)(b) of the Directive is not applied in the Executive Order and one can in fact violate the Order without having the material distortion test. In Denmark, the material distortion test is not applied, but a more flexible regime exists, saying that a financial undertaking shall act honestly and loyally towards its customers. The expressions ‘honest’ and ‘loyal’ in this context have no specific definition in law, but they have evolved in practice. There are some guidelines to the Executive Order providing some notion of what is meant by acting loyally and honestly towards the customer. This means that the national legislation is more flexible as it is not necessary to prove that the unfair commercial practice is distorting the economic behaviour of consumers on the market.

The Consumer Ombudsman commented that Denmark has had provision on unfair commercial practices for a long time as the Marketing Practices Act dates back to 1975. Many cases and decisions of the Consumer Ombudsman regarding goods and services have been applied since then, some of which may also apply to immovable property. Danish general provisions on good marketing practices and professional diligence are more or less the same as unfair commercial practices in the Directive, though it may differ from sector to sector what is considered good marketing. This also applies to the ban on misleading practices and omissions and the use of sales promotions. For example, the information duty regarding for instance the use of sales promotions is applicable wherever the promotion applies to goods and services or immovable property. In Denmark, there have not been many problems with the implementation of the Directive, as there have been provisions for many years which are more or less the same as the UCPD, and these are well established.

**Relevant case law**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>The following case laws are judicial decisions of the Danish High Court:</td>
<td>None reported</td>
</tr>
<tr>
<td>U.2007.2905H concerned unrequested e-mails about a computer fair sent by an IT company to addresses the IT company had received in connection with its regular sales. The company was fined.</td>
<td></td>
</tr>
<tr>
<td>U.2008.161/2H concerned a law firm which was fined for violating the ban in the Marketing Practices Act on giving a discount by using coupons put at the consumer’s disposal prior to a purchase.</td>
<td></td>
</tr>
<tr>
<td>U.2010.2561H concerned an injunction against the marketing of a product which constituted an illegal imitation.</td>
<td></td>
</tr>
<tr>
<td><strong>Enforcement</strong></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>Responsibility for enforcing the UCPD</strong></td>
<td></td>
</tr>
<tr>
<td>Financial services (including financial services related to immovable properties such as mortgages)</td>
<td>Immovable property (Danish Consumer Ombudsman)</td>
</tr>
<tr>
<td>Danish FSA (Finanstilsynet)</td>
<td></td>
</tr>
<tr>
<td><strong>Means of enforcement of UCPD</strong></td>
<td></td>
</tr>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>By public law</td>
<td>By public law</td>
</tr>
<tr>
<td><strong>Who can bring an action under the national legislation implementing the UCPD</strong></td>
<td></td>
</tr>
<tr>
<td>Public authorities, ombudsman, organisation representing consumer interests, competitors, trade associations and individual consumers. Besides the Consumer Ombudsman organisations, firms and individuals with a ‘sufficient legal interest’ have standing to sue under the Marketing Practices Act. The Danish FSA commented that the Financial Business Act is enforced by them. The Consumer Ombudsman can take civil lawsuits including class actions to court on behalf of consumers if violation of the Good Business Practices has led to consumer detriment.</td>
<td></td>
</tr>
<tr>
<td><strong>Main obstacles for enforcing unfair commercial practices legislation reported</strong></td>
<td></td>
</tr>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>The Danish FSA reported that for commercial practices which are banned in all circumstances, for misleading actions, misleading omissions, aggressive practices, and other unfair commercial practices the main obstacle is the fact that information about unfair practices is partly reported by consumers or others. The FSA conducts investigations of marketing material for example by conducting sweeps of marketing material on the internet. However new marketing material does not have to be authorised by the Danish FSA prior to the beginning of a marketing campaign. The FSA therefore also rely on consumers, competitors and the press to inform them about unfair behaviour.</td>
<td></td>
</tr>
<tr>
<td><strong>Problems relating to cross-border enforcement of unfair commercial practices legislation reported</strong></td>
<td></td>
</tr>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
<tr>
<td><strong>Codes of conduct and self-regulation</strong></td>
<td></td>
</tr>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>Finance and Leasing Code on best practice/good behaviour</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Denmark

#### Common unfair practices reported in the area of financial services

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>DK-FS-1</td>
<td>Essential information regarding financial products and services was not included in some advertising.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>2008</td>
<td>Life insurance, Health insurance, Motor insurance, Travel insurance, Other insurance (home, care, etc.), Stocks or shares, bonds, derivatives, etc., Other investment plans, Private pension plans, Savings account, Current account, Mortgage, Credit card, Other retail financial service, Other financial service</td>
<td>X X</td>
<td>X X X X</td>
<td>Don’t know</td>
</tr>
<tr>
<td>DK-FS-2</td>
<td>Financial products and services were misdescribed in some advertising.</td>
<td>Practice banned in my country, but not included in the Black List (Annex I) of the UCPD</td>
<td>2009</td>
<td>Life insurance, Health insurance, Motor insurance, Travel insurance, Other insurance (home, care, etc.), Stocks or shares, bonds, derivatives, etc., Other investment plans, Private pension plans, Savings account, Current account, Mortgage, Credit card, Other retail financial service, Other financial service</td>
<td>X X</td>
<td>X X X X</td>
<td>Yes X X X X</td>
</tr>
<tr>
<td>DK-FS-3</td>
<td>The advice and information given about some financial products, most often mortgage products, can be problematic and/or lacking.</td>
<td>Misleading omission</td>
<td>2010</td>
<td>Life insurance, Health insurance, Motor insurance, Travel insurance, Other insurance (home, care, etc.), Stocks or shares, bonds, derivatives, etc., Other investment plans, Private pension plans, Savings account, Current account, Mortgage, Credit card, Other retail financial service, Other financial service</td>
<td>X X</td>
<td>X X</td>
<td>Yes X X X X</td>
</tr>
<tr>
<td>DK-FS-4</td>
<td>Some advice given around the purchase of financial products was not sufficient and/or balanced. In one example, advice given around the purchasing of investment products did not adequately explain the disadvantages of the products; it focused only on the advantages. The consumer therefore did not have a fair basis on which to make decisions.</td>
<td>Other unfair commercial practice</td>
<td>2011</td>
<td>Life insurance, Health insurance, Motor insurance, Travel insurance, Other insurance (home, care, etc.), Stocks or shares, bonds, derivatives, etc., Other investment plans, Private pension plans, Savings account, Current account, Mortgage, Credit card, Other retail financial service, Other financial service</td>
<td>X X</td>
<td>X X</td>
<td>Yes X X X X</td>
</tr>
</tbody>
</table>

Source: Danish Bankers Association (DK-FS-1); Finanstilsynet (Danish FSA) (DK-FS-2; DK-FS-4); The Danish Mortgage Complaint Board (DK-FS-3).
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>DK-IP-1</td>
<td>Brokers sometimes misleadingly used &quot;was / now&quot; prices to speed up the sale of immovable properties. Specifically, they stated that a certain immovable property was on the market now for less than it used to be, in order to give the buyer the impression they were getting a bargain. However, this &quot;was&quot; price is not considered relevant because this is not actually something the buyer is saving, but rather reflects stagnation in the market.</td>
<td>Broke banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X X S S S X</td>
<td>X X</td>
<td>Citation data, decisions by enforcement bodies</td>
<td>No</td>
<td>Referred consumer(s) to relevant enforcement body such as ADR or ombudsman, initiated procedure for judicial decision, issued guidance for businesses, referred a warning about the trader or the practice</td>
</tr>
<tr>
<td>DK-IP-2</td>
<td>Brokers used sales promotions, such as &quot;buy this house and get a car for free,&quot; which decreases transparency. This is because while the broker may state the value of the house in the deal, it is very hard to estimate the &quot;real value&quot; of a house, and therefore it is impossible for the consumer to tell whether they are really getting a &quot;free car&quot; or whether they are actually paying for the car in the (inflated) price of the house.</td>
<td>Broke banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X X S S S X</td>
<td>X X</td>
<td>Citation data, decisions by enforcement bodies</td>
<td>No</td>
<td>Referred consumer(s) to relevant enforcement body such as ADR or ombudsman, initiated procedure for judicial decision, issued guidance for businesses, referred a warning about the trader or the practice</td>
</tr>
</tbody>
</table>

Source: Danish Consumer Ombudsman (DK-IP-1; DK-IP-2).

Note: VF: Very frequently, RF: Rather frequently, S: Sometimes.
ANNEX 3: References


Lovforslag nr. L 102, Folketinget 2008-09, om statslig kapitalindskud i kreditinstitutter *(Parliamentary Bill 102, 2008-09)* (download at: www.folketinget.dk).


<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender No.</td>
<td>Invitation to tender n° JUST/2010/JCIV/PR/0018/A4</td>
</tr>
<tr>
<td>Prepared by</td>
<td>Dr. Charlotte Pavillon, based on a text prepared by Professor Elise Poillot</td>
</tr>
<tr>
<td></td>
<td>October 2011</td>
</tr>
<tr>
<td>Checked by</td>
<td>Dr. Senda Kara, Dr. Frank Alleweldt, Harriet Gamper</td>
</tr>
</tbody>
</table>
4.1 Introduction

A comprehensive act on unfair commercial practices does not exist in French law. In the battle against unfair commercial practices, consumers and enforcers could and still can rely on the Civil Code (such as the provision on fraudulent concealment, Article 1116)\(^1\) and the Criminal Code (such as Articles 223-15-2 to 223-15-4 on the fraudulent abuse of a person’s ignorance or weakness, 313-1 on fraudulent obtaining and 314-1 on the fraudulent breach of trust). Since the early 1990s, consumers are also protected by the Consumer Code.\(^2\) When it came into force, this Code mainly consolidated existing consumer protective legislation, some of it being of European origin, like the provisions on misleading advertising and unfair contract terms. Legislation pertaining to commercial practices was inserted into Book I, Title II on Commercial Practices, which is divided into Regulated and Illegal Commercial Practices (respectively Chapter 1 and 2).

The UCPD was implemented in Book I, Title II of the Consumer Code.\(^3\) A (new) preliminary Chapter to Book I, Title II contains the general clause laid down in Article 5 UCPD. The provisions implementing the misleading clauses of Articles 6 and 7 UCPD and the ‘black list’ of misleading practices have been inserted into Book I, Title II, Chapter 1 on Regulated Commercial Practices (Articles L 121-1 to L 121-7). The provisions implementing Articles 8 and 9 UCPD on aggressive commercial practices and the ‘black list’ of aggressive practices have been added to Book I, Title II, Chapter 2 on Illegal Commercial Practices (Articles L 122-11 to L 122-15).

The French provisions implementing the UCPD are enforced by both criminal and private law. The national supervisory authority in charge of controlling unfair practices (DGCCRF) has powers granted to it by law: it identifies contraventions of the Consumer Code and draws up reports to be sent to the public prosecutor, who decides whether or not to pursue the case. In line with Community law, in particular Regulation 2006/2004/EC on consumer protection cooperation, the DGCCRF has been given powers of injunction, suspension and settlement.\(^4\) The DGCCRF has the competence to seek civil injunctions to require the cessation of the infringement of the UCPD provisions laid down in the Consumer Code (Article L 141-1 Consumer Code). Consumer organisations like UFC Que Choisir may also undertake civil actions.

The transposition of the UCPD into French law did not end with its insertion into the Consumer Code. In May 2011, some existing provisions in both Chapters of Book I, Title

\(^{1}\) All the integral translations of French Codes’ articles are official translations, taken from the official website www.legifrance.gouv.fr.

\(^{2}\) However, in case of a ‘conflict of qualification’ between Article L 121-1 Consumer Code regarding misleading practices, and Article 313-1 Criminal Code, a French judge will most likely apply the latter, as the penalty is much stricter (2 years imprisonment and a €37,500 fine v 5 years imprisonment and a €375,000 fine).

\(^{3}\) The UCPD has been implemented into French legislation by the Law 2008-3 of 3 January 2008 on developing competition for consumers’ welfare and the Law 2008-776 of 4 August 2008 on Modernising the Economy.

II were amended to be in conformity with EU case law.\textsuperscript{5} The commercial practices formerly prohibited by Articles L 121-35 (sales with gifts),\textsuperscript{6} L 121-36 (commercial lottery and sweepstake advertising) and L 122-1 (tied sales) must now be reviewed under the general clause laid down in Article L 120-1 Consumer Code before being condemned. These provisions can be considered as ‘other’ national legislation regarding unfair commercial practices in general.

All the above-mentioned legislation applies to the fields of financial services and immovable property.

No explicit exceptions were made to the scope of the provisions transposing the UCPD (par. 1.2.1.1 and 1.3.1.1). Many general provisions not emanating from European Directives and relating to consumer information and commercial practices included in Book I of the Consumer Code apply to the fields at stake in this report.\textsuperscript{7} This holds for example for the provisions banning the abuse of a person’s weakness or ignorance in order to get them to subscribe, by means of home visits, to cash or credit obligations in whatever form these may take (Articles L 122-8\textsuperscript{8} and L 122-9\textsuperscript{9} Consumer Code).

Both sectors are also subject to a certain amount of specific legislation, which will be dealt with in this report.\textsuperscript{10} Regarding financial services, relevant provisions are spread throughout various Codes such as the Consumer Code, the Monetary and Financial Code, the Insurance Code, the Social Security Code and the Mutual Insurance Code. As for immovable property, the relevant legislation is again to be found in various Codes

\textsuperscript{5} Law 2011-525 of 17 May 2011. Cf. the decisions of the ECJ 23 April 2009, joint cases VTB-VAB (C-261/07) & Galatea (C-299/07) and ECJ 9 November 2010, case Mediaprint (C-540/08).

\textsuperscript{6} Article L 121-35 does not apply to goods or services of ‘low value’ or financial gifts.

\textsuperscript{7} Some practices may be relatively unusual in the sector of immovable property. However, in some cases combined offers as defined in Article L 121-35 may occur – for example the rental of a holiday flat combined with services such as access to ski slopes, private beaches, or a spa for a certain period, or rental of a flat combined with services such as insurance, cleaning of the flat, and/or supply of goods such as household and bathroom linen. As a result, the cost of the renting could be substantially higher than it would have been, had these various services not been supplied.

\textsuperscript{8} ‘Anyone who may have taken advantage of a person’s weakness or ignorance in order to get them to subscribe, by means of home visits, to cash or credit obligations in whatever form these may take, shall be punished by five year imprisonment and a 9,000 Euro fine or just one of these penalties, where circumstances indicate that this person was not in a position to assess the impact of the undertakings given or to detect the ruses or tricks employed to convince him or her to subscribe to them or show that said person has been subjected to duress.’

\textsuperscript{9} ‘The provisions of Article L 122-8 are applicable, under the same circumstances, to undertakings obtained: 1° either subsequent to canvassing by telephone or fax; 2° or subsequent to personalised soliciting, without said soliciting necessarily being by name, to visit a place of sale; taking place at home and accompanied by the offer of particular benefits; 3° or upon the occasion of meetings or excursions organised by the person committing the offence or to his advantage; 4° or when the transaction was carried out in places not intended for the marketing of the goods or services proposed or within the scope of fairs or shows; 5° or when the transaction was concluded in an emergency making it impossible for the victim of the offence to consult one or more qualified professionals, third parties or to the contract.’

\textsuperscript{10} This specific legislation does however not constitute legislation on unfair commercial practices in the fields of financial services and immovable goods as such but legislation regulating commercial practices in those fields.
such as the Consumer Code, the Tourism Code, and the Criminal Code, but also in some very specific legislation dealing with the rent or the sale of immovable property. Strictly considered, there are very few provisions that directly deal with (unfair) commercial practices in the fields of immovable property and financial services. Most provisions concern detailed (pre-contractual) information duties whose breach might, by analogy with Article 7(5) UCPD, be regarded as a misleading omission
4.2 Financial services

4.2.1 Legislative framework

4.2.1.1 National implementation legislation(s) of the UCPD

Book I, Title II, Chapter 1 and 2 of the Consumer Code which implement the provisions of the UCPD apply to financial services (see par. 1.1).

Beside the DGCCRF, two agencies are specifically responsible for the enforcement of the UCPD-provisions in the field of financial services. The Autorité des Marchés Financiers (AMF) is in charge of monitoring financial markets. Its competences are similar to those of the Autorité de Contrôle Prudentiel (ACP, cf. Article L 612 et seq Monetary and Financial Code) which has monitored the activity of banks and insurance companies since 2010. AMF and ACP work closely together. Both authorities control, investigate and sanction the conduct of financial service providers. However, their disciplinary powers are connected to their monitoring role. The authorities cannot replace the national (criminal) courts in sanctioning the infringement of the provisions of the Monetary and Financial Code.

In the field of financial services there is also some self-regulation (although there is little tradition of self-regulation of commercial practices). Worth mentioning are the Code of Conduct of the French Banking Federation and the Standards of the Banking Profession. The French Federation of Insurance Companies and the French Asset Management Association have also adopted codes of conduct concerning advertising on life insurance and Undertakings for Collective Investments in Transferable Securities (UCITS). Banks as retailers of these products have to comply with the provisions of these Codes. Respondents stated that their provisions are more specific than the UCPD provisions and are adapted to the products concerned. ADR in France is considered to be quite effective by some respondents, but not very effective by others.

---


13 See responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services. UFC Que Choisir remarked that ADR is not very effective and commented that there is no independent ombudsman in France in the banking sector. All banking ombudsmen services are funded by banks and so they are not considered to be independent. The only truly independent ombudsman in France in the banking sector is the AMF (Autorité des Marchés Financiers) mediator, but it has competence only in pure financial products.
4.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

Monetary and Financial Code: banking services
General prohibitions on tied sales, as well as sales and services with free gifts included in the Consumer Code have been tempered to be in conformity with ECJ case law (see above). Article L 312-1-2 of the Monetary and Financial Code however still prohibits these practices as far as services offered by banks are concerned: it bans tied offers and sales with incentives for deposit and payment accounts. According to this article promotional activities like the selling or offering for sale of bundled banking products or services is prohibited, unless the products or services included in the bundled offer may be purchased individually or are indissociable. The selling or offering for sale of banking products or services to a customer which give immediate or eventual entitlement to a pecuniary advantage or a benefit in kind in the form of products, goods or services of a value above a threshold set in relation to the type of product or service offered to the customer is also prohibited. By banning tied offers and regulating sales and services with free gifts in the Monetary and Financial Code, the French legislator has opted for a higher level of consumer protection in the field of banking services. Under the Monetary and Financial Code, there are also restrictions on the doorstep-selling of financial products (Article L 341-10). Asking for advance payment is for example prohibited (Article L 341-15).

Consumer Code: consumer credit
The Consumer Code contains provisions which strictly regulate the advertising of the credit offer. Some types of advertising are simply banned. According to Article L 311-5(3) of the Consumer Code it is not allowed to advertise that a loan may be granted without documentary proof of the borrower’s financial position, or to suggest in any advertising that the loan gives rise to increased resources or makes an automatic financial reserve available, without any identifiable financial particulars. According to Article L 311-5(4) Consumer Code, it is prohibited to refer to the possibility not to repay the instalments before a three month period, except for specific loans supported by the State (‘driving license loan’ or loans financing higher education studies). Article L 311-5(5) prohibits consumer credit being advertised with any form of inducement such as a ‘bonus

14 Monetary and Financial Code Article L 312-1-2(1)
15 Monetary and Financial Code Article L 312-1-2(2). A ministerial order of 11 August 2003 provides that in no case shall the value of the advantage exceed 80 Euro.
16 The doorstep-selling of equity release loans (or remortgage) is banned by Article L 314-4 Consumer Code.
17 ‘All canvassers are prohibited from receiving cash, negotiable debt instruments, securities, bearer cheques or cheques made out to them, or payment in any other form, from the persons canvassed, subject to provisions of Article L 341-16-II.’
payment’ or any kind of ‘prize’. The UCPD and Directive 2008/48/EC on credit agreements for consumers do not explicitly prohibit such practices.\footnote{The infringement of Article L 311-5 is sanctioned by a fine of €1,500 Euro (Article 311-49 Consumer Code).}

The Consumer Code also embraces some provisions on the conclusion and content of the consumer credit agreement, which prohibit practices that are not included in the black list of the UCPD and which do not transpose the Consumer Credit Directive. Article L 311-10-1 of the Consumer Code provides that when the conclusion of a consumer credit agreement gives or may give immediate or eventual entitlement to a benefit in kind in the form of products or goods, the value of the latter shall not exceed €80 Euro. In the specific context of revolving credit (a type of credit that does not have a fixed number of payments, in contrast to instalment credit), Article L 311-17 prohibits tying commercial advantages linked to a credit card to the use of this credit.\footnote{Those payments are used to constitute capital during periods and under conditions laid down in the credit agreement or in an ancillary agreement, for an amount exceeding €1,000 Euro as fixed by Article 8 Decree 2011-136 of 1 February 2011.} Article L 311-20 forbids the creditor to require the borrower to sign one or more prior credit offers for a total capital amount which is higher than the value payable on credit for the goods purchased or the services supplied.\footnote{This provision is quite new and prohibits forcing consumer’s to buy the bank’s insurance.}

Article L 311-28 of the Consumer Code touches upon free credit offers. According to this article, when a financing transaction involves total, or partial, meeting of the costs, the creditor may not ask the borrower for a sum of money in excess of the lowest price actually charged for the purchase of a similar item or service in cash in the same retail establishment, during the last thirty days before the start of the advertising or the offer. The creditor must, in addition, offer a price for cash payment that is less than the sum proposed for credit purchase or rental. This provision both forbids the creditor to include the cost of the credit in the transaction and obliges him to inform the consumer about the exact price of the good or product.

\textit{Consumer Code: credit agreements relating to immovable property/housing loans}

The provisions on credit for land purchase of the Consumer Code (which fall outside the scope of the Consumer Credit Directive) also embrace prohibitions on certain types of advertising and commercial practices surrounding the conclusion of the contract. Article L 312-6 Consumer Code stipulates that any advertising categorising monthly repayments as rental payments or referring, for the calculation of instalments, to social security benefits which are not guaranteed throughout the duration of the contract is forbidden. This provision targets a specific group of consumers, mainly the poorest ones, who could be influenced by the reference to social security benefits, which cannot be considered as a regular income.\footnote{This practice could easily fall within the scope of application of Article 6 UCPD, as such information is ‘untruthful’ even if ‘factually correct’, concerns the ‘price or the manner in which the price is calculated’ and is likely to distort the}
Article L 312-9 Consumer Code deals with group insurance policies guaranteeing the lender against some or all loss caused by default by the borrower. According to this Article a bank may not refuse another (cheaper) credit insurance contract than the one it is offering when the level of guarantee is similar. Any refusal to do so must be duly motivated. In return for its acceptance of another insurance contract than its own, the bank may not modify the conditions of the rate of the loan, fixed or variable, indicated in the credit offer. Article L 312-11 Consumer Code provides that until acceptance of the offer by the borrower, no advanced payment may be made, by virtue of the transaction in question, by the lender to the borrower or on the latter’s behalf, nor by the borrower to the lender.

**Consumer Code: provisions common to both types of credit**

Anyone who grants another a usurious loan or knowingly contributes for any reason and in any way, whether directly or indirectly, to the obtaining or granting of a usurious loan or a loan that may become usurious in the sense of Article L 313-3 due to his or her contribution is punishable by a two year imprisonment a 45,000 Euro fine or only one of these two penalties (Article L 313-5 Consumer Code). Under Article L 313-3 Consumer Code, a usurious loan is defined as any contractual loan granted at an annual percentage rate which, at the time of its granting, is more than one third higher than the average percentage rate applied by the credit institutions during the previous quarter for loans of the same type presenting a similar risk factor.

**b) National legislation regarding misleading actions**

French law does not explicitly ban commercial practices as misleading actions outside the framework of Book I, Title II, Chapter 1 on Regulated Commercial Practices (Articles L 121-1 to L 121-7) of the Consumer Code. In the field of consumer credit there are, however, a few provisions which aim at preventing consumers from being actively misled. The advertising practice banned by Article L 312-6 Consumer Code (referring to social security benefits) would for example easily qualify as a misleading action.\(^\text{23}\) The same goes for Article L 311-5(3) Consumer Code (suggesting that the loan gives rise to increased resources).

**c) National legislation regarding misleading omissions**

French law does not explicitly ban commercial practices as misleading omissions outside the framework of Book I, Title II, Chapter 1 on Regulated Commercial Practices (Articles L 121-1 to L 121-7) of the Consumer Code. However, as the UCPD categorises the infringement of a legal information duty as a misleading omission (see the non-exhaustive list to which Article 7(5) UCPD refers), a closer look will be taken at some economic behaviour of the average member of the group. A per se ban of this practice however offers more protection.

\(^{23}\) This practice falls within the scope of application of Article 6 UCPD, as such information is ‘untruthful’ even if ‘factually correct’, concerns the ‘price or the manner in which the price is calculated’ and is likely to distort the economic behaviour of the average member of the group. A per se ban of this practice however offers more protection.
national information disclosure duties on the part of financial service providers. Those duties aim at preventing misleading omissions.

Most of the information duties on the part of financial service providers stem from European Directives. The focus will be on information duties which do not literally implement these Directives provisions.

**Consumer Code: distance selling of consumer financial services**

In the framework of the distance selling of financial services, specific information must be delivered to consumers. In this context, French legislation mainly reproduces the provisions of Directive 2002/65/EC concerning the distance marketing of consumer financial services. The French legislator however specified the information requirements included in the Directive on a few points. For example, although Article 3(1) of the Directive only provides that information must be delivered about the ‘supplier’, Article L 121-10-10 Consumer Code requires information on “the name, the professional address, and if necessary the name of his representative and his intermediary”.

**Consumer Code: consumer credit**

Provisions regarding consumer credit agreements mainly reproduce the requirements of the Consumer Credit Directive in terms of information to be provided to consumers. The French legislator however went a few steps further than the Directive. French legislation on consumer credit is known for its formalism. It regulates in detail the advertising and drafting of the credit agreement by imposing extensive information and transparency requirements.

Article L 311-5(1) Consumer Code holds that in all written advertising, regardless of the medium used, the information relating to the nature of the transaction, its term, the annual percentage rate, where applicable, and, where a promotional rate is offered, the period during which the said rate is applicable, the ‘fixed’ or ‘revisable’ nature of the annual percentage rate and the amount of the instalments shall be indicated in a character size at least as large as that used to indicate any other information relating to the particulars of the transaction and shall feature in the main body of the advertising text. This means that professionals may not mention the promotional rate (lasting a few months) in larger characters than the rate that will be applied after these months. Such requirements are more precise than the ones included in the European provision Article L 311-5 is transposing.

Article L 311-8-1 requires the trader who proposes to the consumer a credit agreement under which payments made by the consumer do not give rise to an immediate amortization of the total amount of credit but to revolving credit, to also propose, as an alternative, a credit agreement which actually leads to an immediate amortization. This

---

24 The Monetary and Financial Code for example provides the information to be delivered with regard to deposit accounts (Article L 312-1-1) and single payments (Article L 314-11). These provisions mainly result from the implementation of Directive 2007/64/EC on payment services. The French government added that banks must inform their consumer at least once a year about the fees they have charged. Article L 121-20-8 Consumer Code implements the Financial Services Directive.
obligation goes beyond the requirements of the Consumer Credit Directive which only holds that the pre contractual information shall include a clear and concise statement that such revolving credit agreements do not provide for a guarantee of repayment of the total amount of credit drawn down under the credit agreement, unless such a guarantee is given (see Articles 5(5) and 10(4) of the Consumer Credit Directive).

Consumer Code: credit agreements relating to immovable property/housing loans

Articles L 312-4 and L 312-5 Consumer Code establish the information requirements relating to the advertising of credit for the purchase of an immovable property. Article L 312-8 defines in detail the way information that must be mentioned in the credit offer. Article L 312-9 determines the specific information to be provided when the lender offers the borrower or asks the latter to take part in a group insurance policy, that has been taken out with a view to guaranteeing, in the event of the occurrence of one of the risks defined by said policy, either the total or partial reimbursement of the outstanding loan amount, or payment of all, or part, of the instalments for said loan. This article requires information about the risks guaranteed by the contract and the conditions of application of the insurance contract to be provided to the seller. Articles L 314-3 and L 314-5 set out the mandatory information to be delivered when advertising about granting equity release loans (also known as reverse mortgages). The information to be delivered is once again very detailed.

Insurance Code

Article L 112-2 Insurance Code specifies the pre contractual information which must be provided to the insured party. Article L 112-2-1-II includes specific information to be delivered such as the period of validity of the information provided, the existence of a right of withdrawal or its non-application, the amount of the sums debited, the board in charge of sector control, the price or procedure of price calculation, the costs of distance communication, the conditions of contestation, the bodies in charge of it (if not national jurisdictions), the existence of a guarantee fund, and the main characteristics of the product. Information must be delivered in a clear and comprehensible way.

Article L 132-5-2 Insurance Code relates to life insurance and capitalisation contracts and requires some precise pre contractual information to be delivered on a special form (in line with Article 36 Directive 2002/83/EC concerning life assurance). The information

25 'All advertising originating, received or seen in France which, regardless of the medium used, relates to a loan referred to in Article L 312-2, shall: 1. Indicate the identity of the lender and the nature and object of the loan; 2. If it contains one or more elements expressed in figures, indicate the term of the proposed facility, the total cost, and the annual percentage rate applied to the loan, to the exclusion of any other rate. All compulsory references shall be presented in a manner which is perfectly legible and understandable to the consumer.'

26 'Any publicity document or any information document submitted to the borrower and relating to one of the operations referred to in article L 312-2 must mention that the borrower has a ten day cooling off period, that the sale is subject to the loan being obtained and that if the latter is not obtained, the vendor must repay the borrower the sums paid.'

27 This type of product is mainly directed at elderly people who can continue to live in their property, while the property’s value is used to boost their income.
mainly concerns the main characteristics of the insurance contract. The insurance or capitalisation firm must also deliver against receipt an information sheet on the main provisions of the contract.

Article L 132-27-1 Insurance Code also pertains to life insurance and capitalisation contracts. It requires the insurance company to advise the policyholder about individual insurance contracts or group insurance policies and to verify the adequacy between the proposed contract and the needs of the policyholder, on the basis of the information delivered by the policyholder on his or her financial situation and in consideration of the complexity of the insurance contract. The insurance company must acknowledge the level of competence of the policyholder in the field of finance. This duty to advise ensures a high level of protection of the consumer. To some extent, it can be connected to Article 7(2) UCPD, although the duty to advise surely goes beyond the mere prohibition to omit material information. The weight insurance contracts can have on a consumer budget and their complexity may justify such an extensive approach of pre-contractual information duties.

Mutual Insurance Code and Social Security Code: health insurances

Health insurance contracts are also subject to very similar requirements as those applying to insurance contracts in general. The Mutual Insurance Code requires the same pre-contractual information to be delivered as the Social Security Code. These information requirements are detailed and far-reaching. The difference is that the first Code relates to mutuelles (non-lucrative associations such as a building society or co-operative) and not to insurance companies. As is the case for insurance companies, mutuelles are obliged to value the needs of the policyholder as well as to assess his or her level of competence in the field of finance. These duties aim at preventing a misleading omission of material information.

---

28 This includes guarantees, terms of allocation of the technical and financial benefits, sums available in case of repurchase of the contract, and existence and process of exercise of the right of withdrawal. It shall in particular specify the transfer value, or, for contracts which contain the surrender value as well as, in the same diagram, the amount of premiums or contributions paid at least at the end of each of the eight first years.

29 See Article L 311-8 Consumer Code which implements the duty to advise the consumer on his needs in terms of credit contracts laid down in Article 5(6) Consumer Credit Directive.

30 Article L 221-18 Mutual Insurance Code corresponds to Article L 932-15-1-III Social Security Code which provides some specific information to be delivered such as the existence of a right of withdrawal and the supplying of a form to exercise it, information on the health insurance company (address, phone number, registration number), on duration of contract, period of validity of the information provided, board in charge of sector control, price or modalities of price calculation, cost of distance communication, procedure of contestation, bodies in charge of it (if not national jurisdictions), existence of a guarantee fund, the sums debited and eventually the main characteristics of the product. The information provided must be clear and comprehensible.

31 Article L 223-25-3 Mutual Insurance Code (duty to advise the consumer on his needs in terms of contracts) is a copy-paste of Article L 132-27-1 Insurance Code.
d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

French law does not explicitly ban commercial practices as aggressive practices outside the framework of Book I, Title II, Chapter 2 on Illegal Commercial Practices (L 122-11 to L 122-15) of the Consumer Code. There are no additional specific rules pertaining to aggressive practices in the field of financial services.

e) Other national legal provisions on unfair commercial practices in the field of financial services

There is no specific legislation on unfair commercial practices in the field of financial services as such. However, as mentioned above, there are provisions which specifically regulate commercial practices in this particular field. Some of those provisions concern practices which do not fall under the above-mentioned categories of practices but aim at preventing the consumer's ability to make an informed decision from being impaired. Article L 312-10 Consumer Code on credit agreements relating to immovable property for example, holds an obligation to maintain the stated terms of the credit offer during a lapse of 30 days. Its breach could be considered as an unfair commercial practice within the meaning of the UCPD as it would certainly distort the behaviour of consumers. It provides a high level of consumer protection since it leaves time to the consumer to compare different offers before taking a decision; he or she does not have to enter the contract under the pressure of a hypothetical rate modification.

4.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

There is no general definition of consumer under French law. Several specific definitions exist, resulting from the interpretation of the concept by the courts. But no specific definition has been developed in the field of financial services. Where the French legislator made use of the minimum harmonisation clause inserted into some Directives, the concept of consumer might be broader than it is under European law. Article L 121-21 of the Consumer Code defining the scope of application of the provisions on doorstep-selling for example does not refer to consumers but to a ‘natural person’ canvassed at his or her domicile. The main difference lies in the fact that French legislation or French case law (except for the provisions implementing the UCPD and the provisions regarding advertising in general), never views the concept in the light of an average attitude or the attitude of an average member of a group. Court decisions pertaining to Articles L 122-8 and L 122-9 of the Consumer Code (abuse of weakness) for example rely on a concrete appreciation of the weakness of the consumer.

32 ‘Sending of the offer obliges the lender to maintain the stated terms for a minimum of thirty days from receipt of the offer by the borrower. The offer is subject to acceptance from the borrower and declared guarantor, as natural persons. The borrower and guarantors can only accept the offer ten days or later after receiving it. Acceptance must be given by letter, the postmark being taken as proof of posting date.’

33 See for example Cour d’appel de Lyon, 19 December 1990, Recueil Dalloz 1990, p. 250, footnote Ruellan, where the low level of education of the consumer was taken into account.
4.2.1.4 Level of protection provided by national legislative framework compared to UCPD

The national provisions banning combined offers and sales with gifts in the field of financial services (Article L 312-1-2 French Monetary and Financial Code) offer more protection than the UCPD. Such per se prohibitions are not allowed under the UCPD-regime.\textsuperscript{34} The Consumer Code also explicitly bans practices in the field of consumer credit and housing loans which, as such, are not prohibited by the UCPD (or the Consumer Credit Directive). The banned practices might be deemed unfair under the provisions transposing the UCPD (either under the general or the sub-clauses). For that, the practices in question would have to be considered contrary to the requirements of professional diligence (Article 5 UCPD) or be deemed misleading or aggressive. They also would have to cause the consumer to (potentially) take a transnational decision he would not have taken otherwise (Article 5 to 9 UCPD). It is doubtful whether the blacklisted practices under French law would in all circumstances meet those requirements. This would be up to the courts to decide.\textsuperscript{35} The existing legislation therefore offers more legal certainty to consumers, professionals and enforcers. As UFC Que Choisir stated, ‘national provisions supplement the UCPD in a positive way, by bringing additional protection adapted to the local situation’.\textsuperscript{36}

As regards the explicit and detailed sector-specific information and transparency duties referred to in par. 1.2.1.2 b) and c), they also offer a high level of protection. The misleading omission clause of the UCPD does not contain any positive information or transparency duty and therefore offers less legal certainty to the consumer than any such duty, whether from European or national origin. The question of whether the far-reaching national provisions are more protective than the UCPD depends on whether each piece of information required by French law would be deemed material in the sense of Articles 7(1) and 7(2) UCPD; material information being the information the average consumer needs to take an informed transactional decision. This would again be up to the courts to decide. The mandatory information generally relates to the identity of the trader, the main characteristics of the specific contract and the consumer’s legal rights (e.g. to material information within the meaning if the UCPD) but one could argue that the breach of certain duties would not cause the average consumer to (potentially) take a transactional decision he would not have taken otherwise.\textsuperscript{37} If this is actually the case, French law is more protective.

\textsuperscript{34} This results from the VTB-VAB, Galatea and Mediaprint-cases mentioned before.

\textsuperscript{35} In the field of digital TV and that of computer sales, the (formerly forbidden) conditional sales practice (Article 122-1 Consumer Code) has already been deemed fair in particular circumstances: Cour d'Appel de Paris 14 May 2009, nr. 09/03660, D 2009, p. 1475 (Free \& SFR v Orange Sports) & 26 November 2009 (Darty v UFC Que Choisir).

\textsuperscript{36} Responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.

\textsuperscript{37} Even if the European Court of Justice indicates whether this definition shall be construed strictly or extensively, which has not been the case yet, national courts would retain a certain margin of appreciation.
4.2.2 Most common unfair commercial practices in the area of financial services

4.2.2.1 Description of the most common unfair commercial practices

Despite the aforementioned far-reaching sector-specific national provisions, financial service providers still make use of unfair commercial practices in some cases. In the field of consumer credits:

“Both the European and the French legislations are extremely complex. This extreme complexity plays against consumers, lost in the ocean of the numerous provisions supposed to protect them and in favour of credit institutions which know how to handle the legislation and use it to their benefit”.38

The survey data shows that some unfair commercial practices are persistent.

Tied sales constitute one issue. Financial products are often sold in combination with expensive products. For example, a mortgage credit is coupled to a credit insurance provided by the bank. Even though the borrower has the right to refuse the bank’s insurance and to opt for a cheaper insurance (Article L 312-9 Consumer Code), he or she generally does not have enough time to compare the different tariffs and will eventually accept the offer made by the lender. Financial products are also often sold in combination with products which in some cases may not be useful for consumers. An example of such tied selling is the package of services that may come with the opening of a bank account. Services inside this package may include, for example bank cheques, which are seldom used, or the ‘Bank Review’, a magazine about the bank not many people would be likely to read. The amounts at stake may seem insignificant at an individual level but the cumulative superfluous costs for French consumers may be high and consumers often do not know they have the right to refuse these services.39

As one interviewee explained:

“You have a credit card (which is useful), an internet connection (for making operations), but you also have the ‘Bank Review’. Not many people read it. It is a magazine about the bank and it costs around 15 EUR per year, and no one reads it, but it is inside the package. Also in this package are three bank cheques per year, but no one ever uses them. No one uses bank cheques, because you only use them to buy a car or a house. You do not buy three cars each year. You buy one car every three years...[you can have a current account without these services]...but the bank seller does not tell you this.”40

Further examples of tied sales are credit cards which are tied to a credit card insurance that is rarely used by the consumer and fidelity cards which are linked to revolving credit.

39 Article L 312-1-2(1) Monetary and Financial Code does not apply in this case because the services may be purchased individually.
40 Interview with UFC Que Choisir, 11 May 2011.
UFC-Que Choisir report financial products, most often insurances such as home or care, current accounts, and credit cards, as being mis-advertised. In this case the risks associated with the product may not be made clear to the consumer. An example of such a misleading practice is where mortgage credit/housing loans were mis-described: uncapped variable rates were sold as capped variable rates.\textsuperscript{41}

Respondents also reported banks mis-selling cards to consumers. For example, banks sold debit cards with no security to prevent low-income consumers going overdrawn, causing these consumers to incur overdraft fees. Banks also sold ‘average’ consumers premium cards that were ill-suited to their needs. UFC Que Choisir also mentioned aggressive advertising practices on the internet with regard to dangerous financial products.\textsuperscript{42}

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

\textbf{4.2.2.2 Cross-border dimensions of most common unfair commercial practices}

The Financial Markets Authority regularly warns consumers and investors about unfair commercial practices in the field of financial services.\textsuperscript{43} In liaison with the Hungarian Financial Supervisory Authority a warning has been issued about the activity of a Hungarian Company whose commercial practices in the field of financial services could be considered as unfair, as they were promising false benefits for consumers.\textsuperscript{44} The DGCCRF mentioned problems relating to the cross-border enforcement of unfair commercial practices legislation in the field of financial services, as regards the identification of those responsible for the practices and the measures that need to be taken.\textsuperscript{45}

\textsuperscript{41}Responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services. See also Tribunal Correctionnel de Créteil, 21 January 2010 (UFC v Crédit Foncier).

\textsuperscript{42}Responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.

\textsuperscript{43}See AMF warning: http://www.amf-france.org/documents/general/10094_1.pdf.

\textsuperscript{44}Responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.

\textsuperscript{45}Responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.
4.3 Immovable property

4.3.1 Legislative framework

4.3.1.1 National implementation legislation(s) of the UCPD

Book I, Title II, Chapter 1 and 2 of the Consumer Code which implement the provisions of the UCPD apply to immovable property as no explicit exceptions were made to the scope of the provisions (par. 1.1).

4.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

As regards housing loans, there are some practices which are explicitly banned by the French Consumer Code. Those bans were dealt with in paragraph 1.2.1.2. No further specific national legislation has been identified in this area.\(^{46}\)

b) National legislation regarding misleading actions

French law does not explicitly ban commercial practices as misleading actions outside the framework of Book I, Title II, Chapter 1 on Regulated Commercial Practices (Articles L 121-1 to L 121-7) of the Consumer Code.

c) National legislation regarding misleading omissions

French law does not explicitly ban commercial practices as misleading omissions outside the framework of Book I, Title II, Chapter 1 on Regulated Commercial Practices (Articles L 121-1 to L 121-7) of the Consumer Code. The UCPD itself does not contain any positive sector-specific information duty and is therefore less protective of the consumer than any such duty, whether from European or national origin. However, as the UCPD categorises the infringement of a legal information duty as a misleading omission of material information (see Article 7(5) UCPD), a closer look will be taken at some national information disclosure duties in the field of immovable property (see also paragraph 1.2.1.2 for information duties regarding housing loans).

Consumer Code

Under the credit legislation, there is a specific duty of information obliging the credit provider to inform the buyer of a real estate of his or her legal rights, preventing him from being misled. Those duties were dealt with above (Articles L 312-4, L 312-5 and L 312-9 Consumer Code for example).

\(^{46}\) The commercial practice of referring to timeshare property as a financial investment is prohibited by Article L 121-62 Consumer Code. This however results from a requirement of the Timeshare Directive 2008/122/EC (Article 3(4)) and is therefore not a national provision in the sense of this report.
Articles L 121-16 to L 121-20-7 Consumer Code deal with distance contracts, implementing the minimum harmonisation Directive 97/7/EC on distance contracts. Although French legislation does not really depart from the Directive, Article L 121-18 explicitly provides that the phone number of the supplier of goods or services is communicated and that the consumer is informed of the lack of any right of withdrawal in contexts where such a right does not apply (such as the rent of an apartment). Those information duties apply to contracts for the provision of accommodation when the contract is entered into by electronic means (Article L 121-20-4).

**Building and Occupancy Code**

Under the Building and Occupancy Code, the seller of a building is required to provide specific information to the buyer taking the form of a technical diagnosis (structural survey) of the building. Articles L 271-4 and L 271-5 contain the obligation to provide the buyer with a technical diagnosis (structural survey) of the building to be sold (energy performance, presence of lead or asbestos). Article L 271-4 describes the information to be delivered in the survey, which must be annexed to the written contract or the unilateral commitment. Article L 271-5 provides that the survey must be updated at the moment the written document is signed.

**Loi Hoguet: the French Estate Agents Act**

Under Article 4-1 of Law 70-9 of 2 January 1970 (enacted by Law 2009-323 of 25 March 2009 - Article 122), any real estate agent shall inform the client of any legal or financial link with financial private bodies and be able to prove that the client received such information. The obligation for real estate agents to inform consumers that they are in some way related to financial private bodies is very specific and provides a high level of protection for consumers.

**Tourism Code: rental of furnished holiday homes**

Specific information submitted to formal requirements shall also be delivered in the field of the rental of furnished premises for holiday purposes. Article L 324-2 Tourism Code provides that the rental offer must be written and shall indicate the price and a description of the premises.

**Other legislation**

The duty to provide a structural survey also applies to rental contracts under Articles 3-1 and 3-2 of the Law 89-462 of 6 July 1989 for the improvement of tenancy relationships and modifying Law 86-1290 of 23 December 1986. Similarly to the provisions concerning the sale of immovable property, Article 3-1 requires a technical survey to be provided to the tenant of a property. Article 3-2 states that the tenant must be informed on the TV reception means existing in the building. The technical survey and information must be attached to the written contract.

**d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence**

No specific legislation has been identified in this area.
e) Other national legal provisions on unfair commercial practices in the field of immovable property

No specific legislation has been identified in this area.

4.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

No general definition of the concept of ‘consumer’ exists under French law. There are different specific definitions, resulting from the interpretation of the concept by the courts in a particular sector or situation.\textsuperscript{47} But no specific definition has arisen in the field of immovable property. As was mentioned before, French legislation or French case law, except for the provisions implementing the UCPD (and misleading advertising), never construe the concept in the light of an average attitude or the attitude of an average group member.

4.3.1.4 Level of protection provided by national legislative framework compared to UCPD

In contrast to the UCPD, the information disclosure duties laid down in French law are very detailed and precisely defined, although it is debatable whether all the information required by French law (such as information on TV reception) would be deemed material within the meaning of the UCPD. Therefore French legislation offers more protection than the UCPD.

\textsuperscript{47} Where the French legislator was given the possibility to use the minimum standard harmonisation clause inserted in some Directives, the concept of consumer might be larger than it is under European law. A professional handling outside his own business or a legal person may sometimes be considered as consumers.
4.3.2 Most common unfair commercial practices in the area of immovable property

4.3.2.1 Description of the most common unfair commercial practices

Despite all the above-mentioned information disclosure duties, respondents report misleading information being given and material information omitted, most often with regard to the rental of immovable properties and building contracts. Complaints reported by the DGCCRF mainly related to misleading information regarding the main characteristics of the immovable property (for example room measurements).

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

4.3.2.2 Cross-border dimensions of most common unfair commercial practices

The DGCCRF has observed unfair timeshare practices in Spain. In the different survey responses, no special problems relating to the cross-border enforcement of unfair commercial practices legislation in the field of immovable property were mentioned.

---

48 Response to the Civic Consulting survey on the application of Directive 2005/29/EC in immovable property. See also interview with DGCCRF, 8 July 2011.
## France

### Implementing legislation of the Unfair Commercial Practices Directive (UCPD)

The provisions implementing the Directive have been inserted in the French Consumer Code (Code de la consommation), Articles L 120-1 to L 121-7 and L 122-11 to L122-15. Some provisions have been amended in order to be in conformity with EU law (more precisely ECJ decisions) by Law 2011-525 of 17 May 2011 on simplification and improvement of the quality of law (Loi de simplification et d’amélioration de la qualité du droit).

- Law 2008-3 of 3 January 2008 for the development of competition for the benefit of consumers (Loi pour le développement de la concurrence au service des consommateurs)
- Law 2008-776 of 4 August 2008 on modernisation of the economy (Loi de modernisation de l’économie)

#### National legal provisions on commercial practices*

**Overview of relevant provisions which are not based on EU legislation**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>National provisions include:</em></td>
<td><em>None reported</em></td>
</tr>
<tr>
<td>• The French Monetary and Financial Code (Art. L. 312-1-2, 1) prohibits joined offers and sales with incentives for deposit and payment accounts;</td>
<td></td>
</tr>
<tr>
<td>• The French Consumer Code (Art. L. 311-10-1) provides that when the conclusion of a consumer credit agreement gives or may give immediate or eventual entitlement to a benefit in kind in the form of products or goods, the value of the latter shall not exceed 80 Euro;</td>
<td></td>
</tr>
<tr>
<td>• The French Consumer Code (Art. L.311-17) prohibits tying commercial advantages linked to a card to the use of credit linked to this card;</td>
<td></td>
</tr>
<tr>
<td>• Article L.312-9 of the Consumer Code indicates that a bank granting a housing loan cannot refuse another insurance contract guaranteeing either the total or partial reimbursement of the outstanding loan amount, or payment of all, or part, of the instalments for said loan than its own, when the level of guarantee is similar. Any refusal must have a clear reason behind it. Moreover, it is forbidden for the bank to modify the conditions of the rate of the loan, fixed or variable, indicated in the offer of credit, in return for its acceptance in guarantee of an insurance;</td>
<td></td>
</tr>
<tr>
<td>• Law 2010-737 of 1 July 2010 Consumer Credit Reform Act (Loi portant réforme du crédit à la consommation);</td>
<td></td>
</tr>
<tr>
<td>• Articles L.313-3 to L.313-5 of the Consumer Code which prohibit and sanction usurious loans;</td>
<td></td>
</tr>
<tr>
<td>• Article L.311-8-1 of the Consumer Code, which requires lenders to offer, at the point of sale, a redeemable credit in addition to the revolving credit to finance a product or service (credits beyond 1,000 Euro);</td>
<td></td>
</tr>
<tr>
<td>• Articles L.311-27 to L.311-29 of the Consumer Code laying down rules on free credit;</td>
<td></td>
</tr>
<tr>
<td>• Article L.311-5 of the Consumer Code, which specifies rules for the presentation of advertisements for consumer credit;</td>
<td></td>
</tr>
<tr>
<td>• Article L.313-15 of the Consumer Code relating to consolidation of credit.</td>
<td></td>
</tr>
</tbody>
</table>

**Reasons why enforcement bodies apply these national legal provisions**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tying or sales with bonuses would have to be dealt with using the general clause (Article 5) or the misleading clauses (Articles 6 and 7) of the UCPD. These clauses are ill suited to this aim. Therefore stricter provisions are required.</td>
<td>None reported</td>
</tr>
</tbody>
</table>
### Relevant case law

<table>
<thead>
<tr>
<th>Relevant case law</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
<td></td>
</tr>
</tbody>
</table>

### Enforcement

#### Responsibility for enforcing the UCPD

<table>
<thead>
<tr>
<th>Responsibility for enforcing the UCPD</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Responsibility for enforcing the UCPD</td>
<td>The General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF)</td>
<td>The General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF)</td>
</tr>
<tr>
<td>Autorité de Contrôle Prudentiel (ACP)</td>
<td>Autorité des Marchés Financiers (AMF)</td>
<td></td>
</tr>
</tbody>
</table>

#### Means of enforcement of UCPD

<table>
<thead>
<tr>
<th>Means of enforcement of UCPD</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Means of enforcement of UCPD</td>
<td>By criminal law and private law</td>
<td>By criminal law and private law</td>
</tr>
</tbody>
</table>

#### Who can bring an action under the national legislation implementing the UCPD

<table>
<thead>
<tr>
<th>Who can bring an action under the national legislation implementing the UCPD</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who can bring an action under the national legislation implementing the UCPD</td>
<td>Public authorities, organisations representing consumer interests, competitors, trade associations, and individual consumers</td>
<td>Public authorities, organisations representing consumer interests, and individual consumers</td>
</tr>
</tbody>
</table>

#### Main obstacles for enforcing unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Main obstacles for enforcing unfair commercial practices legislation reported</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Main obstacles for enforcing unfair commercial practices legislation reported</td>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

#### Problems relating to cross-border enforcement of unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Problems relating to cross-border enforcement of unfair commercial practices legislation reported</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems relating to cross-border enforcement of unfair commercial practices legislation reported</td>
<td>DGCCRF stated that identification of traders and practices, and following-up can be problematic.</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Codes of conduct and self-regulation

<table>
<thead>
<tr>
<th>Codes of conduct and self-regulation</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Codes of conduct and self-regulation</td>
<td>Codes of Conduct of the French Banking Federation</td>
<td>None reported</td>
</tr>
<tr>
<td>Codes of conduct and self-regulation</td>
<td>Standards of the banking profession</td>
<td></td>
</tr>
<tr>
<td>Codes of conduct and self-regulation</td>
<td>The French Federation of Insurance Companies and the French Asset management Association have adopted codes of conduct concerning advertising on life insurance and UCITS. Banks as retailers of these products have to comply with the provisions of these codes. Their provisions are more specific than the UCPD provisions and are adapted to the products concerned.</td>
<td></td>
</tr>
</tbody>
</table>

---


*Note: DGCCRF stated that national regulations related to financial services and immovable property are not ‘national legal provisions on unfair commercial practices’ but are texts which regulate financial services and real estate professionals, and which seek to regulate certain commercial practices that cannot be addressed using the UCPD. Therefore, for France, the word ‘unfair’ has been removed from the heading.*
ANNEX 2: Fact sheet – most common unfair commercial practices reported
## France

### Common unfair practices reported in the area of financial services

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR-FS-1</td>
<td>Financial products are sold tied to other products. This takes place most often with &quot;other&quot; insurances. For example, credit insurance is tied to consumer credit or mortgage credit, or credit card insurance is tied to credit cards.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>2008 RF RF RF</td>
<td>Life Insurance</td>
<td>X</td>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>FR-FS-2</td>
<td>Financial products, most often “other” insurance (home, care, etc.), current accounts, and credit cards, were mis-advertised. This often meant that the risks associated with the product were not clear.</td>
<td>Practice banned in my country, but not included in the Black List (Annex I) of the UCPD</td>
<td>2009 S S S S</td>
<td>Health Insurance</td>
<td>X X X X</td>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>FR-FS-3</td>
<td>Packages related to current accounts were mis-sold and/or tied. Banks systematically sell these packages when a bank account is opened. However, most of the services inside the package are useless for the consumer, for example bank cheques, which are seldom used, or the &quot;bank review,&quot; a magazine about the bank.</td>
<td>Misleading omission</td>
<td>2010 VF VF VF</td>
<td>Travel Insurance</td>
<td>X X</td>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>FR-FS-4</td>
<td>Banks mis-sold cards to consumers. For example, banks sold debit cards with no security to prevent low-income consumers going overdrawn, causing these consumers to incur overdraft fees. Banks also sold &quot;average consumers&quot; premium cards that are totally unadapted for their needs.</td>
<td>Aggressive practice</td>
<td>2000 S S S S</td>
<td>Other (home, care, etc.)</td>
<td>X X X X</td>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>FR-FS-5</td>
<td>Mortgage credit was mis-described: uncapped variable rates were sold as capped variable rates.</td>
<td>Other unfair commercial practice</td>
<td>2020 2000 VF VF</td>
<td>Savings account</td>
<td>X X</td>
<td></td>
<td>Yes</td>
</tr>
</tbody>
</table>

Source: Federal Union of Consumers (UFC Que Choisir) (FR-FS-1; FR-FS-3; FR-FS-4; FR-FS-5); The General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) (FR-FS-2).

Note:  
VF: Very frequently,  
RF: Rather frequently,  
S: Sometimes.
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR-IP-1</td>
<td>Misleading or missing information was given, for example room measurements were inaccurate. This occurred most often in the rental of immovable properties</td>
<td></td>
<td>X X X S S S</td>
<td></td>
<td>X X X</td>
<td>Yes</td>
<td>X X X X X X X X</td>
</tr>
</tbody>
</table>

Source: The General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) (FR-IP-1).

Note: VF: Very frequently, RF: Rather frequently, S: Sometimes.
ANNEX 3:

Generic provisions (introduction)

Please note that these provisions are general and thus applicable to both financial services and immovable property.

National legislation regarding misleading omissions

Articles L 121-1 to L 121-7 Consumer Code (misleading actions and omissions/UCPD)

Article 313-1 Criminal Code (fraudulent obtaining)

Article 314-1 to 314-4 Criminal Code (fraudulent breach of trust)

National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Articles L 122-8 and L 122-9 Consumer Code (abuse of weakness)

Articles L 122-11 Consumer Code (aggressive practices/UCPD)

Criminal Code

Article 223-15-2(1) Criminal Code (fraudulent abuse)

Other national legal provisions on unfair commercial practices

Article L 121-35 Consumer Code (illegal practice, sales and services with free gifts)

Article L 122-1 Consumer Code (illegal practice, refuse to sell and supply, combined offers, products or services at additional cost)

National legislation relevant for the field of financial services in particular

Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

Monetary and Financial Code

Article L 312-1-2 Monetary and Financial Code (deposit account agreement, tied offers)

Article L 341-10 Monetary and Financial Code (doorstep-selling)

Articles L 341-15 Monetary and Financial Code (doorstep-selling, prohibition of advanced payment)

Consumer Code

Article L 311-5(4) and L 311-5(5) Consumer Code (consumer credit, prohibited advertising)

Article L 311-10-1 Consumer Code (consumer credit combined with the entitlement to a pecuniary advantage or a benefit in kind, conditions of application)

Article L 311-17 Consumer Code (consumer revolving credit, ban on tying commercial advantages linked to a card to the use of credit linked to this card)
Article L 311-20 Consumer Code (consumer credit, amount of the credit)
Article L 311-28 Consumer Code (free credit, conditions of application)
Article L 312-6 Consumer Code (housing loan, prohibited advertising)
Article L 312-9 Consumer Code (housing loan, free choice of insurance contract)
Article L 312-11 Consumer Code (housing loan, prohibition of advance payment)
Article L 313-3 to L 313-5 Consumer Code (prohibition of usurious loans)

**National legislation regarding misleading omissions (information and transparency duties)**

*Consumer Code*

Article L 121-10 Consumer Code (distance marketing of consumer financial services)
Article L 311-5 Consumer Code (consumer credit, advertising)
Article L 311-8-1 Consumer Code (consumer credit, duty to propose a credit agreement giving rise to an immediate corresponding amortisation of the total amount of credit)
Article L 312-4 and L 312-5 Consumer Code (housing loan, advertising)
Article L 312-8 and L 312-9 (housing loan, information duties)
Article L 314-3 and L 314-5 Consumer Code (reverse mortgage contracts, information duties)

*Insurance Code*

Article L 112-2 Insurance Code (insurance contracts, information duties)
Article L 112-2-1 Insurance Code (insurance contracts, information duties)
Article L 132-5-2 Insurance Code (life insurance contracts and capitalisation contracts, information duties)
Article L 132-27-1 Insurance Code (life insurance contracts and capitalisation contracts, duty to advise the policyholder)

*Social Security Code*

Article L 932-15-1 Social Security Code (health insurance contracts, information duties)

*Mutual Insurance Code*

Article L 221-18 Mutual Insurance Code (health insurance contracts, information duties)
Article L 223-25-3 Mutual Insurance Code (health insurance contracts, duty to advise the consumer on his or her needs)

**Other national legal provisions on unfair commercial practices in the field of financial services**

Article L 312-10 Consumer Code (housing loan, duty to maintain the credit offer during a lapse of 30 days)
National legislation relevant for the field of immovable property

**Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD**

Article L 121-18 Consumer Code (distance contracts for the provision of accommodation when the contract is concluded by electronic means (Article L 121-20-4), information duties)

Articles L 271-4 and L 271-5 Building and Occupancy Code (housing sales, information duties)

Article 4-1 Law 70-9 of 02 January 1970 (housing sales, obligation for real estate agents to inform consumers that they are in some way related to financial private bodies)

Article L 324-2 Tourism Code (rental of furnished premises in a holiday context, information duties)

Articles 3-1 and 3-2 Law 89-462 of 6 July 1989 for the improvement of tenancy relationships and modifying Law 86-1290 of 23 December 1986 (housing rental, information duties)

**National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence**

No relevant legislation has been identified.

**Other national legal provisions on unfair commercial practices in the field of immovable property**

No relevant legislation has been identified.
ANNEX 4: References

5 Germany

Document Control

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender No.</td>
<td>Invitation to tender n° JUST/2010/JCIV/PR/0018/A4</td>
</tr>
<tr>
<td>Prepared by</td>
<td>Assoc. Prof. Dr. Peter Rott, August 2011</td>
</tr>
<tr>
<td>Checked by</td>
<td>Prof. Dr. Axel Halfmeier, Harriet Gamper, Dr Frank Alleweldt, Dr Senda Kara</td>
</tr>
</tbody>
</table>
5.1 Introduction

Article 3(9) UCPD has not played a role in the German implementation of the UCPD. Financial services and immovable property had not received special treatment in German unfair commercial practices law before, and the legislator did not even consider making use of Article 3(9) UCPD.\(^1\) In academic writing, this topic has not been discussed either.\(^2\)

In fact, the UCPD very much resembles previous German law, with consumer protection as one goal of unfair competition law and with a general unfairness clause and specific rules. In many regards it was felt that the previous law including caselaw could be upheld after the implementation of the UCPD.\(^3\)

The law on commercial practices has always been enforced by private law mechanisms, and this has not been changed. Legal standing has been granted to consumer organisations, to competitors, to business associations and to the chambers of trade and industry. In contrast, individual consumers have no mechanisms available to enforce unfair commercial practices law directly under the German ‘UWG’ law against unfair competition (Erstes Gesetz zur Änderung des Gesetzes gegen den Unlauteren Wettbewerb).

German unfair commercial practices law cannot be regarded in an isolated manner though. It is accompanied by contractual and pre-contractual obligations that play a crucial role in the area of financial services, and in particular in investment and insurance. By using the concepts of explicit or implied advice contracts and of pre-contractual information obligations (culpa in contrahendo, § 311 para. 2 German Civil Code)\(^4\) the courts have tried to ensure that misleading information, or non-information, will lead to a damage claim for the consumer, which often means that the consumer can claim to be released from the wrongful contract and be reimbursed what he or she paid or invested.\(^5\)

With a view to immovable property, one should note that a notary is required in the conclusion of a contract related to the purchase of immovable property (§ 311b BGB); this takes time and therefore provides an opportunity for the consumer to reconsider the purchase.

According to § 17 para. 1 of the Notarisation Act (Beurkundungsgesetz), the notary shall inquire into the actual intentions of the contracting parties, clarify the facts, inform the contracting parties about the legal consequences of the contract and document their declarations clearly and unequivocally. The notary shall ensure that errors and doubts

\(^1\) Federal Gazette (Bundesgesetzblatt, BGBl.) 2008 I 2949.

\(^2\) See, for example, Apostopoulos (2004), pp. 841 ff.

\(^3\) See, for example, Köhler (2008), p. 3033.

\(^4\) German Civil Code (Bürgerliches Gesetzbuch, BGB)

\(^5\) Established case-law, see for example BGH, 6/7/1993, XI ZR 12/93, NJW 1993, pp. 2433 f.
are avoided and that inexperienced contracting parties are not disadvantaged. Thus, unclear information would not normally lead to an immediate uninformed purchasing decision.

Moreover, after problems with so-called ‘junk real estate’ (existing real estate or real estate projects that were overpriced and meant to be financed by tax savings alone), the sale of which had been initiated by doorstep sellers and then quickly performed by notaries who co-operated with them,6 the legislator introduced additional safeguards for consumer contracts in 2002. According to § 17 para. 2a of the Notarisation Act, consumers shall be given sufficient opportunity to reflect on the contract before the notarisation takes place. In case of contracts regarding the sale of immovable property, this normally requires the consumer to receive the text of the contract two weeks before the notarisation.

---

5.2 Financial services

5.2.1 Legislative framework

5.2.1.1 National implementation legislation(s) of the UCPD

The original Unfair Competition Act dated back to 1909. It was replaced in 2004 by a modernised version that incorporated some important developments in national case-law but also some European ideas.\(^7\) Certain prohibitions were abolished with the modernisation, for example the prohibition of summer and winter sales outside a specific period of time.

The UCPD was implemented by the First Act amending the Unfair Competition Act (Erstes Gesetz zur Änderung des Gesetzes gegen den Unlauteren Wettbewerb, UWG) of 22 December 2008.\(^8\) The implementation of the Directive applies to all commercial activities, including financial services and immovable property. A consolidated version was published in 2010.\(^9\)

Already prior to the implementation of the Directive, the UWG served the three purposes of protecting competitors, consumers and competition as such. This threefold purpose is made explicit in § 1 UWG:

“This Act shall serve the purpose of protecting competitors, consumers and other market participants against unfair commercial practices. At the same time, it shall protect the interests of the public in undistorted competition.”

Consequently, the UWG continues to apply not only to B2C transactions but also to B2B transactions, as it has always done.

A special provision with definitions was included in § 2 UWG, following the definitions of the Directive, a practice which is uncommon in German law.

German law has also availed of a general clause prohibiting unfair commercial practices, or, in its original version (before the 2004 reform) ‘actions that are against good morals’, and of special provisions related to specific commercial practices. The general clause is now laid down in § 3 para. 1 UWG. It has been adjusted to reflect Article 5 of the UCPD.

Until 1999, the German courts were fairly restrictive towards commercial practices, and they held advertisements to be misleading when 10% to 15% of consumers could be misled.\(^10\) This has, however, changed, and since a leading judgment of the

---

\(^7\) Federal Gazette (Bundesgesetzblatt, BGBl.) 2004 I 1414.


**Bundesgerichtshof** (BGH) of October 1999 the courts have applied the European concept of the ‘average consumer’. Thus, the implementation of the UCPD has not changed anything in this respect, and it is generally assumed that previous German caselaw (since 1999) remains valid.

The blacklist has been implemented in an annex to the UWG. According to § 3 para. 3 UWG, all the commercial practices listed in that annex are unlawful. The annex corresponds with the black list of the UCPD, although the order has been slightly changed. However, Germany has also maintained certain *per se* prohibitions that existed prior to the implementation of the UCPD. They are enshrined in § 4 UWG. Some of them concern B2B relationships; others B2C relationships. One provision, § 4 no. 6 UWG, (which relates to the prohibition of commercial practices which make the participation of consumers in a lottery conditional on the purchase of goods or the use of services) has been declared by the ECJ to be in breach of the UCPD in the case of *Plus Handelsgesellschaft*.

Following this ECJ judgment, the BGH has interpreted § 4 no. 6 UWG in the light of the UCPD in such a way that commercial practices which make the participation of consumers in a lottery conditional on the purchase of goods or the use of services are only considered to be unfair if they are in breach of professional diligence in the individual case.

Another provision whose compatibility with the UCPD has been discussed is § 4 no. 4 UWG, according to which unfairness shall have occurred where a person does not clearly and unambiguously state the conditions for taking advantage of sales promotions such as price reductions, premiums or gifts. In contrast to its view on § 4 no. 6 UWG, the BGH held this provision to be a lawful interpretation of Article 7(1) UCPD on misleading omissions.

Of particular importance is § 4 no. 11 UWG, which builds a bridge between unfair commercial practices law and other legislation. According to § 4 no. 11 UWG:

> “Unfairness shall have occurred in particular where a person infringes a statutory provision that is also intended to regulate market behaviour in the interest of market participants.”

---

11 The *Bundesgerichtshof* (BGH) is the German Federal Court of Justice; the highest German court for civil and criminal law.


13 See Köhler (2008), p. 3033.

14 ECJ, judgment of 14/1/2010, Case C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH, not yet reported.


16 See Köhler (2009), p. 117.

This concept – often called "advantage through unlawful acts" – has been used by the courts to bring breaches of consumer law provisions under the law of unfair commercial practices. Therefore, consumer organisations can take action against traders engaging in, amongst other things, breaches of consumer contract law since consumer organisations have had standing under the UWG since 1965. § 4 no. 11 UWG also opens up the path for the remedial system of the UWG; which includes, for example, a damage claim for traders and a skimming-off procedure that can be initiated by consumer associations.\(^{18}\) However, the UCPD has put a limitation on the use of § 4 no. 11 UWG insofar as Article 7(5) only regards the breach of an information obligation as a misleading omission if that obligation stems from EU consumer law. This limitation has been accepted by the BGH in recent case-law.\(^{19}\) However, that case law does not necessarily extend to the areas of financial services and immovable property where Article 3(9) UCPD would seem to allow more stringent national legislation.

The discussion on whether or not the use of unfair contract terms (as regulated by Directive 93/13/EEC) constitutes an unfair commercial practice in the terms of § 4 no. 11 UWG has proved controversial for a long time.\(^{20}\) In a decision of March 2010, the BGH has now taken the approach that the exclusion of liability term in breach of consumer sales law (§ 475 para. 1 BGB, which is derived from the Consumer Sales Directive 1999/44/EC) was at the same time a case of § 4 no. 11 UWG and therefore actionable by a competitor.\(^{21}\) The same would apply to standard terms that are in breach of the general fairness requirements of §§ 307 ff. BGB. This decision may improve the enforcement of rules against unfair terms in the future, as such rules can now also be enforced by competitors and not only by consumer associations and other institutions.

The special provisions concerning misleading actions and omissions are now enshrined in §§ 5 and 5a UWG. Whilst it has been assumed that § 5 UWG on misleading actions corresponds with the previous § 3 UWG, the provision on misleading omissions is new. The courts have, however, previously held advertisements to be misleading that were only partly truthful (for example by referring to one positive environmental property of a product while omitting negative characteristics).\(^{22}\) They have also regarded the omission of information that is required under consumer law, for example, on the right of

\(^{18}\) See below,1.2.2.3.


\(^{21}\) See BGH, 31/3/2010, I ZR 34/08, NJW 2011, pp. 76 ff.

withdrawal in doorstep selling law, as an unfair commercial practice under the above-mentioned concept that is now enshrined in § 4 no. 11 UWG.23

Consequently, the courts often do not distinguish § 5 UWG from the new § 5a UWG but simply name both provisions.24 The Oberlandesgericht Hamm25 made a distinction and held incomplete information to be a misleading action,26 whilst the OLG Munich took the opposite stand.27 In practice however, the result is the same.

The provisions on aggressive practices have been implemented in § 7 UWG. The national implementation goes beyond the requirements of the UCPD in that Germany has maintained its opt-in system for cold calling and for unsolicited e-mails.28

5.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

Germany did not differentiate between financial services on the one hand and goods and other services on the other prior to the implementation of the UCPD, and this has not changed. Thus, there are no commercial practices in the area of financial services banned beyond the blacklist of the UCPD.

b) National legislation regarding misleading actions

The UCPD provisions on misleading actions are implemented in § 5 of the UWG. They apply to all commercial activities, including financial services, and do not go beyond the requirements of the UCPD.

c) National legislation regarding misleading omissions

The UCPD provisions on misleading omissions are implemented in § 5a UWG. They apply to all commercial activities, including financial services, and do not go beyond the requirements of the UCPD.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

The UCPD provisions on aggressive practices are implemented in § 7 UWG. They apply equally to all commercial activities, including financial services. § 7 UWG generally goes beyond the UCPD insofar as it explicitly bans certain direct marketing practices, such as

23 See, for example, BGH, 8/7/1993, I ZR 202/91, NJW 1993, p. 2868.
25 Higher Regional Court (Oberlandesgericht, OLG).
26 See OLG Hamm, 20/7/2010, 4 U 101/10, WRP 2010, at p. 1275.
28 See below, at 1.2.1.2.(d).
cold calling and unsolicited e-mails. Commercial telephone calls and e-mail advertising is only allowed with prior consent of the consumer. This established caselaw\(^{29}\) has in the meantime been codified in § 7 para. 2 nos. 2 and 3 UWG. Moreover, the BGH has held standard terms to be unfair when the consumer automatically consents to receiving unsolicited e-mails unless he or she notifies their disagreement, since the opt-in requirement could otherwise be turned into an opt-out requirement.\(^{30}\) However, the case law in this area is far from settled. At least in obiter dicta, certain higher regional courts have mentioned the possibility that such standard terms are not necessarily unfair if they are not surprising to consumers, limited in scope and sufficiently transparent.\(^{31}\)

e) Other national legal provisions on unfair commercial practices in the field of financial services

There is sector-specific law derived from sector-specific EU law. For example, § 31 para. 2 of the Securities Act (\textit{Wertpapierhandelsgesetz}, WpHG) prohibits misleading advertising for securities. This is derived from Article 19 (2) of Directive 2004/39/EC on markets in financial instruments. Furthermore, Article 4 of the Consumer Credit Directive 2008/48/EC has not been implemented in the UWG but in the Price Indication Order (\textit{Preisangabenverordnung}; PAngV).

Beyond these requirements from EU law, no other special provisions related to financial services have existed prior to the implementation of the UCPD, and none have been introduced in the course of its implementation or later. The German legislator simply stated that Article 3 (9) did not affect Germany since no stricter provisions existed.\(^{32}\)

It should however be noted that through the concept of unfairness due to getting an advantage through unlawful acts, as enshrined in § 4 no. 11 UWG, numerous pre-contractual and contractual information obligations may gain relevance for the law of unfair commercial practices.

Germany has extended the scope of consumer credit law beyond the scope of application of Directive 2008/48/EC, amongst others, by not applying the ceiling of 75,000 Euro.\(^{33}\) An important extension is the application of parts of the Directive to mortgage credit. The breach of the related information obligations constitutes an unfair commercial practice.

---


30 BGH, 16/07/2008, VIII ZR 348/06, NJW 2008, p. 3055; cf. also Draft First Act to Amend the Unfair Competition Act, BT-Drs. 16/10145, 14.

31 See OLG Hamburg, 4/3/2009, 5 U 260/08, WRP 2009, p. 1282 (obiter dicta to the effect that a pre-formulated consent regarding a limited purpose may be lawful); cf. also OLG Cologne, 23/11/2007, 6 U 95/07, WRP 2008, p. 1130.

32 Draft First Act to Amend the Unfair Competition Act, BT-Drs. 16/10145, p. 14.

33 See § 495 para. 2 BGB.
Status transparency has been subject to financial law regulation. According to § 39 of the *Kreditwesengesetz* (Act concerning banking activities; KWG), only banks that have been authorised under the KWG are allowed to use the name of “bank” or similar. The notion of “Volksbank” is restricted to banks in the legal form of a cooperative society. Similar rules apply to saving banks (“Sparkassen”) under § 40 KWG and to insurance companies under § 4 of the *Versicherungsaufsichtsgesetz* (Act concerning the supervision of insurance companies; VAG).

In recent years, the legislator has also taken a number of measures in this area in order to tackle specific problems in the sector of financial services. For example, Germany has introduced information obligations related to the assignment of secured credit to a third person, as a reaction to a mass phenomenon of banks assigning credit contracts to (mainly foreign) investors, including hedge funds, as a consequence of the financial crisis; which then gave the concerned consumers the options of termination of the contract or increased interest rates.\(^\text{34}\) Under the current regime, the consumer must be informed of the possibility of an assignment prior to the conclusion of the contract, and he or she must also be informed of the actual assignment.\(^\text{35}\) A standard term granting the creditor the right to assign the contract to a third person is invalid unless the consumer is granted the right to terminate the contract in that case.\(^\text{36}\)

In the area of investment law, Germany has recently introduced the duty to hand out to the consumer leaflets containing essential information on financial investments.\(^\text{37}\) These are meant to facilitate the understanding of investment products.

Another novelty in German investment law relates to so-called ‘grey capital market products’ that do not fall under the regime of the MiFiD Directive 2004/39/EC. After numerous problems with these products, the German Bundestag has adopted a new law in October 2011, according to which the information and advice duties of the MiFiD regime are extended to the grey capital market.\(^\text{38}\)

Problems have also occurred with kickback payments that the customers of banks that acted as intermediaries knew nothing about. The civil courts have established a *de facto* duty to lay open kickbacks in recent decisions in which they have held the failure to lay open commission to be a breach of a pre-contractual obligation, with the result that the investor can claim relief from the contract and full reimbursement of his or her investment.\(^\text{39}\) The forthcoming German law will now contain stronger regulation of financial advisors, including their duty to lay open commissions.\(^\text{40}\)

\(^{34}\) See, for example, Knops (2009).

\(^{35}\) § 493 para. 4 BGB.

\(^{36}\) § 309 no 10 BGB.


\(^{38}\) For the bill see BT-DrS. 17/6051 of 6/6/2011.

\(^{39}\) See only BGH, XI ZR 586/07, 12/5/2009, NJW 2009, 2298.

\(^{40}\) For the bill see BT-DrS. 17/6051 of 6/6/2011.
5.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

The UWG does not distinguish between consumers in the area of financial services and other consumers. The courts also do not seem to apply different concepts. Certainly, they do not apply higher standards to the clarity or transparency of commercial practices in the area of financial services in comparison to other areas, but use the concept of the ‘average consumer’. In a case decided by the OLG Frankfurt, for example, a financial service provider claimed to be the ‘largest independent financial service provider in Europe’, although it was 97% owned by a Swiss company whose financial products it actually distributed. The OLG Frankfurt held this to be misleading but also indicated that an ‘average consumer’ should understand that the notion of ‘independence’ would not mean the absence of dependence from shareholders, economic dependence or dependence resulting from binding contracts; a view that is not shared by practitioners in the field. The Landgericht Itzehoe expected consumers to understand the difference between ‘basic interest’ (Grundverzinsung), where the actual interest can fall below the basic interest, and ‘minimum interest’ (Mindestverzinsung), where this is not the case.

According to an interviewee for this study, courts do not tend to take a protective approach, and in fact expect consumers to be more careful when it comes to financial services. According to the LG Frankfurt, the average consumer only decides on the conclusion of an insurance contract or on an investment after thorough examination of the offer. In its above-mentioned decision on the notion of ‘independence’, the OLG Frankfurt referred to that judgment.

5.2.1.4 Level of protection provided by national legislative framework compared to UCPD

In conclusion, the level of protection provided by German law and court practice is equivalent to the level of protection provided by the UCPD.

---

41 See, for example, BGH, 2/10/2003, I ZR 252/01, NJW 2004, pp. 439 f.; OLG Frankfurt, 2/12/2010, 6 U 238/09, GRUR-RR 2011, p. 220.

42 Interview with Centre for Protection against Unfair Competition, July 2011.

43 Regional Court (Landgericht, LG).

44 LG Itzehoe, 10/5/2011, 5 O 99/10, unpublished.

45 Interview with Centre for Protection against Unfair Competition, July 2011.

5.2.2 Most common unfair commercial practices in the area of financial services

5.2.2.1 Description of the most common unfair commercial practices

The most important unfair commercial practices in the areas of banking and insurance appear to be cold calling and other forms of unsolicited direct marketing; but this applies to all sectors and is not specific to financial services. In the financial services sector, one recent commercial practice is the sending of unsolicited credit cards to consumers. A consumer organisation brought a claim against this practice but failed. The BGH argued that sending unsolicited credit cards was not harassment under the condition that the consumer can understand easily that he or she did not have to take any action but could simply dispose of the credit card if he or she had no interest in it.

Apart from this, there are misleading actions and omissions, in particular related to the costs of credit or of bank accounts. It seems that due to the recent financial crisis, banks have increased their efforts to raise deposits from consumers, thereby overstating the profits or understating the risks involved. For example, the Zentrale zur Bekämpfung des unlauteren Wettbewerbs has successfully sued a bank for misleading advertising. The bank had stated an interest rate of 6% on consumer current accounts, when the effective interest rate over the total duration was in fact only 3%.

Another problem is banking fees. Currently, a number of banks are advertising bank accounts ‘entirely free of charge’, whilst certain banking activities in fact trigger fees; which is only visible in the small print of the banking contract. Interviewees consulted during the course of this study also mentioned this problem.

A further current issue is advertising for investment products which are described as low risk in order to regain the trust of consumers. One company used the term ‘Genussrechte’ (profit participation right) for a speculative financial product where the consumer could in fact lose his investment; the Zentrale zur Bekämpfung des unlauteren Wettbewerbs successfully pursued this. The problem of understating risk is not new, but well known from investment firms. In 2003, the BGH held an advertisement with a ‘safe minimum interest’ of 6% to be misleading since that minimum interest could only work if the investment firm actually made sufficient profits to pay out the respective amount of money.

---


51 Interview with Centre for Protection against Unfair Competition, July 2011.


In the area of insurance, problems lie in the non-compliance with legal provisions relating to the registration of insurance intermediaries\(^ {54}\) and in breaches of the provisions relating to their status transparency under § 11 of the Regulation on Insurance Mediation (Verordnung über die Versicherungsvermittlung und–beratung),\(^ {55}\) where insurance intermediaries present themselves as independent brokers when in fact they are co-operating with only one or a small number of companies.\(^ {56}\)

Other issues include: \(^ {57}\)

- Advertising misleadingly stating the entity is approved and controlled by the German government's responsible inspection authority;
- The imprint text of websites or correspondence contains wrong information or omits information; and
- Consumers receiving letters stating that if they did not contact the bank or insurance company changes would be made to the consumer’s disadvantage.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

### 5.2.2 Cross-border dimensions of most common unfair commercial practices

Cross-border unfair commercial practices are known from areas such as prize draws, which may be misleading. Consumers are promised a ‘prize’ if they order products, which tend to cost more than their actual value. In reality, prizes are never distributed.\(^ {58}\) However, these practices do not seem to have appeared in the area of financial services, according to the practitioners interviewed.\(^ {59}\)

### 5.2.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

It would seem that the law as such would cover most common unfair commercial practices, through the broad provisions in particular on misleading actions and omissions. Still, interviewees have expressed concern that this might change with new products and therefore desire to maintain Article 3(9) UCPD.

---

\(^ {54}\) § 34d para. 1 sentence 1 of the Trading Order (Gewerbeordnung; GewO), derived from Article 3 (1) of the Insurance Mediation Directive 2002/92/EC.


\(^ {57}\) Civic Consulting database on the application of Directive 2005/29/EC.

\(^ {58}\) See Micklitz (1993). See also the cross-border action of the Office of Fair Trading against the Belgian company Duchesne S.A.; on which see Rott and von der Ropp (2004).

\(^ {59}\) Interview with Centre for Protection against Unfair Competition, July 2011.
Unfair commercial practices in the area of financial services seem to occur less because of a lacuna in the substantive law, but rather due to deficiencies in the current enforcement system.

Enforcement lies in the hands of consumer organisations, of the Centre for Protection against Unfair Competition (Zentrale zur Bekämpfung des unlauteren Wettbewerbs), of the chambers for trade and industry, of trade associations, and of competitors, see § 8 para. 2 UWG. Individual consumers cannot bring lawsuits under the UWG.

Whilst the chambers for trade and industry are rather insignificant in this respect, the consumer organisations and the Zentrale zur Bekämpfung des unlauteren Wettbewerbs are very active. Moreover, trade associations sometimes bring actions on behalf of their members, in particular against aggressive outsiders.\(^60\)

The highest number of lawsuits however is brought by competitors. Due to their proximity to the market, their financial power and their economic self-interest, competitors are particularly effective in enforcing the prohibition of unfair commercial practices.\(^61\) An interviewee from the Zentrale zur Bekämpfung des unlauteren Wettbewerbs confirms this.\(^62\) Due to the recent decision of the BGH, according to which the use of an unlawful exclusion of liability clause constitutes a breach of § 4 no. 11 UWG that is actionable by competitors, they have obtained another important instrument to take action against their competitors who act in breach of consumer law.

In contrast, there is no public authority generally competent to control the fairness of commercial practices. The public authority that is competent for prudential supervision in the area of financial services – the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) – does not have legal standing under the UWG. Instead, it operates under a public law regime that allows it to impose fines on financial service providers. The BaFin, however, does not see its task in protecting consumers but rather in safeguarding the functioning and stability of the financial markets.\(^63\)

Recently, public law sanctions have been introduced for some particular unfair commercial practices, in particular in the context of cold calling where the legislator explicitly recognised that the enforcement of the pre-existing prohibition under the law of unfair competition was difficult.\(^64\) In August 2009, the Act against unfair telephone advertising (Gesetz zur Bekämpfung unlauterer Telefonwerbung und zur Verbesserung des Verbraucherschutzes bei besonderen Vertriebsformen) was passed. It brought

---

\(^{60}\) It should be mentioned that these actions are not always successful since they may also be guided by the desire to avoid stiffer competition; see, for example, the case of BGH, 8/11/1990, I ZR 48/89, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1991, 462, at 463 – Wettbewerbsrichtlinie der Privatwirtschaft.


\(^{62}\) Interview with Centre for Protection against Unfair Competition, July 2011.

\(^{63}\) See also Hofmann (2010), at p. 1784.

\(^{64}\) See the explanations of the German government, Bundestagsdrucksache 16/10734, at p. 1.
changes to contract law but it also introduced fines of up to 50,000 Euros for intentional or negligent breach of the prohibition of cold calling. The responsible agency is the Bundesnetzagentur (Federal Network Agency), which is the regulator for telecommunications, postal services, energy supply and railway services. In a first step, the Bundesnetzagentur has only shut down telephone numbers used for cold calling and fax spamming. In December 2009, it has started to impose fines on call centres and their customers who engaged in cold calling. Still, the threat does not appear to amount to a sufficient deterrent, and the Ministry of Justice has just announced to increase the potential sanction to 300,000 Euros.

Some particularly severe unfair commercial practices can be sanctioned by means of criminal law. According to § 16 UWG, it is a criminal offence to make false statements in advertisements to the public with the intention of giving the impression of a particular price-worthy offer. One rare example where this provision was actually applied was a bus tour case that made its way to the Federal Civil Court (Bundesgerichtshof, BGH).

In rare cases, misleading unfair commercial practices can constitute fraud in the terms of § 263 of the Criminal Code. Criminal courts have recently been dealing with so-called subscription traps (fraudulent internet pages on which the customer is alleged to have concluded a long-term contract, without even realising they have done so).

The question of whether or not the enforcement system is effective is subject to some controversy. Whilst the legislator, the Zentrale zur Bekämpfung des unlauteren Wettbewerbs, and most academic authors find no lack of effectiveness, the consumer

---

65 In particular, the exemptions for contracts on the sale of newspapers, periodicals and magazines and on gaming and lottery services from the right of withdrawal under distance selling law do not apply any longer if the contract was concluded over the telephone, see new § 312d para. 4 BGB.

66 New § 20 of the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb, UWG).

67 See the overview at http://www.bundesnetzagentur.de/de_1911/DE/Verbraucher/Rufnummernmissbrauch/SpanDialen/Informationen/MissbrauchTelefonverwaltung/ListeMassnahmen/ListeMassnahmen_Basepage.html. The legal basis is § 67 TKG.


70 BGH, NJW 2002, 3415: on which see Pluskat (2003). In several cases, the trader had, amongst others, promised that participants would get a delicious lunch, whilst they were then handed out a can of soup or beans. The trader also mentioned that the addressee had won a prize of around 500 DM (approximately 250 Euros) that he now had to collect. In fact, the participants only received between 3 and 10 DM cash, and in one case only shampoo worth 2.80 DM.

71 See, for example, OLG Frankfurt, 17/12/2010, 1 Ws 29/09, NJW 2011, pp. 398 ff. See also Rott (2011).

72 See the official publication of the German parliament (Bundestags-Drucksache, BT-Drs.) 15/1487, at 26.

73 Information from the Zentrale zur Bekämpfung des unlauteren Wettbewerbs, December 2011.
associations are not entirely convinced. A gap may in particular occur where competitors collude, for example, in the area of aggressive commercial practices (harassment through cold calling and the like). If most firms in a given market wish to carry out these dubious commercial practices, they would have no incentive to report each other to the relevant authorities. Also, the incentives to comply with the law have been said to be insufficient, which is due to the remedial system. At the first stage, the claimant can ask for an injunction; which includes a speedy interim procedure that can be used to stop a commercial practice until the final decision about its lawfulness is made. Often, however, the commercial practice may have had a beneficial effect for the trader already before being prohibited. For example, advertising campaigns are often designed to be used for a short time only. They can reach the targeted consumers within a day or two so that there is no harm for the trader in being stopped by an injunction after a few days.

In 2004, the legislator introduced a skimming-off procedure in § 10 UWG, according to which unlawful profits can be taken from the trader. The explicit legislative aim was to tackle the problem of mass low-value damage due to unfair commercial practices (Streuschäden). This procedure, however, has some serious limitations and has not become fully effective yet. First of all, the suing consumer organisation has to prove the trader’s intentional breach of the law of unfair competition; a requirement that was criticised from the outset. After a slow start, courts have however interpreted this requirement more generously, and the skimming-off procedure has been used successfully in an action against a company which engaged in subscription traps.

A practical problem lies in the fact that the burden of proving the amount of unlawful profit falls on the consumer organisation. Courts have recognised an implied claim aimed at investigating profits, including compelling the release of information and documentation from the trader who was thought to be implicated in the skimming-off claim. Still, in general the consumer organisations tend to act cautiously, since they would be partly liable for the litigation costs if they claim too high an amount.

74 See, for example, Köhler (2005), at p. 3033; Alexander (2005), p. 811.

75 See Müller (2004), p. 82.

76 See Müller (2004), p. 82.

77 See, for example, Stadler and Micklitz (2003), pp. 559 ff.

78 For very restrictive interpretation see only LG Heilbronn, 23/2/2006, 23 O 136/05 KfH, Verbraucher und Recht (VuR) 2007, p. 73, with a critical comment by Beuchler (2006).


81 See, for example, OLG Stuttgart (n. 19 above), p. 352.

82 For detailed analysis of the few cases that have been brought up to now, see Rott (2009), pp. 269 ff.
In general, the German system of "loser pays" litigation, in connection with costs which rise in relation to the value in contention, leads to a high cost risk for any skimming-off action that relates to a high profit. As consumer associations have limited financial means, they may even risk insolvency if they lose such a case. Therefore, large volume skimming-off cases will only be brought if the association can secure some method of covering the cost risk, such as help from a litigation financing company.

In view of these *de facto* restrictions of associations' claims, the lack of individual enforcement possibilities may be criticised because it means that consumers are entirely dependent on other actors' willingness or ability to take action.

Self-regulation does not play an important role in Germany.\(^3\) It has gained some significance in specific areas, in particular in the protection of minors, but certainly not in the area of financial services.

---

\(^3\) See also Schmidhuber (2010), p. 595.
5.3 Immovable property

5.3.1 Legislative framework

5.3.1.1 National implementation legislation(s) of the UCPD

The UCPD was implemented by the First Act amending the Unfair Competition Act (Erstes Gesetz zur Änderung des Gesetzes gegen den Unlauteren Wettbewerb, UWG) of 22 December 2008.84 The implementation applies to all commercial activities, including immovable property.

5.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

Germany did not differentiate between immovable property on the one hand and movables on the other prior to the implementation of the UCPD, and this has not changed. Thus, there are no commercial practices in the area of immovable property banned beyond the Black List of the UCPD.

b) National legislation regarding misleading actions

The UCPD provisions on misleading actions are implemented in § 5 of the Unfair Competition Act (UWG). They apply to all commercial activities, including immovable property, and do not go beyond the requirements of the UCPD.

c) National legislation regarding misleading omissions

The UCPD provisions on misleading omissions are implemented in § 5a UWG. They apply to all commercial activities, including immovable property, and do not go beyond the requirements of the UCPD.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

The UCPD provisions on aggressive practices are implemented in § 7 UWG. They apply equally to all commercial activities, including immovable property. § 7 UWG generally goes beyond the UCPD insofar as it explicitly bans certain direct marketing practices, such as cold calling and unsolicited e-mails. According to the interviewees, these practices do occur in the area of immovable property.85

e) Other national legal provisions on unfair commercial practices in the field of immovable property

---

84 Federal Gazette (Bundesgesetzblatt, BGBI.) 2008 I 2949.

85 Response to Civic Consulting survey on the application of Directive 2005/29/EC.
No other special provisions related to immovable property existed prior to the implementation of the UCPD, and none have been introduced in the course of its implementation or later.

In Germany, the Price Indication Regulation (PreisangabenV; PAngV) requires traders to indicate the final price as a figure. The courts have clarified that the PAngV applies to immovable property. The failure to mention the end price as required by the PAngV is at the same time a misleading omission under § 5a para. 4 with para. 2 UWG if the price indication obligation is based on EU law.

Moreover, there are some special provisions relating to the activities of real estate agents with regard to rented accommodation in the Wohnungsvermittlungsgesetz (Accommodation Agency Act; WoVermG). According to the general rule in German agency law, an agent is only paid if his activity leads to the conclusion of a contract. The WoVermG adds to that by prohibiting the agent to claim advance payment and by restricting the agency fee to a maximum of two monthly rents. The fee must be indicated in monthly rents or in parts of them. In advertisement, the agent must indicate that he acts as an agent, and he must also indicate the price of the advertised accommodation and whether or not costs arise for additional services. Moreover, the Act prohibits all sorts of circumventions of these rules, such as extra payment for the previous renter to move out.

5.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

The German Unfair Competition Act does not distinguish between consumers in the area of immovable property and other consumers. The courts also do not seem to apply different concepts, and there have been very few court decisions related to unfair commercial practices in the area of immovable property.

---

89 § 652 BGB.
90 § 2 para. 4 WoVermG.
91 § 3 para. 2 WoVermG.
92 § 3 para. 1 WoVermG.
93 § 6 WoVermG.
94 § 4a para. 1 WoVermG. Exempted from these costs are the costs that actually arise for moving house.
95 See above, at 1.2.4.1.
5.3.1.4  *Level of protection provided by national legislative framework compared to UCPD*

In conclusion, the level of protection provided by German law and court practice equals the level of protection provided by the UCPD.
5.3.2 Most common unfair commercial practices in the area of immovable property

5.3.2.1 Description of the most common unfair commercial practices

The most common unfair commercial practices are misleading actions and omissions. One problem is estate agents that mislead consumers with a view to their fees or their status as an agent. Another problem is incorrect description of the property, be it the size or other characteristics. Generally speaking, although the area of unfair commercial practices is heavily litigated in Germany, case law on unfair commercial practices related to immovable property itself - as opposed to, for example, financing immovable property - is rare.

As mentioned above, the Price Indication Regulation requires traders to indicate the final price as a figure. The courts have clarified that therefore the purchase price as it will appear in the future notary contract must be given. Square meter pricing, for example, is not sufficient even if the total amount can be calculated easily. In contrast, costs for the services of intermediaries do not form part of the final price in terms of the Price Indication Regulation. Their indication may however be required by regular unfair commercial practices law. For example, costs for the services of estate agents must be mentioned if they apply.

Otherwise, the normal expectations of consumers related to certain notions must be taken into account. For example, the Kammergericht (KG) Berlin has decided that the purchaser of a ‘Fertighaus’ (prefabricated house) may expect a house including foundation and perhaps a basement. Thus, advertising a ‘Fertighaus’ that does not meet these requirements is misleading. If a ‘house’ is advertised it must be finished, not under construction.

Another issue that has arisen in case law relates to the roles of seller and purchaser. These roles can differ. The customer may be the purchaser in the narrow sense, i.e. conclude a sales contract, or he or she may order someone to build a house, which is a contract on works and services. In practice, the ‘seller’ of a house frequently only acts as an intermediary who organises the land and the contracting partner (a so-called Bauträger). German courts held that advertising is misleading if it gives the purchaser the impression that they will be the party to a sales contract although in fact they will actually be party to a contract on works and services, with a different legal position following from this legal construct. In particular, in Germany the consumer sales law

---

98 This is the Higher Regional Court for Berlin.
derived from the Consumer Sales Directive 1999/44/EC applies to the sale of immovable property, whereas there is no specific consumer law in the law on contracts on works and services.

One issue discussed in an exceptional case was tying. A municipality had sold immovable property tying that sale to an additional contract concerning the supply of electricity from the municipal electricity supplier. The court did not consider such a condition to be unlawful under unfair competition law, but considered this as a lawful offer under market conditions.102

Other issues included unsolicited advertising for properties for sale and company imprints not containing all the information required. For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

5.3.2.2 Cross-border dimensions of most common unfair commercial practices

No cross-border dimensions relevant to Germany have been reported by the survey respondents in the area of immovable property in this study.

5.3.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

The described practices can be dealt with under the rules on misleading actions and omissions. The rules of the Price Indication Order specify the requirements as to the indication of the price. This appears to protect consumers sufficiently from misleading advertisements in the area of immovable property.

---

102 See BGH, 9/7/2002, KZR 30/00, NJW 2002, p. 3779.
ANNEX 1: Fact sheet – legal framework and enforcement
### Germany

**Implementing legislation of the Unfair Commercial Practices Directive (UCPD)**

First Act Amending the Unfair Competition Act (UWG), 2008

### National legal provisions on unfair commercial practices

**Overview of relevant provisions which are not based on EU legislation**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>• German rule concerning unsolicited advertising (§ 7 UWG)</td>
<td>• German rule concerning unsolicited advertising (§ 7 UWG)</td>
</tr>
<tr>
<td>• Price Indication Regulation (sometimes also called the Decree on Price Disclosure)</td>
<td>• Price Indication Regulation (sometimes also called the Decree on Price Disclosure)</td>
</tr>
<tr>
<td>• Law on Banking (Gesetz über das Kreditwesen), especially § 39 and § 40</td>
<td>• Accommodation Agency Act (Wohnungsvermittlungsgesetz)</td>
</tr>
<tr>
<td>• Act on the Supervision of Insurance Companies (Gesetz über die Beaufsichtigung der Versicherungsunternehmen), especially § 4</td>
<td></td>
</tr>
</tbody>
</table>

**Reasons why enforcement bodies apply these national legal provisions**

According to the Federation of German Consumer Organisations the national provisions in the area of financial services are more specific.

**Relevant case law**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rulings of the Federal Court of Justice (Bundesgerichtshof, BGH) in cases such as: BGH, Az. I ZR 189/92 regarding cold calling by insurance companies asking consumers to upgrade contracts. BGH, Az. I ZR 86/00 regarding misleading information at cash points concerning the account balance.</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Enforcement

**Responsibility for enforcing the UCPD**

Organisations representing consumer interests such as the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V.) and trade associations such as the Centre for Protection against Unfair Competition (Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.), and also other parties such as competitors and chambers of commerce, who are able to bring an action under German law.

**Means of enforcement of UCPD**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>By private law. There is public law enforcement of the prohibition on cold calling (§ 7 UWG).</td>
<td>By private law. There is public law enforcement of the prohibition on cold calling (§ 7 UWG).</td>
</tr>
</tbody>
</table>

**Who can bring an action under the national legislation implementing the UCPD**

Organisations representing consumer interests, competitors and trade associations.

In the area of financial services the public authority Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) can also bring an action.

**Main obstacles for enforcing unfair commercial practices legislation reported**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Federation of German Consumer Organisations stated that for commercial practices which are banned in all circumstances a problem is lack of compensation for consumers. The consumer cannot claim compensation if they have made a contract based on a misleading advertisement. Only the Federation of German Consumer Organisations and other such qualified organisations have the possibility of profit-skimming, and this can be a risk to the organisation since the loser has to pay the litigation costs.</td>
<td>None reported</td>
</tr>
</tbody>
</table>

**Problems relating to cross-border enforcement of unfair commercial practices legislation reported**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>
### Codes of conduct and self-regulation

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

ANNEX 2: Fact sheet – most common unfair commercial practices reported
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>DE-FS-1</td>
<td>Consumers received unsolicited phone calls, emails, and faxes. These related most often to the following financial products: life insurance, health insurance, other insurance (home, care, etc.), stocks or shares, bonds, derivatives, collective investments, private pension plans, and credit cards.</td>
<td>X 4 0 4 5 4 0 XX XXXX X X Don’t know</td>
<td>Life insurance, Health insurance, Major insurance, Travel insurance, Other insurance (home, care, etc.), Stocks or shares, bonds, derivatives, etc., Collective investments, Savings account, Current account, Mortgage, Secured loan, Other card (including consumer credit), Other retail financial service, Complaints data, Court cases, Decisions by enforcement bodies, Warnings issued by enforcement bodies, Decisions or recommendations made by ADR bodies, Other</td>
<td>X</td>
<td>Don’t know</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>DE-FS-2</td>
<td>Consumers were offered a misleading bargain for credit contracts with a low interest loan.</td>
<td>X X X</td>
<td>X X X X X X X X X X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DE-FS-3</td>
<td>Consumers were sent credit cards applications that they did not ask for.</td>
<td>X X</td>
<td>X X X X X X X X X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DE-FS-4</td>
<td>Advertising for securities implied that these securities were safe products when in fact they were a risky investment.</td>
<td>X X</td>
<td>X X X X X X X X X</td>
<td>X</td>
<td>Don’t know</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>DE-FS-5</td>
<td>Consumers were sent letters that stated they should contact their banks and/or insurance companies to check their accounts. The letters suggested that if consumers did not do this, they would suffer a financial loss. However, the letter was a disguised advertisement for a financial product and therefore misleading. This practice most often applied to: life insurance, private pension plans, savings accounts, and current accounts.</td>
<td>X 5 12 10 X X X X X X X X X X X X X</td>
<td></td>
<td>X</td>
<td>Don’t know</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>DE-FS-6</td>
<td>Insurance salespeople were caught working without the necessary registration at the authorised body.</td>
<td>X X 6 10 15 X X X X X X</td>
<td></td>
<td>X</td>
<td>Don’t know</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>DE-FS-7</td>
<td>During the financial crisis, banks advertised that consumers’ money would be 100% safe with them, although “100% security” is a misleading term for the sale of financial products.</td>
<td>X 30 5 2 X X X X X X</td>
<td></td>
<td>X</td>
<td>Don’t know</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>DE-FS-8</td>
<td>Consumers received letters from their insurance company stating that changes to their plan would occur unless they acted to stop this.</td>
<td>X</td>
<td>X</td>
<td>4</td>
<td>5</td>
<td>4</td>
<td>X</td>
</tr>
<tr>
<td>DE-FS-9</td>
<td>Advertising for a financial product, investment, and/or company misleadingly stated that said entity was approved and controlled by the German government's responsible inspection authority (BaFin).</td>
<td>X</td>
<td>X</td>
<td>5</td>
<td>8</td>
<td>10</td>
<td>X</td>
</tr>
<tr>
<td>DE-FS-10</td>
<td>The imprint text of companies in financial services contained misleading omissions and/or false information. Imprint text is the legally required information on websites and correspondence that gives details such as registered address, tax numbers, copyright information, trademark information, and contact details. This occurred most often for companies that sell: health insurance, other insurance (home, care), stocks or shares, bonds, derivatives, collective investments, private pension plans, savings accounts, and current accounts.</td>
<td>X</td>
<td>15</td>
<td>20</td>
<td>20</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>DE-FS-11</td>
<td>Companies misleadingly stated, in advertising, that they were a bank or insurance company.</td>
<td>X</td>
<td>X</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>X</td>
</tr>
</tbody>
</table>

Source: Centre for Protection Against Unfair Competition (DE-FS-1; DE-FS-5; DE-FS-6; DE-FS-7; DE-FS-8; DE-FS-9; DE-FS-10; DE-FS-11); The Federation of German Consumer Organisations (VZBV) (DE-FS-2; DE-FS-3; DE-FS-4).
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>DE-IP-1</td>
<td>Some advertising about the prices of houses either did not mention or did not have transparency around the cost of the estate agent’s commission (normally between 3 and 7% of the price of the house). The fact that there is an additional cost is always supposed to be at least mentioned in advertising.</td>
<td>X X</td>
<td>15-20 15-20 15-20</td>
<td>X X</td>
<td>Don’t know</td>
<td>X X</td>
<td>Referred consumer(s) to relevant enforcement body such as ADR or ombudsman; initiated procedure for judicial decision; took administrative decision; issued a warning about the trader or the practice; other actions</td>
</tr>
<tr>
<td>DE-IP-2</td>
<td>In the rental and buying of houses, some estate agents have misled consumers by either not stating they are agents (which they are required to do by law) or by advertising the property with only a telephone number. This can give consumers the impression they are not dealing with professional agents but with private persons, which is misleading.</td>
<td>X X X</td>
<td>15-20 15-20 15-20</td>
<td>X X</td>
<td>Don’t know</td>
<td>X X</td>
<td>Referred consumer(s) to relevant enforcement body such as ADR or ombudsman; initiated procedure for judicial decision; took administrative decision; issued a warning about the trader or the practice; other actions</td>
</tr>
<tr>
<td>DE-IP-3</td>
<td>Consumers received unsolicited telephone calls, e-mails, and faxes without prior consent, most often about the buying of properties. For example, some consumers received unsolicited e-mail newsletters.</td>
<td>X ~10 ~10 ~10</td>
<td>~10 ~10 ~10</td>
<td>X X</td>
<td>Don’t know</td>
<td>X X</td>
<td>Referred consumer(s) to relevant enforcement body such as ADR or ombudsman; initiated procedure for judicial decision; took administrative decision; issued a warning about the trader or the practice; other actions</td>
</tr>
<tr>
<td>DE-IP-4</td>
<td>Companies, most often those renting properties, did not have a complete imprint by the standards of the E-Commerce Directive and § 5 TMG (Telemediengesetz). This related to the online environment over 50% of the time.</td>
<td>X 10-15 10-15 10-15</td>
<td>X X</td>
<td>Don’t know</td>
<td>X X</td>
<td></td>
<td>Referred consumer(s) to relevant enforcement body such as ADR or ombudsman; initiated procedure for judicial decision; took administrative decision; issued a warning about the trader or the practice; other actions</td>
</tr>
</tbody>
</table>

Source: Centre for Protection Against Unfair Competition (DE-IP-1; DE-IP-2; DE-IP-3; DE-IP-4).
ANNEX 3: References


<table>
<thead>
<tr>
<th>Document Control</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tender No.</strong></td>
</tr>
<tr>
<td><strong>Prepared by</strong></td>
</tr>
<tr>
<td><strong>Checked by</strong></td>
</tr>
</tbody>
</table>
6.1 Introduction

Prior to the implementation of Directive 2005/29/EC, commercial practices were regulated in Italy by general provisions of the Civil Code concerning unfair competition (qualified as a special kind of tort for the Italian private law), general provisions concerning advertising (including the provisions which implemented Directive 84/450/EEC on misleading and comparative advertising), infringement of which was punished with administrative pecuniary sanctions imposed by the Competition and Market Authority (Autorità Garante della Concorrenza e del Mercato, AGCM), and general rules concerning commerce and the marketing of goods and services offered to consumers (pricing, sales periods, rebates, etc.) contained in the legislative decree n. 114 of 31 March 1998 on regulation of commerce, infringement of which is punished with administrative pecuniary sanctions.

The UCPD has been implemented in Italy by three legislative decrees: decreto legislativo n. 145 of 2 August 2007; decreto legislativo n. 146 of 2 August 2007; decreto legislativo n. 221 of 23 October 2010.

The provisions that implement Articles 1-13 and Article 17 of Directive 2005/29/EC are Articles 18 – 27 quater of the Italian ‘Consumer Code’ (Codice del consumo – Decreto Legislativo n. 205 of 6 September 2005), which have been inserted into the Italian Consumer Code by the abovementioned decreto legislativo n. 146 of 2 August 2007.

---


2 Originally laid down by the legislative decree n. 74 of 25th January 1992 (deleted in 2005) and subsequently transposed in Articles 18ff. of the Consumer Code; on the provisions of the legislative decree n. 74/1992, see: V. Meli, La repressione della pubblicità ingannevole (commento al d.l.s. 25 gennaio 1992, n. 74, Milano (Giuffre), 1994;

3 An English translation in of these decrees can be found in www.agcm.it/en/list-consumer-protection.html.


5 Particularly: Article 18 of the Consumer Code implements Article 1 and 2 of the UCPD; Article 19 of the Consumer Code implements Article 3 of the UCPD; Article 20 of the Consumer Code implements Article 5 of the UCPD; Article 21 of the Consumer Code implements Article 6 of the UCPD; Article 22 of the Consumer Code implements Article 7 of the UCPD; Article 23 of the Consumer Code implements the First Part (List of misleading commercial practices which are in all circumstances considered unfair) of the Annex I of the UCPD; Article 24 of the Consumer Code implements Article 8 of the UCPD; Article 25 of the Consumer Code implements Article 9 of the UCPD; Article 26 of the Consumer Code implements the Second Part (List of aggressive commercial practices which are in all circumstances considered unfair) of the Annex I of the UCPD; Article 27 implements Articles 11-13 of the UCPD, by regulating the enforcement measures that can be taken by the “Autorità garante della concorrenza e del mercato” (Competition and Market Authority - AGCM) against traders who infringe the prohibition of unfair commercial practices: especially, injunction orders and
Decreto legislativo n. 221 of 23 October 2010 has inserted, in the ‘List of Fundamental Rights of Consumers’ contained in the general provision of Article 2 of the Italian Consumer Code, the “right to commercial practices that are in conformity with the principles of good faith, fairness and loyalty” (lit. c-bis).

Beyond the administrative pecuniary sanctions, the injunction orders and the other measures that can be imposed by the AGCM according to Article 27 of the Consumer Code, if a trader infringes the prohibition of unfair commercial practices (Article 25(1), of the Consumer Code, that reproduces Article 5(1) of the UCPD), it is possible for consumer associations to pursue an injunction for the protection of consumers' collective interests under Article 139 and Article 140 of the Consumer Code, and it is also possible for individual consumers to pursue a class action regulated by Article 140-bis of the Consumer Code, in order to obtain compensation for losses caused by an unfair commercial practice addressed to a group of consumers.

Article 57 and Article 67-quinquiesdecies of the Consumer Code implement, respectively, Article 9 of the Directive 97/7/EC (inertia selling of goods and non-financial services) and Article 9 of the Directive 2002/65/EC (inertia selling of financial services), as amended by Article 15 of the UCPD.

Decreto legislativo n. 145 of 2007, a legislative act separate from the Consumer Code, contains provisions introduced by the Italian legislator autonomously (that is to say not in order to implement EU Directives), which apply generally to any kind of advertising (see the wide definition of the notion of ‘advertising’ in Article 2. Article 8 of the decreto legislativo n. 145 of 2007 regulates the enforcement measures that can be taken by the AGCM against traders who infringe any of the rules laid down by this law. It must be stressed that administrative pecuniary sanctions, injunction orders and other measures that according to this provision may be adopted by AGCM in case of violation of the general rules concerning advertising (and especially misleading advertising towards traders and comparative advertising) are identical to the administrative pecuniary sanctions, injunction orders and other measures provided by Article 27 of the Consumer Code for infringement of the prohibition of unfair commercial practices towards consumers. The undertaking can contest the decisions (provvedimenti) of the AGCM with an action brought in the Tribunale amministrativo regionale (TAR) Lazio-Roma. Against the decisions of the TAR Lazio-Roma it is possible to appeal to the Consiglio di Stato (highest administrative court).

6 The decisions of the AGCM can be found at: http://www.agcm.it/consumatore--delibere/consumatore-provvedimenti.html.

7 The decisions of TAR Lazio-Roma and Consiglio di Stato can be found in: http://www.giustizia-amministrativa.it/.
6.2 Financial services

6.2.1 Legislative framework

6.2.1.1 National implementation legislation(s) of the UCPD

In the legislative decrees adopted to implement the UCPD the Italian Government has not made use of the possibility offered by Article 3(9) of the UCPD to introduce special rules imposing more restrictive and prescriptive requirements in the field of financial services.

6.2.1.2 National legislation relevant for the field of financial services

Financial services were already before the implementation of the UCPD, and still are, regulated by legislative acts:

- In the field of banking and credit services Decreto legislativo 1° settembre 1993, n. 385 – “Testo unico delle disposizioni in materia bancaria e creditizia” – which is a general act containing the rules concerning banks and credit. It is also known as the ‘TUB’;

- In the field of investment services Decreto legislativo 24 febbraio 1998, n. 58 - “Testo unico delle disposizioni in materia di intermediazione finanziaria” – which is a general act containing the rules concerning investment services and activities. It is also known as the ‘TUF’;

- In the field of insurance services Decreto legislativo 7 settembre 2005, n. 209 - Codice delle assicurazioni private, the Private Insurance Code, which is also known as the ‘PIC’.

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

The provisions of the Italian Consumer Code which implement Articles 1-13 of the UCPD (Articles 18 to 27-quater) do not contain special rules applying only to commercial practices connected with the promotion of the conclusion of contracts for financial services. In particular, the list of “misleading commercial practices which are in all circumstances considered unfair” and the list of the “aggressive commercial practices which are in all circumstances considered unfair”, respectively inserted in Article 23 and Article 26 of the Consumer Code, are fully identical to Annex I of the UCPD.

---

b) National legislation regarding misleading actions

Common Rules - Distance marketing of financial services: The provisions which implement Directive 2002/65/EC on contracts concerning financial services concluded by consumers by means of distance communication are Articles 67-bis – 67-viciesbis of the Consumer Code. These provisions apply to credit, banking, payment, investment and insurance services and lay down rules of conduct that are substantially identical to the provisions of the directive.

Banking (including consumer credit): Most of the provisions which regulate banking activities, credit services and contracts are contained in the TUB.

Part VI of this legislative decree regulates “transparency of the contractual terms and transparency of the relations with the clients”.

Beyond the rules contained in Part VI of the TUB, there are more detailed rules that have been inserted into a regulation adopted by the National Bank of Italy (Banca d’Italia) on 9 February 2011 entitled “Transparency of the banking and financial operations and services – Fairness of the relations between financial intermediaries and clients”. The power to verify that the rules laid down by the TUB and by the integrating Regulations adopted by the Bank of Italy are respected by the banks and the financial intermediaries which operate in Italy, as well as the power to adopt injunction measures and to impose administrative pecuniary sanctions in case of infringement of such rules, belongs to the Bank of Italy.

Payment Services: The provisions which regulate payment services in Italy are to be found mainly in two legislative decrees.

Firstly, the TUB, Article 114-quinquies onwards regulates payment service providers (and implements Articles 5-29 of Directive 2007/64/EC on payment services in the internal market), and Articles 127-128ter regulate payment transactions covered by a framework contract (and implement Articles 40-48 of Directive 2007/64/EC)

---

11 Part. Vi of TUB especially, contains:

Section 1 (Articles 115-120-quater): General Rules concerning advertising and precontractual information that any bank must respect in relation to any contract offered to any possible client (not only consumers), as well as general rules concerning form, content and effects of any contract concluded by a bank with any client (not only consumers), as well as special provisions concerning single types of credit contracts (in particular credit contracts concluded in order to finance the acquisition of a residential building): all these provisions do not implement corresponding provisions of EC-Directive, but have been spontaneously and autonomously introduced by the Italian legislator.


Section 3 (Articles 127 – 128ter): “Final” rules which find application to all the contracts which fall into the field of application of Section 1, Section 2 and Section 2-bis.
Secondly, *decreto legislativo 27 January 2010, n. 11*, which contains the provisions which implement Articles 1-4 and Articles 30-39 and 51-81 of Directive 2007/64/EC.

Beyond the rules contained in the *Decreto legislativo 27 gennaio 2010, n. 11*, there are more detailed rules that have been inserted in a Regulation adopted by the Bank of Italy on the 5th of July of 2011, entitled “Execution of provisions of the Legislative Decree n. 11 of 2009 concerning Rights and Duties of the parties of agreements relating to payment services”, and in Section VI of the above mentioned Regulation adopted by the Bank of Italy on the 9th of February of 2011 (entitled “Transparency of the banking and financial operations and services – Fairness of the relations between financial intermediaries and clients”).

*Investment Services and Activities*: These are regulated by the TUF. In this legislative decree are *inter alia* laid down the provisions which implement the EC-Directives concerning investment services (amongst others: Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading; Directive 2004/39/EC on markets in financial instruments; Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities).

The general rules laid down in the TUF are complemented by more detailed rules contained in Regulations adopted by CONSOB (*Commissione Nazionale per le Società e la Borsa*) which is the supervisory authority for the fields of securities, investment services and activities and financial instruments. Of particular importance are: Resolution n. 16190 of 29 October 2007, containing implementation rules on intermediaries and resolution n. 11971 of 14 May 1999 concerning the regulation of issuers.

CONSOB can check compliance with the rules laid down by the TUF and by the above mentioned Regulations, and has the power to adopt injunction measures and to impose administrative pecuniary sanctions in case of infringement of such rules.

*Insurance*: The great majority of the provisions which regulate insurance services in Italy are contained in the PIC. Beyond the rules inserted in the PIC, more detailed rules are contained in regulations adopted by ISVAP (*Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo*) which is the supervisory authority for private insurance undertakings and insurance undertakings of public interest. ISVAP has the power to check that the rules laid down by the PIC and by the above mentioned regulations are respected by the insurance undertakings operating in Italy, as well as the power to adopt

---

12 Particularly important are: Regulation n. 35 of 26 May 2010, on the information duties and the advertising of insurance products (integrating articles 182-187 Private Insurance Code); Regulation n. 34 of 19 March 2010, concerning the promotion and distance marketing of insurance contracts (integrating Article 183 and 191 of the Private Insurance Code); Regulation n. 23 of 9 May 2008, laying down rules governing premium and contract terms disclosure in compulsory insurance for motor vehicles and crafts (integrating Article 131 Private Insurance Code); Regulation n. 5 of 16 October 2006, laying down provisions on insurance and reinsurance mediation (integrating Articles 106-121 and Article 183 Private Insurance Code); Regulation n. 4 of 9 August 2006, concerning information duties existing on undertakings in relation to the each annual expiry date of compulsory insurance contracts for motor vehicles and crafts.
injunction measures and to impose pecuniary administrative sanctions in case of infringement.

c) National legislation regarding misleading omissions

Article 2 of the ISVAP Regulation n. 4 of 9 August 2006 imposes on insurance undertakings the obligation to send to policy holders, at least 30 days before the annual expiry date of compulsory insurance contracts for motor vehicles and crafts, a communication with the following indications: expiry date of the effects of the contract, procedural rules for the exercise of the withdrawal right in order to avoid the prorogation (for another year) of the effects of the contract, and new economic conditions offered for the renewal of the contract.

The undertaking that does not send the communication imposed by this provision is likely to be responsible for a misleading omission, according to Article 22 of the Consumer Code, because such communication is imposed in order to give the policy holder the possibility to have enough time and sufficient elements to evaluate the renewal or prorogation of the contract with an informed and well-reasoned commercial decision.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

There are no provisions of this kind in the field of investment services.

Article 170 of the Private Insurance Code imposes the prohibition of ‘tie-in-sales’, by stating that insurance undertakings may not subordinate the conclusion of a compulsory insurance contract against civil liability arising from accidents caused by motor vehicles to the conclusion of other insurance, credit or investment contracts. This prohibition is purely national, since Directive 2009/103/EC, relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability does not contain a corresponding provision. Violation is sanctioned with a fine of between 1,000 and 3,000 Euro (Article 314(3) of the Private Insurance Code).

e) Other national legal provisions on unfair commercial practices in the field of financial services

National Rules concerning commercial practices in the area of financial services other than the national provisions which implement the UCPD

In the Italian legislation there are firstly ‘common’ rules which find application to commercial practices relating to any financial service (banking, payment, insurance, credit and investment): such rules are laid down by Articles 67-bis seq. of the Italian Consumer Code, which implement Directive 2002/65/EC on the distance marketing of financial services to consumers. Article 67(1)-septiesdecies of the Italian Consumer Code foresees the application of an administrative pecuniary sanction (from 5,000 to 50,000 Euro) for traders who infringe the rules of conduct (especially pre-contractual information duties), for traders who impose barriers or impediments to the exercise of the right of the consumer to withdraw from the contract as well for traders who, despite the fact that the consumer has exercised his right of withdrawal in time, omit and refuse
to reimburse the price already paid by the consumer for the financial service before the expiration of the time limits for withdrawal from the contract.

Beyond the administrative pecuniary sanction, paragraph 4 of Article 67-septiesdecies foresees a private law sanction, which makes the contract void if the trader: a) imposes obstacles and impediments to the exercise of the right of the consumer to withdraw from the contract, or b) omits and refuses to reimburse the price already paid by the consumer, when the latter exercises his right of withdrawal, or c) infringes pre-contractual information duties causing a material distortion of the description of the characteristics of the financial service of the contract.

The refusal to reimburse the sum paid by the consumer, as well as the imposition of impediments to the exercise of the right of withdrawal are also forbidden and punished (with the administrative pecuniary sanction and the civil law sanction of invalidation of the contract) in itself, no matter if such conduct, in the factual context, really impair or are likely to impair the average consumer’s ability to take a free and informed decision concerning the exercise of his rights arising from the contract (and especially the right of withdrawal as well as the rights arising out from the exercise of the right of withdrawal). For this reason this provision appears to be more stringent than the similar provision under Article 9(1) of the UCPD (Article 25, par. 1, lit. d) of the Italian Consumer Code).  

Secondly, there are ‘special’ rules which find application only to commercial practices relating to banking and credit services, including consumer credit (see Article 40-bis, 116 onwards of the TUB). Article 116(1) of the TUB (‘Advertisements’) states that Banks and Financial Intermediaries must: a) communicate to their clients the interest rates, the prices and all the economic conditions concerning the operations and the services offered, including any interest for delayed payments; and b) indicate, in every advertisement concerning any credit and financial operation offered, the medium annual percentage rate of charge foreseen by the Act on combating usury. More detailed Rules concerning advertisement, information and other pre-contractual duties are laid down by Articles 1-8 of the abovementioned Regulation on Transparency and Fairness adopted by the Bank of Italy on February 2011.

These provisions are purely national and find application to any business-to-business credit contracts, as well as to all consumer credit contracts that are excluded from the scope of application of the provisions implementing Directive 2008/48/EC. This means credit contracts concluded in order to finance the acquisition or retention of a right on an immovable property and/or secured by mortgages on immovable property.  

---


14 The provisions of Articles 116, 118, 119, 120 and 120-quater of the TUB are all purely national. However, they relate to contractual issues which are outside the scope of this study. The infringement of these provisions is punished with an administrative pecuniary sanction of between 5,160 Euro and 64,555 Euro (Article 144, par. 3-bis of the TUB), that can
It must be stressed that the Bank of Italy will sanction the administrators, directors and employees of a bank (or financial intermediary) only because of an infringement of the duties imposed by these ‘special rules’ of the TUB. However, conduct is also punished in itself, no matter if such conduct actually impairs or is likely to impair the average consumer’s ability to take a free and informed transactional decision.

On the other hand, it must be stressed that such conduct can often be qualified as an unfair commercial practice according to Articles 18 onwards of the Italian Consumer Code. The conduct of a bank (or financial intermediary) which infringes the special rules laid down by the TUB are certainly contrary to the requirements of professional diligence and therefore constitute unfair commercial practices, provided it is ascertained that they are likely to materially distort the economic behaviour of the consumer. Very often they can also be qualified as misleading or aggressive practices. As a result, it is possible that the AGCM may apply the much heavier sanction foreseen by the Consumer Code for the infringement of the prohibition of unfair commercial practices.

Thirdly, there are special rules which find application to commercial practices relating to investment services. In this field, it is necessary to distinguish between the rules concerning issuers and the rules concerning investment undertakings providing investment services and ancillary services.

**Issuers**

Title I of Part II of CONSOB Resolution n. 11971 of 14 May 1999 (concerning the regulation of issuers) is dedicated to the Public Offerings for Subscription and Sales of Financial Products. It contains special provisions concerning financial products other than units/shares of collective investment undertakings and products issued by insurance companies. It also contains general provisions, concerning all the above mentioned financial products. Among these general provisions, Article 34-sexies (proper conduct rules)15, Article 34-octies (general criteria for carrying out advertising activities)16 and Article 34-novies (illustration of returns achieved and other data)17 appear to be relevant in the field of unfair commercial practices.

---

15 Article 34 sexies (‘Proper conduct rules”) establishes (par. 1) that offerors, issuers and persons placing the financial products shall behave in conformity of rules of proper conduct, transparency and equal treatment towards the beneficiaries of the public offering, and shall avoid divulging information non consistent with the prospectuses or suitable for influencing the performance of the subscriptions. In particular (par. 2), the bidder and the parties appointed to make the placement shall: adopt the operating methods indicated in the prospectuses; and carry out, as promptly as possible, the activities necessary for the finalization of the investment and those in any event associated with the exercise of the investors’ rights.

16 Article 34 octies (General criteria for carrying out advertising activities) states that “Advertising must be clearly recognizable as such. The information contained in the advertisement must not be inaccurate or such that it misleads in relation to the features, the nature and the risks of the financial products offered and the related investment” (par. 1); “The advertising message transmitted by means of the advertisement shall be consistent with the information contained in the published prospectuses or, with regard to EU financial instruments, with that which will have to appear in the prospectuses to be published” (par. 2); “Each advertisement shall contain the following warning, in a manner that ensures immediate and easy perception: “before subscribing, read the prospectus”. In the event of use of audio-visual instruments, the warning is reproduced at least in audible form (par. 3); “Each advertisement shall indicate that a prospectus has been or will be published and the location where the public can or may procure a copy of the same as
Article 34-sexies of the regulation implements Article 95(2) and Article 98(3)-quater of the TUB. Article 34-octies and Article 34-novies of the regulation enact and integrate the general provision of Article 101(3) of the TUF, which states that “advertisements shall comply with the guidelines laid down by CONSOB in a regulation having regard to the accuracy of the information and its conformity with the contents of the prospectus”.

The TUF foresees a penal sanction for the infringement of the above described rules concerning issuers (which can be imposed by a criminal court), as well as pecuniary administrative sanctions (which can be imposed by CONSOB).

Article 173-bis deals with false statements in prospectuses.\(^{18}\)

According to Article 191(2), of the TUF, any person who makes a public offering in violation of Articles 94, 96, 97, 98-ter and 101, or in violation of the related implementing provisions issued by CONSOB shall be punished by a pecuniary administrative sanction of between 5,000 and 500,000 Euro. Such administrative sanctions can be imposed by CONSOB.

**Investment Undertakings Providing Investment Services and Ancillary Services**

Chapter I (Articles 27-36) of Title I of Part II (Transparency and Correctness in the Provision of Investment Services/Activities and Accessory Services) of the CONSOB resolution n. 16190 of 29 October 2007 (Regulation containing implementation rules on intermediaries) lays down the rules of conduct which must be observed by intermediaries who advertise and promote financial services and instruments.

These Rules integrate and enact the general criteria laid down by Article 21(1) of the TUB\(^{19}\) and implement Article 19 of Directive 2004/39/EC.

Article 27 refers to general information requirements.\(^{20}\) Article 28 refers to conditions for the provision of information that is correct, clear and not misleading.\(^{21}\)

---

17 Article 34 novies (“Illustration of returns achieved and other data”) states (Par. 1) that: “In compliance with the matters envisaged by Article 34 octies, par. 1, the advertisement which contains the returns achieved by the proposed investments shall specify the reference period for the calculation of the return and clearly represent the risk profile associated with the return; make the comparison with the reference parameter indicated in the prospectus for the representation of the risk-return profile or, in the absence thereof, with a parameter consistent with the investment policy described in the prospectus; indicate these returns net of the tax liabilities and, where this is not possible, shall specify that they are gross of the tax liabilities; and contain the warning “Past returns are no indication of future ones”. Par 2 states also that “Advertisements which contain the results of statistics, studies or data processing, or in any event make reference to the same, shall indicate the sources”.

18 “Any person who, with a view to obtaining an undue profit for himself or for others, in prospectuses required for public offerings or for admission to trading on regulated markets, with the intention of deceiving the recipients of the prospectus, includes false information or conceals data or news in a way that is likely to mislead such recipients, shall be punished by imprisonment for between one and five years”.

19 Article 21, par. 1, of the TUB: “The intermediaries shall: a) act diligently, fairly and transparently in the interests of customers and the integrity of the market; b) acquire the necessary information from customers and operate in such a way that they are always adequately informed; c) use advertisement and promotional communications which are correct, clear and not misleading”.

20 Article 27 (par. 1): “All information, including advertising and promotional notices, addressed to customers and potential customers by intermediaries must be correct, clear and not misleading. Advertising and promotional notices
The following articles lay down detailed rules about:

- Information on the intermediary and services provided (Article 29);
- Information on the safeguarding of financial instruments and sums of money belonging to the customer (Article 30);
- Information on the financial instrument itself (Article 31, which imposes the obligation to provide any customer with a general description – illustrating the characteristics of the specific type of instrument involved, together with the risks related to such instruments, in sufficient detail to allow the customer to make an informed investment decision – of the nature of risks involved with the financial instrument concerned, in particular taking into account the customer category as a retail or professional customer);
- Information on costs and charges (Article 32, which imposes the obligation to provide retail customers and potential retail customers with information on the costs and charges involved in the provision of services).

According to Article 190(1) of the TUB anyone performing administrative or management functions in (and the employees of) companies or entities authorised to engage in investment services or activities shall be punished by a pecuniary administrative sanction of between 2,500 and 250,000 Euro for non-compliance with Article 21 and the detailed rules issued by CONSOB. Such administrative sanctions can be imposed by CONSOB.

Insurance

Finally, there are special rules which find application to commercial practices relating to insurance services. Very important for the regulation of advertising of insurance services are the special provisions contained in Article 182 of the Private Insurance Code (and in the integrating detailed Rules contained in Articles 39-42 of ISVAP regulation n. 35 of shall be clearly identifiable as such"

Article 27 (par. 2): “Intermediaries shall provide customers and potential customers with appropriate information, in a comprehensible format, in order that the nature of the investment service, the specific types of financial instruments involved and related risks are easily understandable and, consequently, the customer shall be able to make informed decisions regarding investments. Such information, which may be provided in standardised format, refers to: a) the investment firm and related services; b) the financial instruments and investment strategies proposed, including appropriate guidelines and warnings on the investment risks for such instruments or particular investment strategies; c) the execution venues, and d) related costs and charges.

21 Article 28 (Conditions for an information that is correct, clear and not misleading) lays down the conditions that must be satisfied by any information (including advertising and promotional notices) issued by intermediaries to retail customers or potential retail customers (par 1). Par 2 states, in general, that “any information shall: a) include the name of the intermediary; b) not exaggerate any potential advantage of an investment service or financial instrument unless a correct and clear indication is given of any significant risks; c) have a content and presentation that in all probability will be comprehensible to the average investor in the population to which it is addressed or is likely to be received; d) not conceal, minimize or withhold important elements or warnings”. The subsequent paragraphs lay down the further conditions which must be satisfied where the information compares investment or accessory services, financial instruments or persons providing the investment or accessory services (par. 3), where the information contains an indication of past results of a financial instrument, financial index or investment service (par. 4), where the information includes or makes reference to historic data processing (par. 5) and where the information contains estimated future results (par. 6).
2010), according to which “advertising of an insurance’s undertaking products shall comply with the requirement of fair information and be in conformity with the content of the informative note and of the terms of the contracts concerning the insurance products to which the advertising refers”.

Also important are the rules of conduct for undertakings and intermediaries stated by Article 183 of the PIC (and by the integrating detailed rules contained in Articles 4-38 of ISVAP Regulation n. 35 of 2010), according to which before and after the conclusion of the contract and until the end of its duration intermediaries and undertakings must behave with diligence, fairness and transparency towards policy holders and insured persons. They must acquire from policy holders the information that is necessary to evaluate their needs and ensure that they are always properly informed. They must also identify and prevent – if reasonably possible – conflicts of interest and, where such conflicts exist, make the policyholder aware of the possible adverse effects and manage such conflicts so as to avoid any detrimental consequence for policy holders. They must take adequate measures to safeguard the rights and interests of policy holders.

Infringement of the rules of conduct of Articles 182 and 183 PIC (and of the integrating detailed rules) can be sanctioned by ISVAP with a fine of between 2,000 and 20,000 Euro (see Articles 318 and 319 of the PIC).

According to Article 185 of the Private Insurance Code, insurance undertakings shall submit to policyholders, prior to the conclusion of the contract, together with the policy conditions, an informative note (nota informativa) drawn up in conformity with the detailed rules established by ISVAP and containing the information which policyholders need in order to have an informed opinion on their contractual rights and obligations, as well as on the financial situation of the insurance undertaking (see the detailed rules contained in Article 4-38 of ISVAP Regulation n. 35 of 2010). If the trader does not comply with these obligations they can be sanctioned by ISVAP with a fine of between 2,500 and 25,000 Euro (see Article 320 of the PIC).

Article 186(1), of the PIC allows an insurance undertaking to submit in advance to ISVAP the draft text of the informative note imposed by Article 185, so that an assessment of compliance with the rules of the PIC concerning the content, the transparency and the form of pre-contractual information to be given can be made. However, ISVAP’s assessment may not be used for promotional purposes. No special sanction is foreseen in the PIC for the violation of this prohibition, but it may be qualified as a misleading commercial practice if an undertaking explicitly states (for example in advertising or in his commercial premises), that his informative note has previously been positively assessed by ISVAP.

According to Article 120(3) of the PIC, the insurance intermediary shall, prior to the conclusion of any contract, offer a product which meets the policyholder’s needs, especially on the basis of the information provided by the latter, and illustrates the main features of the contract as well as the contractual obligations of the insurance undertaking. This pre-contractual information duty (infringement of which can be sanctioned by ISVAP with a fine of between 1,000 and 10,000 Euro: see Article 324 of the PIC) appears to be stricter than the duty laid down by Article 12(3) of Directive
2002/92/EC, according to which the insurance intermediary “shall at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product”.

The behaviour of an insurance intermediary who does not comply with the duty imposed by Article 120(3) of the PIC is likely to be contrary to the requirements of professional diligence and therefore constitutes an unfair commercial practice if it is likely to distort the economic behaviour of the average consumer to whom it is addressed. The same can be said about an insurance intermediary which infringes the rules of conduct foreseen for intermediaries by Article 183 of the Private Insurance Code as well as by Article 48(2) and Article 52 of regulation n. 5 of 16 October 2006, laying down provisions on insurance and reinsurance mediation.

According to Article 131 of the Private Insurance Code (a purely national rule introduced on the basis of an autonomous decision of the Italian legislator), insurance undertakings shall make available to the public the informative note and the contractual terms relating to contracts for compulsory insurance cover against civil liability in respect of the use of motor vehicles, and specifies that advertising of premiums of such insurance contracts shall be made by means of customized estimates issued at any point of sale of the insurance undertaking and through internet sites. Such a customized estimate must be prepared and delivered (on a paper delivered personally to the consumer in the premises of the insurance undertaking or anywhere else by the intermediary, or on a durable medium delivered through the internet site) without any cost to any person who asks for it. It must indicate the amount of the premium as well as the amount of the fee owed to the insurance intermediary.

The behaviour of an insurance intermediary who does not comply with the duty imposed by Article 131 of the PIC is likely to be contrary to the requirements of professional diligence and therefore constitutes an unfair commercial practice if it is likely to distort the economic behaviour of the average consumer to whom it is addressed. It is particularly likely that (according to Articles 21 and 22 of the Consumer Code) the conduct of an intermediary or of an undertaking who delivers a customised estimate containing false or incorrect indications about the amount of the premium or the amount of the commission owed to the intermediary will be qualified as a misleading practice.

6.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

Banking (including consumer credit)

The word ‘consumer’ is used only in the provisions which implement Directive 2008/48/EC (Articles 121-126 of the TUB) and in the integrating provisions adopted by the Bank of Italy with the Regulation of February 2011. The notion of consumer is defined here (Article 121, lit. b), of the TUB) in the same way as in Directive 2008/48/EC
(a natural person who acts for purposes which are outside his trade, business or profession) and in the UCPD.\textsuperscript{22}

Payment services

The provisions which implement Directive 2007/64/EC (the ones contained in the TUB and the ones contained in the \textit{decreto legislativo} n. 11 of 2010) apply to any contract relating to payment services, no matter if the payment services user is a natural or legal person or acts for private purposes or for purposes related to his trade, business or profession. The provisions concerning payment transactions covered by a framework contract (Article 126-bis to 126-octies of the TUB) cannot therefore be derogated by the contract to the detriment of a payment service user that is a consumer (defined as a natural person who acts for purposes outside his trade, business or profession) or a ‘micro-enterprise’. Also the provisions concerning rights and duties of the parties laid down by Article 3 onwards of \textit{decreto legislativo} n. 11 of 2010 may not be derogated by the contract to the detriment of a payment service user that is a consumer or a micro-enterprise.

Investments

In the TUB and in the related CONSOB regulations the word ‘consumer’ is never used. References are always made to ‘clients’ and/or ‘investors’.\textsuperscript{23}

\textsuperscript{22} In the other (purely national) provisions of the TUB the Italian legislator has used a relatively wide notion of “client”, that is likely to include any subject (natural or legal person, no matter the “private” or “professional” purposes for which the contract is stipulated) with whom a Bank (or another financial intermediary) concludes a credit contract or a contract relating to other banking services. As we have seen, some of these provisions (Art. 118, Art. 117, par. 6; Art. 120-quarter) apply to any contract concluded by a bank with a consumer, included the consumer credit contracts which fall into the field of application of the provisions implementing Directive 2008/48/EC; some other provisions (Art. 116, 117, par. 4, 119, par. 1, Art. 120, par. 1) apply to all the contracts concluded by banks with consumers other than credit contracts which fall into the field of application of the provisions implementing Directive 2008/48/EC; some other provisions apply only to consumer credit contracts concluded in order to finance the acquisition of property rights on residential buildings (Art. 120-ter) or secured by a mortgage on immovable property (art. 40-bis). The “Regulation on transparency and Fairness” adopted by the Bank of Italy in February 2011 also distinguishes between \textit{client} (in general: natural or legal person, no matter the “private” or “professional” purposes for which the contract is stipulated), \textit{retail client} (consumers; natural persons who acts for purposes relating to their business, trade or profession; non-profit organisations; small and medium sized enterprises (SMEs) and consumers (natural persons who act for purposes which are outside their trade, business or profession). Some rules of conduct must be respected only by acting towards consumers, some other rules of conduct must be respected by acting towards any retail client, some other rules must be respected by acting towards any client.

\textsuperscript{23} Some rules of conduct and information duties must be respected by investment undertakings and intermediaries towards any \textit{private} client. Some other rules of conduct and information duties must be respected only if the client is a retail client (and also not a professional client). The notion of “Retail client” is negatively formulated (Article 26 of the CONSOB Regulation on intermediaries): a retail client is any private client that is not a professional client. Professional clients are (Annex III to the CONSOB Regulation on intermediaries) “clients in possession of the experience, awareness and competence necessary to make their own informed decisions on investments and to correctly evaluate the risks assumed”. There are two categories of professional clients: professional clients by law (for example banks, insurance companies, investment firms, etc.) and professional clients “on request”, that is clients who make a specific request to be classed as professional customers, provided at least two of the following requirements are met: - the client has executed significant transactions on the market in question, averaging 10 transactions per quarter in the previous four quarters; - the value of the customer’s financial instrument portfolio, including cash deposits, must exceed 500,000 Euro; - the customer works or has worked in the financial sector for at least one year in a professional capacity which presumes awareness of the transactions and services envisaged.
Insurance

In the Private Insurance Code the word ‘consumer’ is used only three times. In this legislative decree (as well as in all the ISVAP regulations) the concept of “party of the insurance contract” (that is, the policy holder) is always used. Information duties and rules of conduct are also foreseen in order to protect any subject who stipulates an insurance contract with an insurance undertaking: it does not matter if the contracting party is a natural or a legal person, nor does it matter if the purposes for which the policy holder has stipulated the contract are outside their trade or business or relate to their trade or business. The intention is to treat the party of the insurance contract as a client, not as a ‘consumer’.

6.2.1.4 Level of protection provided by national legislative framework compared to UCPD

Most of the national rules applicable to the commercial practices in the field of financial services implement corresponding provisions of EU Directives concerning insurance, credit or investment services. Only some of these rules are purely national. In general, it is difficult to say if the level of protection provided by these rules is higher than the level of protection provided by the rules of Directive 2005/29/EC. In most of the cases such rules appear to be a particularly detailed application – to the field of financial services – of the general principles of fairness and transparency which inspire the regulation of unfair commercial practices.

The greatest difference between the general regulation of unfair commercial practices and the ‘special’ regulation of financial services is that the conduct of a professional who infringes the information duties and/or the rules of conduct laid down in the TUB, TUF or PIC is qualified as illegal (and therefore must be punished with administrative pecuniary sanctions) in itself, - the fact that such behaviour may distort the economic behaviour of the average consumer and impair the average consumer’s capacity to take an informed and free commercial decision is immaterial.

6.2.2 Most common unfair commercial practices in the area of financial services

6.2.2.1 Description of the most common unfair commercial practices

Banking (including consumer credit)

In several cases the AGCM has adopted injunction orders and administrative pecuniary sanctions for infringement of the prohibition of unfair commercial practices (according to the provisions of the Consumer Code implementing the UCPD) in the field of credit and banking services.\(^{24}\)

In some cases Banks have violated the rules (laid down by Article 120-quater of the TUB) concerning the procedure for the substitution of the creditor in consumer credit

---

contracts (the so-called *Surrogazione nei contratti di finanziamento*), for example by making consumers pay penalties or expenses prohibited by law, or by refusing to take the necessary steps in order to allow the substitution to take place. Such practices have been qualified as misleading and aggressive.²⁵

In other cases banks have published commercial communications giving incorrect, false or incoherent information (or omitting some essential information) about the characteristics and cost of the service offered, deceiving the average consumer and causing him or her to take a transactional decision that would not have been taken otherwise. For example information was omitted about the fact that a credit contract could not be concluded immediately by request of the consumer, but could be concluded only after a reference check by the bank and then only if the check returned positive results.²⁶ Another practice is advertising which lets the average consumer think that the offer is customised, while in reality the offer is standardised.²⁷ Internet advertising which fails to specify the real nature and the functioning of the debit-card offered,²⁸ advertising which fails to specify that the credit would in reality be granted by a bank other than the advertiser, who is in fact merely a credit intermediary,²⁹ and advertising concerning a cashpoint card which declared that the withdrawals would be free of charge whilst omitting to inform consumers about the fact that every withdrawal made in non-Euro States involved payment of a fee are other instances. Additionally, advertising in which the conditions to which the grant of the credit is subordinated are described in an ambiguous and incoherent way and advertising in which the annual percentage rate of charge and/or the total cost of the credit for the consumer are not indicated or are indicated incorrectly has been observed.³⁰

All these conducts have been qualified by the AGCM as misleading practices according to Article 21 or 22 of the Consumer Code and often at the same time as unfair practices according to the general clause of Article 20 of the Consumer Code.

Other unfair practices relate to closure of a current account contract: for example banks may claim for the payment of fees or penalties (not owed by the consumer) on the

---


²⁶ AGCM, Provvedimento n. 19229 of 18th December 2008 (case n. PS668 – Findomestic);

²⁷ AGCM, Provvedimento n. 19229 of 18th December 2008 (case n. PS668 – Findomestic);

²⁸ AGCM, Provvedimento n. 20301 of 16th September 2009 (case n. PS1904 – Che Banca!);

²⁹ AGCM, Provvedimento n. 21228 of 23rd June 2010 (case n. PS5435 – Area Consult Finanziamenti); AGCM, Provvedimento n. 22059 of 26th January 2011 (case n. PS5822 – Promofin Italia); AGCM, Provvedimento n. 22313 of 20th April 2011 (case n. PS6203 – Mutuando).

³⁰ AGCM, Provvedimento n. 21771 of 3rd November 2010 (case n. PS4916 – Banca Nazionale del Lavoro – Prelievi gratuiti);

³¹ AGCM, Provvedimento n. 21500 of 26th August 2010 (case n. PS4388 – Fineco Bank – Requisiti fido);

³² AGCM, Provvedimento n. 22439 of 17th May 2011 (case n. PS6758 – Cofidis – Prestito revolving); AGCM, Provvedimento n. 22059 of 26th January 2011 (case n. PS5822 – Promofin Italia); AGCM, Provvedimento n. 21375 of 21 July 2010 (case n. PS2715 – Accord Italia);
occasion (and because) of the termination of the contract,\textsuperscript{33} and banks may unjustifiably slow down the operations that are necessary in order to close a current account, causing delays and consequently inconvenience to the consumer.\textsuperscript{34}

These conducts have been qualified by the AGCM as aggressive practices according to Article 22 and 25 of the Consumer Code and often at the same time as unfair practices according to the ‘general clause’ of Article 20 of the Consumer Code.

\textit{Investments}

For reasons explained below (1.2.2.2) there are no decisions from AGCM concerning unfair commercial practices in the field of investment services and activities to date.

\textit{Insurance}

In some cases the AGCM has fined insurance undertakings for infringement of the prohibition of unfair commercial practices towards consumers (under Article 27 of the Consumer Code).\textsuperscript{35}

In some cases, advertising has been recognised as misleading (Article 21(1) and Article 22 Consumer Code) because of its incompleteness: the respective message did not indicate one (or more) conditions that – according to the terms of the contract subsequently concluded – were necessary for the policy holder in order to be entitled to claim the indemnity promised by the insurance undertaking.\textsuperscript{36}

Other cases concern the sudden cancellation of compulsory insurance contracts for damages caused by motor vehicles. In case of termination of such an insurance contract, insurance companies must give adequate information to the consumer and they must also deliver the certificate of claims experience, which always has to be returned to the insured party when the contract is ended without any renewal or prorogation (according to Art. 134 of the Code of Private Insurance). In these cases the insurance companies were held liable because they had not provided the required information nor had they delivered the certificate of claim experience. This conduct has been qualified as an aggressive practice (according to Article 24 and Article 25, lit. d) of the Consumer Code.\textsuperscript{37}

In other cases insurance undertakings, after they had received a valid notice of termination of the insurance contract sent by the consumer, nonetheless asked for payment of the premium for the subsequent year, warning the clients that if they did not

\textsuperscript{33} AGCM, Provvedimento n. 21144 of 19th May 2010 (case n. PS2833 – Webank – chiusura c/c);

\textsuperscript{34} AGCM, Provvedimento n. 21321 of 7th July 2010 (case n. PS2624 – Cassa di Risparmio di Parma e Piacenza);


\textsuperscript{36} AGCM, Provvedimento n. 21286 of 23 June 2010 (case n. PS4307 – Arfin); AGCM, Provvedimento n. 20007 of 25th June 2009 (case n. PS1506 – Direct Line Insurance); AGCM, Provvedimento n. 20399 of 22th October 2009 (case n. PS3721 - Zurich).

\textsuperscript{37} AGCM, Provvedimento n. 22500 of 8th June 2011(case n. PS6633 – INA. Assitalia).
pay the premium a legal action before Courts would be brought. This conduct has been qualified as an aggressive practice (according to Article 24 and Article 25, lit. d and e of the Consumer Code).\textsuperscript{38}

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

\textit{Enforcement issues}

TUB, TUF and PIC contain many provisions which set a variety of information duties and rules of conduct (for the pre-contractual phase as well as for the period after conclusion of the contract, and even for the time after the termination of the contract) in order to ensure transparency, diligence, fairness and loyalty in relations between banking, investment and insurance undertakings and their clients. The aim pursued by the legislator is to protect clients (normally any client, and not only ‘consumers’, meant as natural persons who act for purposes which do not relate to their trade, business or profession) from abuses and to give them the chance to take informed and well-reasoned decisions.

Some of these provisions implement corresponding provisions of EU Directives (and in some cases with stricter and/or more detailed rules); some other provisions are purely national.

In both cases, the above mentioned legislative Acts foresee that the infringement of such information duties and rules of conduct has to be punished in itself (notwithstanding the possibility of distorting the economic behaviour of the average consumer and impairing the average consumer’s capacity to take an informed and free commercial decision) with administrative pecuniary sanctions and injunctions which must be applied by enforcement authorities (respectively, \textit{Banca d’Italia}, CONSOB and ISVAP). These are different from the enforcement authority AGCM (which is entitled to apply the administrative pecuniary sanctions and the other sanctions laid down by Article 27 of the Consumer Code for the infringement of the prohibition of unfair commercial practices towards consumers). The procedure for the application of these sanctions by enforcement authorities is also regulated in a different way, and the amount of the administrative pecuniary sanctions foreseen in TUB and PIC is lower than the fines laid down by Article 27 of the Consumer Code (on the contrary, the amount of the administrative pecuniary sanctions foreseen in the TUF is identical).

As raised by respondents to this study such as the \textit{Associazione Bancaria Italiana}, it may happen that with one conduct a banking, insurance or investment undertaking infringes at the same time both the prohibition of unfair commercial practices towards consumers (according to Article 18 onwards of the Consumer Code) and the special rules of transparent and fair conduct laid down by one of the special provisions contained in TUB, TUF or PIC. In these cases there is the risk of the undertaking being punished twice (with two different penalties applied by two different authorities) for the

\textsuperscript{38} AGCM, Provvedimento n. 19655 of 19th March 2009 (case n. PS317– RAS); AGCM, Provvedimento n. 22173 of 2nd March 2011 (case n. PS6514 – \textit{Italiana assicurazioni}).
same conduct. More generally, it appears the relationship between the enforcement authorities and the respective procedures is problematic. The legislative decrees that implemented the UCPD have not faced such problems with similar rules; nor are such problems faced by equivalent provisions inserted in the TUB, TUF or PIC.

This situation creates great difficulties and leads some authors to assert that the general rules concerning unfair commercial practices towards consumers should not apply to financial services because of the existence of special rules, sanctions and enforcement authorities in the fields of banking, investment and insurance services.

These views are inconsistent with the UCPD and with the formulation of the provisions that have implemented the UCPD in Italy: by determining the scope of application of such provisions, Articles 18 and 19 of the Consumer Code do not exclude - expressly or by implication - financial services.

Nevertheless, the Italian Consiglio di Stato (highest administrative court) has asserted that Articles 18 onwards of the Consumer Code do not find application in the field of investment services and activities (so that in this field the only enforcement authority should be CONSOB and the only rules of conduct the investment undertakings must comply with are the ones laid down by the TUF), while the rules concerning unfair commercial practices towards consumers are to be considered applicable both in the field of banking and credit services and in the field of insurance services (despite the existence of special rules, sanctions and enforcement authorities in these fields as well).

This opinion has been criticised by many authors, but seems to be shared by the AGCM. So far AGCM has not opened a procedure for assessing the violation of the prohibition of unfair commercial practices against an investment undertaking in order to apply to the latter the fines and sanctions laid down by Article 27 of the Italian Consumer Code. This is why there are a number of decisions of AGCM concerning unfair commercial practices in the field of investment services and activities.

---


42 See F. Maimeri, Le competenze delle altre Autorità, in Jean Monnet Programme, La tutela del consumatore e della concorrenza. Ruolo e funzioni dell’Autorità Garante della Concorrenza e del mercato, Università Europea di Roma, 26 March 2010.


commercial practices in the fields of banking, credit, payment and insurance services, but none so far in the field of investment services.

6.2.2.2 Cross-border dimensions of most common unfair commercial practices

No cases of cross-border unfair commercial practices in the area of financial services have been identified.
6.3 Immovable property

6.3.1 Legislative framework

6.3.1.1 National implementation legislation(s) of the UCPD

In the legislative decrees adopted to implement the UCPD the Italian Government has not made use of the possibility (offered by Article 3(9) of the UCPD) to introduce special rules imposing more restrictive and prescriptive requirements in the field of immovable property.

The provisions of the Italian Consumer Code which implement Articles 1-13 of the UCPD (Article 18-27-quater) contain neither special rules applying (only) to commercial practices connected with the promotion of contracts for the creation, acquisition or transfer of rights of or in immovable property, nor special rules applying only to commercial practices connected with the promotion of contracts for the construction of new buildings, the conversion of existing buildings or for rental of accommodation for residential purposes.

6.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

It appears that in the Italian legislation there are no provisions (inserted in legislative Acts different from the Consumer Code) that contain bans of specific commercial practices connected with the promotion of the conclusion of contracts for the creation, acquisition or transfer of rights of immovable property.

Only the legislative decree n. 192 of 19 August 2005 that implements the EC-Directive on the energy performance of buildings (2002/91/EC, repealed by Directive 2010/31/EU), contains a provision which could be relevant in this context. Article 6, par. 2-quater, implementing the rule of Article 12(4) of Directive 2010/31/EU, but with a wider scope of application, states that (beginning from 1 January 2012), when a seller offers any building or building unit for sale, the energy performance indicator of the energy performance certificate of the building or the building unit must be stated in advertisements made in commercial media. No specific sanction is foreseen for the infringement of this rule in the legislative decree n. 192 of 19 August 2005. Nevertheless, it is obvious that in the future the energy performance indicator will have to be considered as material information according to Article 7(4) of the UCPD (Article 22(4) of the Italian Consumer Code), so that any invitation to purchase made using advertisements in commercial media in order to promote the sale of buildings or building units to consumers lacking such information will surely have to be considered as a misleading omission.

In Italian law there are furthermore several provisions concerning the form and content of the contracts for the creation, acquisition or transfer of rights in immovable property, as well as the rights and obligations of the parties arising from such contracts.

Beyond the (merely private law) rules contained in the civil code the Decreto legislativo n. 122 of 20 June 2005 should be mentioned. This contains several measures of
protection for the consumer who concludes a contract for the acquisition of property whose construction has not been completed (or even started) at the time of the stipulation of the contract. This legislative decree establishes that such contracts are void if a bank or an insurance company does not stipulate a surety for the restitution of the price paid (in advance) by the buyer in the event that the seller fails to construct the building and leads with such non-performance to the rescission of the contract, and moreover contains a list of information and elements that must necessarily be included in the contract. Of course, it is an unfair commercial practice (according to Article 18 onwards of the Consumer Code) if traders fail to comply with such rules by negotiating and concluding with consumers contracts of sale of buildings to be constructed.

There are also national provisions (see above) which purport to protect consumers who stipulate credit agreements secured by mortgages on residential immovable property and/or concluded in order to finance the acquisition of the property of residential buildings and in connection with the sales contracts relating to such buildings.

b) National legislation regarding misleading actions
No specific legislation has been identified in this area.

c) National legislation regarding misleading omissions
No specific legislation has been identified in this area.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence
No specific legislation has been identified in this area.

e) Other national legal provisions on unfair commercial practices in the field of immovable property
No other provisions have been identified.

6.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

There is no specific rule concerning the concept of consumer in the field of immovable property.

6.3.1.4 Level of protection provided by national legislative framework compared to UCPD

The level of protection provided by Italian legislation is not higher than the level of protection provided by the UCPD.

6.3.2 Most common unfair commercial practices in the area of immovable property

6.3.2.1 Description of the most common unfair commercial practices

The AGCM has already imposed penalties and injunctions for infringement of the prohibition of unfair commercial practices in the field of immovable property.

The most relevant cases concern advertising messages prepared by the building firm, or (more often) by the estate agency, and published in newspapers, magazines and
internet sites in order to promote the conclusion of sales contracts for the acquisition of the property on newly constructed building units.

Such advertising messages have been qualified as misleading because of the nature of indications concerning:

- The total amount of the charges for the contract (omission of some charges such as the fee due to the estate agency);\(^ {46} \)
- The extension of the object of the contract (for example acquisition of a garage indicated in the advertisement as merely facultative while the contract stipulates that the buyer of the building unit is obliged to acquire also the connected garage);\(^ {47} \)
- The qualities and characteristics of the building (for example advertising containing pictures of a building different, less valuable, building unit offered for sale);\(^ {48} \)
- The process of the construction of the building (the trader asserts in the advertising that they have directly executed all the performances and works that were necessary for the construction of the building, while in reality some of these works were executed by other undertakings);\(^ {49} \)
- The characteristics of the surroundings and of the area in which the building is located (the area is described as a “purely residential” or “green” area, but these indications are incorrect);\(^ {50} \)
- The date of the delivery of the building unit to the buyer.\(^ {51} \)

On the contrary, there are no reported cases of aggressive commercial practices connected with the field of immovable property.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

### 6.3.2.2 Cross-border dimensions of most common unfair commercial practices

No cases of cross-border unfair commercial practices in the area of immovable property have been identified.

\(^ {46} \) AGCM, Provvedimento n. 21952 of 22nd December 2010 (case n. PS4312 – Immobildream. Complesso immobiliare Polis).

\(^ {47} \) AGCM, Provvedimento n. 21952 of 22nd December 2010 (case n. PS4312 – Immobildream. Complesso immobiliare Polis).


\(^ {49} \) AGCM, Provvedimento n. 21543 of 8th September 2010 (case n. PS3553 – Valpadana Costruzioni).

\(^ {50} \) AGCM, Provvedimento n. 21009 of 14th April 2010 (case n. PS1437 – Papillo. Immobili Roma Aurelia).

\(^ {51} \) AGCM, Provvedimento n. 21009 of 14th April 2010 (case n. PS1437 – Papillo. Immobili Roma Aurelia).
ANNEX 1: Fact sheet – legal framework and enforcement
## Implementing legislation of the Unfair Commercial Practices Directive (UCPD)

- Legislative Decree No 146 of 2 August 2007 modified the Italian Consumer Code to implement the UCPD
- Legislative Decree No. 145 of 2 August 2007 (implements Article 14 of the UCPD)
- Legislative Decree No. 221 of 23 October 2010

## National legal provisions on unfair commercial practices

### Overview of relevant provisions which are not based on EU legislation

<table>
<thead>
<tr>
<th>Financial services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative Decree No 385/1993 (TUB) for banking products, concerning transparency, information to consumer and firms behaviour</td>
</tr>
<tr>
<td>Legislative Decree No 58/1998 (TUF) for financial instruments and investment services and activities, concerning transparency, information to be provided to consumers, and investment firms’ behaviour</td>
</tr>
<tr>
<td>Article 36-bis of Law n. 214 of 22 December 2011</td>
</tr>
<tr>
<td>Regulations enacted by ISVAP</td>
</tr>
<tr>
<td>Regulations enacted by CONSOB</td>
</tr>
<tr>
<td>Regulations enacted by the Bank of Italy</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative Decree No 122 of 20 June 2005</td>
</tr>
</tbody>
</table>

### Reasons why enforcement bodies apply these national legal provisions

The Italian Competition and Market Authority (AGCM) stated that in the area of financial services, the national legislation lays down particular standards of behaviour for professionals to follow in order to protect the consumer. The national provisions regulate behaviour ex ante and in detail, over a wide range of matters. This is needed to provide consumers with adequate protection and information standards. Moreover, national provisions can help define UCPD requirements such as 'professional diligence' or the prohibition of imposing 'disproportionate...barriers...where a consumer wishes to switch to another trader'.

## Relevant case law

### Financial services

According to AGCM, the most important cases regarding consumer credit are from 2008 when there were 20 decisions about portability. These were linked to Law 40 of 2007 concerning bank switching.

Some of the most important cases are:
- PS1191 Portabilita’ Mutuo Unicredit
- PS705 BNL Contratto di Mutuo
- PS2167 BNL Chiusura Conto
- PS5758 Cofidis Prestito Revolving
- PS1311 Fiditalia Carta Eureka
- PS2167 BNL Chiusura Conto
- PS4126 Barclays Bank Rata di Cauzione
- PSS371 INA Assitalia Polizze Assicurative

### Immovable property

- AGCM, Provvedimento n. 21952 of 22nd December 2010 (case n. PS4312 – Immobiledream. Complesso immobiliare Polis)
- AGCM, Provvedimento n. 19757 of 16th April 2009 (case n. PS1363 – Raffaello e Michelangelo. Vendita ville Roddolo)
- AGCM, Provvedimento n. 18116 of 6th March 2008 (case n. PI6459 – GM Immobiliare. Villa tri livelli)
- AGCM, Provvedimento n. 21543 of 8th September 2010 (case n. PS3553 – Valpadana Costruzioni)
- AGCM, Provvedimento n. 21009 of 14th April 2010 (case n. PS1437 – Papillo. Immobili Roma Aurelia)

## Enforcement

### Responsibility for enforcing the UCPD

<table>
<thead>
<tr>
<th>Financial services</th>
</tr>
</thead>
</table>
| Competition and Market Authority (Autorità Garante della Concorrenza e del P.

<table>
<thead>
<tr>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antitrust Authority (Autorità Garante della Concorrenza e del P.</td>
</tr>
</tbody>
</table>
## Means of enforcement of UCPD

<table>
<thead>
<tr>
<th>Services</th>
<th>Means of enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>By public law</td>
</tr>
<tr>
<td>Immovable property</td>
<td>By public law</td>
</tr>
</tbody>
</table>

## Who can bring an action under the national legislation implementing the UCPD

Public authorities, ombudsman, organisations representing consumer interests, competitors, trade associations, and individual consumers.

## Main obstacles for enforcing unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Services</th>
<th>Obstacles reported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>None reported</td>
</tr>
<tr>
<td>Immovable property</td>
<td>None reported</td>
</tr>
</tbody>
</table>

## Problems relating to cross-border enforcement of unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Services</th>
<th>Obstacles reported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>None reported</td>
</tr>
<tr>
<td>Immovable property</td>
<td>None reported</td>
</tr>
</tbody>
</table>

## Codes of conduct and self-regulation

<table>
<thead>
<tr>
<th>Services</th>
<th>Codes of conduct and self-regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>Common Principles for bank account switching (issued by the European Banking Industry Committee, EBIC). The EBIC Common Principles for bank account switching – the compliance of which is monitored by Associazione Bancaria Italiana in Italy – provides specific obligations for banks, in order to facilitate personal current account switching.</td>
</tr>
<tr>
<td>Immovable property</td>
<td>None reported</td>
</tr>
</tbody>
</table>

ANNEX 2: Fact sheet – most common unfair commercial practices reported
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>IT-FS-1</td>
<td>Advertising for consumer credit contained misleading information and omissions. Often this related to the total cost of credit not being indicated, or transparently indicated, in advertising.</td>
<td>X X</td>
<td>100 120 110</td>
<td>Life insurance Health insurance Major insurance Travel insurance Other insurance (home, care, etc.) Stocks or shares, bonds, derivatives, etc. Collective investments Savings account Current account Mortgage Sharing Card Other financial service Complaints data Court cases Decisions by enforcement bodies Warnings issued by enforcement bodies Decisions or recommendations made by ADR bodies Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IT-FS-2</td>
<td>Some banks imposed disproportionate barriers when consumers wanted to switch to a new bank. Under Italian law, consumers should be able to switch from one bank to another without incurring extra costs. However, banks imposed fees relating to switching, for example by charging consumers to close down a current account.</td>
<td>X X X</td>
<td>200 50 50</td>
<td>X X</td>
<td>X</td>
<td>X</td>
<td>X Yes X</td>
</tr>
<tr>
<td>IT-FS-3</td>
<td>Consumers applying for consumer credit also received a revolving credit card (which they did not expect to get) in addition to their loan. Revolving credit means that rather than paying the full balance at the end of each month, the balance can be rolled forward and paid in instalments. This tends to incur more or higher charges. In addition to this, in some cases the loan was conditional on also receiving the revolving credit cards.</td>
<td>X X</td>
<td>10 10</td>
<td>X X</td>
<td>X</td>
<td>X</td>
<td>X Yes X</td>
</tr>
</tbody>
</table>

Source: Competition and Market Authority (AGCM) (IT-FS-1; IT-FS-2; IT-FS-3).
## Italy

Common unfair practices reported in the area of immovable property

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Practice banned in my country, but not included in the Black List (Annex I) of the UCPD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Aggressive practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other unfair commercial practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Misleading omission</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Misleading omission</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Misleading omission</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other unfair commercial practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unfair commercial practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unfair commercial practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unfair commercial practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IT-IP-1</td>
<td>Advertising regarding immovable property was misleading in some cases. For example, sometimes the cost of the property included in the advertising was not the real one. Sometimes the location of the property that was given was not accurate.</td>
<td></td>
<td>2008 &lt;10 &lt;10 &lt;10 X</td>
<td></td>
<td>X</td>
<td>Yes</td>
<td>X</td>
</tr>
</tbody>
</table>

Source: Competition and Market Authority (AGCM) (IT-IP-1).
ANNEX 3: References


## The Netherlands

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender No.</td>
<td>Invitation to tender n° JUST/2010/JCIV/PR/0018/A4</td>
</tr>
<tr>
<td>Prepared by</td>
<td>Professor Willem H. van Boom, August 2011</td>
</tr>
<tr>
<td>Checked by</td>
<td>Dr. Senda Kara, Dr. Frank Alleweldt, Harriet Gamper</td>
</tr>
</tbody>
</table>
7.1 Introduction

The Netherlands does not have a firm tradition of criminalizing, regulating or even legislating around commercial practices. This explains why the introduction of the UCPD was not experienced as an occasion calling for a complete overhaul of the legal landscape of commercial practices. The Netherlands did not have a specific Act on Commercial Practices, nor did it have ‘black lists’ similar to the Annex to the UCPD. Instead, Dutch law relied on general tort and contract law as a source of private law remedies against unfair commercial practices. Moreover, the Dutch legislature had already revoked most of its specific legislation on marketing and sales practices in the deregulation periods of the 1980s and 1990s.\(^1\) Much of the legislation on pricing and marketing (such as rules on sales periods, rebates, joint offers, gifts, et cetera) was thus abandoned and revoked. Meanwhile, the lengthy project of recodification of the Dutch Civil Code, which culminated in the introduction in 1992 of the New Dutch Civil Code, was a powerful engine for the development of comprehensive consumer protection standards in civil law. Therefore, the 1984 Misleading Advertising Directive was implemented and assimilated into the new Civil Code framework (as were most other generic consumer protection Directives).

As far as unfair commercial practices were concerned, rather than relying on formal legislation, Dutch consumer protection was long dominated by a tradition of self-regulation through tripartite negotiations. This involved the Dutch government informally brokering Codes of Conduct and other forms of alternative regulation between representative organisations from trade, industry and services on the one hand and consumer organisations on the other. Although these Codes did not involve heavy-handed sanctioning, they were binding on most of the traders involved through their membership of the association who owned the Code and was held responsible politically for its success. The quality assurance through this modern day version of self-regulatory ‘guilds’ was and still is rather successful.\(^2\) For instance, most of the case law on the 1984 Misleading Advertising Directive did not come from criminal courts or civil courts but from a private ADR Complaints Board for the Advertising Industry. It applied (and still does so) both the rules and standards derived from the 1984 Directive and autonomous standards on fairness and good taste.\(^3\)

---


This brief overview may demonstrate that the Dutch situation is complex in the sense that prior to the implementation of the UCPD, an extensive legislative body of law on unfair commercial practices generally did not exist. Nor were there extensive statutory rules in the domain of financial services and immovable property specifically. The few relevant rules that can be identified are by and large self-regulatory in origin.\(^4\)

Naturally, there were and are the ‘ordinary’ criminal offenses of fraud, extortion and coercion. These have not been amended on implementing the UCPD and they may apply concurrently with the provisions on aggressive and misleading commercial practices. In practice, however, criminal prosecution is considered a last resort.\(^5\)


7.2 Financial services

7.2.1 Legislative framework

7.2.1.1 National implementation legislation(s) of the UCPD

On October 15, 2008, the *Wet oneerlijke handelspraktijken* (Wet OHP; Unfair Commercial Practices Act 2008) came into force.⁶ The Act implemented the UCPD by amending the 1992 Dutch Civil Code (*BW, Burgerlijk Wetboek*) and the *Wet Handhaving Consumentenbescherming* (Whc; Consumer Protection Enforcement Act 2007).⁷ So, the UCPD has been implemented generically instead of sectorally. No explicit exceptions to the UCPD regimes were introduced.

Since both the 1984 and 1997 Directives on Misleading and Comparative Advertising had already been implemented in the Civil Code, as a species of the genus of wrongful extra contractual acts (tortious liability), the legislator considered the Civil Code to be the natural place for the implementation of the UCPD as well. The qualification of unfair advertising practices as private law torts rather than breaches of public law regulations led to an emphasis on private law remedies in case of breach. For a long time, Dutch law trusted in private litigation, self-regulatory ADR schemes (for example in the advertising industry, or the banking and insurance industry), and collective and representative action by private associations and foundations, as far as enforcement of consumer law was concerned. It was only with the introduction of the Dutch Consumer Authority (*Consumentenautoriteit*) by the Consumer Protection Enforcement Act 2007 that a comprehensive public law framework was developed for the enforcement of rules pertaining to consumer law generally.⁸

So, the Unfair Commercial Practices Act 2008 does two things: it renders unfair commercial practices into both wrongful acts in private law and administrative offenses in public law. As far as the private law aspects are concerned, private individuals may seek prohibitory and mandatory injunctions. Individuals affected by an unfair commercial practice may claim a court order holding that the defendant who is pursuing such a practice is prohibited to continue that practice and/or mandatorily ordering cessation of that practice (and possibly restoring the status ex ante quo). Failure of the defendant to

---


comply with the court-ordered injunction results in recurring penalty payments due to the claimant. In practice, mere injunctions are rarely sought by individuals. Individuals usually pursue claims for damages in tort (and possibly also, as the case may be, avoidance and restitution\textsuperscript{9}). Representative associations and foundations may also seek prohibitory and mandatory injunctions in a so-called ‘collectieve actie’ (collective action) proceedings.\textsuperscript{10} This is a method commonly employed by such bodies to enforce consumer law.

The legal framework for all this is based on the insertion of the substantive rules on unfair commercial practices in section 6.3.3A of Book 6 (on obligations) of the Civil Code.\textsuperscript{11} For instance, the core article 6:193b (1) Civil Code provides: “A trader acts wrongfully vis-à-vis a consumer if he commits a commercial practice which is unfair”. By operation of the Civil Code framework, the aforementioned private law remedies are thus made directly available to consumers and representative bodies.

As far as the public law remedies are concerned, the Consumer Protection Enforcement Act 2007 provides literally that “a trader shall abide by the provisions laid down in section 6.3.3A of the Civil Code” (Article 8.8). Offending against this provision is an administrative rather than a criminal offence. The Act lists the various available sanctions. The competent authority may, subject to judicial review, impose a fine of maximum 450,000 Euro per committed offense, may issue a stopping order (an administrative order made by the competent public authority ordering the trader to stop a certain practice, on penalty of a fine), a compliance order (an administrative order holding a positive mandatory duty to comply, issued either after commission of the offense or, by way of anticipatory remedy, where the offense is imminent), and it may publish its order or a voluntary undertaking by the trader.\textsuperscript{12}

As far as public law enforcement of the Unfair Commercial Practices Act 2008 is concerned, either the Consumer Authority or the Autoriteit Financiële Markten (AFM; the Netherlands Authority for the Financial Markets) is the competent authority. Pursuant to the relevant parts of the Consumer Protection Enforcement Act 2007, the Consumer Authority can initiate legal action against unfair practices generally, with the exception of


\textsuperscript{11} Section 6.3.3a “Unfair Commercial Practices” of the Civil Code (article 6:193a-6:193j BW).

\textsuperscript{12} See Consumer Protection Enforcement Act 2007, arts. 2.9, 2.10, 2.15, 2.23; in a limited number of cases involving ‘code owners’ of codes promoting unfair commercial practices (see article 2 (g) and UCPD), the competent authority may have to resort to a specific private law proceedings before the Court of Appeal of the Hague. See article 6:193i (1) (j) and article 3:305d Civil Code. See further W.H. van Boom (2010). Handhaving consumentenbescherming - Een toelichting op de Wet Handhaving Consumentenbescherming. Paris 46-47.
such practices pertaining to ‘financial services and activities’. The Act exclusively burdens the AFM with enforcement in the area of such services and activities.\textsuperscript{13} The Consumer Protection Enforcement Act 2007 defines ‘financial services and activities’ as including, \textit{inter alia}, a financial service within the meaning of Article 1:1 of the Financial Supervision Act 2006 (Wft). This article in turn refers to the business of offering financial products such as investment products, current and savings accounts, credit, or insurance; to advising on financial products, the provision of brokerage services, or reinsurance brokerage services; running a clearing institution; acting as an authorised agent or authorised sub-agent; or providing an investment service.\textsuperscript{14} This definition roughly encapsulates the definition contained in Article 2 of the Distance marketing of consumer financial services Directive (2002/65/EC): ‘any service of a banking, credit, insurance, personal pension, investment or payment nature’.

As far as consumer financial services are concerned, there was no pre-existing coherent body of rules concerning unfair commercial practices. Moreover, as mentioned earlier, the Netherlands does not have a tradition of heavily criminalizing, regulating or even legislating commercial practices in financial services. Consumer protection in the banking and insurance industry is traditionally governed by self-regulation. Examples of such self-regulation include voluntary codes on mortgage debt means-testing, on consumer debt registration, and on consumer credit advertising.\textsuperscript{15} In the last decade or so, there has been a notable shift to public law regulation. Some of the self-regulatory codes have been replaced by public law regulation while others have been embedded in the regulatory framework by the introduction in statute of a duty to take part in or develop a self-regulatory scheme.\textsuperscript{16} The result has been an increasing overlapping and cross-referencing between private law, administrative law regulation and self-regulation.\textsuperscript{17}


\textsuperscript{14} Other activities labeled as financial service by the Consumer Protection Enforcement Act 2007 include: offering securities to the general public or furthering the admission of securities to an official stock exchange listing; contracts concerning financial products which directly stem from these financial services or activities; attracting, obtaining or having the disposal of callable funds beyond a restricted circle in the Netherlands in the pursuit of a business from others than professional market parties; undertaking a currency exchange business; managing a licensed regulated market or a multilateral trading facility; offering a payment service.

\textsuperscript{15} An overview of the developments in this area is offered by W.H. van Boom et al. (2009). \textit{Handelspraktijken, reclame en zelfregulering – Pilotstudy Maatschappelijke Reguleringsinstrumenten (WODC Rapport 1535)}. BJU 49 ff. For examples of Codes of Conduct in this area, see the Code of Conduct on Mortgage Credit, the Code of Conduct on Consumptive Credit (at: www.nvb.nl (Dutch Banking Association)), and the general Dutch Advertising Code (at: www.reclamecode.nl).

\textsuperscript{16} E.g., article 4:17 Financial Supervision Act 2006.

Obviously, the Netherlands has implemented the various sectoral and cross-sectoral Directives that have direct or indirect bearing on the fairness of commercial practices in the financial services industry. Here, we could refer specifically to (pre-) contractual information duties, cooling-off periods and other instruments associated with the prevention of misleading actions and omissions and aggressive marketing and sales practices. However, because these Directives are not the main focus of this study, their relevant provisions pertain to contractual aspects rather than commercial practices aspects, and they have been faithfully duplicated in Dutch law without significant amendments or modifications, no in-depth reference to them will be made. Suffice to note that these Directives were mostly implemented in the (now) Financial Supervision Act 2006 and its satellite decrees and regulations.\(^\text{18}\)

As far as the relationship between the Financial Supervision Act 2006 and the Unfair Commercial Practices Act 2008 is concerned, the government stated that though some of the norms contained in the 2008 Act were already in place as a result of the 2006 Act, the 2008 Act went a step further since the financial services legislation does not contain provisions on practices deemed misleading or aggressive. Moreover, since some services (such as those over a certain monetary threshold) are exempted from supervisory arrangements under the 2006 Act but are nonetheless subject to the general UCP regime of the 2008 Act, the latter is considered to be go well beyond the ambit of the former.\(^\text{19}\) In practice, the AFM prefers using its powers under the Financial Supervision Act 2006 wherever possible over those vested in the AFM under the Unfair Commercial Practices Act 2008. One reason may be that the enforcement instruments contained in the former (such as withdrawal of license) may be more efficient than those under the latter.

7.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

It is quite difficult to state whether Dutch law bans certain practices not included in the Black List, for the reasons set out in the introduction: Dutch law did not already have a comprehensive Act on unfair commercial practices, let alone a black list. Perhaps the following can be considered as banned practices under Dutch law:

The Doorstep Selling Act 1975 (Colportagewet) was and still is a powerful instrument against doorstep selling involving consumers. Doorstep selling is quite rare in the Netherlands. Indeed, the unsolicited doorstep selling of monetary credit is fully prohibited in the Netherlands.\(^\text{20}\) The unsolicited sale of commodities credit as such is not

\(^{18}\) Recently, Directive 2008/48/EC on credit agreements for consumers was implemented partly in the Civil Code (Book 7 nominate contracts) and partly in the Financial Supervision Act 2006. See Stb. 2011, 246.

\(^{19}\) Kamerstukken II 2006/07, 30-328, nr. 2, p. 8, p. 19.

\(^{20}\) Article 6 Doorstep Selling Act 1975 (as amended by Stb. 1992, 70). ‘Credit’ is defined as monetary credit (article 1:1 Financial Supervision Act 2006: ‘to make a sum of money available to a consumer, regarding which the consumer is required to make one or more payments’).
prohibited but the seller is under the obligation to disclose the commercial purpose of the sales pitch, to immediately confirm the contract in duplicate writing with signatures (on penalty of nullity) and observe the eight day cooling-off period.

Since 1998, the Dutch Gambling Act altogether prohibits the unlicensed initiation of a pyramid game. The UCPD Annex ‘black list’ no. 14 prohibits pyramid schemes for promotional purposes. Possibly, this can be considered as Dutch law going further in banning pyramid schemes than the UCPD.

Article 4:25 Financial Supervision Act 2006 provides the basis for the introduction through secondary regulation of specific rules on ‘diligence’ of financial service providers. Currently, the following practices are explicitly banned:

- **Cold calling, faxing and spamming**: the use of automated calling machines, faxes or electronic messages for conveying unsolicited communications to consumers (natural persons not acting in the pursuit of their business or profession to whom a financial enterprise provides a financial service) to promote the conclusion of a distant contract. For other means of distance communication an opt-out regime applies. On the basis of specific provisions in the Telecommunications Act, telemarketing by means of an unsolicited outbound telephone sales pitch is subject to an opt-out choice. Consumers are to be given unambiguous information of the commercial aim of the telephone call at the beginning of the conversation, and the opportunity to directly register with the ‘do not call registry’ at the end of the conversation.

- **Investments**: firms are banned from directly or indirectly approaching persons ‘face to face’ where these persons are not professional investors, have not had prior business contact with these firms and did not explicitly consent to such contact in advance writing or electronic communication. Note that this ban also applies to others than consumers in the strict sense.

---


22 Article 7 (1), article 24 and 25 Doorstep Selling Act; cf. Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises.


24 See article 7:46h BW and article 77 Besluit Gedragstoezicht financiële ondernemingen Wft (BGFO; Financial Supervision Act (Supervision of Financial Enterprises Conduct) Regulations (as far as financial services is concerned).

25 See Article 11.7 Telecommunicatiewet (Telecommunications Act) and Besluit bel-me-niet-register (Do-not-call register Decree), Stb. 2009, 129. For supervision and enforcement of the ‘do not call registry’ please see www.bel-me-niet. Most of the practical support of the registry is procured to a private foundation ‘Stichting Infofilter’.

26 Article 82 Besluit Gedragstoezicht financiële ondernemingen Wft (BGFO; Financial Supervision Act (Supervision of Financial Enterprises Conduct) Regulations.
• **Commission churning:** in principle, investment firms are banned from excessively manipulating the client’s portfolio. This briefly comprises the duty of the financial service provider who manages the client’s portfolio not to buy and sell stock with such a frequency that the transactions are merely undertaken with the obvious aim of favouring the provider or related third parties (for example, because of commissions due to the provider with each transaction).\(^2^7\)

Note that the basis of these bans is partly to be found in sectoral EU Directives.

b) **National legislation regarding misleading actions**

It is quite difficult to state whether Dutch law bans certain practices as misleading actions outside the UCPD framework. Perhaps Article 4:19 Financial Supervision Act can be considered as one such article.\(^2^8\) It holds that a financial enterprise shall ensure that the information provided by it or on its behalf with regard to a financial product, financial service or ancillary service, including advertisements, is not detrimental to the information to be supplied or made available. Moreover, the information supplied by an investment firm to clients shall be accurate, clear and not misleading. The financial enterprise shall ensure that the commercial objective of the information supplied or made available is recognisable as such. See also above.

c) **National legislation regarding misleading omissions**

The Financial Supervision Act 2006 sets forth a number of information disclosure duties which arguably aim at preventing misleading omission of material information. In that sense, Dutch law has specific legislation preventing misleading omissions by imposing a duty to inform on financial service providers. These duties, which predominantly stem from sectoral Directives, include the following:

- *All* information supplied shall be correct, unambiguous and not misleading;\(^2^9\)
- A financial enterprise shall ensure that the information it provides with regard to a financial product or service, including advertisements, does not de-emphasize or obfuscate the information that is to be supplied in accordance with the Financial Supervision Act 2006;\(^3^0\)

---


\(^{28}\) See C.M. Grundmann-van de Krol (2010). Koersen door de Wet op het financieel toezicht. BJu 221 f.

\(^{29}\) Article 4:19 Financial Supervision Act is partially based on article 19 Directive 2004/39/EC on markets in financial instruments (MiFID), which uses the words ‘fair, clear and not misleading’. See also Directive 2006/73/EC, arts. 26 ff.

• The financial enterprise shall ensure that the commercial objective of the information supplied or made available is recognisable as such;\textsuperscript{31}

• Prior to giving advice, providing an investment service, providing an ancillary service or concluding a contract regarding a financial product other than a financial instrument, an investment firm or financial service provider shall supply information to the consumer or, where it concerns a financial instrument or insurance, to the client, insofar as this is reasonably relevant for an adequate assessment of that service or product;\textsuperscript{32}

• A Financial advisor is under a duty to communicate to consumers whether he or she acts as a tied agent of an insurance company or provider of an investment product so as to be transparent on contractual ties and commission-based advising.\textsuperscript{33}

Furthermore, there are rules on the standardisation of information requirements:

• Advertising standards concerning complex financial products include specific rules on a so-called ‘financial product leaflet’ (financiële bijsluiter). This is a standard product guide, which has to be drawn up in Dutch and consists of a compulsory inclusion of a standardised product risk indicator, particulars of the investment firm, reference to AFM supervision and availability of a more detailed prospectus.\textsuperscript{34} Commercials on radio, TV, internet and in print have to include the standardised pictogram/audio file. The warning states “Do not run unnecessary risk. Read the Financial Leaflet” and depicts a person carrying a weight (depending on the extent of the risk, the risk-indicating cylinder is nearly empty, half-filled or fully filled);

• Similar duties apply to consumer credit.\textsuperscript{35} There, the compulsory warning pictogram/audio file states “Beware! Borrowing money costs money”;


\textsuperscript{32} Article 4:20 Financial Supervision Act 2006.

\textsuperscript{33} Article 4:73 Financial Supervision Act 2006.

\textsuperscript{34} Article 4:22 Financial Supervision Act; article 64/article 52 Besluit Gedragstoezicht financiële ondernemingen Wft (BGFO; Financial Supervision Act (Supervision of Financial Enterprises Conduct) Regulations. Cf. C.M. Grundmann-van de Krol (2010). Koersen door de Wet op het financieel toezicht. BJu 224 ff.; 565. Further detailed rules are laid down in the AFM Regulations (Nadere regeling gedragstoezicht financiële ondernemingen Wft).

\textsuperscript{35} Article 53 Besluit Gedragstoezicht financiële ondernemingen Wft (BGFO; Financial Supervision Act (Supervision of Financial Enterprises Conduct) Regulations. For rules on calculation and presentation of APR et cetera, see Uitvoeringsregeling Wft, article 2-8. Further detailed rules are laid down in the AFM Regulations (Nadere regeling gedragstoezicht financiële ondernemingen Wft).
Let op! Geld lenen kost geld

- Rules on the investment prospectus pursuant to Directive 2003/71/EC; 36

- As of January 2012, a pictogram (and audio file) has been introduced to warn consumers when an investment opportunity that is being offered to them, is not subject to supervisory oversight by the AFM (a so-called 'Wild West warning'). Advertisements for public offers of stock and investment objects valued over 50,000 Euro should contain the ‘Wild West warning’ which states “Beware! You are investing outside the AFM oversight. No duty to license this activity”. 37

Finally, it has been suggested by the government that investment firms are under a duty to avoid the use of words and phrases in sales and marketing which would lead the consumer to associate an investment (higher risk) product with a banking, savings or insurance product. 38 This could be considered to flow from the general duty not to give misleading information, see above.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

We are unaware of the existence of any additional rules pertaining to aggressive practices. Perhaps one could file the restrictions on cold calling and the prohibition of credit doorstep selling under this heading.

e) Other national legal provisions on unfair commercial practices in the field of financial services

There is no significant number of truly autonomous national legal provisions on unfair commercial practices in the field of financial services. The following provisions may be mentioned but they are based wholly or partially on obligations under other EU Directives:

- The duty of investment firms to have an internal complaints procedure available to guarantee that complaints are handled diligently, verifiable, consistently and within a reasonable period; 39

---


The duty of investment firms to treat like customers alike, meaning that the firm is not allowed to discriminate between participants. This may entail the duty not to charge different fees to participants in an investment scheme with identical portfolios or profiles for example;

The duty for financial enterprises to have an employee remuneration policy aimed at preventing the mistreatment of consumers, clients and participants. This recently inserted and broadly phrased standard is primarily aimed at combatting excessive corporate bonuses in the banking sector. It is unclear how this open textured norm will be enforced. It seems unlikely that it will have direct spill-over effects to the UCP framework. It is connected, however, to an issue that does seem to have more direct implications for the field of unfair commercial practices: commission payments in the insurance industry. Although commission payments in consumer insurance markets have not been completely banned yet, there is an ongoing legislative effort aimed at minimising the distortive practices of such ‘legal bribery’ by insurance companies of so-called independent insurance advisors in consumer markets. These practices are thought to be one of the causes of a number of recent financial scandals in the Netherlands. In the 1990s, sales of inherently dangerous investment stock-lease products were boosted by such commissions. Likewise, in the 2000s, some banks harvested excessive commission on the sale of newly designed and heavily overpriced endowment policies and payment protection insurance which were tied up as ancillary products to mortgage loans. Consumers were not informed of the sometimes extremely generous commissions paid to the middlemen. In endowment policies, consumers were not properly informed of the management fees subtracted from their investments. Arguably, therefore, information was withheld that might have been relevant for average consumers. These and other unsavoury practices have resulted in concrete steps towards greater transparency in the conveyance of management fees information in endowment policies. Moreover, recently plans have been put forward to prohibit certain types of commission payments for certain ‘complex’ financial services.


40 Article 83 (2) and article 84 Besluit Gedragstoezicht financiële ondernemingen Wft (BGFO; Financial Supervision Act (Supervision of Financial Enterprises Conduct) Regulations).

41 Article 86a Besluit Gedragstoezicht financiële ondernemingen Wft (BGFO; Financial Supervision Act (Supervision of Financial Enterprises Conduct) Regulations).


43 AFM (2011), Feitenonderzoek Beleggingsverzekeringen. AFM/Amsterdam, parts I and II.
products such as endowment policies, life insurance and annuities, payment protection insurance, and mortgages. The gist of these plans is to enhance transparency of the cost of the advice for such products and to stimulate ‘customer agreed remuneration’ (which basically denotes a situation where the consumer directly pays the advisor).

7.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

The Financial Supervision Act 2006 defines a consumer as ‘a natural person not acting in the pursuit of his business or profession to whom a financial enterprise provides a financial service’ (Article 1:1 Wft). At first blush this seems to resemble the definition of consumer in the UCPD. It must be noted, however, that in the UCPD the notion of consumer is tightly connected to the economic decision-making process of the average consumer. In the national rules on consumer protection in financial services, the concept of ‘consumer’ is without explicit reference to the average or to the concept of economic decision-making. However, both parliamentary explanatory notes and relevant literature seem to hold that the concepts are rather similar. It is possible, though, that in absence of any explicit reference to the concepts of average consumer and transactional decision-making process, the standard or level of protection may be higher, lower or identical.

Note that the protection offered by some of the provisions of the Financial Supervision Act 2006 is not merely for the benefit of consumers – ‘clients’ and ‘non-professional investors’ may be protected sometimes as well. However, that does not affect the definition of ‘consumer’ as such.

7.2.1.4 Level of protection provided by national legislative framework compared to UCPD

The national legislative framework in financial services – notably the Financial Supervision Act 2006 – is far more precise and detailed than the UCPD. Most of the rules laid down in the Financial Supervision Act 2006 that bear resemblance to the issues of unfair commercial practices dealt with in the UCPD, can be traced back to sectoral Directives. However, the UCPD framework may be used where the national authorities lack competence to act or intervene according to the sectoral Financial Supervision Act 2006. This is exactly what the AFM has done: debentures with a nominal value surpassing 50,000 Euro are exempt from supervision by the AFM under the

---

44 See the announcement issued by the Minister of Finance on April 13, 2011, Kamerstukken II 2010/11, 31 086, nr. 27.


sectoral regime of the Financial Supervision Act 2006. However, pursuant to the Consumer Protection Enforcement Act 2007, the AFM retains the authority to enforce the Unfair Commercial Practices Act 2008. It has used these powers to extend protection against unfair commercial practices to consumers investing large sums in otherwise unregulated investment firms and funds. In a number of decisions, the AFM has ordered the disclosure of vital information in annual reports of investment firms for the benefit of these consumers. Briefly described, these orders involved information on the financial position, securities, private arrangements with prioritised creditors et cetera. The AFM reasoned that such information was essential for average consumers investing in such firms because they would use such information to decide whether or not to continue their contractual relationship with the firm. Though these decisions have been upheld in judicial review, some criticism has been raised in legal doctrine.

7.2.2 Most common unfair commercial practices in the area of financial services

7.2.2.1 Description of the most common unfair commercial practices

The Dutch Consumer Authority (Consumentenautoriteit, CA) is not competent to act against unfair commercial practices in this area. The Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten; AFM) has limited experience with enforcement in the area of aggressive practices within financial services. However, it did use the UCP framework for combating unfair commercial practices aimed at encouraging consumers to invest large sums in otherwise unregulated investment firms and funds. In a number of decisions, the AFM has ordered the disclosure of vital information in annual reports of investment firms for the benefit of these consumers — not merely at the start of the contractual relationship but also during the course of the


execution. Briefly described, these cases involved information on the financial position, securities, private arrangements with prioritised creditors et cetera. The AFM reasoned that such information was essential for average consumers investing in such firms because they would use such information to decide whether or not to continue their contractual relationship with the firm.

If inventory is made of past scandals in the consumer financial services industry, we can say that particular defective or inherently dangerous products have been sold, that practices of mis-selling have occurred and that intransparency in commission-based selling has artificially boosted sales. Please see the examples given earlier, such as the stock-lease scandal in the 1990s, the now prohibited pyramid games and the ongoing debate on the transparency and reasonableness of management fees in endowment policies as charged by insurance companies.

It is worthwhile to elaborate further on the stock-lease case, as it shows that the Unfair Commercial Practices Directive framework may not always be as forthcoming as national legislation. The stock-lease case involved financial products sold mostly by predecessors of the Dexia Bank between 1990 and 2001. The overall design of this product was that it made stock investment available to low-income consumers by lending them money with which they could “lease” stock for a fixed period. The monthly deposits these consumers had to make were in fact interest payments for the loan they had taken out with the bank. It is clear that buying or even “leasing” stock with borrowed money may be profitable but is certainly also highly risky. Due to aggressive marketing techniques, downplaying inherent risks of stock prices going down and by employing highly impenetrable prospectuses and advertisements, the Bank nonetheless succeeded in selling some 465,000 contracts at a total value (in 2001) of some 4.4 billion Euro. Then the inherent risks that had not been properly disclosed to the clients (or so they alleged) materialised: stock prices fell and a considerable number of clients were left with debts rather than equity. These clients claimed that Dexia had not properly informed them of the risks inherent to the financial product. Some also argued that the Dexia Bank had been under a duty to assure prior to conclusion of the contract that the client was able to bear the financial consequences of a catastrophic downturn in stock value.

The stock-lease case generated much civil litigation and ultimately a mass settlement under the newly introduced 2005 Collective Settlement of Mass Damage Act (WCAM) 2005. Of interest here is one of the Supreme Court decisions in the stock-lease case. There, the consumers ending up with the short end of the stick argued that the bank had omitted to convey vital information in the sales process, had failed to assess


creditworthiness of the borrowers and to warn against the inherent risks of this loan-hire-purchase construction. They argued, inter alia, that the predecessor of the Unfair Commercial Practices Directive, the Misleading and Comparative Advertising Directive, should be interpreted as holding a duty to properly and unambiguously inform consumers about the relevant sales material. The Supreme Court held, briefly comprised, that in this case the European Directive did not protect consumers. In essence, the court ruled that consumer had to be more cautious when reading the small print:

“(…) dat van een gemiddeld geïnformeerde gewone consument in ieder geval verwacht mag worden dat hij weet dat effecten niet alleen in waarde kunnen stijgen, maar ook in waarde kunnen dalen, en dat van een omzichtige en oplettende consument mag worden verwacht dat hij zich vooraf redelijke inspanningen getroost om de betekenis van de overeenkomst en de daaruit voortvloeiende verplichtingen en risico’s te doorgronden, en dat hij de in de brochures opgenomen aanprijzingen, loftuitingen en voorbeelden met prudentie beschouwt.”

[‘(…) a reasonably well informed consumer may be expected at least that he knows that the value of stock may not only go up but also go down, and that it may be expected from a reasonably observant and circumspect consumer that he makes reasonable efforts in advance to comprehend the implications of the contract and its ensuing obligations and risks, and that he prudently considers endorsements, praise and examples’]

So, the Dutch Supreme Court did not consider this to be a case of misleading omission under EU rules. However, it did give consumers some compensation for their losses by resorting to national tort law and ruling that in the stock-lease case the bank was under a duty to explicitly warn and check affordability. Again, the case was not decided under the UCP framework but under the highly similar Misleading and Comparative Advertising Directive. It appears likely that the outcome under the former would have been exactly the same. And the outcome is essentially that national law offers better protection than the UCP framework since under Dutch national rules consumers were ultimately able to obtain compensation for their losses.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

7.2.2.2 Cross-border dimensions of most common unfair commercial practices

Stakeholders did not report notable cross-border dimensions in this area, although the AFM did identify cases of lack of essential information and aggressive selling practices in investment opportunities, stocks, bonds and some loans. Actions undertaken by the AFM

in some cases involved investment objects which were to be built in other countries. AFM took administrative action and issued guidance for traders.\textsuperscript{57}

\textbf{7.2.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation}

If we consider the stock-lease case to be a case of unfair commercial practices in the mass marketing of complex financial products with inherent risks, then national tort law is to be considered more effective in offering redress for affected consumers. There, the UCP framework would probably not offer sufficient protection.

\textsuperscript{57} Besluit AFM 19 June 2009 (TRE Investments II B.V.); Besluit AFM 20 November 2009 (Dutch Portugal Investments B.V.). Both involved investment schemes targeted at the Dutch market for investing in real property abroad.
7.3 Immovable property

7.3.1 Legislative framework

7.3.1.1 National implementation legislation(s) of the UCPD

On October 15, 2008, the Wet oneerlijke handelspraktijken (Wet OHP; Unfair Commercial Practices Act 2008) came into force. The Act implemented the UCPD by amending the 1992 Dutch Civil Code (BW, Burgerlijk Wetboek) and the Wet Handhaving Consumentenbescherming (Whc; Consumer Protection Enforcement Act 2007). So, the UCPD has been implemented generically instead of sectorally. No explicit exceptions to the UCPD regimes were introduced.

7.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

No specific legislation in the area of immovable property banning particular unfair commercial practices has been identified. Obviously, Directives 94/47/EC and 2008/122/EC on timeshare et cetera were faithfully implemented in Dutch law. Moreover, there are numerous rules on the content of consumer contracts in this area (sales, transfer of ownership, building contracts, and others) but none of these seem to extend to the unfair commercial practices area. By and large, these relate to the usual contractual issues such as passing of ownership and risk, hidden defects, damages, et cetera. Therefore, we conclude that there is no specific national legislation existent as such which directly aims at unfair commercial practices concerning immovable property. Note, however, that there are three caveats. Firstly, there is a fair amount of regulation and self-regulation concerning the marketing of and affordability testing in mortgage loans, as well as specific rules on repossessions and court-monitored seizure and forced sale of immovables. To some extent, these rules pertain to the fairness, proportionality and transparency of the execution phase of mortgage repossessions. Secondly, there is an inclusive legislative framework of mandatory contractual protection of house tenants against their landlords. This purports to protect against practices that could possibly be filed under the concept of unfair commercial practices, such as aggressive practices of unduly and unfairly raising rents and the refusal to maintain and repair the rented space.


60 See Stb. 2011, 50.
Thirdly, and on a more general level, the fact that there is currently no specific national legislation listing unfair commercial practices in this area, does not imply that there will not be such a need in the future. Indeed, recently some concerns have been raised concerning practices by mortgage lenders in the period leading to the lapse of the fixed interest rate period. Theoretically speaking, this transition to a new period is also the time for consumers to evaluate their mortgage loans and possibly switch to a different lender for a better refinancing deal. There is some anecdotal evidence that banks do not actively inform their clients of the lapse of these periods or inform them just weeks before the start of a new fixed rate period – hoping that clients will be forgetful, remain inactive and thus be tied in for another period.\(^1\) There is compelling evidence that banks charge these ‘loyal’ customers higher interest rates than new clients which demonstrates the need for clients to be able to quickly switch from one lender to another. Switching costs for consumers include having to survey a relatively intransparent market, collecting quotes, entering into a new mortgage loan contract with a competitor, and getting the legal paperwork done by a notary-public. This is costly, burdensome and time-consuming.\(^2\) There are also signals that during the loan period, banks dissuade clients to accelerate their payments as this is detrimental to the bank.\(^3\)

b) National legislation regarding misleading actions
No specific legislation has been identified in this area.

c) National legislation regarding misleading omissions
No specific legislation has been identified in this area.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence
No specific legislation has been identified in this area.

e) Other national legal provisions on unfair commercial practices in the field of immovable property
No specific legislation has been identified in this area.

7.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

There does not seem to be any particular definition of ‘consumer’ used here that deviates from the UCPD standard.

---

\(^1\) The self-regulatory Gedragscode Hypothecaire Financieringen (Code of Conduct Mortgage Loans) of the Dutch Banking Association provides for a notification period of one month (article 13). Arguably, this is understandable from the lenders’ point of view but for consumers a month is too short for surveying the market, collecting quotes, entering into a new mortgage loan with a competitor and getting the legal paperwork (notary-public and registration is involved) in order.

\(^2\) See Sectorstudie Hypotheekmarkt, research paper of the Nederlandse Mededingingsautoriteit (Dutch Competition Authority), May 2011.

\(^3\) Volkskrant, August 17, 2011.
7.3.1.4 **Level of protection provided by national legislative framework compared to UCPD**

Since there is no specific legislation in this area, the level of protection is identical to the UCPD level.

7.3.2 **Most common unfair commercial practices in the area of immovable property**

7.3.2.1 **Description of the most common unfair commercial practices**

No quantifiable data are available but from the previous discussion it follows that mortgage lenders may be tempted to impede switching by clients to alternative lenders. Furthermore, there is some evidence suggesting that Dutch consumers are sometimes targeted and lured through unfair commercial practices into entering into time-share arrangements and holiday club arrangement abroad.\(^{64}\)

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

7.3.2.2 **Cross-border dimensions of most common unfair commercial practices**

There appear to be cross-border dimensions involved in the unfair commercial practices surrounding investment arrangements involving real property abroad. Some of the cases dealt with by the AFM involved real property investment in countries such as Turkey and Portugal.\(^{65}\) Respondents did not mention cross-border cases where Dutch traders targeted foreigners outside the Netherlands.

7.3.2.3 **Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation**

Since no quantifiable data are available, it is hard to say whether these issues are adequately covered. However, the AFM does note that room for manoeuvring with more prescriptive national legislation does remain essential.

---

\(^{64}\) Interview with the Netherlands Consumer Authority, 21 July 2011.

\(^{65}\) See, e.g., Besluit AFM 19 June 2009 (TRE Investments II B.V.); Besluit AFM 20 November 2009 (Dutch Portugal Investments B.V.).
## The Netherlands

### Implementing legislation of the Unfair Commercial Practices Directive (UCPD)

- Unfair Commercial Practices Act 2008
- Adaptation of Books 3 and 6 of the Civil Code
- Consumer Protection (Enforcement) Act
- General Administrative Law Act

### National legal provisions on unfair commercial practices

**Overview of relevant provisions which are not based on EU legislation**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dutch Gambling Act</td>
<td>None reported</td>
</tr>
<tr>
<td>Colportagewet (Doorstep Selling Act) Article 6</td>
<td></td>
</tr>
<tr>
<td>Wft (Financial Supervision Act) – Consumer protection is mainly integrated into the broader legislation concerning financial services, the Wft, which incorporates virtually all European directives regarding financial services, and in some cases may go further than the provisions of the UCPD (as far as these contain particular national rules on marketing and sales of financial products.)</td>
<td></td>
</tr>
</tbody>
</table>

### Reasons why enforcement bodies apply these national legal provisions

According to the Netherlands Authority for the Financial Markets and the Department of Finance, the national provisions in the area of financial services go beyond the level of protection provided by the UCPD, are more specific, better known and understood by enforcers and businesses, it is easier to obtain a result under the national legislation than the UCPD, and there is existing case law relating to this legislation.

### Relevant case law

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rotterdam District Court (summary proceedings) 6 July 2009, parties: TRE Investments II B.V. against AFM, case number: AWB 09/2114 BC-T2, references: LJN: BJ2013 and JOR 2009/233.</td>
<td>None reported</td>
</tr>
<tr>
<td>Because of their complexity, descriptions of these cases are available in Dutch, at <a href="http://www.rechtspraak.nl">www.rechtspraak.nl</a>.</td>
<td></td>
</tr>
<tr>
<td>Please note that there is also relevant Dutch non-financial services case law since implementation concerning the interpretation of certain terms used in the national implementation legislation of the UCPD, as this legislation has a broader scope than just the financial services area. Furthermore, there may be Dutch case law from before implementation of the UCPD that is relevant for a similar reason.</td>
<td></td>
</tr>
</tbody>
</table>

### Enforcement

**Responsibility for enforcing the UCPD**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Netherlands Authority for the Financial Markets and the Department of Finance</td>
<td>The Netherlands Consumer Authority</td>
</tr>
<tr>
<td>Provided that collective consumer interests are involved, the</td>
<td></td>
</tr>
</tbody>
</table>
Netherlands Consumer Authority (NCA) is competent to enforce the UCPD in all sectors with exception of the financial sector. This means the NCA could enforce the UCPD in the field of immovable property, unless the practice is related to a financial product or service. In that case the Netherlands Authority for Financial Markets (AFM) is the competent authority.

<table>
<thead>
<tr>
<th>Means of enforcement of UCPD</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>By public law and private law</td>
<td>By public law and private law</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Who can bring an action under the national legislation implementing the UCPD</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Public authorities in both areas.</td>
<td></td>
</tr>
<tr>
<td>Additionally, the Netherlands Consumer Authority reported that in case of enforcement under private law, an action can be brought by organisations representing consumer interests (Article 3:305b Civil Code), and by individual consumers in the area of immovable property.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Main obstacles for enforcing unfair commercial practices legislation reported</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>None reported</td>
<td>According to the Netherlands Consumer Authority, an obstacle is lack of evidence. The sort of problems the NCA has come across is that of a trader offering an apartment for rent online and providing misleading information about the apartment, but the trader does not mention his/her name or identity. In such cases it is difficult to take action against the trader.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Problems relating to cross-border enforcement of unfair commercial practices legislation reported</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>The Netherlands Authority for the Financial Markets and the Department of Finance reported that when organisations hold foreign establishments, information essential for enforcement of investigation is hard to obtain. For example it is harder to establish whether documents are authentic.</td>
<td>None reported</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Codes of conduct and self-regulation</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

ANNEX 2: Fact sheet – most common unfair commercial practices reported
# Netherlands

Common unfair practices reported in the area of financial services

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>NL-FS-1</td>
<td>Aggressive practices were sometimes used in the sale of financial products and services.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>2008</td>
<td>Life insurance, Health insurance, Major insurance, Travel insurance, Stocks or shares, bonds, derivatives, etc.</td>
<td>Complaints data, Decisions by enforcement bodies, Warnings issued by enforcement bodies</td>
<td>Yes</td>
<td>Referred consumer(s) to relevant enforcement body, Took administrative decision for judicial decision, Issued a warning about the trader or the practice, Other actions</td>
</tr>
<tr>
<td>NL-FS-2</td>
<td>Essential information was sometimes not included in advertising of financial products and services. This most often related to: stocks or shares, bonds, derivatives, and other loans (including consumer credit).</td>
<td>Practice banned in my country, but not included in the Black List (Annex I) of the UCPD</td>
<td>2009, 2010</td>
<td>Stocks or shares, bonds, derivatives, etc.</td>
<td>Court cases, Decisions or recommendations made by ADR bodies</td>
<td>X</td>
<td>Referred consumer(s) to other body, Issued guidance for businesses, Other actions</td>
</tr>
</tbody>
</table>

Source: The Netherlands Authority for the Financial Markets and the Department of Finance (NL-FS-1; NL-FS-2).

Note: VF: Very frequently, RF: Rather frequently, S: Sometimes.
### Netherlands

#### Common unfair practices reported in the area of immovable property

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>[Highlighted text]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NL-IP-1</td>
<td>Sometimes, misleading and/or aggressive practices related to the renting and selling of timeshare properties occur. Occasionally consumers are led to sign a contract that they were not aware was a timeshare contract. Other times, Dutch consumers are approached on holiday and pressured to come to meetings where they are asked to buy timeshare, for example by being told they won a prize.</td>
<td>X X X X</td>
<td>~20 ~20 ~20</td>
<td>X X</td>
<td>Don't know</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>NL-IP-2</td>
<td>In online advertising for immovable properties, sometimes the properties turn out to be non-existent and/or the trader is not traceable.</td>
<td>X X</td>
<td>~20 ~20 ~20</td>
<td>X X</td>
<td>Don't know</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

Source: The Netherlands Consumer Authority (NL-IP-1; NL-IP-2).
ANNEX 3: References


C.M. Grundmann-van de Krol (2010). Koersen door de Wet op het financieel toezicht. BJU.


<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender No.</td>
<td>Invitation to tender n° JUST/2010/JCIV/PR/0018/A4</td>
</tr>
</tbody>
</table>
| Prepared by | Professor Jerzy Pisuliński  
in collaboration with:  
Dr. Tomasz Targosz  
Dr. Karolina Włodarska-Dziurzyńska  
Dr. Michał Wyrwiński  
Michał Bobrzyński, LL.M. (Harvard)  
August 2011 |
| Checked by | Dr. Senda Kara, Dr. Frank Alleweldt, Harriet Gamper |
8.1 Introduction

Poland implemented Directive 2005/29/EC on unfair commercial practices in the Act of 23 August 2007 on combating unfair commercial practices (the UCP Act). The law entered into force on 21 December 2007. Article 3 of the UCP Act prohibits the use of unfair commercial practices. The definition of an unfair commercial practice is contained in Article 4(1) of the UCP Act which provides that a commercial practice employed by a trader in relations with consumers is unfair whenever it is contrary to good customs and significantly distorts, or may distort, the economic behaviour of the average consumer prior to, during or after the conclusion of a contract relating to a product.

The UCP Act provides in Article 4(2) that a commercial practice is regarded as unfair in particular whenever it misleads the consumer, it is aggressive or whenever a code of conduct is used that is contrary to law.

In addition, Article 4(3) and Article 10 of the UCP Act provide for an additional category of practices that are considered unfair. These consist of carrying out a consortium activity (such as the Argentine system or Ponzi schemes) or organising groups with consumers’ participation to finance a purchase of specified goods (for more information see below).

A more comprehensive regulation of misleading practices is contained in Articles 5-6 of the UCP Act. The definition of the misleading practice is provided for in the Article 5(1) of the UCP Act. Pursuant to this definition, a commercial practice is regarded as a misleading action if, in any way, it causes, or may cause, an average consumer to take a transactional decision that he or she would not have otherwise taken. In particular, a misleading action may consist of (i) distributing false information; (ii) distributing true information but in a potentially misleading way; (iii) an action related to the introduction of a product into the market that may be misleading; (iv) failure to follow a code of conduct that was voluntarily acknowledged by the trader, if the trader informs, as part of his commercial practice, that he is bound by the code of conduct. Article 6(1) of the UCP Act provides that an unfair commercial practice may amount to a misleading omission whenever it lacks material information that the average consumer needs to take a transactional decision and as such it either causes or may cause the average consumer to take a transactional decision that he would have not otherwise taken. As a general rule, the UCP Act considers as material information such information that the trader using the commercial practice is required to provide to consumers pursuant to separate provisions (Article 6(2) of the UCP Act).

Article 7 of the UCP Act contains a list of 23 unfair commercial practices that are considered unfair in all circumstances (this list corresponds to the practices contained in the Annex I to the Directive).

Aggressive practices are defined in Article 8(1) of the UCP Act. A commercial practice is regarded as aggressive if, by undue influence, it significantly impairs or may impair the average consumer’s freedom of choice or conduct with regard to the product. In particular the use (or threat of use) of physical or psychological force is considered to be unfair (Article 8(2) of the UCP Act). Article 9 of the UCP Act contains a list of eight
aggressive commercial practices that are regarded as unfair in all circumstances (they correspond to the practices contained in Annex I to the Directive).

Furthermore, Article 11 considers as an unfair practice the use of codes of conduct, when the provisions of these are contrary to law.

In case of an unfair commercial practice, the consumer may request that:

1) Such an unfair practice be discontinued;
2) The effects of such a practice be removed;
3) A single or multiple statement of appropriate content and appropriate form be made;
4) The damage as per general terms and conditions be redressed, the contract be cancelled and the benefits mutually returned and the costs associated with the purchase of the product be reimbursed by the trader;
5) An adequate amount of money is adjudicated for a specific social cause related to the support of the Polish culture, national heritage or consumer protection.

The claims referred to under 1), 3) and 5) above can also be brought by the Commissioner for Civil Rights Protection, the Insurance Ombudsman, a national or regional organisation whose statutory objective is to protect consumer interests and a district (municipal) consumer ombudsman (Article 12(2) of the UCP Act).

The above remedies may be sought before the common courts individually by consumers. Private enforcement of claims by consumers may also take the form of group proceedings (class actions) under the Act of 17 December 2009 on pursuing

---

1 The system of remedies against unfair commercial practices has been adopted from the Act on suppression of unfair competition.
2 If a consumer was nudged to enter into agreement by virtue of an aggressive commercial practice that is prohibited by the UCP Act, he or she or a consumer organisation may request that the trader publishes in an apology in the press. If an unfair commercial practice consisted of a misleading press advertisement, the trader may be obliged on the basis of this provision to publish a statement that the advertisement e.g. contained untrue information.
3 This remedy does not coincide with another remedy, i.e. the request to remove the effects of an unfair commercial practice. Firstly, an unfair commercial practice will not always result in conclusion of an agreement or such an agreement may be null and void for other reasons, so that it would not be necessary to nullify the agreement. Secondly, even if an agreement was concluded, the consumer may not want to nullify it but rather request that the effects of an unfair commercial practice are removed.
4 This is a quasi-penalty for a trader (the legal doctrine underlines the proximity of this remedy with the penal law and calls for a resignation from this remedy in the private law; see R. Stefanicki, Ustawa o przeciwdziałaniu, p. 491). The obligation to pay an adequate amount of money for a specific cause is intended to constitute an economic hardship for the trader that would discourage him from resorting to the unfair commercial practices. The other remedies provided for in the UCP Act, such as discontinuation of the practice or apologies in a press announcement may not be severe enough for a trader. Moreover, the consumer will not always be in position to prove that he or she suffered a loss because of an unfair commercial practice.
claims in group proceedings.\(^5\) This new Act allows for examination a single civil proceeding of claims of the same type, that are based on the same or similar factual situations, if they are pursued by at least ten persons. The scope of application of the Act on pursuing claims in group proceedings is limited and encompasses the claims made by consumers as well as actions in tort and product liability.

Additionally, the President of the Office of Competition and Consumer Protection may initiate proceedings against a trader under the provisions of another act - the Act of 16 February 2007 on competition and consumer protection\(^6\). If a given unfair commercial practice infringes the collective consumer interests, the President of the Office of Competition and Consumer Protection may issue a decision against a trader in which the President may prohibit such practice (Article 26 (1) in connection with Article 24 of the Act on competition and consumer protection). The President can issue a decision ordering an unfair commercial practice to be discontinued, order specific commitments to be undertaken by the trader (Article 28 of the Act on competition and consumer protection), as well as impose a pecuniary penalty on a trader (Article 106 of the Act on competition and consumer protection). Examples of such decisions are included below. From the practical standpoint, the proceedings initiated by the President of the Office of Competition and Consumer Protection appear to be effective.

The provisions of the Act on competition and consumer protection supplement the system of remedies against unfair commercial practices. The President of the Office of Competition and Consumer Protection cannot undertake actions against traders on the basis of Article 12 of the UCP Act. This Act permits individual consumers, who have suffered from an unfair commercial practice, as well as organisations listed above (such as consumer organisations) to resort to the remedies. However, when a given commercial practice infringes collective consumers' interests, the President of the Office of Competition and Consumer Protection may – on the basis of the provisions of the Act on competition and consumer protection – initiate proceedings against the trader.

It needs to be stressed that the Polish lawmaker has not made use of the competence provided for in the Article 3(9) of the Directive 2005/29/EC and has not included in the UCP Act – aside from the Article 4(3) and Article 10 mentioned above – any particular provisions pertaining to financial services and immovable property. Article 4(3) and Article 10 are the only provisions in the UCP Act that relate to financial services and exceed the scope of Directive 2005/29/EC.

Pursuant to Article 6(1) of the UCP Act, a commercial behaviour is recognized as a misleading omission whenever it lacks material information that the average consumer needs to take a transactional decision and as such it either causes or may cause the average consumer to take a transactional decision that he would have not otherwise taken.

---

In case of doubt, material information referred to in Article 6(1) of the UCP Act is such information that the trader using the commercial practice is required to provide to consumers pursuant to separate provisions (Article 6(2) of the UCP Act). The UCPD itself states: “information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material” (Article 7). Furthermore, Recital 15 of the preamble to the Directive states: “Where Community law sets out information requirements in relation to commercial communication, advertising and marketing that information is considered as material under this Directive. Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. A non-exhaustive list of such information requirements in the acquis is contained in Annex II. Given the full harmonisation introduced by this Directive only the information required in EU law is considered as material for the purpose of Article 7(5) thereof. Where Member States have introduced information requirements over and above what is specified in EU law, on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under this Directive”.

The abovementioned supposition, unquestionably indicating that only omission of informational requirements is to be recognised as a misleading omission, has not been deployed in the Polish UCP Act. As result, there may be doubts as to the interpretation of the UCP Act in relation to the issue of how to qualify an infringement consisting of the omission of additional information that has been additionally prescribed by a Member State. Taking into account the principle that legal acts must conform to EU law, an interpretation corresponding to recital 15 of the preamble to Directive 2005/29/EC seems to be justified. The final solution of this problem would however require an insertion of an explicit provision into the Polish UCP Act.

The Polish Civil Code\(^7\) contains a general definition of ‘consumer’ in Article 22(1). Pursuant to this provision, a consumer is any natural person performing a legal act which is not directly related to his business or professional activity. Although this provision does not stipulate who should be the other party of legal transaction, it is generally accepted that it should be an entrepreneur within the meaning of Article 43(1) of the Civil Code\(^8\). Other acts either refer directly to this definition (e.g. the UCP Act, the Act on competition and consumer protection, the new Act on consumer credit from 2011) or they do not define consumer at all (e.g. the Act on payment services). This is the consequence of the opinion accepted in the legal doctrine and the jurisprudence that the Civil Code is the basic legal act in the system of private law and its provisions should be applied unless other acts provide otherwise. Even when European law permits for the extension of

---

\(^7\) The Act from 23 April 1964, Journal of Laws ,No 16, item 93 with further amendments.

consumer regulation to other subjects who are not consumers, the Polish lawmaker does not make use of this possibility.⁹ Although the older legal acts may provide for a different definition of consumer (for example the definition of consumer in Article 2(4) of the Act on consumer credit from 2001 is not identical to the definition of consumer in Article 22(1) of the Civil Code), this is the result of omission than an intentional decision of the lawmaker to apply a different concept of consumer. Only with regard to the general terms and conditions used in the insurance contracts does the Polish lawmaker apply a different concept. Namely, the application of provisions about unlawful clauses in consumer contracts has been extended to insurance contracts that are concluded also with non-consumers¹⁰ (see Article 384 § 5 of the Civil Code as amended by the Act of 22 May 2003 on the insurance activity). This provision was repealed by the Act of 13 April 2007,¹¹ and in its place a new provision of Article 805 § 4 was inserted into the Civil Code. According to this new provision, the rules on unlawful clauses in consumer contracts apply if the policyholder is a natural person executing a contract related directly to his or her business or professional activity. Article 805 § 4 of the Civil Code therefore limits the scope of application of the provisions on unlawful clauses in consumer contracts as compared to the repealed Article 384 § 5 of the Civil Code.

Apart from this regulation, the Polish law does not provide for any other provisions (in the area of financial services or immovable property law) that would extend the application of the consumer protection regime to other persons or provide for a broader definition of consumer than the Civil Code. Furthermore, Polish jurisprudence does not apply a broader notion of consumer within this subject matter.

---

⁹ The abovementioned Act on payment services does not provide for application of consumer provisions to small and medium sized enterprises.

¹⁰ Irrespective whether this was a natural person or legal entity.

¹¹ Journal of Laws No 82, item 557.
8.2 Financial services

8.2.1 Legislative framework

8.2.1.1 National implementation legislation(s) of the UCPD

Unfair commercial practices with respect to the financial services are governed by the Act of 23 August 2007 on combating unfair commercial practices (the UCP Act), referred to above.

8.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

The UCP Act prohibits the organisation of groups with participation of consumers for the financing of a purchase within a consortium system and carrying out of activities in the form of consortium system. Please see below for more information.

b) National legislation regarding misleading actions and omissions

In addition to the UCP Act, in Poland the following legal acts govern the provision of financial services (the list is not exhaustive):

- The Act of 14 December 1994 on the Bank Guarantee Fund;
- The Act of 29 June 1995 on bonds;
- The Act of 28 August 1997 on organisation and functioning of the pension funds;
- The Act of 29 August 1997 – The Banking Law;
- The Act of 2 March 2000 on protection of certain consumer rights and liability for dangerous products;¹²
- The Act of 26 October 2000 on commodities stock markets;
- The Act of 16 November 2000 on warehouses;
- The Act of 12 September 2002 on electronic payment instruments;
- The Act of 22 May 2003 on insurance activity;
- The Act of 22 May 2003 on insurance mediation;
- The Act of 20 April 2004 on individual pension accounts;
- The Act of 20 April 2004 on the employee pension schemes;
- The Act of 27 May 2004 on the investment funds;
- The Act of 29 July 2005 on trading in financial instruments;

¹² This Act includes provisions on distance marketing of financial services.
o) The Act of 29 July 2005 on public offering, conditions governing the introduction of financial instruments to organized trading and public companies;


q) The Act of 17 May 2011 on payment services which implements the Directive 2007/64/EC on payment services in the internal market.

Act of 23 August 2007 on combating unfair commercial practices

The provisions of Article 4(3) and Article 10 of the UCP Act consider as an unfair commercial practice “carrying out an activity in the form of a consortium system or organizing groups with consumers’ participation to finance a purchase as part of a consortium system”. The purpose of this regulation is to curb certain practices that were widespread at the end of the 1990s and at the beginning of the 21st century. Under Polish law acceptance of funds for the purpose of extension of credit is an activity restricted exclusively to banks and credit institutions from other EU Member States. Therefore a system was developed to circumvent this limitation. The idea was to organize a group of consumers (usually around 30 persons) that paid a certain amount of cash. These funds were pooled and used to grant loans to members of the group or to purchase certain goods, such as cars. The property was transferred to one member of the group (selected either on the basis of a lottery, or otherwise depending on the amount of contributed funds).

Such systems can work only if all persons participating in the group contribute funds, which are specified in the agreement with the arranger of such “consortium”. This arranger (a trader) would typically bear no risk, because the agreements generally provided that the contributed funds could be ‘withdrawn’ only after a new person joined the consortium in the place of the person who wanted to quit. This created a sort of financial pyramid, because the persons who did not receive the loan or the good, financed the loan or the purchase of goods for other members of the group. The arranger did not engage its own financial resources, and received compensation for “management” of the system (this was referred to as initial payment or administrative fees). It was argued that the members of such a group provided credit to each other.

This system resulted in a great deal of risk for its participants, because they bore the risk of insolvency of other members of the group – in other words they could lose the funds they had contributed and receive nothing in exchange (if, for example, they were

---

13 This Act contains specific provisions on mortgage loans.

14 The Act will enter into force on 18 December 2011.


16 This system is sometimes referred to as an Argentine system.
not drawn as beneficiaries of a loan). There was no supervision over such consortia in place and no capital requirements as guarantees for the contributing members of the group. Moreover, the agreements concluded with the members of the group were often very vague, did not make clear the financial risk and misled about the expected benefits, at the same time as creating an impression that every member of the group would receive a loan or a good. The courts did not always notice that the agreements contained unlawful clauses or were even null and void (on the basis of Article 58 § 1 or Article 58 § 2 of the Civil Code).

A similar provision to Article 4(3) and Article 10 of the UCP Act was contained in the Act on suppression of unfair competition (Article 17e of the Act on suppression of unfair competition) that declared such activity as an act of unfair competition; however, this provision was repealed by the UCP Act. Polish legal doctrine considers that the provisions of Article 4(3) and Article 10 of the UCP Act prohibit the establishment of the consortium systems without the need to assess such activity in the view of general clause of Article 4(1) of the UCP Act. This means that the prohibition is absolute and in fact extends the list of commercial practices that are considered unfair in all circumstances. The violation of Article 10 constitutes a crime with a penalty of imprisonment from three months up to five years, and when the value of the assets collected is high, with a maximum penalty of up to 8 years imprisonment (Article 16 of the UCP Act).

**Act of 14 December 1994 on the Bank Guarantee Fund**

Deposit guarantee schemes are subject to the Act on the Bank Guarantee Fund, implementing Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay, as amended by the Directive 2009/14/EC. Because of the nature of this act, dealing mostly with regulations that could be classified as

---

17 Interview with the Office of Competition and Consumer Protection, July 2011.


19 Article 58 § 1 of the Civil Code provides that a legal act which is contrary to the law or which is designed to circumvent the law is invalid (in this case – the legal acts were designed to circumvent the provisions of the Banking Law). According to Article 58 § 2 of the Civil Code, a legal act contrary to the principles of community life is invalid.


21 Article 17e(1) of the Act on suppression on unfair competition better than the current regulation described the essence of such systems. It stated that it is an act of unfair competition to “manage the property assembled within the group with the participation of consumers that was created for the purpose of financing the acquisition of rights, movables, immovable property or services for the members of the group”. One should concur with the view (see E. Nowińska, M. du Vall, Komentarz do ustawy…, s. 276), that this provision did not apply to the consumers organizing themselves for the purpose of group purchases. Such group purchases have in the meantime become more and more popular.


23 Consolidated text: Journal of Laws 2009, No 84, item 711, as amended.
belonging to the area of the public law, it is difficult to identify in it any provisions that might be regarded as directly relating to business-to-consumer unfair commercial practices. However, as the law implementing the Directive 2005/29/EC also refers to misleading practices resulting from withholding the relevant information from consumers, any provisions introducing information obligations vis-à-vis consumers may have an impact on the application of the UCP Act. This is to a certain extent also a result of the fact that the Polish implementing legislation presumes that not providing a consumer with information that the professional is under obligation to provide (regardless of whether this information obligation stems from EU law or is of purely national origin) is a misleading unfair commercial practice.

In the Act on the Bank Guarantee Fund information obligations are dealt with in Article 38b that implements Article 9 of Directive 94/19/EC. When compared to Article 9 of the Directive, Article 38b of the Act on the Bank Guarantee Fund introduces one information obligation not explicitly provided for in the Directive: an obligation to inform the consumer of the financial and economic situation of the entity covered by the guarantee scheme.

Pursuant to Article 9(3) of the Directive 94/19/EC, “Member States shall establish rules limiting the use in advertising of the information referred to in paragraph 1 in order to prevent such use from affecting the stability of the banking system or depositor confidence. In particular, Member States may restrict such advertising to a factual reference to the scheme to which a credit institution belongs.” However, Article 38b of the Act on Bank Guarantee Scheme goes further, as it simply prohibits the use in advertising of information concerning participation in the mandatory guarantee scheme.24 One should probably note that in fact the use of such information in advertising could also be regarded as an unfair commercial practice covered by the Black List (presenting rights given to consumers in law as a distinctive feature of the trader’s offer). It is therefore a question of perspective whether this provision is stricter than the requirements of the EU law in this area.

Act of 29 August 1997 – The Banking Law

The provisions of the Banking Law25 regulate both the issues of establishment and supervision of banks and credit and financial institutions that take up their activities in Poland, as well as certain bank activities (such as the operation of bank accounts, performance of monetary settlements, extension of credit, bank guarantees and letters of credit). The Banking Law does not provide for complete regulation, as specific bank activities are also governed by other statutory acts.26

24 The prohibition also applies to entities that are not participating in the scheme.


26 Journal of Laws No. 108, item 685 with further amendments. For example bank account agreements are regulated by the Civil Code, see Articles 725-733; the performance of monetary settlements is subject to the Act of 12 September 2002 on electronic payment instruments the extension of credits is governed by the Acts on consumer credit from 2001 and the new one from 2011, as well as by other acts, for example the Act of 17 July 1998 about student loans and credits.
The provisions of the Banking Law do not resort to the definition of consumer and contain no specific provision oriented towards consumer protection. In practice, some of the provisions of the Banking Law concern the agreements that are concluded with consumers (such as provisions on the savings accounts, including accounts for minors), however they do not provide any rules that are specifically intended to protect consumers from unfair commercial practices.

**Act of 28 August 1997 on organisation and functioning of the pension funds**

The Act on organisation and functioning of pension funds regulates the creation of pension funds (as open funds, occupational funds or voluntary funds), and the management companies of pension funds. Pension funds are established by a pension fund management company with the permission of the supervisor (in this case the Financial Supervision Commission) and are entered into the register of pension funds (Article 12 of the Act). Membership of the fund is acquired by execution of an agreement with the pension fund and it generally ceases when the member acquires pension rights. The Act, together with an Ordinance of the Council of Ministers, sets out the form and content of an agreement with the pension fund. It is possible to change membership (execution of an agreement with a different fund results in the renunciation of the agreement with the present fund). The Act also governs the modes of distribution of funds collected in the fund (Articles 107-125), the division of funds in the event of divorce or invalidation of marriage (Articles 126-130) and the distribution of funds in the event of member’s death (Articles 131-133).

Of particular interest is the change in the provisions governing canvassing (solicitation) for pension funds. Initially the Act allowed for canvassing activities that could be carried

---

27 This refers to the bank accounts that are held by natural persons who are not engaged in business activity. The specific regulation of such accounts concerns, for example the possibility of making a disposition that certain funds are distributed after the death of the holder to the person who is not his or her heir, or specifying an amount that is exempted from judicial or administrative enforcement. Article 58 of the Banking Law permits opening of the savings accounts for minors, who may, on reaching 13 years of age, freely dispose of the funds in the account, unless the legal guardian of the minor objects in writing.

28 Consolidated text: Journal of Laws 2010, No. 34, item 189 with further amendments.

29 Pension funds are legal entities. Their activity consists in collection and investment of financial resources intended for payment of cash benefits to the members who have attained pension age (Article 2 of the Act).

30 The management companies of the pension funds are joint-stock companies that can only engage in establishing and managing of the pension funds (Articles 27 and 29 of the Act). The management company is liable towards the members of the fund for any loss amounting from the non-performance or inadequate performance of its duties in the managing the fund.

31 Exceptionally, the membership may be created by drawing organized by the social security organ (Zakład Ubezpieczeń Społecznych), if a person that is required to join a pension fund does chose the fund him/herself. The membership in a pension fund is mandatory for persons who were born after 31 December 1968.

32 Ordinance of the Council of Ministers from 9 June 1998, Journal of Laws No. 84, item 534 with further amendments.

33 A single person cannot simultaneously be a member of two open pension funds (Article 84 of the Act).

34 The canvassing (solicitation) activities were defined as any income-earning activities aimed at persuading a given
out by the entities listed in the Article 93(1) of the Act (for example banks and insurance agents). The Act only prohibited the extension of additional benefits in connection with entry into the fund. Due to abuses in canvassing for pension funds (in some cases agents falsified the agreements with pension funds, or misrepresented the projected financial results of the fund in order to incentivise people to change fund), the Act on organisation and functioning of the pension funds has been amended. From 1 January 2012 it will be prohibited to solicit on behalf of pension funds. It is prohibited not only to offer additional financial benefits for joining the pension fund or remaining its member, but also to coerce employees into joining the fund or remaining its member. According to the Article 81(1a) of the Act the execution of an agreement may only take place by post, that is to say execution can only be effected using means of distance communication.

The Act requires pension funds to publish annual information prospectuses in a national newspaper. These must contain the statute of the fund, information about its results and the approved financial statement (Article 189 of the Act). Furthermore, the pension funds must make their information prospectuses available to any person who applies for membership in the fund, and upon request by a member (Article 190(1)-(2) of the Act). The funds are also required to provide each member with information about the amount of assets collected in the fund, contributions to and withdrawals from the fund and about the results of the investment activities of the fund at least once every twelve months (Article 191 of the Act).

Information about the pension funds, including any promotional information, should fairly and reliably present the financial situation of the fund and any risks associated with membership. If it turns out that the disseminated information is or may be misleading, the supervisory authorities (Financial Supervision Commission) may prohibit its publishing, order publication of a disclaimer and impose a pecuniary fine up to 500,000 Polish złoty on the management company of the pension fund (Article 197 of the Act). This regulation should be considered as lex specialis to the UCP Act (it does not exclude the application of Article 12 of the UCP Act, for example by individual consumers or consumer organisations).

**Act of 2 March 2000 on the protection of certain consumer rights and liability for dangerous products**

Distance contracts are subject to the Act of 2 March 2000 on the protection of certain consumer rights and liability for dangerous products. This Act implements into Polish law inter alia not only the Directive 97/7/EC of the European Parliament and of the

---


37 As of September 2011, this is equal to approximately 116,280 EUR at an exchange rate of 1 Euro = 4,3 PLN.


The relevance of both the ‘regular’ distance contract as well as the distance contracts concerning financial services for the regulations of the UCP Act may be found in the extensive scope of information obligations. The Act does not contain any provisions that could be considered as specific regulation of unfair commercial practices in business to consumer relations that would be going beyond the current standard of EU law.

Act of 20 July 2001 on consumer credit

The Act of 20 July 2001 on consumer credit\(^{39}\) contains provisions concerning the issuance of bills of exchange (promissory notes) by a consumer as collateral for repayment of received consumer credit. Article 9(1) of the Act on consumer credit provides that a bill of exchange or cheque furnished to the creditor in order to perform or secure contractual obligations arising from the consumer credit agreement must contain a “non-negotiable” clause, i.e. it cannot be transferred by endorsement but only by virtue of an assignment (cession). The purpose of this regulation is a protective one as such bills of exchange and cheques instead of bearer securities become registered securities. This is because according to the Article 513(1) of the Civil Code\(^{40}\) a debtor is entitled to all defences against the assignee of the claims that it had against the assignor at the time it learned of the assignment (cession). However, it needs to be noticed that the Article 17 of the Act of 28 April 1936 - The Law of Bills of Exchange\(^{41}\) applies to the bill of exchange transferred by endorsement and it excludes the possibility of raising defences concerning the underlying relation, i.e. concerning the relation between the debtor and the creditor. This results in the possibility of infringement of the consumers’ interests.

Article 9 of the Act on consumer credit implements provisions of the Article 10 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit. The EU legislation does not specify which instruments are to be implemented to ensure protection for consumers; it only indicates the result that has to be achieved, leaving specific way of reaching it at the disposal of Member States.

The breach of disposition of Article 9(1) of the Act on consumer credit triggers the sanction provided for in Article 9(2) of this Act, pursuant to which if the lender (debt creditor) accepts bill of exchange or cheque without the “non-negotiable” clause and such a bill of exchange or cheque is transferred to a third party, than the lender is obliged to repair damage suffered by a consumer resulting from the payment to the

\(^{39}\) Journal of Laws 2001, No. 100, item 1081 as amended.

\(^{40}\) Act from 23 April 1964 – the Civil Code (Journal of Laws 1964, No. 16 Item. 93 as amended); hereinafter referred to as the Civil Code.

\(^{41}\) Journal of Laws 1936, No. 37 item 282, as amended.
holder of such documents (this sanction is also applicable if a bill of exchange or cheque is in possession of another person against the will of the lender).

The aforementioned legal situation will be similar as a result of application of the new Act of 12 May 2011 on consumer credit that implements into the Polish law the provisions of the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. Article 41 of this new Act on consumer credit corresponds to Article 9 of the current Act on consumer credit (is in fact an exact repetition of the corresponding norms of the current act).

The new Act is a fairly verbatim transposition of the Directive 2008/48/EC. The particular regulation of mortgage loans, that have been excluded from the scope of the Directive 2008/48/EC, should however be noted. With respect to such credits only some provisions of the Act are applicable (Articles 22, 23, 29, 35 and 46). These provisions include: specific information requirements that precede the conclusion of the agreement and that should be handed over to the consumer on a special form in a statutory prescribed pattern, the form and content of the mortgage loan agreement, as well as remedies for breach of these obligations.

It is a rule that a breach of information requirements by the lender, non-conformity of the agreement with the prescribed form or non-delivery of the agreement to the consumer results in the conversion of the loan into a so-called free loan (this means that the consumer is not obligated to pay interest and other costs to the lender). With regard to the mortgage loans this sanction has been limited – the consumer need not pay the interest and other costs for a period of four years.

The new Act on consumer credit was almost immediately amended by the Act of 29 July 2011. The provisions of the Act of 29 July 2011 entered into force on 26 August 2011. The amendments to the Act on consumer credit from 2001 and the Act on consumer credit from 2011 regard credits that are extended in Polish złoty but their amount is determined as equivalent of a specific amount expressed in a foreign currency, usually in Euro or Swiss francs. The specifics of such denominated or foreign-exchange linked credits consist in the amount of credit being paid out in Polish złoty on the basis of conversion from a foreign currency at the rate used by a bank to buy such currency (such exchange rate is usually lower than the average market rate). The credit is repaid in Polish złoty after the conversion of the amount into the foreign currency at the rate used by the bank to sell that currency (such exchange rate is usually higher than the average market rate). The difference between the buy-sell rates (so called spread) may amount to 10%. The banks derive additional profits, which is important because the maximum level of interest is limited by the Civil Code - it cannot be more in one year than four times the pawn loan rate of the National Bank of Poland. Furthermore, the Act

43 Journal of Laws 2011 No 165 item 984.
44 Article 359 § 2 of the Civil Code
on consumer credit from 2001 sets the maximum limit of all the costs of consumer credit at 5% of the extended credit (Article 7a of the Act).\textsuperscript{45} There is no comparable provision in the Act on consumer credit from 2011.

The Financial Supervision Commission in its recommendation S II from 2008\textsuperscript{46} ordered banks to change at the request of the client to allow the repayment of the credit in the currency in which such credit was denominated or indexed.\textsuperscript{47} According to this recommendation, the consumer can, for example, purchase the currency at another bank or at an exchange office that offers a better exchange rate than the bank which extended the credit. The problem however was that the banks developed an annex to the credit agreement for which they demanded fees (sometimes up to 500 Polish złoty).\textsuperscript{48} For this reason the Act of 29 July 2011 orders banks to accept payments from consumers directly in the currency in which the credit is denominated or to which it is linked, and the lenders cannot condition this right on amendments to the credit agreement.

The problem of foreign currency swaps is significant because at some banks the mortgage loans denominated or indexed to foreign currency can constitute up to 80% of the credit portfolio\textsuperscript{49} (the share of such credits is however declining due to tightened requirements on examination of credit worthiness introduced by the Financial Supervision Commission). Such credits are still popular because they are cheaper compared to credits denominated in Polish złoty (due to the lower interest rates and the lower premiums required by the banks).

The new Act on consumer credit from 12 May 2011 also provides that mortgage loan agreements that are denominated or indexed to foreign currency indicate the amount of rate in this foreign currency as well as the rules and dates for setting the exchange rates that are used to convert the amount of credit and the credit rates into Polish złoty (Article

\textsuperscript{45} This provision is however of no significance with respect to the mortgage loans. Although such loans are covered by the Act on consumer credit from 2001, but their amount usually exceed the threshold for the credits (80,000 Polish złoty) that fall under this Act.

\textsuperscript{46} Recommendations of the Financial Supervision Commission are not binding law and the clients of the banks cannot refer to their provisions (pursuant to Article 138(6) of the Banking Law, the supervisory measures cannot violate the agreements concluded by a bank). However, in practice the banks follow the recommendation as the failure to do so can be severely sanctioned, including the revocation of the banking license (Article 138(3)(4) of the Banking Law).

\textsuperscript{47} This recommendation was replaced by recommendation T from February 2010 (the recommendation is available at http://www.knf.gov.pl/Images/Rekomendacja%20T\_tcm75-18474.pdf).

\textsuperscript{48} As of September 2011, this is equal to ca. 116.280 EUR at the exchange rate of 1 Euro = 4,3 PLN.

\textsuperscript{49} See: http://wyborcza.biz/Waluty/1,111130,8215415,Kredyty_walutowe_moga_szkodzic.html. In 2009 the average volume of mortgage loans denominated or indexed to foreign currency was 65% of the credit portfolio. See also the report of the Financial Supervision Commission on the loans for households available at: http://www.knf.gov.pl/Images/KNF_kredyty_mieszkaniowe_7-09-2011_tcm75-27556.pdf.
35(2) of the Act). In the information provided to the consumer prior to the conclusion of the agreement, the lender is required to indicate that the change in the exchange rate has impact on the total value of the credit and the amount of rates (Article 22(7)).

**Act of 22 May 2003 on insurance mediation**

The Act on Insurance Mediation from 22 May 2003,\(^{50}\) implementing the Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, introduces information obligations for insurance intermediaries, insurance agents and insurance brokers (Articles 4a, 13, 26). These are relevant for the UCP Act for the reasons stated above with respect to deposit guarantees (failure to provide information required by law creates a presumption of a misleading commercial practice).

The Act on Insurance Mediation explicitly provides that only persons registered in the proper register\(^ {51}\) may indicate in their trade or business names or in their advertising information that they act as insurance agents or brokers (Articles 14, 27 of the Act on Insurance Mediation). Furthermore, it is a criminal offence to act as an insurance intermediary, agent or broker without the required authorization (Article 48 of the Act on Insurance Mediation). Although such actions may very often be regarded as a misleading commercial practice, it could be said that the Act on Insurance Mediation renders such practices illegal in all circumstances, irrespective of whether in a given case a reasonable consumer could be misinformed by such actions.

**Act of 22 May 2003 on insurance activity**

The Act on insurance activity governs in the first place the pursuit of insurance and reinsurance activities. The provisions of this Act have a general public law character. The Act does however contain some private law provisions that relate to the conclusion and content of insurance agreements, the application of general terms and conditions (see in particular Articles 12, 12a, 13 and 14), additional information provided to the insured who are natural persons (Article 13a), the calculation of an insurance premium (Articles 18-18b), payment of indemnity or benefits under a life insurance policy (Article 16), as well as the relevant court for any insurance disputes (Article 9). None of those provisions is specifically intended to protect consumers, although some of them in practice relate to the contracts concluded with consumers (these include in particular provisions relating to life insurance contracts). Particularly deserving of attention is Article 17a of the Act that prescribes that the compensation for traffic damages should include the value added tax if the insurance recipient is not a VAT tax payer (this concerns mostly consumers). This provision was inserted into the Act because some insurance companies did not want to

\(^{50}\) Journal of Laws 2003, No 124 item 1154 as amended.

\(^{51}\) The register of insurance intermediaries is governed by Articles 37-46 of the Act. The register includes the register of insurance agents and register of insurance brokers. The register is maintained by the Financial Supervision Commission. The detailed rules on making the entries into those registers and provision of information contained therein are contained in the Ordinance of the Ministry of Finance from 18 September 2006 (Journal of Laws 2006, No 124 item 1154 as amended). The register of insurance intermediaries is open and accessible to third persons.
include VAT in the compensation amount, although the injured party had to pay VAT, for example, when he or she was repairing their car.

A further provision is to be inserted into the Act of 22 May 2003 on compulsory insurances.\textsuperscript{52} The act of 15 July 2011 has added a new Article 8a into the Act on the compulsory insurances. Although it does not relate only to consumers, it is important also for consumer protection. This provision allows for an increase in the insurance premium if the insured at the time of conclusion of an insurance agreement did not inform the insurance company about circumstances that could increase the probability of an insured event taking place. However, according to the new Article 8a(2), if the insurance company entered into an insurance agreement, even if certain questions were not answered by the consumer in the documentation, those circumstances are deemed irrelevant. This means that the insurance company will not be able to build an argument on the basis of such circumstances and, for example, refuse to pay the insurance indemnity (this is currently a frequent practice among the insurance companies). This provision should however have broader application and not be restricted only to compulsory insurances.

\textit{Act of 27 May 2004 on investment funds}

The Act of 27 May 2004 on Investment Funds\textsuperscript{53} contains rules for the creation and operation of investment funds registered in Poland as well as the rules according to which foreign funds and foreign management companies may operate in Poland.

The Act contains no specific provisions on protection of consumer interests in relation to business-to-consumer unfair commercial practices.

According to the general rule, the fund’s management company and the intermediaries in the sale and redemption of units in investment funds must act fairly and professionally in accordance with the principles of fair trading, having particular regard to the interests of unit-holders of those funds (Article 32a(1) of the Act on Investment Funds).

The information disseminated by an investment fund and entities acting as intermediaries in the sale and redemption of units in investment funds with the purpose of advertisement and promotion of the services rendered should be fair and clear (Article 32a(3) of the Act on Investment Funds). The Act on Investment Funds does not contain any provisions that could be considered as specific regulation of unfair commercial practices in business-to-consumer relations. However, there is a specific instrument for the protection of clients in the promotion of services and contacts with clients provided for in the implementing Ordinance to the Act on Investment Funds.\textsuperscript{54}

\textsuperscript{52} The Act regulates insurance agreements that are compulsory. Those include: third-party insurance of the vehicle owners, third-party insurance of farmers arising out of the farm’s activity and insurance of the farm’s buildings. The vehicle owners and farmers are required to enter into an insurance agreement with an insurance company of their choice that offers such insurance contracts.

\textsuperscript{53} Journal of Laws 2004, No 146 item 1546 as amended.

\textsuperscript{54} Ordinance from 3 April 2009 on the conduct of entities engaged in the brokering of the sale and redemption of units and shares (Journal of Laws No. 62, item 507).
According to § 3 and § 4 of the Ordinance on the conduct of entities engaged in the brokering of the sale and redemption of units and shares, information to clients and potential clients (including information disseminated by an investment fund and entities acting as intermediaries in the sale and redemption of units in investment funds to advertise or promote the services provided by such entity) should be accurate, understandable and not misleading. Information disseminated to advertise or to promote the services provided by an investment fund and entities acting as intermediaries in the sale and redemption of units in investment funds are considered to be beyond question information disseminated in the advertising or promotion services.

In the event that a management company is in breach of the law, does not comply with the conditions specified in the authorization, exceeds the scope of the authorization, or acts to the detriment of the interests of unit-holders of a fund or a collective securities portfolio, the Polish Financial Supervision Commission may issue a decision to revoke the authorization, or impose a financial penalty of up to 500,000 Polish złoty or impose both of the penalties.
Act of 29 July 2005 on trading in financial instruments

The Act on trading in financial instruments defines the manner of, and the rules and conditions for commencing and conducting business that involves trading in securities and other financial instruments, the rights and obligations of entities engaged in such trading and the supervision of these. Poland does not provide in this regard for any

55 This Act implements, within the scope of its regulation, the following Directives:


56 Consolidated text: Journal of Laws 2010 No. 211, item 1384.
special provisions relating to unfair commercial practices. There are, however, several provisions to protect the interests of clients who are using the services of the financial sector:

1) The conduct of investment services requires a licence issued by the Polish Financial Supervision Commission (established pursuant to the Act on Capital Market Supervision\textsuperscript{57}) (Article 69 of the Act on trading in financial instruments);

2) Manipulation involving financial instruments (‘market manipulation’) is prohibited (Article 39 of the Act on trading in financial instruments). Market manipulation means, for example, placing orders or executing transactions that are or may be misleading as to the actual supply of, demand for or price of a financial instrument, unless the reasons behind such activities are legitimate, and the placed orders or executed transactions are not in breach of the established market practice on the relevant regulated market. The prohibition applies to any kind of manipulation of the transaction. It does not matter whether the customer is a consumer or other legal entity.

The Act on trading in financial instruments distinguishes between professional\textsuperscript{58} and retail customers; however there is no direct relationship with the concept of the consumer. ‘Retail customer’ means a non-professional customer to whom at least one of the investment services in Article 69(2) or Article 69(4) of the Act on trading in financial instruments is or is to be provided.

An investment firm, at a written request of an entity other than those specified in Article 3(39b)(a) to (m) of the Act on trading in financial instruments and to the extent specified in such a request, may classify the entity as a professional customer, provided that it has the knowledge and experience enabling it to make the right investment decisions, as well as to properly assess the risk associated with these decisions. An investment firm, before agreeing to the request, is required to assess the customer's knowledge of the rules of the treatment of professional customers when providing investment services referred to in Article 69(2) or Article 69(4) of the Act on trading in financial instruments, to which the request relates. An investment firm, on a written request by a professional customer and to the extent specified in the request, may classify it as a retail customer. An investment firm may also classify a professional customer as a retail customer, despite the absence of such a request.

Protection of retail consumers is based on the requirements concerning the form of a service contract for trading in financial instruments. Pursuant to Articles 72, 73, 74b and 75 of the Act on trading in financial instruments, the agreements on offering of financial instruments must be in writing if concluded with a retail customer (under the sanction of nullification).

\textsuperscript{57} Journal of Laws 205, No. 183, item 1537, as amended.

\textsuperscript{58} According to Article 3(39b) “professional customer” means an entity to which at least one service referred to in Article 69(2) or in Article 69(4) is provided, or is to be provided, and which has the experience and knowledge enabling it to make the right investment decisions and to correctly evaluate the risk associated with the decisions.
Act of 29 July 2005 on public offering, conditions governing the introduction of financial instruments to organised trading, and public companies

The Act on public offering contains rules and conditions for carrying out a public offering of securities, for conducting subscription or sales of such securities and for seeking admission and introduction of securities or other financial instruments to trading on a regulated market. The Act on Public Offering also stipulates obligations of issuers of securities and other entities participating in trade in such securities or other financial instruments. It also addresses the consequences of obtaining the status of a public (listed) company, as well as special rights and obligations relating to the holding of and trading in shares of listed companies.

As the Act on public offering belongs to the area of public law, it is difficult to identify any problems that might present business-to-consumer unfair commercial practices.

The main instrument to protect the interests of investors is the prospectus. The prospectus must contain true, accurate, and complete information material for assessment of the economic and financial standing, assets and development prospects of the issuer and the guarantor of liabilities under the securities, taking into account the type of issuer and the type of securities which are to be offered, as well as information concerning the rights and obligations associated with such securities. Information set out in the prospectus should be formulated in a way comprehensible to investors and in a manner enabling assessment of the situation (Article 22 of the Act on public offering). The prospectus should include a declaration of entities listed below as to the authenticity, integrity and completeness of information, in the form provided for in the EC Regulation 809/2004.

The entity that was responsible for authenticity, integrity and completeness of information contained in the prospectus, assumes full liability to investors (Article 98 of the Act on public offering). It may also incur criminal liability for false information (Article 100 of the Act on public offering).

The application of those protective instruments does not depend on whether the investor is or is not a consumer. The Act on public offering does not contain any provisions that

59 This Act implements, within the scope of its regulation, the following Directives:


60 Consolidated text: Journal of Laws 2009 No. 185, item 1439.

c) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Please see above.

d) Other national legal provisions on unfair commercial practices in the field of financial services

Please see above.

8.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

Neither the UCP Act, nor other acts in the area of financial services, do not provide for other definition of consumer than the definition contained in the Article 22(1) of the Civil Code. Also the Polish jurisprudence does not show willingness to a broader application of a consumer protection regime. The only exception is Article 805 § 4 of the Civil Code. Article 805 § 4 of the Civil Code mandates the application of the provisions about the unlawful clauses in the consumer contracts also to the insurance agreements concluded with the natural persons even if he or she executes an insurance contract related directly to his or her business or professional activity. This means that the provisions of the Civil Code on the control of general terms and conditions are also applicable to entrepreneurs who are natural persons. If such an entrepreneur enters into an insurance agreement, he or she may request in a dispute with an insurance company that a certain contractual clause will be declared unlawful on the basis of the same legal provisions that are applicable to consumers (so called incidental control). It will not be possible to perform an abstract control of the general terms and conditions employed by the insurance companies with respect to the insurance contracts executed with such entrepreneurs, because Article 805 § 4 of the Civil Code does not provide for application of the provisions of the Civil Code on the abstract control of general terms and conditions.

The Polish Civil Code provides for a broader concept of consumer than Article 2(a) of the UCP Directive. Under the UCP Directive, ‘consumer’ means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. Any interrelation between a commercial practice and his or her trade, business, craft or profession excludes such person from the scope of the Directive. On the other hand, the definition of the consumer in the Civil Code, to which Article 2(2) of the UCP Act relates, allows classifying as a consumer also such a person who is engaged in trade, business, craft or profession, but an interrelation between such activity and commercial practice is only indirect. Therefore, not every

61 Those provisions implement into the Polish law the directive 93/13/EEC on unfair terms in consumer contracts.

62 In practice it is difficult to determine whether there is an interrelation between an action of natural person and his or her business or professional activity. In the literature it is emphasized that such interrelation is indirect when a natural person undertakes an action that is typical for his or her business or professional activity (see J. Strzebińczyk, in:
interrelation between commercial practice and business activity of a natural person results in the loss of consumer status.

The Polish UCP Act also protects such natural persons to whom the provisions of the UCP Directive are not applicable.

8.2.1.4 **Level of protection provided by national legislative framework compared to UCPD**

With respect to financial services, Polish law contains no provisions that would address misleading or aggressive commercial practices differently from the UCP Act. Upon finding a misleading practice, however, the supervisory authorities may apply more specific legal measures towards the financial institutions, other than the remedies provided for the UCP Act (for example against a pension fund that disseminates false or misleading information about the pension fund).

In addition, several legal provisions are intended to limit or exclude those commercial practices that can be classified as unfair commercial practices within the meaning of the UCP Act. These are:

1) The prohibition of carrying out activities in the form of a consortium system or organising groups with consumers’ participation to finance a purchase as part of a consortium system (Article 10 of the UCP Act);

2) The prohibition of canvassing (solicitation) for the pension fund, including the prohibition of offering additional financial benefits for joining the pension fund or remain its member as well as the prohibition of exploitation of superiority relation resulting from employment relationship or another legal relationship of similar nature to join the fund or remain its member (Article 92 of the Act on organisation and functioning of the pension funds);

3) Prohibition of making the repayment of a credit denominated or indexed in a foreign currency conditional on amendments to the credit agreement or the payment of any fees by the consumer, as well as prohibition of restriction of the possibility to purchase the foreign currency from other entities than the lender (Article 7b of the Act on consumer credit from 2001 and Article 35a of the Act on consumer credit from 2011);

4) Prohibition of accepting bills of exchange (promissory notes) without the “non-negotiable” clause in order to secure the repayment of the consumer credit (Article 9 of the Act on consumer credit from 2001 and Article 41 of the Act on consumer credit from 2011).

With respect to financial services, the provisions of Polish law generally do not provide for a broader protection of consumers from unfair commercial practices as compared to the UCP Directive.

8.2.2 Most common unfair commercial practices in the area of financial services

8.2.2.1 Description of the most common unfair commercial practices

With respect to financial services, the following unfair commercial practices have been identified in Poland:

**Banking services:**

- Misleading advertisements about the conditions of advertised financial services, for example the date on which interest starts to accrue, advertising a fixed-term savings deposit without mentioning that the interest rate is actually variable, or lack of information about other requirements that must be fulfilled by the consumer to receive a specific benefit at the conclusion of an agreement;\(^{63}\)
  
- A misleading advertisement about conditions of the management of finances by credit unions that suggested that the deposits at the credit unions are covered by the bank guarantee scheme when they are not;\(^{64}\)
  
- Use of general terms and conditions containing unlawful clauses or clauses similar to the unlawful clauses that were entered into the register of unlawful clauses,\(^{65}\) which could mislead the consumers about their rights;\(^{66}\)
  
- Mis-selling of products, for example consumers being told they have to buy a form of insurance such as payment protection insurance when buying another product. This mainly applies to credit products.\(^{67}\)

---


\(^{64}\) See decision of the President of the Office of Competition and Consumer Protection No. DDK-61-2/09/PM from 31 December 2009 issued against Krajowa Kasa Oszczędnościowo-Kredytowa in Sopot.

\(^{65}\) The register of contractual clauses that were declared as unlawful is maintained by the President of the Office of Competition and Consumer Protection on the basis of Article 479\(^{45}\) § 4 of the Code of Civil Procedure. The content of the register is set by the Ordinance of the Council of Ministers from 19 July 2000 (Journal of Laws No. 62 item 723). The register is available at the Website of the Office of Competition and Consumer Protection (see [http://www.uokik.gov.pl/rejestr_klauzul_niedozwolonych2.php](http://www.uokik.gov.pl/rejestr_klauzul_niedozwolonych2.php)).


\(^{67}\) Responses to Civic Consulting survey on the application of Directive 2005/29/EC in the field of financial services, May 2011, and interview with the Polish Financial Services Authority, July 2011.
• Offering of purportedly free credit agreements, under which the consumer is not required to pay interest, but needs to pay various fees to the lender or credit intermediary.\(^{68}\)

• The use of non-transparent fee tables/structures that make it hard for the consumer to establish the total cost of service.\(^ {69}\)

**Insurance services:**

• Describing the risks that are not covered by the insurance policy in an ambiguous way or in contradiction to proven scientific facts, and refusing to pay out insurance on this basis;\(^ {70}\)

• Use of general terms and conditions containing unlawful clauses (or clauses similar to unlawful clauses) that were entered into the register of unlawful clauses, which could mislead consumers about their rights;\(^ {71}\)

• Excessively prolonging proceedings aiming at establishing the amount of damages, refusing to pay out insurance based on a trivial reason or on a reason that is not related to the event that caused the damage, or making payment conditional on the claimant presenting additional documents or on final resolution of another proceeding, such as a criminal trial against the perpetrator of the damage;\(^ {72}\)

• Valuing the costs of damage excluding VAT that the consumer will still need to pay.\(^ {73}\)

**Within the brokerage services:**

• The use of general terms and conditions containing unlawful clauses or similar to unlawful clauses that were entered into the register of unlawful clauses, what could possibly mislead the consumers about their rights.\(^ {74}\)

---

\(^{68}\) Based on observations of the author.

\(^{69}\) Based on observations of the author.

\(^{70}\) See decision of the President of the Office of Competition and Consumer Protection No. 28/2010 from 10 December 2010 issued against Powszechny Zakład Ubezpieczeń S.A.


\(^{72}\) See the judgment of the Supreme Court from 10 January 2000, III CKN 1105/98, Orzecnictwo Sądu Najwyższego 2000, No. 7-8, item 134.


\(^{74}\) See report of the Office of Competition and Consumer Protection from April 2006, available on the website of the
Within pension funds:

- Misleading by agents (sales representatives) of management companies of the pension funds, as to the results of the fund in order to provide incentives to join or change fund;\(^75\)
- The use of aggressive commercial practices such as frequent visits at home or telephone contacts.\(^76\)

Generally speaking, it is difficult to estimate the actual scale of the problems, and the frequency of such practices. With respect to financial services, in some cases there were unclear general terms and conditions containing unlawful clauses that could mislead consumers. The amendments to the Act on organisation and functioning of the pension funds that prohibit canvassing (solicitation) for pension funds were triggered by numerous reported mis-selling practices by the agents (sales representatives) of these funds.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

8.2.2.2 Cross-border dimensions of most common unfair commercial practices

Cross-border dimensions were not reported.

8.2.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

The majority of the commercial practices described above could be classified as unfair on the basis of the provisions already in force. A common practice is the use of clauses in the general terms and conditions that have been declared unlawful (unfair) and entered into the register of unlawful clauses. Therefore, it would be advisable to declare as an unfair commercial practice the employment of contractual clauses by traders, if the prohibition of their use results from an earlier judicial or administrative order. Furthermore, with regard to insurance contracts, consideration could be given to whether to introduce a general rule according to which the estimation of any damage and the payment of insurance by insurance companies to consumers must include VAT.


\(^76\) See the reasoning to the draft law amending the Act on organisation and functioning of the pension funds from 28 August 2009, pp. 70-71. The information comes from the Insurance Ombudsman and the Polish Financial Supervision Commission which receive complaints about practices employed by the sales representatives; the reasoning is available at the website of Ministry of Labor and the Social Policy at http://www.mpips.gov.pl/bip/projekty-aktow-prawnych/projekty-ustaw/ubezpieczenia-społeczne/ustawa-o-organizacji-i-funkcjonowaniu-funduszy-emerytalnych/#akapit5.
In Poland neither consumers nor consumer organisations initiate actions against traders on the basis of Article 12 of the UCP Act. This may be explained by the need to initiate proceedings before the court and the risk of bearing the court fees if the case is dismissed. A solution could be the waiver of court fees when the plaintiff is a consumer. Currently the costs of the group proceedings under the Act on pursuing claims in the group proceedings are lower than in ordinary (individual) proceedings, but in case of loss the consumers’ group is still required to reimburse the costs of the proceedings to the winning party. Furthermore, in a class-action setting the court may order the plaintiffs to place a security for the costs of proceedings (this instrument is intended to prevent abuse and curtail frivolous claims).

The President of the Office of Competition and Consumer Protection does not have the right to act in individual cases on the basis of the UCP Act, as unfair commercial practices may be combatted only when collective consumer interests are affected. This solution may be justified by potentially large numbers of individual claims. The analysis of such individual motions would require a large number of staff and generate costs. The result is, however, that apart from the infringement of collective consumer interests, the UCP Act does not always fulfill its intended function.
8.3 Immovable property

8.3.1 Legislative framework

8.3.1.1 National implementation legislation(s) of the UCPD

The unfair commercial practices in the area of immovable property are governed by the UCP Act. As above with financial services, the UCP Act does not contain any provisions that would be different from the provisions of the UCP Directive.

8.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

The Polish law does not provide for any specific provisions that would prohibit commercial practices different to the unfair commercial practices included in Annex I to the UCP Directive.

b) National legislation regarding misleading actions and omissions

With regard to the acquisition of immovable property, the following legal acts are applicable (the list is not exhaustive):

- The Act of 6 July 1982 on land register and mortgages;\(^{77}\)
- The Act of 24 June 1994 on apartment ownership;
- The Act of 21 August 1997 on the real estate management;\(^{78}\)
- The Act of 13 July 2000 on the protection of purchasers in respect of the right to use buildings or dwellings during certain time each year;\(^{79}\)
- The Act of 15 December 2000 on co-operative housing;\(^{80}\)
- The Act of 16 September 2011 on timeshare\(^{81}\) that implements the Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contract;
- The Act of 16 September 2011 on the protection of purchasers of dwellings and single family houses\(^{82}\).

---

\(^{77}\) This Act governs the establishment of a mortgage on real estate and the functioning of the real estate register (so called perpetual book, \(księga wieczysta\)).

\(^{78}\) This Act governs inter alia the acquisition of real estate from the State Treasury and from the local government.

\(^{79}\) This Act governs the timeshare agreements until 27 April 2012. The Act of 16 September 2011 enters into force on 28 April 2012.

\(^{80}\) This Act governs the acquisition of dwellings from housing cooperatives.

\(^{81}\) Journal of Laws 2011, No 230, item 1370.

Act of 24 June 1994 on apartment ownership

The Act on apartment ownership[^83] governs the acquisition of ownership of apartments (for both residential and other purposes) and the rules of administration of properties on which the building is situated. The Act does not differentiate whether the purchaser is a consumer or not. It also does not impose any information requirements on the seller of the apartment. The only provision that serves as protection to purchasers is Article 9, relating to the agreements obliging the owner of the land (who often is an entrepreneur) to erect the building and establish in it a separate apartment ownership.[^84] This provision is however not limited to consumers. Article 9 prescribes the prerequisites for the validity of such agreement. As it does not exclude the possibility of a contract being concluded on a different legal basis (for example a preliminary contract),[^85] it does not fulfill its envisaged role in practice.

For this reason, a law that protects the purchasers of apartments or single-family houses more comprehensively was adopted in 2011.[^86]

The Act of 16 September 2011 does not use the notion of ‘consumer’. It would apply to the contracts concluded between a developer (mainly a construction company) and purchasers who are natural persons. In the majority of cases, those will be consumers.[^87]

The draft law provides for specific regulation concerning:

- Information requirements towards the purchasers before the execution of the contract;
- The content of the contract and its performance;
- The maintenance of any trust accounts that would be utilized to make payments to the developer;
- The obligation of a developer to obtain an insurance or bank guarantee for the benefit of the purchaser as security for any claim against the construction company; and

[^83]: Consolidated text Journal of Laws 2000 No. 80, item. 903 with further amendments.

[^84]: Pursuant to this Article, the construction company must be the owner of the land and be in possession of a building permit when it concludes an agreement to erect a building and transfer a separate apartment ownership on the purchaser. The claim for transfer of the apartment ownership should be entered into the land and mortgage register. Further, this provision permits the court to entrust the performance of the agreement to another entity if the performance of the contract is defective. Article 9 of the Act on apartment ownership has been poorly drafted what results in many ambiguities. In practice it is not applied at all.

[^85]: A preliminary agreement obliges parties to enter into another agreement in the future, in this case into a sale contract of an apartment.


[^87]: The purchasers can however also be natural persons, who purchase the apartments within their business activity for the future resale.

The conduct of insolvency proceedings in case the developer is declared bankrupt (see below).

The Act concerns the agreements by which a developer undertakes to establish for the benefit of the purchaser (natural person) ownership of an apartment or to transfer the ownership of land or perpetual usufruct of land on which a single family house has been constructed. Prior to the sale, the developer is required to prepare a prospectus and deliver it free of charge to the potential purchaser. The Act specifies the content of such information prospectuses in the Annex 1. Such information will constitute an integral part of the agreement.

The developer is further obliged to allow potential purchasers access to information concerning its financial standing (the annual report for the previous two years), the documents concerning the real property (an excerpt from the land and mortgage register), as well as the documentation concerning the construction works (the construction permit and architectural designs).

The Act specifies in detail the form and content of an agreement to be executed between the developer and the purchaser. The developer is further required to enter into an insurance or guarantee agreement that will be used to reimburse the purchaser in case of insolvency or a delay in performance of the agreement exceeding 120 days. The developer is further required to enter into an agreement on the maintenance of trust accounts for the benefit of purchasers, managed by a bank. Purchasers will make payments into these accounts. The bank may distribute those funds to the developer only when it receives a copy of a notarial act establishing the ownership of an apartment or the ownership of the real property on which a single-family house was constructed (such an account is referred to as a closed one). The bank may also distribute funds to the developer after completion of a given stage of the construction process (such an account is referred to as an open one). In such cases, the bank is obliged to control whether a given construction stage was completed on the basis of the building diary. If the developer offers two kinds of banking accounts, the choice should be agreed in the contract between the developer and the purchaser.

The envisaged amendments to the Bankruptcy and Rehabilitation Law will create a separate insolvency estate consisting of the real property (perpetual usufruct of land) that is subject of the contracts with the purchasers and the funds collected in the trust accounts. In case of insolvency, this estate will in the first place be used to satisfy the claims of the purchasers. The assembly of the purchasers will be able to decide on the continuation of the construction process by the insolvency administrator and the amount of additional payments that are necessary to complete the construction. After the construction is completed, the insolvency administrator would transfer the ownership of the apartment or the real property (perpetual usufruct of land) on which the single-family house was constructed to the purchasers.

88 Act of 28 February 2003, consolidated text Journal of Laws 2009, No 175, item 1361 with further amendments.
Act of 21 August 1997 on the real estate management

The Act on real estate management\(^{89}\) regulates *inter alia*: the rules for the disposition of the immovable property by the State Treasury\(^{90}\) or the local administration, expropriation of the real property, the division of the real property and the activities within the appraisal of the real estate (by real estate experts), real property intermediation and real property management. Although the Act does not contain specific provisions aimed at consumer protection, one should note the following provisions:

1) Property can be appraised (valued) only by natural persons who are entered into a special register\(^{91}\) (Article 174(3b) of the Act). Property professionals are obliged to perform their duties with the particular diligence and impartially, in accordance with the provisions of the law, professional standards and ethical rules (Article 175(1) of the Act). The professional standards are set by professional organisations of real property professionals in agreement with the Minister of Infrastructure. Information about the agreement on the professional standards is published in the official journal of the Minister of Infrastructure (Article 175(6) of the Act).

2) Only licensed brokers can act as real estate intermediaries. They acquire the right to perform this function with registration in a special register\(^{92}\) (Article 179 of the Act). An intermediary may prepare expert opinions and provide advice with regard to the real property market (Article 180(1a) of the Act). Brokers are expected to adhere to professional standards.

3) Only licensed real estate managers who are entered into a special register\(^{93}\) can manage real property (Article 184 of the Act). The real estate manager may prepare expert opinions and provide advice with regard to the management of real property (Article 185(1a) of the Act). Real estate managers are expected to adhere to professional standards.

\(^{89}\) Consolidated text Journal of Laws 2010 No. 102, item. 651 with further amendments.

\(^{90}\) The disposition of the agricultural property that is owned by the State Treasury is governed by a separate Act (the Act of 19 October 1991 on management of agricultural real estate of State Treasury; consolidated text Journal of Laws 2007 No. 231, item.1700 with further amendments). This Act will not be analysed in this report.

\(^{91}\) The central register of the property appraisers is maintained by Minister of Infrastructure on the basis of Article 193 of the Act on real estate management. The register contains information not only on the award of qualification, but also on the suspension or revocation of qualifications and information on the disciplinary penalties. This information (with the exception of the information about disciplinary penalties) is available on the Website of the Ministry and in its official journal. The inquiries can be made via the Website http://www.mi.gov.pl/2-482c0de8bdcdd4.htm.

\(^{92}\) The central register of real estate brokers is maintained by the Minister of Infrastructure on the basis of Article 193 of the Act on real estate management. This register contains the same information as the register of property appraisers (see the footnote above). The inquiries can be made via the Website http://www.mi.gov.pl/2-482c0de6fbd3dc.htm.

\(^{93}\) The central register of real property managers is maintained by the Minister of Infrastructure on the basis of Article 193 of the Act on real estate management. This register contains the same information as the register of property appraisers (see the footnote above). The inquiries can be made via the Website http://www.mi.gov.pl/2-482c0ddde037d.htm.
All real estate experts, brokers and managers are required to enter into third party liability insurance. In the agreement executed with the client they have to refer to insurance policy.

The provisions of the Act on real estate management do not differentiate between the sales procedure or establishing perpetual usufruct\(^94\) depending on the person of purchaser. In general the sale of immovable property and establishment of perpetual usufruct takes place in tender proceedings (with exceptions\(^95\)). Only with regard to the setting of the price for immovable property or the fees for perpetual usufruct the Act provides for some preferences for certain purchases (usually natural persons such as tenants) in a form of a discount.

**Act of 13 July 2000 on the protection of purchasers in respect of the right to use buildings or dwellings during certain time each year**

The Act on the protection of purchasers of the right to use building or residential unit in a specified time each year\(^96\) generally does not contain any regulation concerning legal qualification of certain behaviours as unfair (business-to-consumer) commercial practices. The only provisions referring to this area of entrepreneur’s activity are:

- Article 2(1) of the Act on timesharing pursuant to which, prior to concluding the agreement with the consumer, entrepreneur is obliged to provide consumer with prospectus containing information referred to in Article 3 of the Act on timesharing;
- Article 3(2) of the Act on timesharing that limits the possibility of introducing changes into the contract in relation to the content of the prospectus.

Both aforementioned provisions are the result of implementation of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.\(^97\)

- Articles 3 and 4 of the Act on timesharing imposing obligations on entrepreneur concerning the content of the agreement and the prospectus.

The Act will be replaced by the Act of 16 September 2011 on timeshare which provides special provisions (chapter 7 of the new Act) on the responsibility of the entrepreneur in cases where a building or residential dwelling which is the object of the timeshare contract is defective. Those provisions apply *mutatis mutandis* to the object of the long-term holiday product contract. There is no such regulation in the Act of 13 July 2000.

---

\(^94\) Perpetual usufruct is a property right that can be established on immovable property of State Treasury or local administration. It is governed by the Civil Code and the Act on real estate management. It allows the use and disposal of property. The perpetual usufructor acquires also property of the buildings constructed on the property.

\(^95\) The exceptions involve e.g. the tenants.

\(^96\) Journal of Laws 2000 No 74, item. 855, as amended. Hereinafter referred to as “Act on timesharing”.

Act of 15 December 2000 on cooperative housing

The Act on cooperative housing⁹⁸ regulates the establishment of rights to apartments (not only for residential purposes) or single family houses by housing cooperatives. Certain rights can be acquired only by the members of the cooperative, whereas others (such as the ownership right) can also be acquired by people who are not members of the cooperative. The law does not use the concept of consumer, although in most cases the purchasers of the apartments will be consumers.

With regard to the establishment of apartment ownership by housing cooperatives, the Act contains provisions on the contracts for the construction of an apartment (Article 18 of the Act) that are lex specialis to the Act on apartment ownership. In such a contract a housing cooperative undertakes an obligation to establish an apartment ownership⁹⁹ after its construction, and the other party (member of the cooperative)¹⁰⁰ undertakes to pay the construction costs in the amount corresponding to the apartment. The Act stipulates the content and the form of such a contract by the cooperative.

c) National legislation regarding misleading omissions

Please see above.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Please see above.

e) Other national legal provisions on unfair commercial practices in the field of immovable property

Please see above.

8.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

There are no provisions or judicial opinions that would provide for specific consumer protection with respect to the immovable property rights (see however the provisions on the mortgage loans above).

⁹⁸ Consolidated text Journal of Laws 2003 No. 119, item. 1161 with further amendments. A housing cooperative is a special kind of a cooperative. According to the Act of 16 September 1982 – The Law on cooperatives (consolidated text: Journal of Laws 2003, No. 188, item 1848 as amended), a cooperative is a voluntary association of an unlimited number of persons, of variable membership and variable share fund, which conducts joint economic activity in the interests of its members. The specific of the housing cooperatives is that their major purpose consists in satisfaction of the housing needs of their members. This is achieved by construction of apartment houses from the funds contributed by the members; the members can use the apartments or receive their full ownership.

⁹⁹ Once the construction is completed, the housing cooperative and a member enter into an additional agreement for the transfer of the ownership right to the apartment on the member.

¹⁰⁰ Although the purchaser of an apartment needs not to be a member of cooperative, a cooperative can enter into a construction contract only with its member.
8.3.1.4 Level of protection provided by national legislative framework compared to UCPD

In general, Polish law does not contain any specific regulation protecting consumers from unfair commercial practices with regard to immovable property (the Act of 16 September 2011 on the protection of purchasers of dwellings and single family houses is not specifically designed to protect consumers against unfair commercial practices). In some cases the law does however impose an obligation on an entrepreneur to act in accordance with professional standards that are set out in an agreement with an appropriate minister (this applies to property experts, property agents and property administrators). The legal provisions do not however provide for any specific sanctions for violation of this obligation (for example for the use of non-approved professional standards). In this respect, the provisions of the UCP Act may be applied as a ‘backstop’.

Therefore, Polish law does not provide a greater level of protection compared to the UCPD.
8.3.2 Most common unfair commercial practices in the area of immovable property

8.3.2.1 Brief description of the most common unfair commercial practices

In the area of immovable property the following unfair commercial practices have been identified with respect to the consumers:

1) An advertisement misleading the consumer about apartments offered for sale, e.g. by indicating in the advertisement of lower price than the price effectively used (net of VAT tax) or by advertising apartments for a specified price, although such apartments were not actually available.\(^{101}\)

2) Use of general terms and conditions containing unlawful clauses, in particular with respect to the permissible difference in the surface of an apartment or price adjustments after the completion of the construction of an apartment, that may mislead a consumer.\(^{102}\)

3) Reference to codes of good practices that contain unlawful provisions or were allegedly accepted by the appropriate authority what in fact this acceptance never took place.\(^{103}\)

It is however difficult to estimate the actual scale of the problem and frequency of such practices as data is not available.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

8.3.2.2 Cross-border dimensions of most common unfair commercial practices

Cross-border dimensions were not reported.

8.3.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

The unfair commercial practices described above are prohibited by the UCP Act. As with financial services, the use of contractual clauses that have been declared as unlawful (unfair) and entered into the register of unlawful clauses by the appropriate administrative or judicial body is common. Therefore, it would be advisable to declare as

---

101 Decision of the President of the Competition and Consumer Protection No. RWA-25/2010 from 28 December 2010 issued against ECO-Park S.A.


an unfair commercial practice the employment of unfair contractual clauses by traders, if
the prohibition of their use results from an earlier judicial or administrative order. In such
cases it would not be necessary to interpret the provisions on misleading practices (such
unlawful contractual clauses mislead the consumer as to his or her rights and duties). In
order to provide the purchasers of an apartment with special protection when the
developer does not perform or is insolvent such protection is awarded by the Act on
protection of purchasers of apartments or single-family houses. However this Act does
not sufficiently protect the purchasers of apartments in a case of defective performance
by the developer (there is no specific provision on this matter; it means that the provision
of the Civil Code on the warranty for defective goods apply\textsuperscript{104}).

\textsuperscript{104} See Article 556 – 576 of the Civil Code.
ANNEX 1: Fact sheet – legal framework and enforcement
## Implementing legislation of the Unfair Commercial Practices Directive (UCPD)

- Act on Competition and Consumer Protection

## National legal provisions on unfair commercial practices

**Overview of relevant provisions which are not based on EU legislation**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 3, art. 4 of the Prevention of Unfair Commercial Practices Act, 23 August 2007: The article bans carrying out an activity in the form of a pyramid or ‘Argentine’ system (organising groups with consumer participation to finance a purchase as part of a pyramid scheme).</td>
<td>According to the Office of Competition and Consumer Protection, new legislation (the Act on protection of real estate purchasers) will enter into force 6 months after publication (the law is currently awaiting publication).</td>
</tr>
</tbody>
</table>

## Reasons why enforcement bodies apply these national legal provisions

The Polish Financial Supervision Authority stated that it is easier to obtain a result under the national provision in the area of financial services than the UCPD. Applying the national provisions, the authority can sometimes stop misleading actions, such as misleading advertising in TV and print newspapers. The national legislation gives the authority more power. They can take an action under financial sector regulations related to banking, insurance, capital markets and pensions, but they also use the UCPD to support their actions.

## Relevant case law

### Financial services

- Decision nr 8/2010 of the Office of Competition and Consumer Protection: It is a misleading omission to advertise a fixed-term savings deposit without mentioning that the interest rate is actually variable.
  
  The object of the proceedings was the promotional campaign of defendant (a bank), encouraging actual and potential clients of the bank to take advantage of the offer ‘Przyjaźń procentuje’ (‘Friendship pays off’) for fixed-term savings deposits.
  
  From 17 November to 19 December 2009, the defendant published materials in the form of brochures, labelled “Recommendation Certificates”.
  
  The President of the Office of the Competition and Consumer Protection started proceedings, as the trader was misleading the consumer, because the brochures did not state that the terms of the offer (including the interest rate for the deposits) were subject to modification.
  
  The practice of the defendant was found to be unfair.
  
  The President of the Office ordered publication of the administrative decision, not only on the defendant’s website, but also in the first five pages of a nationwide journal.

Please also see Civic Consulting Poland Country Report for other relevant cases.

### Immovable property

- Decision no. RWA-25/2010 of the President of the Office of Competition and Consumer Protection: Advertisements infringe the prohibition on misleading commercial practices when the indicated prices are exclusive of VAT.
  
  The defendant was a joint-stock company providing services including building and selling apartments.
  
  In a complaint addressed to the President, the consumers indicated that the defendant advertised apartments using phrases as “It’s cheaper than you might think. Prices starting from 9000 PLN for square meter” (“Jest tania niż sądzisz. Ceny od 9000 zł/m2”). However, it turned out that there were no apartments available for the price as indicated in the advertisement. Moreover, the price indicated in the advertisement did not include VAT.
  
  The defendant argued that there was a limited number of flats available for the price mentioned in the advertisement. However, the price of such apartments was lower in comparison with the majority of apartments offered, due to the unfavourable location of the former.
  
  The defendant breached the prohibition on misleading commercial practices.
  
  The President ordered the company to stop using the contested practice; in addition, he ordered publication of the administrative decision, not only on the defendant’s website, but also in the first five pages of a nationwide journal. The President imposed a financial penalty upon the defendant, to be paid to the state budget and amounting to PLN 213,185.

Please also see Civic Consulting Poland Country Report for other relevant cases.
<table>
<thead>
<tr>
<th>Enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Responsibility for enforcing the UCPD</strong></td>
</tr>
<tr>
<td>Financial services</td>
</tr>
<tr>
<td>Office of Competition and Consumer Protection</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Means of enforcement of UCPD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
</tr>
<tr>
<td>By public law and by private law</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Who can bring an action under the national legislation implementing the UCPD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public authorities, ombudsman, organisations representing consumer interests, and individual consumers.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Main obstacles for enforcing unfair commercial practices legislation reported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
</tr>
<tr>
<td>The Office of Competition and Consumer Protection reported that there are not enough cases to define any obstacles so far.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Problems relating to cross-border enforcement of unfair commercial practices legislation reported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
</tr>
<tr>
<td>None reported</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Codes of conduct and self-regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
</tr>
<tr>
<td>The code of good practices of the Conference of Financial Companies in Poland (KPF).</td>
</tr>
</tbody>
</table>

ANNEX 2: Fact sheet – most common unfair commercial practices reported
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>PL-FS-1</td>
<td>Essential information was not included in advertising of financial products, most often unsecured loans. In TV advertising, consumers were told they could get &quot;credit for free&quot; or &quot;zero,&quot; however these offers were subject to terms such as: offers were not available to all consumers, offers were only for a limited period of time, and/or consumers were charged with some additional fees instead of interest.</td>
<td>Banned commercial practice included in the Black List (Annex I) of the UCPD / Misleading omission / Aggressive practice / Other unfair commercial practice</td>
<td>2008 &lt;10 2009 &lt;10 2010 X</td>
<td>Life insurance / Health insurance / Major insurance / Travel insurance / Other insurance (home, care, etc.) / Stocks or shares, bonds, derivatives, etc. / Collective investments / Savings account / Current account / Mortgage / Secured loan / Credit card / Other retail financial service</td>
<td>X</td>
<td>X</td>
<td>No</td>
</tr>
<tr>
<td>PL-FS-2</td>
<td>Essential information was not included, or not clear enough, in advertising of financial products. Advertising was therefore misleading.</td>
<td>Banned commercial practice included in the Black List (Annex I) of the UCPD / Misleading omission / Aggressive practice / Other unfair commercial practice</td>
<td>2008 X</td>
<td>Life insurance / Health insurance / Major insurance / Travel insurance / Other insurance (home, care, etc.) / Stocks or shares, bonds, derivatives, etc. / Collective investments / Savings account / Current account / Mortgage / Secured loan / Credit card / Other retail financial service</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>PL-FS-3</td>
<td>Consumers were informed they had to buy a product when they were purchasing another product. This happened, for example, when people looking to buy bank credit were told that they also had to buy an insurance product (normally payment protection insurance).</td>
<td>Banned commercial practice included in the Black List (Annex I) of the UCPD / Misleading omission / Aggressive practice / Other unfair commercial practice</td>
<td>2008 X</td>
<td>Life insurance / Health insurance / Major insurance / Travel insurance / Other insurance (home, care, etc.) / Stocks or shares, bonds, derivatives, etc. / Collective investments / Savings account / Current account / Mortgage / Secured loan / Credit card / Other retail financial service</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>PL-FS-4</td>
<td>Financial products were misdescribed in advertising, misleading consumers.</td>
<td>Banned commercial practice included in the Black List (Annex I) of the UCPD / Misleading omission / Aggressive practice / Other unfair commercial practice</td>
<td>2008 X</td>
<td>Life insurance / Health insurance / Major insurance / Travel insurance / Other insurance (home, care, etc.) / Stocks or shares, bonds, derivatives, etc. / Collective investments / Savings account / Current account / Mortgage / Secured loan / Credit card / Other retail financial service</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>PL-FS-5</td>
<td>Essential information was not included in advertising for financial products and/or advertising was misleading. This happened most often in relation to life insurance and savings accounts. For example, one company claimed to offer a savings account with an interest rate of 6%. However, in the end, consumers did not get this rate for the entire length of their contract so the offer was not as attractive as it seemed.</td>
<td>Banned commercial practice included in the Black List (Annex I) of the UCPD / Misleading omission / Aggressive practice / Other unfair commercial practice</td>
<td>2008 X</td>
<td>Life insurance / Health insurance / Major insurance / Travel insurance / Other insurance (home, care, etc.) / Stocks or shares, bonds, derivatives, etc. / Collective investments / Savings account / Current account / Mortgage / Secured loan / Credit card /Other retail financial service</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
Certain life insurance providers refused to pay an insurance claim, which was related to misleading information concerning the insurer's liability. In general, the terms of life insurance cover heart attacks. However, in the provisions of some providers, the definition of a heart attack was not the same as the medical definition. In order for the customer to claim compensation for their heart attack, it had to be a specific kind of heart attack.

<p>| Source: Konferencja Przedsiębiorców Finansowych (PL-FS-1); Transcom WorldWide CMS Poland LLC (PL-FS-2); The Polish Financial Supervision Authority (PL-FS-3; PL-FS-4); Office of Competition and Consumer Protection (PL-FS-5; PL-FS-6). |
|---|---|---|---|---|---|---|
| Note: VF: Very frequently, RF: Rather frequently, S: Sometimes. |</p>
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>2008</td>
<td>2009</td>
<td>2010</td>
<td>Buying property</td>
<td>Renting property</td>
</tr>
<tr>
<td>PL-IP-1</td>
<td>The code of conduct of an immovable property traders association had provisions in it which were contrary to the law. Specifically, the provisions did not require traders to give out some essential information. Traders who agreed to this voluntary “code of conduct” could then use the association’s logo on their advertising, thus leading consumers to assume a certain level of credibility on the part of the trader.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Yes</td>
<td>X</td>
</tr>
<tr>
<td>PL-IP-2</td>
<td>An association of entrepreneurs of immovable property included a note in an advertisement that a code of conduct that they adhered to was approved by the president of the Office of Competition and Consumer Protection (OCCP). In fact, the president of the OCCP gave a positive opinion about a first draft of the code of conduct but not about the later version that included a significant attachment. Consumers trusted the code of conduct because it was supposedly “endorsed” by OCCP. It later turned out that provisions in the attachment were contrary to the law.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Yes</td>
<td>X</td>
</tr>
<tr>
<td>PL-IP-3</td>
<td>Developers advertised the price of immovable property before taxes, instead of after taxes, therefore misleading consumers. Consumers had to verify the information given in the invitation to purchase and after they found out that the information was unreliable, they lost confidence in the trader.</td>
<td>X</td>
<td>S</td>
<td>S</td>
<td>S</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
Some traders advertised their properties in a particular area as being “cheaper than you think,” and listed a certain price. However, this claim was later proved to be misleading, as the traders were only able to offer properties at this price in other (less expensive) areas.

Source: Office of Competition and Consumer Protection (PL-IP-1; PL-IP-2; PL-IP-3; PL-IP-4).
ANNEX 3: References


<table>
<thead>
<tr>
<th>Document Control</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Document</strong></td>
</tr>
<tr>
<td><strong>Tender No.</strong></td>
</tr>
<tr>
<td>Invitation to tender n° JUST/2010/JCIV/PR/0018/A4</td>
</tr>
<tr>
<td><strong>Prepared by</strong></td>
</tr>
<tr>
<td>Professor Fernando Gomez</td>
</tr>
<tr>
<td>in collaboration with:</td>
</tr>
<tr>
<td>Marian Gili</td>
</tr>
<tr>
<td>August 2011</td>
</tr>
<tr>
<td><strong>Checked by</strong></td>
</tr>
<tr>
<td>Dr. Senda Kara, Dr. Frank Alleweldt, Harriet Gamper</td>
</tr>
</tbody>
</table>
9.1 Introduction


Legislative Royal Decree 1/2007 did not include other laws transposing European Directives since they were considered to deal with provisions for areas that were more

---

¹ For a definition of ‘consumers’ and ‘users’ in Spanish legal system, see below.
² Section 51 of the Spanish Constitution: "(1) The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests. (2) The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law. (3) Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic trade and the system of licensing commercial products”.
⁴ Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usuarios (Official State Gazette num. 312, 30.12.2006).
⁵ Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Official State Gazette num. 287, 30.11.2007).
⁷ Ley 22/1994, de 6 de julio, de responsabilidad civil por los daños causados por productos defectuosos (Official State Gazette num. 161, 7.7.1994).
specific – for example, information society services, electronic trade, television broadcasting, medicinal products and medical devices, consumer credit and timeshare – and that were not deemed to be part of core consumer protection.


This general regulation of unfair commercial practices is complemented by rules that impose obligations of pre-contractual information or regulate other protective mechanisms for specific sectors such as financial services and immovable property in order to protect financial services’ clients as well as purchasers and lessees of housing. In this sense, in the field of financial services the study also briefly describes Acts, Royal Decrees, Ministerial Orders (these are Orders of the Ministry of Economy and Finance), and regulations of the Bank of Spain - the national central bank and supervisor of the Spanish banking system - that passes provisions (traditionally *Circulars*) in order to implement the rules that expressly authorise it to do so. Some of these try to improve the transparency of financial transactions.

Finally, the Spanish Constitution sets a quasi-federal system with a substantial degree of political powers vested upon the Regions (*Comunidades Autónomas*). Statutes of Autonomy – basic institutional laws – of the Regions provide them with normative powers, and executive powers in matters such as internal trade, consumer affairs, savings banks, insurance and mutual benefit societies not included in the social security system, housing, and advertising. As a result, this study analyzes both the legal regulation on unfair commercial practices in the field of financial services and immovable property at the State or Federal level as well as the rules of the Spanish Regions on consumer protection regulating pre-contractual information requirements and unfair business-to-consumer commercial practices in these fields (see Annexes 4 and 5).

---

10 Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios (Official State Gazette num. 315, 31.12.2009).


12 Ley 34/1988, de 11 de noviembre, general de publicidad (Official State Gazette num. 274, 15.11.1988).

9.2 Financial services

9.2.1 Legislative framework

9.2.1.1 National implementation legislation(s) of the UCPD

State legislation implementing the UCPD: Act 29/2009, of 30 December 2009, modifying the legal regime governing unfair competition and advertising to improve the consumers and users protection.


Act 3/1991, of 10 January 1991, on unfair competition:
The main changes introduced by Act 29/2009 into Act 3/1991,\textsuperscript{15} according to the object of this study, can be summarised as follows:

- Section 1 (Purpose): unlawful advertising in the terms established by Act 34/1988 (see below) is included within the general prohibition of unfair competition.
- Section 2 (Objective scope): a Subsection 3 is added in order to clarify and widen the scope of Act 3/1991 to expressly include unfair competition practices carried out before, during and after a commercial transaction or contract, regardless of whether they have been concluded or not.
- Section 3 (Subjective scope): Act 3/1991 is applicable to traders, professionals and any other person who participates in the market. Act 29/2009 widens the scope of Act 3/1991 to adapt it to the UCPD.
- This is followed by sections (sections 4 to 31) which implement the UCPD provisions on misleading actions, misleading omissions, and aggressive practices, as well as providing specific rules on aspects such as comparative advertising and acts of imitation.
- Section 32 relates to Remedies: actions and remedies foreseen in Act 3/1991 and Act 34/1988 are unified in order to allow consumers to bring not only declaratory suits but also injunctions, future prohibition or removal of the effects produced by the unfair behaviour; suits to rectify misleading, inaccurate or false information; damages suits due to negligence or willful misconduct, or unjust enrichment suits. If courts consider it necessary, they will be able to order the publication of the judgment in whole or in part or, if the effects of the infringement may spread, the publication of a corrective statement.


• Section 33 (Standing to sue): any individual or legal entity that participates in the market and whose economic interests are directly harmed or threatened by an unfair commercial practice has standing to bring the suits provided for in Section 32. In case of unlawful advertisement, the suits may be brought by any affected individual or legal entity and, in general, by those who have a subjective right or a lawful interest. Damages suits may also be brought by those with standing to sue according to Section 11.2 of the Civil Procedure Act. Unjust enrichment suits may only be brought by the party whose legal position has been infringed upon. Declaratory suits, suits for injunction or removal of the effects produced by the unfair conduct and for rectification of misleading, inaccurate or false information may also be brought by associations, professional bodies or bodies representing economic interests if, and only if, their members’ interests are affected. Entities who have standing to bring declaratory suits, suits for injunction or removal of the effects produced by the unfair behaviour and for rectification of misleading, inaccurate or false information, in order to protect consumers’ general, collective or diffuse interests, are the following: (a) the National Institute of Consumer Affairs (Instituto Nacional del Consumo) and its counterparts in the Regions and local corporations with authority on consumer protection; (b) consumer associations that meet the requirements established by the Legislative Royal Decree 1/2007 or the legislation of the Regions on consumer protection; (c) entities of other EU Members States for protecting consumers which have been approved on a list published by the Official Journal of the European Union. Finally, the Public Prosecutor’s Office may also bring actions for injunction to protect general, collective and diffuse, interests of consumers.

• Section 35 (Statute of limitations): suits foreseen in Section 32 should be brought within 1 year. The statute of limitations for suits addressed to protect the general, diffuse or collective interests of consumers will be governed by Section 56 of the Legislative Royal Decree 1/2007.17

• Section 37 (Encouragement of codes of conduct): codes of conduct to which traders and professionals can voluntarily adhere intend to raise the standards of consumer protection.

• Section 38 (Remedies against codes of conduct): suits for injunction and rectification can be brought when codes of conduct recommend, encourage or

---

16 Ley 1/2000, de 7 de enero, de Enjuiciamiento civil (Official State Gazette num. 7, 8.1.2000). According to Section 11.2 (Procedural standing for the defence of rights and interests of consumers and users): “(...) 2. When the people that have been affected by a damaging fact are a group of consumers or users the members of which are perfectly determined or are easy to determine, the procedural standing to undertake the defence of the collective interests corresponds to the associations of consumers and users, to the entities legally incorporated whose goal is the defence or protection of those, as well as to the groups of affected people themselves (...).”

17 According to Section 56 of Legislative Royal Decree 1/2007, injunctive suits are not subject to a statute of limitations and therefore they can always be brought before a court.
promote unfair behaviours, after 15 days since having requested the code owner for the elimination or rectification of the recommendation of the unfair behaviour or, if such recommendation has not been made yet, for an undertaking to refrain from doing so, without the code owner having notified the claimant its decision, or the decision made is unsatisfactory or not complied with.

- **Section 39 (Preliminary actions against traders and professionals adhered to codes of conduct):** in case of misleading conducts, a request must be made to the body controlling the code for injunction or rectification of the act and for an undertaking to refrain from engaging in such act if it has not been made yet. After 15 days without a decision, or if the decision made is unsatisfactory or not complied with, suits for injunction or rectification foreseen in Section 32 will be able to be brought. In all other cases, preliminary action before the controlling body is optional.

- **Sole Additional Provision (Definition of advertising):** Act 29/2009 defines advertising as the activity so defined in Section 2 of Act 34/1988 (see below).

**Act 34/1988, of 11 November 1988, on General Advertising:**

The main changes introduced by Act 29/2009 into Act 34/1988, for the scope of this study, can be summarised as follows:

- **Section 1 (Object):** advertising is governed by Act 34/1988, Act 3/1991 and other specific legislation governing certain types of advertising.

- **Section 3 (Unlawful advertising):** unlawful advertising is redefined as follows:
  (a) advertising contravening the personal dignity or the values and rights established by the Spanish Constitution and, specially, advertising that depicts women in a degrading or discriminatory manner; (b) advertising addressed to minors inciting them to purchase products or services by exploiting their inexperience or credulity, or advertising where minors persuade their parents or guardians to make such purchases; (c) subliminal advertising; (d) advertising contravening rules that govern advertising of certain products, goods, activities or services; (e) misleading advertising, unfair advertising and aggressive advertising, which are considered unfair commercial practices under Act 3/1991.

- **Section 4 (Subliminal advertising):** subliminal advertising is defined as advertising that, by using techniques to produce stimulus with intensities that border with the threshold of senses or other analogous techniques, may affect the public without being consciously perceived.

- **Section 5 (Advertising for certain products or services):** this Section deals with advertising on medical materials or products; advertising on products, goods, activities and services that can generate risks to public health or security, and advertising of games of chance. New wording removes any reference to tobacco advertising.
• Section 6 (Suits against unlawful advertising): in addition to the rules of Act 3/1991, the following entities have standing to sue if unlawful advertising arises from the discriminatory or degrading use of women image: (a) the Office of the Government Representative for Gender Violence; (b) The Institute for Women or its counterparts in the Regions; (c) the legally established associations whose purpose is to protect women’s interests and whose membership do not include for-profit legal entities; (d) the Public Prosecutor’s Office.

Legislative Royal Decree 1/2007, of 16 November 2007, that passes the codified text of the General Law for the Defence of Consumers and Users and other complementary laws:

The main changes introduced by Act 29/2009 into the Legislative Royal Decree 1/2007, for the purposes of this study, can be summarised as follows:

• Section 8 (Basic consumer rights): according to subsection (b), a basic right of consumers is their protection against unfair commercial practices and contractual unfair terms.

• Section 19 (General principle and commercial practices): commercial practices with consumers are defined as acts, omissions, behaviours, statements or commercial communications, including advertising and commercialisation, directly related to the promotion, sale or supply to consumers of goods or services and carried out before, during or after commercial transactions. Contractual relations are not considered commercial practices. The protection of consumers’ economic and social interests in relation to traders’ commercial practices is subject not only to the provisions of the Legislative Royal Decree 1/2007 but also those of Act 3/1991 and Act 7/1996. Nevertheless, the provisions of the Legislative Royal Decree 1/2007 and other rules on commercial practices regarding medical products, labelling, presentation and advertising of products, indication of prices, time-share, consumer credit, distance sales of financial services addressed to consumers, electronic trade, collective investment in marketable securities, rules of conduct on investment services, public offers in corporate takeover bids, and related areas will prevail when a conflict with the general rules on unfair commercial practices exists. Finally, Section 19 regulates an authorisation to pass primary or secondary legislation on commercial practices regarding financial services and immovable property in order to offer increased protection to consumers.

• Section 20 (Necessary information in commercial offers of goods and services): commercial offers must include, as a minimum, the following information regarding the features of goods or services and their price:
  o Personal information about the trader that makes the commercial offer;
  o Essential features of goods or services;
  o Full price or way to calculate it;
• Payment methods, dates of delivery, performance of the contract and claims systems; and
• References to the right to terminate the contract. Any breach of this obligation will be considered a misleading and therefore unfair practice according to Section 21.2 of Act 3/1991 (see above).

• Section 47.3 (Competent authority): consumer protection authorities will also sanction unfair commercial practices with consumers.

• Section 49.1 (Infringements regarding consumer protection): unfair commercial practices with consumers, discriminatory conduct in relation to the access to goods and services, and non-compliance with the requirements, obligations and prohibitions foreseen in the Legislative Royal Decree 1/2007 or any other rules implementing it, or in the Regions legislation, are considered as consumer law infringements.

• Section 60 (Pre-contractual information): before concluding a contract, the trader must provide consumers, in a way that is clear, understandable and adapted to the circumstances, the relevant, truthful and sufficient information about the essential features of the contract and, in particular, its legal and economic conditions and the essential features of goods and services (personal information about the offeror, full price, date of delivery, performance and duration of the contract, guarantees, language, right to termination, place where consumers can bring their claims and complaints and ADR systems). Requirements of pre-contractual information also exist for distance contracts (Sections 97 and 98).

Act 7/1996, of 15 February 1996, on Retail Trade:
The main changes introduced by Act 29/2009 into Act 7/1996, related to the scope of this study, can be summarised as follows:

• Section 18 (Definition of sales promotion activities): the use of expressions such as ‘seasonal sales’, ‘sales on offer or promotion’, ‘clearance sales’, ‘sales with prizes’ and ‘direct sales offer’ that contravenes the rules foreseen in Act 7/1996 will be considered unfair if requirements provided by Section 5 of Act 3/1991 (see above) are met.

• Section 23 (Prohibition on pyramid sales): pyramid sales defined by Section 24 of Act 3/1991 (see above) are forbidden and contractual conditions contrary to that provision are null and void.

• Section 32 (Sales with prizes or with incentives): whereas sales with prizes are defined as those that, for promotional purposes, offer a prize automatically or by participating in a draw or competition, sales with incentives are those that offer any incentive or benefit linked to the acquisition of a good or service. Both types of sales will be unfair practices in cases foreseen by Act 3/1991.

Unlike other Regional Acts, that were passed before the UCPD was implemented in the Spanish legal system, Acts 22/2010 (Catalonia) and 1/2011 (Valencian Community) took into account provisions of UCPD or those foreseen by Act 29/2009 when they were passed by the Catalan and Valencian Community Parliaments (for an explanation of their main provisions see Annex 6).

9.2.1.2 National legislation relevant for the field of financial services

a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

All commercial practices included in the Black List (Annex I) of the UCPD are banned by Act 3/1991. Moreover, unfair commercial practices foreseen in both Legislative Royal Decree 1/2007 and Act 7/1996 refer to or replicate the provisions established by Act 3/1991. The only commercial practices not included in Annex I of the UCPD are in most cases those foreseen in Section 3 of Act 34/1988:

- Advertising contravening the personal dignity or the values and rights established by the Spanish Constitution and, specially, advertising that depicts women in a degrading or discriminatory manner (this practice is outside the scope of the UCPD as it relates to taste and decency);
- Subliminal advertising, which is defined by Section 4 of Act 34/1988 as advertising that, by using techniques to produce stimulus with intensities that border with the threshold of senses or other analogous techniques, may affect the public without being consciously perceived (this practice is not included within Annex I of UCPD);
- Advertising contravening rules that govern advertising of certain products, goods, activities or services according to Section 5 of Act 34/1988 (this practice is not included within Annex I of UCPD);
- Misleading advertising, unfair advertising and aggressive advertising, which will be considered unfair commercial practices according to Act 3/1991 (these practices are not included within Annex I of the UCPD but under other UCPD provisions).

b) National legislation regarding misleading actions

Misleading actions are regulated in the following Acts:

---

18 Section 18 of Act 3/1991 includes unlawful advertising within unfair commercial practices but it refers to the provisions foreseen by Act 34/1998. As advertising may go beyond the consumer or unfair competition settings, the Spanish legislator decided to keep a specific advertising Act with general application when transposing Act 29/2009.
• Act 3/1991: Section 5 (misleading acts); Section 20 (misleading practices caused by confusion); Section 21 (misleading practices regarding codes of conduct or other quality marks); Section 22 (bait practices and misleading promotional practices); Section 23 (misleading practice as to the natures and properties of products or services, their availability and after-sale services); Section 24 (pyramid sale practices); Section 25 (misleading practices by confusion); Section 27 (other misleading practices).

• Act 34/1988: Section 3 (unlawful advertising); Section 4 (subliminal advertising); and Section 5 (advertising for certain products and services).

• Legislative Royal Decree 1/2007: Section 49.1 (infringements regarding consumer protection).

• Act 7/1996: Section 18 (definition of sales promotion activities); Section 23 (prohibition of pyramid sales); and Section 32 (sales with prizes or with incentives).

These provisions are described above in section 1.2.1.1.

c) National legislation regarding misleading omissions

Misleading omissions are regulated in the following Acts:

• Act 3/1991: Section 7 (misleading omissions); Section 26 (covered commercial practices).

• Act 34/1988: Section 3 (e) (unlawful advertising).

• Legislative Royal Decree 1/2007: Section 49.1 (infringements regarding consumer protection).

These provisions are described above in section 1.2.1.1.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Aggressive practices because of the use of harassment, coercion and undue influence are regulated by the following Acts:

• Act 3/1991: Section 8 (aggressive practices); Section 28 (aggressive practices because of coercion); Section 29 (aggressive practices because of harassment); Section 30 (aggressive practices related to minors); Section 31 (other aggressive practices).

• Act 34/1988: Section 3 (b) and (e) (unlawful advertising).

• Legislative Royal Decree 1/2007: Section 49.1 (infringements regarding consumer protection).

These provisions are described above in section 1.2.1.1.

e) Other national legal provisions on unfair commercial practices in the field of financial services
This part of the study concentrates on State provisions regarding the transparency of financial transactions and the protection of financial service clients. It also refers to Regional provisions that impose pre-contractual information requirements or regulate other protection mechanisms in the field of financial services.

State provisions regarding the transparency of financial transactions and the protection of financial service clients

Based on their content, State provisions regarding the transparency of financial transactions and the protection of financial service clients may be grouped into the following categories:

Banking

General

Act 26/1988, of 29 July 1988, on discipline and intervention of financial entities: Act 26/1988 is a purely national provision whose Section 48.2 authorises the Ministry of Economy and Finance to regulate some specific issues in order to protect the interests of clients of financial entities. According to the scope of this authorisation, the Ministry of Economy and Finance may adopt the following measures:

- To establish that financial contracts should be formalized in writing and that they should include the obligations and rights of the parties and, especially, issues related to the transparency of the mortgages and the financial conditions of mortgage loans;
- To impose the delivery of a copy of the financial contract;
- To impose on financial entities the obligation to inform both the Bank of Spain and financial clients about the financial conditions before their application;
- To pass rules to ensure that advertising includes the necessary information, rules on advertising control and rules on regimes of previous authorisation;
- To publish the official interest rates;
- To widen the scope of the previous rules to other contracts or transactions, although financial entities do not participate;
- To establish the minimum pre-contractual information that financial entities must provide to consumers in order to allow them to know the essential features of the financial products and to assess if they are adapted to their circumstances and financial situation.

Act 26/1988 establishes the basic character of the rules passed on the basis of this authorisation and that the rules passed by the Regions regarding these issues cannot offer a lower level of protection to financial clients.

Ministerial Order of 12 December 1989, on interest rates and fees, rules of conduct, clients’ information and advertising of the financial entities: Order of 12 December 1989 is a purely national provision which was passed by the Ministry of Economy and Finance on the basis of Section 48.2 of Act 26 /1988 in order to improve the transparency of
financial transactions. In this sense, the Order imposes on financial entities specific obligations applicable to contractual relations as well as obligations to inform both public authorities and their clients about the essential conditions of financial transactions (Sections 1 to 8); it also establishes the obligation of the Bank of Spain to have a Claims Service (Section 9) and regulates some issues on financial advertising, which have been repealed by the Order of 11 June 2010 (see below). This Ministerial Order has been repealed by the Order EHA/2899/2011, of 28 October 2011, on the transparency and protection of banking services’ clients (see below).

Circular of the Bank of Spain 8/1990, of 7 September 1990, addressed to the financial entities, on the transparency of financial transactions and the protection of financial services clients: Circular 8/1990 is a purely national provision that implements the Order of 12 December 1989 and imposes on financial entities the following obligations:

- To publish interest rates;
- To publish some exchange rates;
- To inform about the rates applied to the financial transactions;
- To have a bulletin board that publishes all relevant information; and
- To deliver contractual documentation, information about the financial fees and rules on the dates of evaluation of financial transactions.


Act 39/2002 amended both Act 26/1984 – codified by the Legislative Royal Decree 1/2007 (see above) – in order to regulate injunctive suits in defence of consumers and users’ interests, and Act 7/1995, of 23 March 1995, on Consumer Credit – repealed by Act 16/2011, of 24 June 2011, on consumer credit contracts (see below) –, to specify the way the Annual Percentage Rate should be calculated.

Act 2/2011 of 4 March 2011, on Sustainable Economy: Act 2/2011 is a purely national provision that establishes rules to improve the protection of consumers of financial services by allowing financial entities to evaluate the solvency of borrowers and by increasing the pre-contractual information to be able to assess if financial products adapt to the interests, needs and financial situation of financial services clients. In this sense, Section 29 establishes that, before the conclusion of credit or loan contracts, financial entities must assess consumers’ solvency. Additionally, financial entities must offer consumers, in an accessible way and, especially, by means of pre-contractual information, sufficient explanations to be able to assess if financial products adapt to their interests, needs and financial situation, with special emphasis on the essential features of these products and their effects on consumers (consequences of non-payment, etc.). Act 2/2011 also authorises the Ministry of Economy and Finance to pass rules to guarantee the appropriate level of consumers and users protection in their relations with financial entities, including measures related to the transparency of loans, mortgages and credit contract conditions. Finally, Act 2/2011 also guarantees the observation of provisions on personal data privacy and includes measures that reform markets on insurance and pension funds in order to improve the protection of the insurers’ rights. Moreover, it regulates mechanisms to protect the financial services clients by referring to the claims services of the Bank of Spain, the National Commission on Securities Market and the General Directorate for Insurance and Pension Funds (Section 31).

Order EHA/2899/2011, of 28 October 2011, on the transparency and protection of banking services’ clients: Order of 28 October 2011 repeals, among others, the Ministerial Order of 12 December 1989, on interest rates and fees, rules of conduct, clients’ information and advertising of the financial entities; the Ministerial Order of 5 May 1994, on the transparency of mortgages’ financial conditions, and the Ministerial Order PRE/1019/2003, of 24 April 2003, on the transparency of prices when financial services are rendered by automatic teller machines. Some of the most important provisions of this Ministerial Order are the following:

(a) The obligation of financial entities to provide consumers with information relative to the applicable financial fees (period, exact amount, etc.) and interest rates. This information must be available in financial entities’ establishments and webpages as well as in the Bank of Spain webpage. In financial services rendered by automatic teller machines or distance contracts, a free telephone number must be available in a visible place in order to allow consumers to solve any problems;

(b) Advertising regarding financial services must be clear, sufficient and objective, and cannot be misleading;

(c) The obligation of financial entities to provide consumers with the necessary pre-contractual information to be able to compare similar offers and to adopt an informed decision about financial services;

(d) The obligation of financial entities to provide their clients with appropriate and sufficient explanations to be able to understand the essential terms of financial services and to be able to adopt an informed decision taking into account their
needs and financial situation. These explanations must include clarifications of the information content as well as the consequences of the conclusion of the contract for clients;

(e) The Order imposes a standard form for mortgage applications that highlights the most risky provisions for consumers.

Claims services

Ministerial Order ECO/734/2004, of 11 March 2004, on the claims service for financial entities: Order of 11 March 2004 is a purely national provision that regulates the requirements and duties of claim services as well as the proceedings to solve the claims and complaints brought by financial clients.

Advertising

Ministerial Order EHA/1718/2010, of 11 June 2010, on the regulation and control of the advertising of financial services and products: Order of 11 June 2010 is a purely national provision. Advertising control is based on two levels: on the first level, the Order of 11 June 2010 and the Circular of the Bank of Spain 6/2010 establishes some criteria that govern financial advertising and impose on financial entities the obligation to have internal controls and proceedings to guarantee that advertising is clear and honest. In this sense, it is presumed that entities have these internal controls and proceedings if they have adhered to advertising self-regulation systems in Spain and therefore are subject to their codes of conduct. On the second level, all inappropriate behaviours according to the previous criteria are corrected by means of the rights of the supervisor - the Bank of Spain - to rectify or cease unlawful advertising, in addition to the actions foreseen in Act 3/1991 for the injunction of unlawful advertising.

Circular of the Bank of Spain 6/2010, addressed to financial entities, on the financial services and products advertising: Circular 6/2010 is a purely national provision that establishes general principles for financial advertising including criteria about its form and content, as well as rules on its controls.

---

19 According to Section 61 of Legislative Royal Decree 1/2007, the content of advertising can be demanded by consumers regardless of whether or not it appears in the contract expressly.

20 The Bank of Spain publishes these adhered financial entities at http://www.bde.es/webbde/es/secciones/servicio/autorregulacion_entidades/autorregulacion.html

All of them adhere to the Association for the self-regulation of the commercial communication [Asociación para la Autорregulación de la Comunicación Comercial (Autocontrol)], which is the Spanish advertising self-regulation organisation. Autocontrol’s main objective is to contribute to ensure high ethical standards in advertising in the benefit of consumers, competitors and the marketplace. Autocontrol has signed various agreements with relevant statutory authorities in order to set up co-operation schemes (self-regulation within a co-regulatory framework), in which advertising self-regulation (Autocontrol) co-operates with regulators by providing a helpful additional complement to statutory mechanisms in place. Besides, Autocontrol participates in the control and application schemes of all sectoral advertising codes in Spain (TV advertising, food advertising to children, toys, videogames, alcoholic beverages, etc.). There are three key instruments in Autocontrol: codes of conduct, out-of-court dispute settlement system [Complaints Committe (Jurado de la Publicidad)], and pre-launching advice (Copy advice). Further information about Autocontrol is available at http://www.autocontrol.es/.
Consumer credit contracts

Act 16/2011, of 24 June 2011, on consumer credit contracts: Act 16/2011 transposes into the Spanish legal system Directive 2008/48/EC on credit agreements for consumers. In order to improve consumer information, Sections 8 to 14 of Act 16/2011 regulate the essential information that advertising and communications on credit contracts as well as offers exhibited in commercial establishments must include. It also establishes the obligation of financial entities to provide consumers with pre-contractual information in a standard form, the obligation to assist consumers in order to allow them to conclude the contract which is best adapted to their needs and financial situation, and the obligation to assess the consumer’s creditworthiness before concluding the contract.

Mortgages

Act 2/1994, of 30 March 1994, on subrogation and modification of mortgages: Act 2/1994 is a purely national provision that aims to allow financial clients to profit from decreases in interest rates by establishing the conditions under which financial entities may be subrogated by debtors in mortgages loans granted by other financial entities.

Ministerial Order of 5 May 1994, on the transparency of mortgages’ financial conditions: Order of 5 May 1994 is a purely national provision that complements the Order of 12 December 1989. It tries to guarantee sufficient information and protection to those who conclude mortgages of an amount that does not exceed 150,253 Euro. In this sense, it foresees the minimum content of the leaflet delivered to those asking for mortgages; the form and content of the binding offers; the terms to be included in the public instruments; the duties of Notaries regarding verification and information, and the obligation of the Bank of Spain to fix and regularly publish official interest rates applicable to these transactions. This Ministerial Order has been repealed by the Order EHA/2899/2011, of 28 October 2011, on the transparency and protection of banking services’ clients (see above).

Royal Decree-Law 6/2000, of 23 June 2000, on urgent measures to increase competition in markets for goods and services: Section 40 of Royal Decree-Law 6/2000 is a purely national provision that foresees the information that financial entities must provide to their clients before the conclusion of mortgages. In this sense, leaflets must include the right of the borrower to appoint, by mutual agreement with the lender, the individual or legal entity who will appraise the value of the property to be mortgaged, the individual or entity who will administer the transaction as well as the insurance company who will cover the risks. The breach of this obligation will be deemed an infringement according to Section 48.2 of Act 26/1988 governing financial institutions.

Act 36/2003, of 11 November 2003, on measures about economic changes: Act 36/2003 is a purely national provision that takes measures to promote competition and to protect borrowers from risks derived from interest rates in financial markets. In this sense, it makes the modification and subrogation of mortgages both easier and cheaper and it promotes new products to cover the risks derived from interest rates.

Act 41/2007, of 7 December 2007, that modifies Act 2/1981, of 25 March, regulating the mortgage market and other rules on the mortgage and financial system, reverse mortgages (equity release loans) and long-term care insurance, and establishing some
tax rules: Act 41/2007 is a purely national provision that concentrates on the mortgage market and, in particular, on removing obstacles to marketing new products, and updating the consumer protection regime. In this sense, it authorises the Ministry of Economy and Finance to regulate issues related to the transparency of financial conditions in mortgage loans. Furthermore, it establishes an explicit reference to the pre-contractual information that financial entities must provide to their clients in order to allow them to take an informed decision about financial products. In this sense, Act 41/2007 authorises the Ministry of Economy and Finance to fix the minimum information that financial entities must provide to their clients before the conclusion of the contract. This information must allow clients to know the essential features of the financial products and to assess if they are adapted to their needs and financial situation.

Act 2/2009, of 31 March 2009, that regulates the conclusion of mortgage loans with consumers and agency services for the conclusion of loans or credit contracts with consumers: Act 2/2009 is a purely national provision that establishes the legal regime of individuals or entities other than financial entities (legally regulated under Spanish or other Member State’s banking regulations) that provide mortgage loans with consumers or render agency services for the conclusion of loans or credit contracts. In order to guarantee client protection, Act 2/2009 imposes on those carrying out these activities the obligation to be registered in a Regional Registry; to provide their clients with pre-contractual information relative to standard terms, the individual or entity itself, the product or service, the contract, the price and fees, etc.; and to have liability insurance or bank guarantees covering potential losses caused to clients.

Money exchange

Act 13/1996, of 30 December 1996, on tax, administrative and social measures: Act 13/1996 is a purely national provision whose Section 178 establishes the legal regime of money exchange and purchase or sale of foreign notes and traveller’s checks transactions when they are carried out by individuals or legal entities other than financial entities. In this sense, those who carry out these activities need to obtain the authorisation of the Bank of Spain and be registered in the Registry of money exchange establishments. The Bank of Spain will supervise and control the money exchange establishments authorised to sell foreign notes and traveler’s checks or to administer international transfers. For those establishments which have only obtained an authorisation to purchase, the surveillance and control of the observation of provisions related to the transparency of the transactions and clients’ information will be carried out by the public authority that deals with consumer protection.

Royal Decree 2660/1998, of 14 December 1998, on money exchange establishments other than financial entities: Royal Decree 2660/1998 is a purely national provision that implements Section 178 of Act 13/1996 (see above) and establishes the legal regime of money exchange establishments by taking into account the different types of entities that carry out these transactions. According to this Royal Decree, money exchange establishments are subject to the following obligations:
The exchange rates applicable to their transactions must observe the regimes on advertising, transparency and client protection as well as the rules that implement the Royal Decree (Section 10);

Money exchange establishments must register their transactions, identify their participants and communicate them to the Bank of Spain and competent authorities. When transactions consist of the administration of external transfers of a sole client by an amount that exceeds 3,005 Euro, money exchange establishments must obtain a specific statement from the client before their execution (Section 11);

Money exchange establishments must provide the information requested by the Bank of Spain (Section 12).

Ministerial Order of 16 November 2000 on some aspects of the legal regime of money exchange establishments and their agents: Order of 16 November 2000 is a purely national provision that regulates some aspects of the legal regime applicable to the money exchange establishments foreseen by Royal Decree 2660/1998 and to their agents as well as implements some obligations on advertising and transparency of transactions in order to guarantee the best level of information and protection to financial clients.

Section 6 establishes the rules on advertising and transparency of transactions consisting of purchasing or selling foreign notes and travellers checks. Furthermore, it imposes some organisational measures when money exchange establishments carry out different activities to allow clients to identify the entity that render the services foreseen in the Order. According to Section 9, the Claims Service of the Bank of Spain will solve any claims and complaints. Titleholders of establishments must inform their clients about the existence and functions of this service as well as the rules on the transparency of their transactions.

Circular of the Bank of Spain 6/2001, of 29 October 2001, on the titleholders of money exchange establishments: Circular 6/2001 is a purely national provision that specifies the proceedings to be able to carry out the activities foreseen in Royal Decree 2660/1998, the information that money exchange establishments must deliver to the Bank of Spain, and the content and scope of their obligations and those of their agents regarding the information about their exchange rates and financial fees and the adoption of organisational measures.

Services rendered by automatic teller machines

Ministerial Order PRE/1019/2003, of 24 April 2003, on the transparency of prices when financial services are rendered by automatic teller machines: Order of 24 April 2003 is a purely national provision that means credit entities that have automatic teller machines in Spain must inform users about any fees charged to make a transaction and to offer the possibility of stopping the transaction if the consumer wishes to. It also establishes specific obligations to regularly inform their clients in order to allow them to identify the transactions and the full price of rendered services. This Ministerial Order has been
repealed by the Order EHA/2899/2011, of 28 October 2011, on the transparency and protection of banking services’ clients (see above).

**Distance contracts**

*Act 22/2007, of 11 July 2007, on distance marketing of financial services addressed to consumers:* Act 22/2007 transposes into the Spanish legal system Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC, in order to improve consumer protection in the sector of financial services. It establishes the information that consumers must receive before concluding such distance contracts, regulates the right to terminate the contract, offers additional guarantees in order to protect consumers from fraudulent use of credit cards, and promotes the use of ADR systems.

**Payment services**

*Act 16/2009, of 13 November 2009, on payment services:* Act 16/2009 transposes into the Spanish legal system Directive 2007/64/EC on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC. Among other objectives, it aims to increase market transparency by establishing standard conditions and informational requirements for national and foreign payment services. Act 16/2009 has been implemented by the Royal Decree 712/2010, of 28 May 2010, on the legal regime of payment services and payment entities and the Ministerial Order EHA/1608/2010, of 14 June 2010, on the transparency of conditions and requirements of information applicable to payment services.

**Investments**

*Act 24/1988, of 28 July 1988, on the securities market:* Act 24/1988, albeit in general a purely national provision, contains Sections 78 to 83, which were introduced or modified by Act 47/2007, of 19 December 2007, which implements into Spanish Law Directive 2004/39/EC on markets in financial instruments (MiFID), MiFID implementing Directive 2006/73/EC, and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions (recast). The above mentioned sections set rules of conduct for those who render investment services, which include, among others, the following obligations:

- The obligation to act in the best interests of their clients according to the principles of due diligence and transparency (Section 79);
- The obligation to inform clients. In this sense, information addressed to clients, including advertising, must be impartial and clear and cannot be misleading (Sections 79 bis, 79 quarter, 79 quinquies);
- The obligation to create a Registry where all contracts concluded between those who render investment services and their clients must be registered (Sections 79 ter, 79 quater);
- The obligation to take reasonable steps to get the best result for their client’s transactions and the obligation to have the necessary proceedings and systems to administrate the order of their clients (Section 79 sexies);
Finally, some obligations that try to prevent the market abuse when those who render investment services have privileged or relevant information (Sections 80 through 83).


Regional provisions that impose information requirements or regulate other protection mechanisms in the field of financial services

General consumer rights for both the protection of their economic and social interests and to obtain information are foreseen in all general Regional provisions on consumers and users’ protection21 and some of these general rights include references to financial services:

- According to Section 12 (Control and surveillance systems) of Act 13/2003 (Andalusia), consumer authorities must develop control and surveillance systems to guarantee that costs and fees derived from financial transactions are clear. Furthermore, they must be advertised before the conclusion of the transaction, if possible, although it is carried out by means of automatic teller machines.

---

21 Right to the protection of economic and social interests: Sections 18 and 19 of Act 1/2011 (Valencian Community); Sections 123-1 through 123-9 of Act 22/2010 (Catalonia); Sections 14 through 18 of Act 16/2006 (Aragon); Sections 11 through 14 of Act 7/2006 (Chartered Community of Navarre); Sections 9 and 10 of Act 1/2006 (Canastria); Sections 10 and 11 of Act 11/2005 (Castile-La Mancha); Section 9 of Act 6/2003 (Basque Country); Sections 10 through 12 of Act 13/2003 (Andalusia); Sections 9 through 11 of Act 3/2003 (Canary Islands); Sections 8 through 12 of Act 11/2002 (Principality of Asturias); Sections 8 through 10 of Act 6/2001 (Extremadura); Sections 11 through 12 of Act 11/1998 (Community of Madrid); Sections 7 through 9 of Act 11/1998 (Castile and Leon); Sections 10 through 11 of Act 1/1998 (Balearic Islands); Section 8 of Act 4/1996 (Region of Murcia); Sections 15 through 21 of Act 12/1984 (Galicia).

Right to information: Sections 23 and 24 of Act 1/2011 (Valencian Community); Sections 123-2, 123-3, 123-4, 123-7,126-1 through 126-16, 128-1, 211-3 through 211-5 of Act 22/2010 (Catalonia); Section 24 through 34 of Act 16/2006 (Aragon); Sections 15 through 17 of Act 7/2006 (Chartered Community of Navarre); Sections 14 through 20 of Act 1/2006 (Canastria); Sections 15 through 17 of Act 11/2005 (Castile-La Mancha); Sections 14 through 23 of Act 6/2003 (Basque Country); Sections 16 through 23 of Act 13/2003 (Andalusia); Sections 12 through 16 of Act 3/2003 (Canary Islands); Sections 15 through 19 of Act 11/2002 (Principality of Asturias); Sections 11 through 14 of Act 6/2001 (Extremadura); Sections 13 through 17 of Act 11/1998 (Community of Madrid); Sections 10 through 12 of Act 11/1998 (Castile and Leon); Sections 13 through 20 of Act 1/1998 (Balearic Islands); Sections 9 through 11 of Act 4/1996 (Region of Murcia); Sections 22 through 25 of Act 12/1984 (Galicia).
• According to Section 25 (Extension of the right to information) of Act 16/2006 (Aragon), the Region of Aragon must guarantee that consumers are informed, in consumer credit announcements and offers, about the interest rates or other amounts related to the total cost of the credit and, specially, about the Annual Percentage Rate.

9.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

Section 3 of the Legislative Royal Decree 1/2007 establishes a general definition of consumers and users that includes all individuals and legal entities operating in an area outside a business or professional activity.

Courts do not seem to apply different standards to the concept of ‘consumer’ in financial services when compared to other sectors. However, some recent decisions have focused on the level of information to be provided to the consumer of financial services. Although a clear picture does not emerge, it is safe to infer that Courts consider that even repeat customers of financial services lack the sophisticated knowledge to fully understand complex financial transactions, and that the specific knowledge of the particular customer is crucial for evaluating the appropriateness of the information provided:

• Decision of the Provincial Court (Audiencia Provincial) of Alava num. 80/2009, 27 March 2009: In this case, the Provincial Court established the nullity of a framework contract on financial transactions, as well as the confirmation of a swap, on the basis of mistake, since the financial entity had not provided its client with the documentation and information imposed by the Spanish legislation. Although the plaintiff was a regular client of the defendant and had concluded other financial contracts with the same financial entity, this did not mean that the client knew the conditions of the contract, or that he did not deserve the same informative protection than other financial clients.

• Decision of the Provincial Court of Alava num. 143/2009, 7 April 2009: In this case, the Provincial Court established the nullity of a standard form contract that consisted of a type of insurance which covered possible dollar fluctuations because of mistake since the terms of the contract were obscure and the financial entity had not provided its client with the necessary information to understand the contract, the exchange rate that would be applied, the liquidation method, the inconveniences and problems that could arise if the dollar exchange rate fell, etc.

• Decision of the First Instance Court num. 11 of Barcelona, num. 328/09, 8 September 2009: In this case, the First Instance Court ruled in favour of the financial entity because of lack of proof of its negligence. The financial sophistication and expertise of the plaintiffs was higher than average, taking into account the type of financial products that they were used to contracting. Moreover, they knew the type of product that they were contracting since they had not concluded the contract immediately after talking with the financial entity advisor but after thinking about it and carrying out other analyses.
9.2.1.4 **Level of protection provided by national legislative framework compared to UCPD**

The level of protection provided by the Spanish legislative framework is higher than that provided by UCPD since Spanish legislators have passed several specific provisions in the field of financial services that try to improve the transparency of financial transactions and to protect the rights and interests of financial clients. In general terms, these provisions deal with the following issues:

- The obligation of financial entities to keep their financial clients informed about the essential features of financial products and their effects in order to be able to assess if they are suitable for their circumstances and financial situation;
- The obligation of financial entities to observe the restrictions that govern financial advertising and to establish internal controls and proceedings to guarantee these standards are met;
- The obligation of financial entities to establish mechanisms (for example, claim services) to protect their clients;
- The obligation of some financial firms or some financial transactions to be registered.
9.2.2 Most common unfair commercial practices in the area of financial services

9.2.2.1 Description of the most common unfair commercial practices

The description of the most common unfair commercial practices has been based on the following State and Regional sources:

- State sources include the report of the Consumer National Institute (Instituto Nacional del Consumo (INC)) on the enquiries and claims presented before national consumer organizations in 2010.\(^{22}\) Reports of the Comissioners for the Defence of Financial Services Clients and, in particular, the report prepared by the Claims Service of the Bank of Spain for the first half of the year 2009,\(^{23}\) the document ‘Attention to the Complaints and Enquiries of Investors. Annual Report 2009’ prepared by the National Comission on the Securities Market (Comisión Nacional del Mercado de Valores (CNMV)),\(^{24}\) and the Annual Reports (2007, 2008, 2009 and 2010) prepared by the Claims Service of the General Directorate of Insurance and Pension Funds (Dirección General de Seguros y Fondos de Pensiones).\(^{25}\)

- Regional sources: Information provided by the Catalan Consumer Agency (Agència Catalana del Consum).

- Other sources: Responses to the survey carried out by Civic Consulting as part of this study.

Report of the INC on the enquiries and claims presented in 2010 in State consumer organizations

According to the Report of the INC, a total of 1,632,823 enquiries and claims were received by national consumer associations in 2010.\(^{26}\) Enquiries accounted for 81% of the total and claims for the other 19%. The economic areas with a largest number of enquiries and claims were those of telephone services (14%), financial services (10%),

---


housing (7%)\textsuperscript{27} and insurance (5%) (for the distribution of enquiries and claims by economic area in 2010, see Annex 7).

Although the Report does not specify the most remarkable issues of the claims and the criteria used by consumer associations for solving them, interviewees who are members of these associations state that most common claims are those related to banking fees (concealed fees, excessive fees, etc.), lack of transparency regarding the price or other essential features of the financial products such as their risks and advice given by financial entities about their products.\textsuperscript{28}

\textit{Report prepared by the Claims Service of the Bank of Spain for the first half of the year 2009}

According to its Report, the Claims Service of the Bank of Spain received a total of 28,609 claims, complaints and enquiries during the first half of 2009, which represented an increase of 90\% relative to the previous six months (see Annex 8)

The most important claims during the first half of 2009 were those involving credit transactions, for example:

- The refusal to grant credit transactions, the modification of their conditions when the signature of the contract was close, or the need to contract other products to get more profitable financial conditions. The criteria used by the Bank of Spain to solve these claims were based on the obligation of financial entities to act with transparency by keeping their clients duly informed about the situation of their financing application, by including essential financial conditions in the offers and by avoiding oral agreements and unnecessary delays. In claims about the modification of some conditions that were more profitable than those agreed in the contract, entities were obliged to previously inform their clients. Finally, in claims based on the refusal to renew credit transactions that had been previously renewed automatically, entities had to inform their clients to allow them to search other financing options in the same or other financial entity;

- The revision of interest rates in mortgage loans. According to the Bank of Spain, the clarity of clauses fixing the applicable interest rates and their revision dates was crucial;

- Transactions that allow clients to cover the risk derived from the increase of interest rates in mortgages loans. According to the Bank of Spain, the financial derivatives had to appear in the informative prospectus as well as in the binding offers that financial entities had to deliver when concluding cover transactions.

\textit{CNMV Annual Report 2009}

\textsuperscript{27} 4.66\% of the total was referred to purchases and the other 2.59\% was referred to leases.

\textsuperscript{28} Spanish response to Civic Consulting survey on the application of Directive 2005/29/EC in financial services.
According to the document “Attention to the Complaints and Enquiries of Investors. Annual Report 2009”, the complaints resolved by the CNMV in 2009 could be classified into two large groups: those arising from incidents to do with the provision of investment services (orders, fees, securities custody) and those concerning incidents with investment funds and other undertakings for collective investment in transferable securities (UCITS) (information, inter-fund switches, the exercise of unitholder rights). The first of these groups accounted for 64% of the total and the second for the other 36%. The increase in complaints regarding the provision of investment services mainly referred to information deficiencies, and, in the second place, to order processing and execution, which remained overall the single largest group (see Annex 9).

As to the provision of investment services, many 2009 complaints concerned the acquisition or ownership of financial products issued by Lehman Brothers subsidiaries and Icelandic banks, whose respective insolvency and intervention by the home-country supervisor caused important losses to a significant number of Spanish investors. In the vast majority of cases, complaints turned on the pre-sale information supplied to clients regarding the characteristics or risks of the securities, although they also extended to the information given by custodians before and even after bankruptcy was declared. The CNMV concluded that entities had failed to gather information on the customer’s investment experience29 either when product characteristics placed them in a risky category, or in relation to the consumer’s financial situation and investment goals, when it could be shown or inferred that the investment was framed by an investment advisory relationship – to check that the product was right for the prospective buyer.

In other cases, complainants denied having received written information on financial products. As there was no evidence on the contrary, for example a single receipt or similar, entities were deemed to have omitted this step, unless the purchase document itself included details of the product’s risks and characteristics.

Finally, due to the volume and importance of the complaints received, the report of the CNMV reserves a section for incidents detected in the marketing of products issued by entities in the Lehman group as soon as, in case of issuer insolvencies, custodian entities should inform their customers in a timely manner, detailing the options available to them to defend their interests30 (for some examples of these complaints see Annex 10).

Regarding investment funds and other undertakings for collective investment in transferable securities (UCITS), there is a general requirement to inform clients about the

---

29 Before placing a risky product, entities should gather sufficient information on the client to decide whether it fits well with her/his experience and investor profile and, if necessary, to warn her/him that she/he may be investing in a product whose risk level exceeds the bounds of her/his tolerance.

30 The report also devotes space to complaints alleging the mis-selling of financial swaps. Nevertheless, as they deal with contractual issues, they will not be taken into account in this study. In the disputed cases, the CNMV resolved that entities were obliged to give customers clear and specific indication of the costs incurred by early termination, along with the method of their calculation. By the same token, on receiving a request for early termination, entities had to perform the calculation and to give the client the result before any order was placed.
nature and risks of securities and to deliver updated written information on the investment fund before the investment is made. Again, the report shows that there were numerous incidents where distributors could not give proof of having delivered the prospectus and latest semiannual report or, at the client’s request, the full prospectus and latest annual and quarterly statements. In fact, these mandatory documents were at times replaced by marketing material whose content was incomplete or inexact.

Some entities were also considered to be at fault because they had not directed their customers towards investments funds or products better suited to their goals and expectations (for some examples of these complaints see Annex 10).

Annual Reports prepared by the Claims Service of the General Directorate of Insurance and Pension Funds

The Annual Reports of the General Directorate of Insurance and Pension Funds includes a selection of cases with a particular emphasis on their circumstances, reiteration or complexity. These cases are classified in four areas: insurance, pension funds, mediation and commercialisation by credit entities. The most important cases, according to the object of this study, deal with problems related to the lack of information about the product, the offer of high-risk insurance to risk averse individuals and the commercialisation of different products when concluding a mortgage loan (for some examples of these cases see Annex 11).

Information provided by the Catalan Consumer Agency

According to the interviewees who are members of the Department of Inspection and Market Surveillance of the Catalan Consumer Agency, in 2008 a total of 179 complaints on unfair commercial practices were received; in 2009, the number of complaints increased up to 301 and, in 2010, this number decreased to 255.31

Complaints are grouped into two categories: whereas the first group includes those where the consumer asks for compensation and therefore a mediation and/or arbitration procedure takes place, the second group is made up of complaints where the consumers ask the public authorities for an investigation and, if appropriate, the imposition of a sanction to the company that has infringed the consumer protection legislation.

For the interviewees, the most common unfair commercial practices in the area of financial services refer to the lack of information, information about rising fees disguised as advertising, or the provision of misleading information regarding swap products, and to floor clauses in loans.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

31 Information provided by the Catalan Consumer Agency, July 2011.
9.2.2.2 **Cross-border dimensions of most common unfair commercial practices**

See details of the CNMV Annual Report 2009 above, for an analysis of the complaints concerning the acquisition or ownership of financial products issued by Lehman Brothers subsidiaries and Icelandic banks.

9.2.2.3 **Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation**

Most common unfair commercial practices in Spain are covered by Spanish legislation that deals with the transparency of financial transactions and the protection of financial clients. Their prevalence seems to be due not so much to legislative gaps as to problems regarding enforcement.
9.3 Immovable property

9.3.1 Legislative framework

9.3.1.1 National implementation legislation(s) of the UCPD

The UCPD was implemented by Act 29/2009, of 30 December, modifying the legal regime governing unfair competition and advertising to improve the consumers and users protection (see above, section 1.2.1.1).

9.3.1.2 National legislation relevant for the field of immovable property

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

See above, section 1.2.1.2.

b) National legislation regarding misleading actions

Misleading actions are regulated in the following Acts:

- Act 3/1991: Section 5 (misleading acts); Section 20 (misleading practices); Section 21 (misleading practices regarding codes of conduct or other quality marks); Section 22 (bait practices and misleading promotional practices); Section 23 (misleading practices as to the natures and properties of products or services, their availability and after-sale services); Section 24 (pyramid sale practices); Section 25 (misleading practices by confusion); and Section 27 (other misleading practices);

- Act 34/1988: Section 3 (unlawful advertising); Section 4 (subliminal advertising); and Section 5 (advertising for certain products and services);

- Legislative Royal Decree 1/2007: Section 49.1 (infringements regarding consumer protection);

- Act 7/1996: Section 18 (definition of sales promotion activities); Section 23 (prohibition on pyramid sales); and Section 32 (sales with prizes or with incentives).

These provisions are described above in section 1.2.1.1.

c) National legislation regarding misleading omissions

Misleading omissions are regulated in the following Acts:

- Act 3/1991: Section 7 (misleading omissions); and Section 26 (covered commercial practices).

- Act 34/1988: Section 3(e) (unlawful advertising).

- Legislative Royal Decree 1/2007: Section 49.1 (Infringements regarding consumer protection).

These provisions are described above in section 1.2.1.1.
d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Aggressive practices because of the use of harassment, coercion and undue influence are regulated in the following Acts:

- Act 3/1991: Section 8 (aggressive practices); Section 28 (aggressive practices because of coercion); Section 29 (aggressive practices because of harassment); Section 30 (aggressive practices related to minors); and Section 31 (other aggressive practices).
- Act 34/1988: Section 3 (unlawful advertising).
- Legislative Royal Decree 1/2007: Section 49.1 (Infringements regarding consumers’ protection).

These provisions are described above in section 1.2.1.1.

e) Other national legal provisions on unfair commercial practices in the field of immovable property

This part of the study analyzes both State and Regional provisions regarding pre-contractual information and other requirements that must be observed before concluding housing purchases and leases.

State provisions: Royal Decree 515/1989, of 21 April 1989, on consumers’ protection as for the information to be provided in housing purchases and leases

Royal Decree 515/1989 is a purely national piece of legislation that applies to offers, promotions and advertising addressed by businesses or professionals to consumers for the sale or lease of housing (Section 1.1). Moreover, it is applied as default law in advertising, promotions and offers of state subsidized housing as well as in those Regions that have powers in consumer affairs (Additional Provision 2nd), although some specific provisions govern the entire State: Section 3.2 (right to demand the content of the offer, promotion or advertising even when not expressly foreseen in the contract) and Section 10 (formal requirements of documents that formalise contracts and prohibition of some unfair terms).

The most relevant provisions of Royal Decree 515/1989, according to the object of this study, can be summarised as follows:

- Section 2: offers, promotions and advertising for the sale or lease of property must take into account their features, conditions and usefulness and must mention if the buildings are under construction or concluded;
- Section 3.1: offers, promotions and advertising for the sale or lease of property cannot be misleading or omit essential information;
- Section 4: those who carry out activities subject to the Royal Decree must provide consumers and, if necessary, competent authorities, with the following information:
- Seller or lessor’s name or registered name, address and, if necessary, information about registration in the Commercial Registry (Registro Mercantil);
- Maps of both the area where the property is located and the property as well as the description of the electric, water, gas and heating services, their guarantees and the safety measures of the building;
- Description of the property, building, common areas and accessory services;
- Materials used to construct the property, building, common areas and accessory services;
- Conditions of use and conservation and instructions on evacuation in case of emergency;
- Information that allows consumers to identify the building in the Property Registry (Registro de la Propiedad) or a reference to the lack of registration;
- Full price or rent of the property and accessory services as well as payment methods.

- Section 5: Those who promote housing for sale will have to provide consumers with the following additional information:
  - Copy of the legal authorisations to construct the building, copy of the certification about the town-planning circumstances and copy of the authorisation to use the property, common areas and accessory services;
  - Rules of the homeowners’ association and information about the service and supply contracts concluded by the homeowners’ association;
  - Information about taxes;
  - Type of contract, which will include (a) an assurance that consumers will not pay expenses derived from titles that legally correspond to the seller; (b) the text of Sections 1280.1 and 1279 of the Spanish Civil Code,\(^{32}\) and (c) the right of consumers to choose the Public Notary;
  - Date of delivery and stage of construction; and
  - In first sales, name or registered name and address of the architect and contractor.

\(^{32}\) Section 1279: If the law should require execution of a public deed or another special form for the obligations inherent to a contract to be effective, the contracting parties may compel each other reciprocally to fulfil such form from the moment when consent has been given and the remaining requirements necessary for its validity are present.

Section 1.280.1: The following must be set forth in a public instrument: 1. Acts and contracts whose purpose is the creation, transfer, amendment or extinguishing of rights in rem over immovable property.
• Section 6: an informative note must detail the following information about the price of sale:
  o Full price of sale;
  o Payment methods, with specific information in case of payment by instalments;
  o Public Notary who authorises the subrogation of consumers in credit transactions where the property is offered as security (such as mortgage), as well as the date, information about the registration and liability covered by the property;
  o Guarantees of the payment;
  o Deduction of amounts delivered on account from the full price of the sale before the conclusion of the transaction.

• Section 7: if the property has not been finished, consumers and competent authorities are entitled to get a copy of the document that foresees the payments on account according to Act 57/1968, of July 27, that regulates the payments in advance during the construction and sale of housing33. Furthermore, this Act establishes that developers of housing that receive money before or during the construction must possess insurance coverage or bank guarantee for the full refund if construction does not start or does not finish within the agreed period;

• Section 9: once contracts have been signed, purchasers are entitled to obtain a copy of the documents foreseen in the previous Sections at sellers’ expense.

Regional provisions passed on the basis of the Regions’ powers on consumer affairs and housing

Regions whose Statutes of Autonomy conferred them powers on consumer affairs and housing have passed Acts that foresee rules regarding the pre-contractual information and documentation that must be provided to consumers when they purchase or lease housing.

Regional laws on consumer affairs – essentially, Codes or Statutes of consumers and users – establish the right of consumers and users who purchase or lease housing to get true, effective and sufficient information about their essential features including, among other circumstances, the legal and registration status; the description of the property, the building where it is located, its common areas and services; the materials used in its construction; the conditions of use, maintenance and conservation; the price and payment methods; the guarantees; the amounts delivered on account, etc. (for further

details about Regional regulations passed on the basis of the Regions’ power on consumer affairs, see Annex 12).

Regional laws on housing regulates in a more comprehensive way the pre-contractual information that must be provided to consumers when they purchase or lease housing. In general terms, all regulations start from the premise that information included in offers, promotions and advertising must observe the principles of good faith and truthfulness, and cannot be misleading or conceal essential elements. Most Regional Acts establish specific rules on the minimum information that must be included in advertising (among other circumstances, information about the developer, description of the property and the building where it is located, if the property is ready, under construction or only planned, price and financing conditions, guarantees, etc). They also specify the information that must be included in offers for the – first and second and subsequent – sale of housing (among others, information about the developer and constructor, essential features of the property, economic conditions, legal, registration and public status, and conditions of use and maintenance) or lease of housing (for example, essential features of the property, rent and revision methods, duration of the lease, and expenses) For further details about Regional regulations passed on the basis of the Regions’ power on housing, see Annex 13.

9.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general

Courts do not apply different standards to the concept of ‘consumer’ in immovable property than in other sectors.

9.3.1.4 Level of protection provided by national legislative framework compared to UCPD

The level of protection provided by the Spanish legislative framework appears to be higher than that provided by UCPD, since Spanish legislators have passed several specific provisions in the field of immovable property that try to improve the protection of those who purchase or lease housing. In general terms, these provisions deal with the pre-contractual information that must be provided to consumers in offers, promotions and advertising for the sale or lease of housing. This information usually includes data about the developer or other individuals who have participated in the construction of the property or building, the essential features of the property and the building where it is located, the stage of construction of the property (finished, under construction or only planned), the price or rent and the financial conditions of the sale or lease, the legal, registration and public status of the property, the conditions of use and maintenance of the property, guarantees, and duration of the lease. This information has to observe the good faith and truthfulness principles and should not be misleading or conceal essential elements.
9.3.2 Most common unfair commercial practices in the area of immovable property

9.3.2.1 Brief description of the most common unfair commercial practices

The description of the most common unfair commercial practices has been based on the following State and Regional sources:

- State sources: Report of the Consumer National Institute (Instituto Nacional del Consumo (INC) on the enquiries and claims presented before national consumer organisations in 2010,\(^{34}\) as well as reports of consumers organisations in the media.;
- Regional sources: Information provided by the Catalan Consumer Agency (Agència Catalana del Consum);
- Other sources: Responses to the survey carried out by Civic Consulting as part of this study.

Report of the INC on the enquiries and claims presented in 2010 in State consumer organisations

According to the Report of the INC, a total of 1,632,823 enquiries and claims were received by national consumer associations in 2010: 42,353 enquiries and claims were related to houses that were rented by the claimants and 76,158 were related to houses that were owned by the claimants.

The Report does not specify the content of the housing claims. Nevertheless, according to the information provided by consumer organizations in the media, the main topics of the claims are misleading advertising, construction defects, deficiencies due to breach of the standard building specifications (documents that describe the installations, materials and structure of the property), breach of contract (date of delivery of the property, prices, etc), and unfair terms.

Information provided by the Catalan Consumer Agency

According to the interviewees who are members of the Department of Inspection and Market Surveillance of the Catalan Consumer Agency, in 2008 a total of 94 complaints on unfair commercial practices in the field of immovable property were received; in 2009, the number of complaints increased up to 120 and, in 2010, this number decreased to 83.\(^{35}\)

Complaints are grouped into two categories: the first group includes those where the consumers asks for compensation and therefore a mediation and/or arbitration procedure takes place, while the second group is made up of complaints where the consumers ask the public authorities for an investigation and, if appropriate, the

---


\(^{35}\) Information provided by the Catalan Consumer Agency, July 2011.
imposition of a sanction to the company that has infringed the consumer protection legislation.

For the interviewees, the most common unfair commercial practices in the area of immovable property are the misdescription of the immovable property\textsuperscript{36} and the omission of essential information in advertising.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

\subsection*{9.3.2.2 Cross-border dimensions of most common unfair commercial practices}

According to the Catalan Consumer Agency, the percentage of complaints regarding unfair commercial practices presented in Catalonia which had a cross-border dimension was very low: about 1\% in 2008, 0.5\% in 2009, and 0.1\% in 2010.\textsuperscript{37}

\subsection*{9.3.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation}

Most common unfair commercial practices in Spain are covered by Spanish legislation that deals with the content of offers, promotions and advertising for the purchase or lease of housing as well as the information and documentation that developers must provide consumers before any purchase or lease. The prevalence of these practices seems to be due not to legislative gaps but to problems regarding enforcement of the Spanish rules on immovable property.

\textsuperscript{36} For example, a consumer filed a complaint because the terrace of the new built property that he had bought did not have the enclosure of PVC sheeting although it was foreseen in the building project. The case was solved with a fine of 1500 Euro.

\textsuperscript{37} Information provided by the Catalan Consumer Agency, July 2011.
OVERVIEW OF ANNEXES:

ANNEX 1: Fact sheet – legal framework and enforcement

ANNEX 2: Fact sheet – most common unfair commercial practices reported

ANNEX 3: References

ANNEX 4: State rules on unfair commercial practices in the field of financial services and immovable property

ANNEX 5: Regional legislation on consumers and users’ protection in the field of financial services and immovable property


ANNEX 7: Distribution of enquiries and claims presented in national consumer associations by economic area in 2010

ANNEX 8: Claims solved by the Bank of Spain during the first half of the year 2009 by subject

ANNEX 9: Complaints resolved by the National Comission on the Securities Market in 2009 distributed by subject

ANNEX 10: Examples of complaints presented to the National Comission on the Securities Market with report favourable to complainant

ANNEX 11: Examples of claims solved by the claims service of the General Directorate of Insurance and Pension Funds

ANNEX 12: Regional regulations passed on the basis of the regions’ power on consumer affairs

ANNEX 13: Regional regulations passed on the basis of the regions’ power on housing
ANNEX 1: Fact sheet – legal framework and enforcement
Spain

Implementing legislation of the Unfair Commercial Practices Directive (UCPD)


National legal provisions on unfair commercial practices

Overview of relevant provisions which are not based on EU legislation

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royal Legislative Decree 1/2007, of 16 November, approving the revised text of the General Law on the Protection of consumers and users</td>
<td>Royal Legislative Decree 1/2007 of 16th of November, approving the revised text of General Law for the Defence of Users and Consumers</td>
</tr>
<tr>
<td>Law 22/2010, of 20 July of the Catalan Consumer Code (Catalonia)</td>
<td>Royal Decree 515/1989, of 21 April 1989, on consumers’ protection for the information to be provided in housing purchases and leases</td>
</tr>
<tr>
<td>Law 16/2011, of 24 June, on consumer credit contracts</td>
<td>Law 22/2010 of 20th of July of Consumer Code of Catalonia (Catalonia)</td>
</tr>
<tr>
<td>Law 2/2009, of 31 March, on mortgages loans with consumers and credit agreements celebrated through intermediary services</td>
<td>Law 18/2007 of 28th of December on the rights of housing (Catalonia)</td>
</tr>
</tbody>
</table>

Reasons why enforcement bodies apply these national legal provisions

According to the Catalan Consumer Agency, the national provisions in the area of financial services and immovable property go beyond the level of protection provided by the UCPD, and are more specific. In the area of financial services, national legislation provides more information and imposes stricter obligation of documentation than EU legislation.

At the regional level, according to the Catalanian Consumer Code, financial services are considered to be basic services and are therefore subject to stricter obligations. Service providers are obliged to provide the consumer with certain relevant information. For example, before making a contract, the service provider must give their physical address in Catalonia. Also, the consumer must be helped to quickly and directly make any complaints or claim regarding the service. Information on where the consumer can make complaints as well as on compensations and refunds must be provided in the contract.

In the area of immovable property, national provisions ban commercial practices which are not included in the Black List of the UCPD. When buying and selling property, the estate agent is obliged to sign an assignment note with the house owner before advertising or making an indication to purchase. This note has to contain certain information about the seller and the property, such as the identification of the agent, the identity of the house owner, or the duration of the contract. The national provisions also prohibit receiving money on account before fulfilling certain formalities and requirements of housing.

The agency also stated that national provisions concerning immovable property are more specific as they were brought in when the housing sector was more vulnerable to misleading practices, because consumers at that time were thinking of buying property before it was built. When consumers make decisions to purchase before the property is built, they can encounter more problems. Sometimes they had to wait more than two years for occupation, for example. The national provision established higher requirements regarding service on behalf of agents and all parties involved in the housing description.

Relevant case law

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

Enforcement

Responsibility for enforcing the UCPD

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ministry of Economy and Finance</td>
<td>General Directorate of Housing of the Regional and Sustainable Department</td>
</tr>
<tr>
<td>Ministry of Health and Social Policy</td>
<td>National Institute for Consumer Protection (Instituto Nacional del Consumo)</td>
</tr>
<tr>
<td>Bank of Spain</td>
<td>Regional consumer authorities (one in each Autonomous Community)</td>
</tr>
<tr>
<td>National Institute for Consumer Protection (Instituto Nacional del Consumo)</td>
<td>Consumer bodies of major town councils</td>
</tr>
<tr>
<td>National consumer organisations</td>
<td></td>
</tr>
</tbody>
</table>
### Means of enforcement of UCPD

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>By public and private law, and by using ADR (as a requirement before pursuing legal remedies)</td>
<td>By public and private law, and by using ADR (as a requirement before pursuing legal remedies)</td>
</tr>
</tbody>
</table>

### Who can bring an action under the national legislation implementing the UCPD

Public authorities and organisations representing consumer interests.

### Main obstacles for enforcing unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>According to the Catalan Consumer Agency, aggressive practices can be an obstacle because this is based on subjective criteria. It can be difficult to define the average consumer and whether or not a consumer has been deceived or coerced, in a way which would affect their transactional decision.</td>
<td>According to the Catalan Consumer Agency, aggressive practices can be an obstacle because this is based on subjective criteria. It can be difficult to define the average consumer and whether or not a consumer has been deceived or coerced, in a way which would affect their transactional decision. Furthermore, there are social and economic factors which should be considered, such as immigration and need for housing, which can make these practices more detrimental for certain consumers.</td>
</tr>
</tbody>
</table>

### Problems relating to cross-border enforcement of unfair commercial practices legislation reported

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>None reported</td>
</tr>
</tbody>
</table>

### Codes of conduct and self-regulation

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>Agreement with the Builders Associations (developers)</td>
</tr>
</tbody>
</table>

This code of conduct applies to construction companies – they have to respect legislation, and it has additional commitments, for example to have complaints resolution procedures, or to join an ADR scheme, or to give consumers additional information. The code applies in Catalonia.

---

ANNEX 2: Fact sheet – most common unfair commercial practices reported
### Spain

#### Common unfair practices reported in the area of financial services

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>2008</td>
<td>Life insurance</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Practice banned in my country, but not included in the Black List (Annex I) of the UCPD</td>
<td>2009</td>
<td>Health insurance</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Misleading omission</td>
<td>2010</td>
<td>Travel insurance</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Aggressive practice</td>
<td></td>
<td>Other insurance (home, care, etc.)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other unfair commercial practice</td>
<td></td>
<td>Stocks or shares, bonds, derivatives, etc.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Collective investments</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Private pension plans</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Savings account</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Current account</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mortgage</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Other consumer debt</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Other financial service</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Claims data</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Court cases</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Decisions by enforcement bodies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Decisions or recommendations made by ADR bodies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Warnings issued by enforcement bodies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ES-FS-1</td>
<td>The rate or charge for certain financial products was considered to be excessive, there was a lack of transparency about bank fees, and there were problems with advice given about certain financial products. For example, banks attempted to conceal rising fees by sending information about this to consumers disguised as advertising.</td>
<td>X X X S S S</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ES-FS-2</td>
<td>There was a lack of information as well as misleading information presented to consumers regarding mortgages and other kinds of loans including consumer credit. In the case of mortgages, often this issue related to swap products and floor clauses. Banks encouraged consumers to agree to flat rate swap products (to protect them from interest rate fluctuation) when the consumer made a mortgage or credit agreement with them, even though the banks were aware that interest rates were going to decrease. Floor clauses are interest buffers so there is a minimum and maximum of interest that can be charged. Again, in this case, the banks were aware that interest rates would</td>
<td>X X S S S</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Consumers' Union of Spain (UCE) (ES-FS-1); Catalan Consumer Agency (ES-FS-2).

Note: VF: Very frequently, RF: Rather frequently, S: Sometimes.
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>ES-IP-1</td>
<td>Essential information was not included in advertising for immovable properties.</td>
<td>X</td>
<td>X</td>
<td>S</td>
<td>S</td>
<td>S</td>
<td>X</td>
<td>Yes</td>
</tr>
</tbody>
</table>
ANNEX 3: References


### ANNEX 4: State rules on unfair commercial practices in the field of financial services and immovable property

<table>
<thead>
<tr>
<th>General rules</th>
<th>Specific rules</th>
<th>Immovable property</th>
</tr>
</thead>
</table>

---


⁴⁹ Real Decreto 515/1989, de 21 de abril, sobre protección de los consumidores en cuanto a la información a suministrar en la compraventa y arrendamiento de viviendas (Official State Gazette num. 117, 17.5.1989).


⁵² Circular del Banco de España núm. 8/1990, de 7 de septiembre, a entidades de crédito, sobre transparencia de las operaciones y protección de la clientela (Official State Gazette num. 226, 20.9.1990). Last amendment: Circular of the Bank of Spain num. 6/2010, of 28 of September 2010, addressed to financial entities, on the financial services and products advertising...
## STATE LEGISLATION

<table>
<thead>
<tr>
<th>General rules</th>
<th>Specific rules</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Financial services</td>
</tr>
<tr>
<td></td>
<td>Ministerial Order of 5 May 1994, on the transparency of mortgages’ financial conditions (Order of 5 May 1994)</td>
</tr>
<tr>
<td></td>
<td>Royal Decree 2660/1998, of 14 December 1998, on money exchange establishments other than financial entities (Royal Decree 2660/1998)</td>
</tr>
<tr>
<td></td>
<td>Royal Decree-Law 6/2000, of 23 June 2000, on urgent measures to increase competition in markets for goods and services (Royal Decree-Law 6/2000)</td>
</tr>
</tbody>
</table>

(Official State Gazette num. 246, 11.10.2010).


**STATE LEGISLATION**

<table>
<thead>
<tr>
<th>General rules</th>
<th>Specific rules</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Financial services</td>
</tr>
<tr>
<td></td>
<td>Ministerial Order of 16 November 2000 on some aspects of the legal regime of money exchange establishments and their agents (Order of 16 November 2000)</td>
</tr>
<tr>
<td></td>
<td>Ministerial Order PRE/1019/2003, of 24 April 2003, on the transparency of prices when financial services are rendered by</td>
</tr>
</tbody>
</table>

---


48 Orden de 16 de noviembre de 2000, de regulación de determinados aspectos del régimen jurídico de los establecimientos de cambio de moneda y sus agentes (Official State Gazette num. 283, 25.11.2000).


<table>
<thead>
<tr>
<th>General rules</th>
<th>Specific rules</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Financial services</td>
</tr>
<tr>
<td>automatic teller machines (Order of 24 April 2003)</td>
<td></td>
</tr>
<tr>
<td>Act 22/2007, of 11 July 2007, on distance marketing of financial services addressed to consumers (Act 22/2007)</td>
<td></td>
</tr>
<tr>
<td>Act 41/2007, of 7 December 2007, that modifies Act 2/1981, of 25 March, regulating the mortgage market and other rules on the mortgage and financial system, the reverse mortgages and the long-term care insurance, and establishing some tax rules (Act 41/2007)</td>
<td></td>
</tr>
<tr>
<td>Royal Decree 217/2009, of 15 February 2009, on the legal regime of investment services businesses and other entities that render investment services, and that partially amends Royal Decree 1309/2005, of 4 November 2005, which implements Act 22/2007</td>
<td></td>
</tr>
</tbody>
</table>

52 Orden PRE/1019/2003, de 24 de abril, sobre transparencia de los precios de los servicios bancarios prestados mediante cajeros automáticos (Official State Gazette num. 103, 30.4.2003).


54 Orden ECO/734/2004, de 11 de marzo, sobre los departamentos y servicios de atención al cliente y el defensor del cliente de las entidades financieras (Official State Gazette num. 72, 24.3.2004).


56 Ley 41/2007, de 7 de diciembre, por la que se modifica la Ley 2/1981, de 25 de marzo, de Regulación del Mercado Hipotecario y otras normas del sistema hipotecario y financiero, de regulación de las hipotecas inversas y el seguro de dependencia y por la que se establece determinada norma tributaria (Official State Gazette num. 294, 8.12.2007).

### State Legislation

<table>
<thead>
<tr>
<th>General rules</th>
<th>Specific rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services</td>
<td>Immovable property</td>
</tr>
<tr>
<td>35/2003, of 4 November 2003, on the Collective Investment Institutions(^{57}) (Royal Decree 217/2009)</td>
<td></td>
</tr>
<tr>
<td>Act 2/2009, of 31 March 2009, that regulates the conclusion of mortgage loans with consumers and agency services for the conclusion of loans or credit contracts with consumers(^{58}) (Act 2/2009)</td>
<td></td>
</tr>
<tr>
<td>Act 16/2009, of 13 November 2009, on payment services(^{59}) (Act 16/2009)</td>
<td></td>
</tr>
<tr>
<td>Royal Decree 712/2010, of 28 May 2010, on the legal regime of payment services and payment entities(^{60}) (Royal Decree 712/2010)</td>
<td></td>
</tr>
<tr>
<td>Ministerial Order EHA/1718/2010, of 11 June 2010, on the regulation and control of the advertising of financial services and products(^{61}) (Order of 11 June 2010)</td>
<td></td>
</tr>
<tr>
<td>Ministerial Order EHA/1608/2010, of 14 June 2010, on the transparency of conditions and requirements of information applicable to payment services(^{62}) (Order of 14 June 2010)</td>
<td></td>
</tr>
</tbody>
</table>

---

\(^{57}\) Real Decreto 217/2008, de 15 de febrero, sobre el régimen jurídico de las empresas de servicios de inversión y de las demás entidades que prestan servicios de inversión y por el que se modifica parcialmente el Reglamento de la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva, aprobado por el Real Decreto 1309/2005, de 4 de noviembre (Official State Gazette num. 41, 16.2.2008).

\(^{58}\) Ley 2/2009, de 31 de marzo, por la que se regula la contratación con los consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito (Official State Gazette num. 79, 1.4.2009).


\(^{60}\) Real Decreto 712/2010, de 28 de mayo, de régimen jurídico de los servicios de pago y de las entidades de pago (Official State Gazette num. 131, 29.5.2010).

\(^{61}\) Orden EHA/1718/2010, de 11 de junio, de regulación y control de la publicidad de los servicios y productos bancarios (Official State Gazette num. 157, 29.6.2010).

\(^{62}\) Orden EHA/1608/2010, de 14 de junio, sobre transparencia de las condiciones y requisitos de información aplicables a los servicios de pago (Official State Gazette num. 148,

**State Legislation**

<table>
<thead>
<tr>
<th>General rules</th>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Circular of the Bank of Spain num. 6/2010, of 28 of September 2010, addressed to financial entities, on the financial services and products advertising⁶³ (Circular 6/2010)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Act 16/2011, of 24 June 2011, on consumer credit contracts⁶⁵ (Act 16/2011)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Order EHA/2899/2011, of 28 October 2011, on the transparency and protection of banking services' clients (Order of 28 October 2011)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

⁶³ Circular del Banco de España núm. 6/2010, de 28 de septiembre, a entidades de crédito y entidades de pago, sobre publicidad de los servicios y productos bancarios (Official State Gazette num. 246, 11.10.2010).


## ANNEX 5: Regional legislation on consumers and users’ protection in the field of financial services and immovable property

<table>
<thead>
<tr>
<th>Spanish Region</th>
<th>General provisions</th>
<th>Specific provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aragon</td>
<td>Act 16/2006, of 28 December 2006, on consumers and users’ protection and defence⁷⁰ [Act 16/2006 (Aragon)]</td>
<td></td>
</tr>
<tr>
<td>Chartered Community of Navarre</td>
<td>Act 7/2006, of 20 June 2006, on consumers and users’ defence⁷¹ [Act 7/2006 (Chartered Community of Navarre)]</td>
<td></td>
</tr>
<tr>
<td>Cantabria</td>
<td>Act 1/2006, of 7 March 2006, on consumers and users’ defence⁷² [Act 1/2006 (Cantabria)]</td>
<td></td>
</tr>
</tbody>
</table>

---

⁶⁶ Ley 1/2011, de 22 de marzo, del Estatuto de los consumidores y usuarios de la Comunidad Valenciana (Official State Gazette num. 91, 16.4.2011).


⁶⁹ Ley 18/2007, de 28 de diciembre, del derecho a la vivienda de Cataluña (Official State Gazette num. 50, 27.2.2008).


⁷¹ Ley foral 7/2006, de 20 de junio, de Defensa de los Consumidores y Usuarios (Official State Gazette num. 172, 20.7.2006).

<table>
<thead>
<tr>
<th>Spanish Region</th>
<th>General provisions</th>
<th>Specific provisions</th>
</tr>
</thead>
</table>

76 Decreto 218/2005, de 11 de octubre, por el que se aprueba el Reglamento de Información al Consumidor en la compraventa y arrendamiento de viviendas en Andalucía (Official Gazette of Andalusia num. 127, 7.11.2005).
<table>
<thead>
<tr>
<th>Spanish Region</th>
<th>General provisions</th>
<th>Specific provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balearic Islands</td>
<td>Act 1/1998, of 10 March 1998, on the Statute of consumers and users[^85] [Act 1/1998 (Balearic Islands)]</td>
<td></td>
</tr>
<tr>
<td>La Rioja</td>
<td>Act num. 24.240, of 13 October 1993, on consumer’s defence[^87] [Act num. 24240 (La Rioja)]</td>
<td>Act 2/2007, of 1 March 2007, on housing [Act 2/2007 (La Rioja)][^88]</td>
</tr>
</tbody>
</table>


[^84]: Ley 9/2010, de 30 de agosto, de derecho a la vivienda de Castilla y León (Official State Gazette num. 235, 28.9.2010).

[^85]: Ley 1/1998, de 10 de marzo, del Estatuto de los Consumidores y Usuarios de las Islas Baleares (Official State Gazette num. 113, 12.5.1998).


<table>
<thead>
<tr>
<th>Spanish Region</th>
<th>General provisions</th>
<th>Specific provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Galicia</td>
<td>Act 12/1984, of 28 December 1984, on the Statute of the consumer and user[^89] [Act 12/1984 (Galicia)]</td>
<td>Act 18/2008, of 29 December 2008, on housing[^90] [Act 18/2008 (Galicia)]</td>
</tr>
</tbody>
</table>


Act 22/2010 (Catalonia)

Act 22/2010 (Catalonia) was passed on the basis of Sections 28, 34, 49 and, especially, Section 123 of the Organic Act 6/2006, of 19 July 2006, on the Reform of the Statute of Autonomy of Catalonia\(^{91}\), as well as Section 51 of the Spanish Constitution (see above). According to its Preamble, “[t]he list of definitions has also allowed important changes that clarify the scope of certain concepts and make the code meet the requirements of European Union directives, including Directive 2005/29/EC, on unfair commercial practices by businesses in their relationship with consumers and Directive 2006/113/EC on services in the internal market”.

Act 22/2010 (Catalonia) regulates the plurality of services that traders can make available to consumers. These services are classified according to their purpose, which allows differentiation between services to people, services about goods, basic services, on-going services and brand-name services. According to Section 251-2, basic services are those “of an essential and necessary nature for everyday life or which have a generalized use among consumers. This includes utilities, transport, audiovisual media, communications mediums, welfare and health services, and those related to finances and insurance”.

---


Section 28 (The rights of consumers and users): 1. Each individual, as a consumer and user of goods and services, has the right to the protection of health and safety. He or she also has the right to accurate and comprehensible information on the characteristics and prices of goods and services, to a system of guarantees for purchased products and contracted supplies, and to the protection of economic interests against abusive, negligent or fraudulent conduct. 2. Consumers and users have the right to information and to participation, either directly or through their representatives, regarding the Public Administration bodies of Catalonia, under the terms established by law.

Section 34 (Linguistic rights of consumers and users): Each individual, in his or her capacity as user or consumer of goods, products and services, has the right to be attended orally or in writing in the official language of his or her choice. Bodies, companies and establishments that are open to the public in Catalonia are bound by the obligation of linguistic availability within the terms established by law.

Section 49 (Protection of consumers and users): 1. The public authorities shall guarantee the protection of health, safety, and the defence of the rights and legitimate interests of consumers and users. 2. The public authorities shall guarantee the existence of consumer mediation and arbitration instruments, promote awareness and use of these instruments, and provide support to consumers and user associations.

Section 123 (Consumer affairs): The Generalitat has exclusive power in matters of consumer affairs. This power includes in any case: a) defence of consumers’ and users’ rights, as proclaimed in Article 28, and the establishment and application of administrative procedures for complaints and claims; b) regulation and promotion of consumer and user associations, and of their participation in any procedures and matters which affect them; c) regulation of mediation bodies and procedures in matters of consumer affairs; d) consumer training and education; and e) the regulation of information regarding consumers and users.
Act 22/2010 (Catalonia) refers to some common obligations for all types of services. Among the obligations to be assumed, emphasis is placed on the content of the pre-sale information that must be supplied to consumers: the content of the bill, documentation requirements for advanced or partial payments, regulation of fees and supplements, and a minimum period of guarantee when there is no specific law establishing a different period:

- Section 251-3 (Common obligations for all types of services): traders who offer or provide any type of service or who advertise them must inform consumers about the complete price of the service by means of a visible sign in the establishment or of a tariff notice or price list. The full price must be shown, including all types of taxes, charges and levies, as well as other items supplementary to the service.

Traders also must draft and provide to consumers a prior quotation for the service if the consumer is unable to calculate the price directly, except when the latter expressly waives preparation of the quotation in a signed, written document. The quotation must contain at least the following details:

- The identity of the service provider, with indication of the name or company name, tax identification number and full address of a physical establishment pertaining to this service provider;
- The reason for or object of the service, with indication of the activities or operations that are to be carried out;
- The expenses to be paid for by the user, with prices broken down, and the cost of parts and spares, accessories and goods that will form part of the service;
- The validity period of the quotation;
- The anticipated initiation date of the provision and duration of the service;
- The quotation date and signature of a person representing the service provision company;
- The date of acceptance or refusal of the budget by the service user, with spaces of equal size reserved for both parties to sign either option.

Copies of the budgets must be kept for a minimum period of six months from the date of non-acceptance of same or from that of complete execution of the service, as appropriate. Non-accepted budgets may be charged for if this is indicated in the price list or tariff, or if the consumer has been expressly informed of this condition. The amount charged may not exceed that indicated or corresponding to the real time employed in preparing the quotation. Budget prices may in no case exceed those advertised, whatever the item to which they are applied.

Traders also must draft and present an invoice, sales slip or payment receipt once the service is completed and paid. Without prejudice to that established in tax law, this document must include the name or company name of the service provider, tax
identification number and full address of the establishment, the items or activities entailed in the service provided, the costs of the items or activities, the applicable taxes or charges and their amount, an indication of the service guarantee period, where applicable, and the date of the service provision, where applicable.

If partial payments are made for the service, a receipt must be issued to the consumer for each payment, containing at least the following details: a) identification of the service provider, with the name or company name, tax identification number and address of the establishment; b) the object of the service and indication of whether the payment is on account or partial; c) the amount paid on each occasion; d) the total amount paid to date and the total amount pending payment; e) the date and signature of a person representing the service provision establishment. Notwithstanding any partial payments, once the service has been completed the obligation to issue an invoice, sales ticket or payment receipt must be fulfilled.

If for some reason the trader is unable to fulfil the obligations deriving from the consumer relations and agreed with the consumer, the trader must guarantee that such obligations will be completed by means of his or her own infrastructure or by that of a third party.

• Section 251-4 (Invoice amount): the invoice amount may not exceed that of the budget, where one exists. If, during provision of the service, new items appear that must be charged to the consumer or other modifications must be made to the quotation, the service provider must extend or modify the budget and must inform the consumer who, if necessary, must accept it in a manner in which such modification is recorded.

• Section 251-5 (Service guarantee): the different types of service must be guaranteed in accordance with the specific legislation applicable to each. Where there is no specific applicable legislation, services must be guaranteed for at least six months from the date of completion of the last action or activity of the service.

• Section 251-6 (Service prices): service prices, surcharges and supplements may be freely set, except for those subject to systems of prior approval or authorisation. Nonetheless, obligations of prior information established by this law and other applicable provisions must be respected. If parts, spares, accessories or other goods must be incorporated in order to properly provide the service, a list of their prices must be available and consumers must be informed of its existence. Abusive prices may not be charged, especially if the particular circumstances of the case reduce the consumer’s freedom of choice.

• Section 251-7 (Surcharges and supplements on the service price): if surcharges or supplements on the service price are charged, the consumer must be informed of them by means of a price list or prior written quotation. Surcharges or supplements for night service may only be charged if the service is provided between 10 pm and 6 am of the following day. Surcharges and supplements for public holidays may only be charged if the service is
provided within the twenty-four hours of the public holiday. For these purposes, holidays must be understood to be Sundays and public holidays observed in the address where the service is provided. As a general rule, Saturdays must not be considered holidays. In no case may surcharges or supplements be charged based on immediate availability, urgency or similar concepts. Surcharges and supplements for night service and holidays must not be mutually compatible; only one of the two may thus be charged. That established in this article is of supplementary application in services regulated by specific regulation.

Act 22/2010 (Catalonia) breaks down traders’ obligations depending on the type of service provided. Regarding basic services, it has been considered of special interest to better protect consumers by an obligation to provide information and an established place and procedures to address complaints and claims. According to Section 252-4 (Basic services):

“Providers of basic services must provide consumers with relevant information regarding the provision, in writing or in a manner adapted to the circumstances of the provision.

Upon entering into the contract, the service provider must provide a physical address in Catalonia where the consumer may present and quickly and directly receive response on any complaint or claim regarding the service, provided customer service is not offered in the same establishment where the service is contracted. A customer service telephone number must also be made available free of charge to allow consumers to receive response on any incident or complaint.

Contracts must contain information regarding the place where service users can process complaints or claims against the basic service provider and the procedure for doing so. Information must also be provided regarding whether the service provider subscribes to a consumer arbitration system and of the consumer’s possibility to approach these organizations to resolve disputes.

Pre-contractual and contractual information must indicate the existence of compensation, refunds or indemnifications in the case of the company’s non-fulfilment of the basic service quality established by regulations or by the company itself. Information must also be provided about the mechanisms to implement the measures referred to in section 3 and about the method of calculating the amount.

Companies that provide basic services must ensure that standard-form contracts are provided to people with disabilities, on request, in a form accessible to them”.

Act 22/2010 (Catalonia) also imposes on public authorities and, especially, those entrusted with consumers’ protection and rights, the duty to guarantee the observance of the rights conferred by the Catalan code. In this sense, they may promote the adoption of codes of conduct as an instrument of self-regulation and co-regulation of companies and collaboration with the various government agencies in order to obtain a higher degree of protection of consumers’ interests. These codes may be drawn up by representatives from the principal consumer, business and professional organisations in
the sectors concerned, and by the consumer affairs authorities. If necessary, authorities on consumer affairs may establish and award seals of approval, as well as legally establish the commitments and obligations undertaken by organizations that opt for them, and the rules for awarding, withdrawing and advertising the aforementioned seals of approval. Moreover, if necessary, these seals of approval may be linked to the adoption of a code of conduct (Section 311-2).

Act 22/2010 (Catalonia) also foresees the right and obligation of consumers to cooperate in the task of protection, mainly through filing complaints before the authorities of consumer affairs, whether individually or through the organizations that represent them (Section 311-6). The procedure for processing these complaints has been regulated in detail in Section 311-7. If the complaint indicates an offence, in accordance with the provisions established by Act 22/2010 and sectorial consumer regulations, the competent authorities shall officially launch appropriate administrative procedures to prevent such infringements. The competent authority will have to inform the complainant of the launch of pertinent action and about the possible effects of the complaint, as well as his or her legal position with regard to the alleged violations. If the complaint fails to meet all formal requirements and the complainant is able to remedy this situation, the competent authority with which the complaint is lodged will allow him/her a period of a minimum of ten days in which to do so. If the authority with which a complaint is lodged does not have competency due to the subject matter of the complaint or to territorial reasons, this authority will have to refer the complaint to the competent body for the subject or territory, and will have to inform the complainant of this. If the competent authority concludes that the complaint lodged does not indicate any infringement of the legislation, it will adopt a reasoned agreement to close the case, informing the complainant of this.

Finally, Act 22/2010 (Catalonia) establishes a catalogue of offences and corresponding penalties. It distinguishes between offences involving safety of goods and services made available to consumers and non-compliance with government provisions or decisions on prohibition of sale, marketing or distribution of certain goods and services (Section 331-1); those involving alteration, adulteration, fraud or deception (Section 331-2); those which directly impact on the trade and technical conditions of sale and on prices (Section 331-3); those related to standardisation, documentation and conditions of sale and supply or provision of services (Section 331-4); those related to non-compliance with obligations or contractual prohibitions of a legal character (Section 331-5) and, finally, other offences not included in any of the above types (Section 331-6). The Catalan Consumer Code incorporates new types of offences regarding obligations that traders must assume, for example, offences related to unfair practices or the inclusion of unfair terms:

- Section 331-3 (Offences with regard to commercial transactions and prices): The following are offences with regard to commercial transactions and technical conditions of sale and with regard to prices: non-compliance with provisions regulating information and announcements of prices of goods and services; selling goods or providing services at prices higher than the maximum authorised or legally established, advertised or announced;
restricting or limiting the real quantity or quality of performance, or causing any kind of discrimination based on conditions, means or forms of payment for goods or services; pursuing, by action or omission, unfair commercial practices that cause or may cause consumers to engage in financial behaviour that they would not have done otherwise; offering or making transactions in which the express or tacit condition is imposed of buying a minimum quantity of the good requested or of other goods or services different from those that are the object of the transaction, unless these comprise a sales unit or there is a functional relation between them; hoarding and withdrawing goods and services from the market in order to increase prices or to wait for foreseeable price rises, to the detriment of consumers; failing to provide contractual documentation, invoices or proof of sale of goods or provision of services, or charging or increasing prices for the provision of these; unjustifiably refusing to satisfy consumers’ demands or making any kind of discrimination with regard to these demands; raising costs stated in estimates without the express agreement of the consumer; raising the price of spare parts or parts used in the repair or installation of goods; charging more than double the estimated average costs for labour, transport or visits for the respective sector.

- Section 331-4 (Offences with regard to standardisation, documentation and conditions of sale and with regard to the supply or provision of services): The following are offences with regard to standardisation, documentation and conditions of sale and with regard to the supply or provision of services: failure to provide consumers with the insurance, warranties or other guarantees stipulated by regulations; non-compliance with provisions governing the standardisation or classification of goods or services that are sold or exist on the market; failure to comply with provisions regulating the marking, labelling and packaging of products; stocking goods for sale which have passed their ‘best before’ date; non-compliance, concerning consumer protection, with regulations governing documentation, information and registers established compulsorily for the correct functioning and operation of the establishment, company, facility or service; non-compliance with provisions governing the conditions for consumer relations, in all their forms, and conditions for invitations to purchase; non-compliance with the system established for the provision and changing of promotional or promoted goods and services; failure to provide estimates, if these are compulsory, or charging for them, if this is prohibited; failure to provide consumers with a receipt for the deposit of goods for any kind of intervention or operation; failure to provide consumers with a written guarantee if legislation makes this compulsory, or charging for repairs that are included in this; failure to provide consumers with instructions for use or maintenance, or any other documents required by law in order to use, occupy, maintain or keep goods; failure to inform consumers about the trial or withdrawal period, if this is compulsory under the legislation; failure to provide official complaint forms or to inform about their availability; failure to inform consumers about opening hours; carrying out or invoicing repair or installation work, or similar, if not expressly requested or authorised by the consumer;
dispatching goods or providing services not previously requested by the addressee, and sending unrequested offers or advertising if these entail costs to the receiver; considering that an addressee’s failure to reply to an offer or advert denotes acceptance of the goods or services offered.

- Section 331-6 (Other offences): In addition to those foreseen in Sections 331-1 to 331-5, the following are also offences: failure to supply or provide data or information required by the competent authorities or their representatives in pursuance of their duties of information, surveillance, investigation, inspection, processing and implementation with regard to the issues regulated by this law; supplying inexact or incomplete information of false documentation; preventing or impeding access by inspection personnel to premises in order to carry out inspection and control visits; and pursuing any action that harms or obstructs inspection services and which, in consequence, makes it wholly or partially impossible to fulfil the work assigned to them by law or regulation; failure to permit inspectors’ access to trade, industrial and accounting documentation or any other documentation possessed by companies under inspection; non-compliance with requirements, summonses and measures adopted by the Government, including provisional measures; handling, moving, destroying, concealing or trading in samples provided in accordance with regulations or goods immobilized by competent public servants as a precautionary measure, or disposing of them without authorisation, or acting without due diligence with regard to the obligation to ensure the safekeeping of immobilized goods; coercing or threatening civil service personnel charged with the functions established by this law, companies, individuals or organizations representing customers and traders that have begun or intend to begin legal action, that have lodged complaints or take part in proceedings already initiated, or exercising reprisals or any other form of pressure; failing to possess the documentation legally required or possessing this documentation in defective state, if this affects the determination or qualification of an offence; refusal or resistance to provide official complaints forms to consumers so requesting, or providing forms that are not official; failure to comply with legally-established responsibilities to provide assistance to consumers; imposing on consumers the obligation of appearing in person to exercise their rights or making charges, payments or similar; requiring unnecessary forms to be filled in and information to be provided and preventing, impeding or otherwise causing difficulties to consumers in exercising their rights; failure to comply with agreements reached with consumers in mediation processes, or non-compliance with arbitration decisions within the time established, except by agreement between the parties; violating consumers’ language rights or failing to comply with language obligations established by law; non-compliance with the requirements, responsibilities or prohibitions established by this law and other consumer protection provisions.

The offences foreseen by the law are classified into minor, serious and very serious. The penalties applicable to offences depends on the type of offence:
For minor offences, a fine of up to 10,000 Euro;

For serious offences, a fine of between 10,001 and 100,000 Euro, which can be increased up to five times the value of the goods or services concerned in the offence;

For very serious offences, a fine of between 100,001 and 1,000,000 Euro, which can be increased up to ten times the value of the goods or services concerned in the offence.

In cases stipulated by the law and complementary to the main sanctions, it may be agreed to impose the following additional sanctions: confiscation and destruction of goods; temporary closure of the offending company; public rectification; publication of the penalty; restitution of unduly obtained income; indemnities for damages.

**Act 1/2011 (Valencian Community)**

Act 1/2001 (Valencian Community) aims to protect, defend and promote consumers and users’ legal rights and interests on the basis of Sections 9.5 and 49.1.35 of the Statute of Autonomy of the Valencian Community\(^\text{92}\) as well as Section 51 of the Spanish Constitution (see above). According to its Preamble,

“The legal framework has substantially changed and therefore it is necessary to adapt and update the Valencian legislation. (…) The EU has passed several rules on the consumer protection by regulating new areas and establishing new mechanisms and legal techniques. (…) Legislative Royal Decree 1/2007 (…) was passed in order to incorporate the European legislation into the internal legal system and was amended by Act 25/2000, of 22 December 2000, that modifies several laws in order to adapt them to the Act on free access to the services and their exercise, and by Act 29/2009 (…). The codified text includes provisions with a basic character and provisions that have been passed on the basis of the State exclusive powers and therefore they must be taken into account in order to establish a new regulation on the protection, defence and promotion of the consumers and users’ rights and interests”.

According to Section 4 of Act 1/2001 (Valencian Community), one of the basic rights of consumers is the protection of their legal economic and social interests against unfair commercial practices and unfair terms included in contracts. Public authorities must guarantee freedom of consumers to choose and conclude contracts, in particular,


Section 9.5: The *Generalitat* will guarantee the policies for the protection and defence of consumers and users as well as their rights of association according to the State legislation.

Section 49.1.35: The *Generalitat* has exclusive power in the following matters: (…) internal trade, defence of the consumer and user, without affecting the general policy on prices, the free movement of goods, the legislation on competition and the State legislation.
against unfair commercial practices and misleading or aggressive ways of contracting (Section 19.1).

Regarding the consumers’ right to information, Section 23 foresees that consumers are entitled to be protected against unfair commercial practices and to receive important, truthful, effective and sufficient information in order to allow them to take an informed decision about the transaction and to use goods or services in a secure and satisfactory way. In this sense, public authorities must guarantee that offers, promotions and advertising addressed to consumers do not include false or misleading information and do not conceal essential information that can result in an unfair commercial practice.

Finally, Act 1/2011 (Valencian Community) establishes that actions or omissions foreseen by the law and other general or specific rules on consumers’ protection and unfair commercial practices with consumers are deemed administrative offences (Section 62), which are classified as follows: offences involving the protection of consumers’ health and safety (Section 63); offences involving alteration, adulteration or fraud in products and services (Section 64); offences related to the technical standardisation, documentation and conditions or techniques of sale and supply of goods and services (Section 65); offences related to the consumers and users protection in distance contracts and off-premises contracts (Section 66); offences related to guarantees and post-sale services (Section 67); offences regarding information, surveillance, investigation, inspection, processing and execution (Section 68); other offences (Section 69):

- Section 65 (Technical standardisation, conditions of sale and documentation): the following are offences regarding technical standardisation, conditions of sale and documentation: failure to observe the provisions on standardisation of products and services and those on documentary and procedural requirements; sale of products whose distribution has been forbidden or sale of products without the necessary authorisations; failure to observe the rules on prices; imposition of conditions, surcharges or undue payments, unrequested activities, minimum amounts or non-acceptance of the legal or accepted payment methods; use of unfair commercial practices with consumers and users and unlawful advertising; failure to observe the legal obligations to inform; failure to issue invoices or documents that certify the transaction, or to issue them without observing the legal requirements; failure to provide consumers with an estimate when necessary; failure to provide consumers with a receipt for the deposit of goods when necessary; repairs or similar activities carried out without being expressly requested or authorised by consumers; to invoice repairs or similar activities that have not been expressly requested or authorised by consumers; imposition of a format, font size or contrast that does not facilitate reading and understanding or does not observe specific legislation.

- Section 69 (Other offences): the following offences will also be considered consumer offences: incorporation of unfair terms; restrictions or unjustified requirements to the right to terminate the contract; incorporation of standard terms that have not been provided prior to or when signing the agreement;
failure to have official complaint forms or to inform about their availability; failure to provide official complaint forms; failure to satisfy the requests of consumers or other discriminatory behaviours regarding such requests; discriminatory behaviours in the access to goods and services; behaviours that involve the failure to observe legal duties, prohibitions and requirements when, after the request of the competent authorities, they are not corrected; any other failure to observe the requirements, obligations or prohibitions foreseen in the rules on consumers' protection.

Offences are classified into minor, serious and very serious. The penalties applicable to these offences depends on the type of offence: for minor offences, a fine up to 3,005 Euro; for serious offences, a fine of between 3,005 and 15,025 Euro; and for very serious offences, a fine of between 15,025 to 601,012 Euro. In some cases, the following additional sanctions will be imposed: temporary closure of the company; confiscation of goods; publication of the penalty; obligation to give notice to the affected consumers when offences related to the distribution of dangerous products are due to unfair commercial practices, unlawful advertising, guarantees or existence of unfair terms; the cancellation of grants, credits or subventions; the inability to conclude contracts with the administration for a maximum period of 5 years.
ANNEX 7: Distribution of enquiries and claims presented in national consumer associations by economic area in 2010

<table>
<thead>
<tr>
<th>Sectores</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Servicios municipales</td>
<td>81</td>
<td>2,355</td>
<td>4,004</td>
<td>46,238</td>
</tr>
<tr>
<td>Transportes públicos</td>
<td>42,651</td>
<td>44,498</td>
<td>47,769</td>
<td>164,079</td>
</tr>
<tr>
<td>Sanidad pública</td>
<td>9,901</td>
<td>12,035</td>
<td>9,741</td>
<td>20,412</td>
</tr>
<tr>
<td>Reparación de automóviles</td>
<td>24,322</td>
<td>13,551</td>
<td>12,962</td>
<td>24,532</td>
</tr>
<tr>
<td>Farmacia</td>
<td>1.785</td>
<td>343</td>
<td>312</td>
<td>485</td>
</tr>
<tr>
<td>Seguros de automóviles</td>
<td>6,944</td>
<td>17,296</td>
<td>18,710</td>
<td>26,253</td>
</tr>
<tr>
<td>Agencias viajes</td>
<td>29,468</td>
<td>21,618</td>
<td>26,830</td>
<td>36,842</td>
</tr>
<tr>
<td>Alimentación y bebidas</td>
<td>15,195</td>
<td>12,037</td>
<td>11,127</td>
<td>14,690</td>
</tr>
<tr>
<td>Ropa - calzado</td>
<td>20,252</td>
<td>21,922</td>
<td>20,297</td>
<td>25,777</td>
</tr>
<tr>
<td>Administración</td>
<td>33,769</td>
<td>27,252</td>
<td>31,492</td>
<td>39,987</td>
</tr>
<tr>
<td>Comunidad de propietarios</td>
<td>12,359</td>
<td>15,442</td>
<td>15,131</td>
<td>18,508</td>
</tr>
<tr>
<td>Agua</td>
<td>5,161</td>
<td>8,170</td>
<td>11,090</td>
<td>12,829</td>
</tr>
<tr>
<td>Adquisición de muebles</td>
<td>18,168</td>
<td>18,957</td>
<td>19,530</td>
<td>22,345</td>
</tr>
<tr>
<td>Servicios financieros</td>
<td>148,135</td>
<td>127,183</td>
<td>142,595</td>
<td>162,879</td>
</tr>
<tr>
<td>Electrodomésticos</td>
<td>39,546</td>
<td>31,220</td>
<td>30,436</td>
<td>34,184</td>
</tr>
<tr>
<td>Teléfono</td>
<td>205,181</td>
<td>154,559</td>
<td>207,942</td>
<td>232,185</td>
</tr>
<tr>
<td>Gas y derivados</td>
<td>17,083</td>
<td>18,758</td>
<td>20,371</td>
<td>21,949</td>
</tr>
<tr>
<td>Vivienda arrendamiento</td>
<td>34,047</td>
<td>28,508</td>
<td>39,426</td>
<td>42,353</td>
</tr>
<tr>
<td>Contenidos no publicitarios</td>
<td>229</td>
<td>654</td>
<td>24,811</td>
<td>26,392</td>
</tr>
<tr>
<td>Compañías de Seguros</td>
<td>41,680</td>
<td>55,828</td>
<td>71,036</td>
<td>75,511</td>
</tr>
<tr>
<td>Sanidad privada</td>
<td>10,846</td>
<td>9,748</td>
<td>15,641</td>
<td>16,503</td>
</tr>
<tr>
<td>Medio ambiente</td>
<td>554</td>
<td>6,241</td>
<td>6,695</td>
<td>5,982</td>
</tr>
<tr>
<td>Publicidad</td>
<td>1,422</td>
<td>3,704</td>
<td>52,664</td>
<td>55,077</td>
</tr>
<tr>
<td>Otros sectores</td>
<td>192,098</td>
<td>265,242</td>
<td>231,053</td>
<td>235,294</td>
</tr>
<tr>
<td>Reparaciones en el hogar</td>
<td>38,724</td>
<td>22,571</td>
<td>25,707</td>
<td>25,680</td>
</tr>
<tr>
<td>Enseñanza</td>
<td>2,987</td>
<td>5,543</td>
<td>9,613</td>
<td>9,321</td>
</tr>
<tr>
<td>Electrodomésticos – S.A.T.</td>
<td>15,224</td>
<td>22,139</td>
<td>19,882</td>
<td>18,882</td>
</tr>
<tr>
<td>Tinterería</td>
<td>7,407</td>
<td>2,971</td>
<td>2,423</td>
<td>2,300</td>
</tr>
<tr>
<td>Compañías eléctricas</td>
<td>20,992</td>
<td>61,202</td>
<td>52,773</td>
<td>48,597</td>
</tr>
<tr>
<td>Vivienda en propiedad</td>
<td>135,729</td>
<td>94,883</td>
<td>84,046</td>
<td>76,158</td>
</tr>
<tr>
<td>Venta a distancia</td>
<td>1,294</td>
<td>27,515</td>
<td>15,677</td>
<td>13,533</td>
</tr>
<tr>
<td>Hostelería - restauración</td>
<td>8,578</td>
<td>9,987</td>
<td>13,020</td>
<td>10,642</td>
</tr>
<tr>
<td>Datos personales</td>
<td>2,622</td>
<td>6,052</td>
<td>34,564</td>
<td>28,126</td>
</tr>
<tr>
<td>Informática y reparaciones</td>
<td>2,600</td>
<td>19,609</td>
<td>15,053</td>
<td>12,586</td>
</tr>
<tr>
<td>Correos y mensajería</td>
<td>723</td>
<td>1,477</td>
<td>2,423</td>
<td>1,875</td>
</tr>
<tr>
<td>Automóviles nuevos</td>
<td>12,356</td>
<td>14,322</td>
<td>16,620</td>
<td>12,841</td>
</tr>
<tr>
<td>Tiempo compartido</td>
<td>1,066</td>
<td>2,933</td>
<td>3,202</td>
<td>1,895</td>
</tr>
<tr>
<td>Automóviles usados</td>
<td>15,861</td>
<td>14,228</td>
<td>17,094</td>
<td>9,041</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1,176,910</td>
<td>1,222,392</td>
<td>1,383,276</td>
<td>1,632,823</td>
</tr>
</tbody>
</table>

FUENTE: Datos remitidos por ASOCIACIONES I.N.C. 2007-2011

ANNEX 8: Claims solved by the Bank of Spain during the first half of the year 2009 by subject

 FUENTE: Banco de España.

---

ANNEX 9: Complaints resolved by the National Commission on the Securities Market in 2009 distributed by subject

### Complaints resolved in 2009. Distribution by subject

<table>
<thead>
<tr>
<th>Subject</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment services</td>
<td>338</td>
<td>388</td>
<td>525</td>
</tr>
<tr>
<td>Order reception, processing and execution</td>
<td>173</td>
<td>200</td>
<td>256</td>
</tr>
<tr>
<td>Customer information</td>
<td>86</td>
<td>112</td>
<td>188</td>
</tr>
<tr>
<td>Fees and expenses</td>
<td>59</td>
<td>59</td>
<td>63</td>
</tr>
<tr>
<td>Others</td>
<td>10</td>
<td>17</td>
<td>18</td>
</tr>
<tr>
<td>Mutual funds and other UCITS</td>
<td>272</td>
<td>334</td>
<td>298</td>
</tr>
<tr>
<td>Customer Information</td>
<td>114</td>
<td>95</td>
<td>108</td>
</tr>
<tr>
<td>Subscriptions/Redemptions</td>
<td>65</td>
<td>103</td>
<td>92</td>
</tr>
<tr>
<td>Transfers</td>
<td>54</td>
<td>88</td>
<td>61</td>
</tr>
<tr>
<td>Fees and expenses (I.S.)</td>
<td>39</td>
<td>48</td>
<td>37</td>
</tr>
<tr>
<td>Total complaints resolved</td>
<td>610</td>
<td>722</td>
<td>823</td>
</tr>
</tbody>
</table>

**Notes:**
- **Source:** CNMV.

---

### Distribution of complaints resolved by subject

![Graph showing distribution of complaints resolved by subject](http://www.cnmv.es/DocPortal/Publicaciones/Informes/MR2009weben.pdf)

**Notes:**
- **Source:** CNMV.

---

ANNEX 10: Examples of complaints presented to the National Comission on the Securities Market with report favourable to complainant

Investment services (securities)

- R/711/2008 - Altae Banco, S.A. The complainant reported that two years after buying a structured note marketed by the entity, the coupon had shrunk to 0% and its value was 20% below acquisition price. He complained that he had not been advised beforehand of the risks of this investment. On examining the evidence it was found that the purchase order signed by the complainant included a clause saying that the signatory was aware of the terms of the bond’s issuance, trading and settlement and of the associated risks. However the document in question did not match the standard format for securities orders in use by investment service providers, Altae among them. The date of the order was correctly entered, but there was no identification of either the securities, their issuer or the amount or quantity of instruments being acquired. Nor was mention made of their acquisition price, the maximum validity of the order, whether it was to be executed in the primary or secondary market, etc. The bond’s liquidity conditions were insufficiently and inadequately explained, being confined to a simple mention that they were exchange traded, without specifying the exact venue or indicating whether or not they had the support of a liquidity provider or similar. The document, in short, set out the general conditions that the ‘structured bond’ should supposedly comply with, but did not provide detailed conditions of the exact product being acquired. In our view, the fact that no other written information was given on the product obliged Altae to include all its characteristics in the purchase agreement, which it had manifestly failed to do. It was also established that Altae had been sending the complainant regular statements on the make-up of his portfolio that may have misled him as to the real value of the structured bonds in his possession, since the unit value shown was 100% of face value, when in reality their price had fallen.

- R/300/2008 and R/317/2008 - Banco de Finanzas e Inversiones, S.A. The complainants alleged that the product recommended and sold to them in April and May 2005 respectively was unsuited to their investment profile and had caused them losses. The product in question was a structured note listed on a foreign secondary market whose main conditions were a fixed rate of 8.25% for the first three years and a floating rate thereafter (linked to movements in the two- and ten-year swap curves) and an initial maturity of 30 years. The entity could not substantiate having provided the investors with information on the product before their investment decision, or advising them that the risk it carried might exceed their tolerance. This lapse was not corrected in the

signed purchase order, which was also missing certain standard elements: identification of the securities to be acquired and the issuer’s complete, verifiable corporate name.

- **R/1019/08 - Bankinter, S.A.** The complainant pointed out that he had a conservative risk profile and, until becoming a client of Bankinter’s, had never acquired a structured product without capital protection at maturity. On joining the entity, however, his new advisor persuaded him to acquire this kind of product, which came to dominate his portfolio. An advisory relationship entails the duty to be informed about customers’ financial situation and investment experience and objectives, so the entity should have gathered information on his financial knowledge, background and current goals and offered him products suited to his “investor profile”. Instead he was steered towards products at odds with the profile shown before and after joining Bankinter, which was incompatible with this kind of speculative investment. The entity was accordingly deemed to have acted incorrectly in the advisory services rendered.

- **R/757/2008 and R/846/2008 - Barclays Bank, S.A.** It was found on examination that the final terms and conditions document furnished by the bank as proof of having informed the client about the product’s characteristics and risks was dated later than the purchase, and, in one case, corresponded to an entirely different issuance to the one the complainant had acquired. It was unlikely therefore that they had been delivered to him at the time of contracting.

- **R/327/2008, R/358/2008, R/741/2008, R/778/2008, R/891/2008, R/202/2009 and R/476/2009 - Deutsche Bank, Sociedad Anónima Española.** The complainants in all these cases shared a similar profile. All were pensioners, including one suffering visual disability and another who had asked his bank for an investment providing stable income to supplement his pension, to be earmarked as payment for a geriatric residence. The product complained about was the Deutsche Bank AG bond 5%, ISIN code XS0230545740, issued by Deutsche Bank AG and marketed by its Spanish branch in November 2005 under the European passport. The following defects were detected in the marketing of this product:
  
  - The entity was unable to substantiate that it had supplied written information on the product at the time the purchase document was signed;
  
  - The entity had assigned this structured product a moderate risk profile (risk score 3) on its in-house scale of 0 to 5, which, in our view, should have ruled it out for investors characterized as conservative or very conservative. The entity, as we understand it, played an informational role in the product placement and should have thought twice about including such a complex instrument among the investments deemed suitable for the objectives and profile of this group of clients. The bond in
question: offered a fixed rate higher than bank deposits for the first two years (fixed coupon of 5%), then switched to a floating rate without guarantee (linked to movements in the yield curve); had a scheduled maturity of 15 years, with a call feature for the issuer; was scheduled for admission to trading on a foreign secondary market; and would incur higher administration and custody expenses than other assets and deposits. The product was accordingly deemed to have a series of risks which should have ruled it out for investors of the complainants’ characteristics. The entity, moreover, could offer no proof of having previously established a customer profile;

- In some cases, the purchase orders were found to have irregularities of form: dates missing, the name of the securities and issuer not stated in full, absence of client’s signature, etc., although complainants were informed that only a court of law could determine whether the documents were therefore null and void;

- Regarding the bond’s valuation at the time of placement with investors, a detailed study by the Secondary Markets Department using two valuation methods (Method 1: implied 2-10 year CMS and Method 2: variation in the curve slope) concluded that the price at launch should have stood at around 87% of its notional value. The fact that the issue may have been overvalued goes entirely unmentioned in the documentation submitted, implying that clients were denied access to full, reliable information.

- **R/856/2008 - Banco de la Pequeña y Mediana Empresa, S.A.** The complainant was holder of structured notes issued by Lehman Brothers Treasury Co. B.V, with the commercial name Lehman BROS. Float 5/35 and ISIN code XS0218304458 and main characteristics as follows: a fixed rate to May 2010 (7%) and floating thereafter (linked to yield curve movements); scheduled maturity of 30 years; and traded on a foreign secondary market (at least Euronext Amsterdam). These features categorize it as a risky product, about which customers need to be adequately informed before deciding whether to invest. The bank implicitly admitted that it lacked any data on the complainant’s previous investment experience, since it had only borne in mind his “family history with the branch”. In fact, he had made no previous investments of a comparable nature through the entity, and did not hold a securities account. Nor could the entity prove that it had supplied him with information in writing or some other durable medium prior to his investment. The buy orders, moreover, lacked basic elements like the ID of the security to be acquired and the full verifiable name of the issuer. These formal defects were especially grave in the absence of other clear and unequivocal information on the bond’s characteristics and risks.

- **R/69/2009, R/70/2009, R/530/2009 - Banco Inversis, S.A.** Complainants had been sold a structured product denominated Bono Himalaya (ISIN code XS0235429437) issued by Lehman Brothers Treasury Co. B.V and listed on
the Luxembourg stock exchange, with a floating rate linked to a basket of investment funds, a scheduled maturity date of 5 July 2010 and capital protection at maturity. Its financial structure was based on a “Himalaya option” with various underlying assets and sample periods. At each sampling date a return is calculated based on the best-performing security in the basket, which is then removed. This bond could be considered a low-risk product – with capital guaranteed at maturity (four and a half years) and what was then a solid rating – amenable to distribution among the retail public without constraints regarding client categorization. Asked whether clients had been provided with information in writing or some other durable medium before making their investment in Bonos Himalaya, the entity replied that it had details on the bond posted on its corporate website, and furnished as proof a provisional terms and conditions document dated 10 November 2005. Bonos Himalaya, however, was not sold on the Internet, even though Banco Inversis has a strong bias to online transactions. It was therefore unlikely that complainants would have found this document on its website, and it was the entity’s responsibility to ensure the same information was available through the available subscription channels (face-to-face or others). There was accordingly insufficient evidence that this information had effectively been delivered or supplied at the time of purchase. The buy orders submitted by the entity were also confusingly worded and did not conform to the standard format for transactions of this type. The entity confirmed that it waited until 12 December 2008 to send its customers the first detailed communication about the Lehman bankruptcy and its implications for their investment, including the options available to defend their rights against the issuer. This was considered a serious delay, since insolvency proceedings were initiated in mid September.

- **R/1034/2008 - Bankinter, S.A.** In January 2006 and 2007, the complainant acquired preference shares issued by Lehman Brothers UK Capital Funding II LP and Lehman Brothers UK Capital Funding IV LP, with a subordinated guarantee from Lehman Brothers Holdings, Inc., ISIN codes XS0233128916 (subsequently XS0229269856) and XS0282978666, and projected annual returns of 5.125% and 5.75% respectively. Our analysis of the complaint permitted the following conclusions: Bankinter was unable to prove that it had supplied the client with information on the characteristics and risk of the preference shares prior to his investment, the signed purchase orders had defects of form in that the securities and their issuers were not properly identified, although at least it was clear that they were Lehman issues. Bankinter was also deemed to have acted incorrectly in destroying an investment preferences questionnaire which the complainant had completed, without asking his permission. This form would in theory have specified the degree of investment risk he was willing to tolerate, thus ensuring he was not offered products inconsistent with his profile, unless specifically requested.

- **R/1031/2008 - BNP Paribas España, S.A. (BNP) and Banco Gallego, S.A. (Banco Gallego).** In September 2005, the complainants acquired a product
issued by Lehman Brothers Treasury Co BV under the name Lehman 30yNC5y Steeprener Notes Bonus Certificate, with the guarantee of Lehman Brothers Holdings Inc. and ISIN code XS0229584296. Its main characteristics included a fixed rate for the first five years (7.25%) and a floating rate thereafter (linked to yield curve movements), a scheduled maturity of 30 years, though with the issuer entitled to buy back at par on pre-set call dates, and listing on a foreign secondary market (Euronext Amsterdam). The securities were acquired through BNP and deposited at Banco Gallego at the time the Lehman Brothers group collapsed. Here too the distributor had failed to include the full name of the issuer, though at least it was clear that the issue proceeded from the Lehman Brothers group.

Investment funds and other Undertakings for Collective Investment in Transferable Securities (UCITS)

- R/388/2008 - ING Direct, N.V. Sucursal en España. The entity had failed to supply the complainant with the prospectus and latest semiannual statement of an investment fund prior to subscription. Shortcomings were also detected in the information given at the time of purchase (by telephone). The message offered was insufficiently balanced and, most seriously, underplayed the risk associated to investment in this particular fund, whose prospectus described it as a very high-risk product.

- R/770/2008 - Banco Caixa Geral, S.A. The complainant was convinced she had invested in a product that guaranteed the nominal value of her investment, so could not understand why the statements she was receiving showed a lower amount. The structure of this fund pursued a specific return on maturity, but it was not guaranteed. Not only that, if a pre-set barrier was reached, the unit holder could suffer the complete loss of the capital invested. The prospectus highlighted the fact that the fund carried a high market risk, citing the volatility inherent to equity investment. On this occasion, the complainant furnished a document bearing the entity’s seal which referred to her investment as if it were a deposit. She had also been delivered a personalised communication containing a number of flaws, which may have led her to form a mistaken judgment about the real operation of the product structure and the risks she would be exposed to. The entity had failed to adequately inform its client about the characteristics of her fund investment.

- R/497/2008 - Banco Inversis, S.A. The complainant had acquired shares in a closed-ended fund called “New Star RBC 1X HDG” whose investment objective was to track an index referencing the performance of 250 hedge funds. This fund had a number of liquidity constraints (no guarantee of daily liquidity and four redemption Windows a year available with up to 120 days notice at the discretion of the management team). The entity was unable to substantiate that it had supplied the client with written information on these liquidity constraints and valuation specifics. And the verbal information given by his financial advisor was missing some essential points, like the fact that liquidity was not guaranteed – an essential input to his investment decision as
it turned out – and that there was a procedure in place to redeem fund holdings on other than the stated dates. Nor was the client sufficiently well informed about the procedures and observation dates for calculating asset value, which left him confused about the apparent discrepancies in its valuation.

- R/315/2009 - Caja de Ahorros de Galicia. The entity acted incorrectly in attempting to get their client to complete a standard order form with the following clause: “In view of the lack of information provided for appropriateness testing, I recognize and accept that the entity is not in a position to determine whether the investment service, transaction or product is right for me, according to my knowledge and experience”. Clauses such as this can only be inserted in exceptional cases when a client refuses to supply information on his knowledge and experience, or the information given is not enough.
ANNEX 11: Examples of claims solved by the claims service of the General Directorate of Insurance and Pension Funds

- 19/2007. Lack of information relative to the product. The claimant asked for information from the credit entity about the possible investment of 90,000 Euro for a period that did not exceed 1 year, without risk. As a consequence of the financial entity’s advice, the claimant contracted a life insurance. After the year, the claimant tried to recover the money but the financial entity informed her that she will lose 10,000 Euro if she tried to recover the invested money. As she needed the money, she had to ask for a loan of 90,000 Euro. The Claims Service concluded that the financial entity fulfilled the regulation on insurance contracts but it did not act according to the good practices of the financial sector and, in particular, to the duty to inform clients. Nevertheless, the Claims Service pointed out that proof on the breach of the duty to inform and quantification of damages were issues beyond its competences.

- 21/2007. Lack of information during the commercialisation of an insured retirement plan. The employee of the financial entity advised the claimant to invest his money in an insured retirement plan. The employee informed him about the conditions of the investment, among others, the need to keep the money in the plan for at least two years. After three years, the claimant tried to recover the money but the financial entity informed him that this was not possible apart from the circumstances foreseen in the contract. The Claims Service concluded that, although the contract had been signed by the claimant and the decision of the bank not to give the money back was correct, the financial entity had not informed the consumer in an appropriate way about the features of the financial product and it was obvious that if the claimant would have known these features, he would not have concluded the contract.

- 22/2008. Commercialisation of high-risk insurance to risk averse individuals. The claimant was an elderly person who decided to invest all his money in a deposit that, according to the financial entity, would give to him benefits equal to the inflation and the initial investment would be guaranteed. One year later, he discovered that he had concluded a unit linked insurance whose value was linked to the Stock Market and a due date of ten years, which made no sense taking into account his age and risk aversion. According to the Claims Service, the information offered by the financial entity did not adapt to the client profile and his needs, as he was 76 when contracting the insurance and he wanted a product without risks that allowed him to complete his retirement pension.

ANNEX 12: Regional regulations passed on the basis of the regions’ power on consumer affairs

Regional laws on consumer affairs foresee rules on the obligation to inform consumers when they purchase housing:

- Section 16 of Act 1/1998, of 10 March 1998, on the Statute of Consumers and Users (Balearic Islands): according to this Section, purchasers of new housing are entitled to get the document that describes the property, the certificate of habitability, gas and power supply bulletins, conditions of use and maintenance and any other necessary document according to the State and Regional regulations on housing.

- Section 12 of Act 11/1998, of 9 July 1998, on consumers and users’ protection (Community of Madrid): according to this Section, amounts delivered on account for the construction and purchase of housing must be guaranteed.

- Section 11 Act 11/1998, of 5 December 1998, on consumers and users’ defence (Castile and Leon): according to this Section, goods, products and services offered to consumers must include or must allow true, effective and sufficient information about their essential features. In this sense, essential features are defined as those that must be necessarily offered in purchases of housing according to the State and Regional legislation.

- Section 17 of Act 11/2002, of 2 December 2002, on Consumers and Users (Principality of Asturias): according to this Section, purchasers of new housing are entitled to get a document that describes the property and the quality of the materials used in its construction, the certificate of habitability, gas and power supply bulletins, conditions of use and maintenance and any other necessary document according to the State and Regional regulations on housing.

- Section 16 of Act 6/2003, of 22 December 2003, on the Statute of Consumers and Users (Basque Country): according to this Section, all information delivered to those who purchase or lease housing must be truthful, complete, objective and understandable, according to the State and Regional rules on consumers’ protection and, if necessary, the rules on consumer credit and standard terms. This Section also orders the Basque Country Government to regulate the information that must be provided to those who purchase or lease housing, which will include, among other circumstances, the features of the construction, route of electric, water, gas and heating mains, materials, price, payment methods, guarantees and amounts delivered on account.

- Section 17.2 of Act 13/2003, of 17 December 2003, on Consumers and Users (Andalusia): this Section spreads the obligation to inform to the field of immovable property in order to allow consumers to know the quality of the materials, the units of building work, the individual and collective services as well as the conditions of use, maintenance and conservation. This rule has been implemented by Decree 218/2005, of October 11, that passes the
Regulations of consumer’s information in housing purchases and leases (see below).

- Section 15 of Act 11/2005, of 15 December 2005, on the Statute of the consumer (Castile-La Mancha): according to this Section, goods, products and services offered to consumers must include or must allow true, effective and sufficient information about their essential features. In this sense, essential features are defined as those that must be necessarily offered in purchases of housing according to the State and Regional legislation.

- Section 18 of Act 1/2006, of 7 March 2006, on Consumers and Users’ Defence (Cantabria): according to this Section, consumers are entitled to know in a concrete, objective, effective and complete way the necessary information to identify the property, surface area, quality of the materials, individual and collective services as well as conditions of use, maintenance and conservation. Developers must provide consumers and, if necessary, competent authorities with the following documentation:
  o Name or registered name of developers and address or address of one of the establishments in Spain and any other information that allows consumers to contact those who participate in the construction;
  o Copy of documents that authorises the construction;
  o Legal and registration status;
  o Copy of the construction project and its changes.
  o Description of the property, including maps of both the area where the property is located and the property, surface area, description of the building, common areas and accessory services, quality of the materials, individual and collective services, soundproofing and insulating material, measures of energy saving.
  o Copies of the construction authorisations;
  o Certification of guarantees to ensure agents’ liabilities;
  o Certification of guarantees of payments on account;
  o Copy of the contract, which will include (a) that consumers will not pay expenses derived from titles that legally correspond to the seller; (b) Sections 1280.1 and 1279 of the Spanish Civil Code; (c) right of consumers to choose the Notary or to subrogate in a credit transaction; (d) guarantees to ensure agents’ liabilities; (e) any breach of the proceedings or lacks of authorisations;
  o Date of delivery;
  o Full price of sale;
  o Payment methods;
  o Conditions of use, maintenance and conservation;
In case of new constructions, developers must provide purchasers and, if necessary, competent authorities, with the following documentation:

- Name or registered name of developers and address or address of one of the establishments in Spain and any other information that allows consumers to contact those who participate in the construction;
- Legal and registration status;
- Description of the property, including maps of both the area where the property is located and the property, surface area, description of the building, common areas and accessory services, quality of the materials, individual and collective services, soundproofing and insulating material, measures of energy saving;
- Date of the construction authorisation;
- Certification of guarantees to ensure agents’ liabilities;
- Certification of guarantees of payments on account, including the information about the insurance company or the financial entity that accomplish its functions. Moreover, a sign must establish the financial entity where the banking account is opened and the financial entities or insurance companies that guarantee the amounts delivered on account;
- A template of contract which will include that: consumers will not pay expenses derived from titles that legally correspond to the seller; Sections 1280.1 and 1279 of the Spanish Civil Code; right of consumers to choose the Notary or to subrogate in a credit transaction; guarantees to ensure the agents’ liabilities; any breach of the proceedings or lacks of authorisations;
- Date of delivery;
- Full price of sale;
- Payment methods;
- Rules of the homeowners’ association;
- Restrictions to the use of housing, if any. If the contract is formalized in a public instrument, the Book of the Building (Libro del Edificio).

- Section 18 of Act 16/2006, of 28 December 2006, on consumers and users’ protection and defence (Aragon): according to Section 18, purchasers and lessees of housing must be protected by the legislation on housing. Due to the necessary character of housing as well as its qualitative and quantitative entity, issues related to the protection of consumers in relation to the purchase
or lease of housing will be specifically regulated according to the legislation on housing.

- **Section 13 Act 3/2003, of 12 February 2003, on the Statute of consumers and users (Canary Islands):** according to Section 13, public authorities must adopt the necessary measures to guarantee that, in offers, promotions and advertising of housing, consumers receive information about the essential features of the property, its price or full cost and payment methods, guarantees, amounts delivered on account and other necessary information for the protection of consumers and users.

- **Sections 123-9, 241-1 and 241-2 of Act 22/2010, of 20 July 2010, on the Catalan Consumer Code (Catalonia):** according to Section 123-9, consumers are entitled to be informed about the health and safety and building characteristics of their housing, as well as the quality and the on-site installation systems of the materials and utilities, including those related to energy-saving, gas, water, power supply, electronic communications, sewerage, lifts and, particularly, insulation and sound-proofing, fire prevention and extinguishing, in accordance with the provision of the specific regulation pertaining to housing referred to building record and other relevant aspects.

- **Section 241-1 of Act 22/2010 (Information on the offer for the sale of immovable property) establishes that:**

  “1. In offers for sale of immovable property, full information must be provided regarding its essential condition prior to the purchaser paying any amount on account, in accordance with that established in legislation on the subject of housing. 2. In offers for the sale of immovable property, information must be provided regarding the legal owner, liens and encumbrances, conditions of use, existing services, foreseeable maintenance expenses, economic and financial conditions of the offer and, if possible, the amounts of the taxes that apply to the property. The remaining information required in accordance with legislation must also be provided. 3. In offers for the sale of immovable property, information must be provided regarding the types of guarantee, terms, quantities and the means established by applicable legislation to demand execution of same.”

- **Finally, according to Section 241-2 (Information on the offer for the leasing of immovable property):**

  “1. In offers for the leasing of immovable property, specific information must be provided regarding its characteristics, services and installations, as well as the conditions of use, contractual rent and other information required by legislation on the subject of housing. 2. The lessor of the property must be in possession of the certificate of habitability, and the definitive qualification or equivalent proof of same in the case of officially protected housing. The lessee is entitled to be provided with a copy of this documentation upon formalizing the contract.”
ANNEX 13: Regional regulations passed on the basis of the regions’ power on housing

Regions have also passed rules on the pre-contractual information that must be provided to consumers when they purchase or lease housing:

- Act 2/1999, of 17 March 1999, on the quality of buildings (Community of Madrid): according to Section 16, offers for sale or lease of housing must specify features of the building and contract conditions, the right of consumers to look through the Book of the Building, the ADR systems and the developers’ liabilities. Section 17 deals with advertising of offers, which must be truthful and observe the construction project. Finally, Section 18 establishes the information that consumers must receive when the object of the offer is a building under construction (certificates, program of the building works, authorisations, etc.) or a temporary use of a the building (company that presents the offer, features of the property, floor or local surface area, uses, services, price or rent and revision methods, expenses for maintenance and conservation, right to look through the Book of the Building, etc.).

- Act 3/2001, of 26 April 2001, on housing (Extremadura): according to Section 26, information and offers for the sale or lease of housing must observe truthfulness and objectivity principles and cannot include misleading information. Section 27 deals with advertising content (surface area, fees, specific content in case of payment by instalments). Section 28 regulates information that must be included in offers for the sale of housing, such as the features of the property, size and design, orientation, quality, insulation and sound-proofing, measures of energy saving, legal ownership, liens and encumbrances, conditions of use, services, expenses for maintenance, economic and financial conditions of the offer, etc. In housing of new construction, construction authorisations, dates of construction and guarantees must also be provided. Finally, Section 29 establishes the information that offers for lease must include, such as the features of the property, services, conditions of use, rent and revision method, duration of the contract and fees.

- Act 8/2004, of 20 October 2004, on housing (Valencian Community): according to Section 9, advertising and information must observe the real features, conditions and uses of property and cannot be misleading or conceal relevant information. Section 10 deals with advertising content, which will include the developer and the location of the building, a description of the property, its surface area and elements, the price of sale or lease and the financing conditions and the observation of rules to guarantee the amounts delivered on account. Section 12 regulates the information that offers for sale must include, distinguishing among first and second and subsequent sales. In the first case, offers must include information about the developer and the constructor (name or registered name, address and registration in the Commercial Registry or other public registries); economic conditions (full price, payments in instalments, guarantees); features of the property (surface
area, quality, maps, services, etc.); legal status of the building (registered ownership, liens and encumbrances, guarantees, etc.); public status (authorisations, etc.), and conditions of use and maintenance (Book of the Building). In the second case, offers must include information about the seller and, if necessary, the person or legal entity that mediates among the seller and the purchaser; economic conditions (full price, financing conditions); essential features of the property (surface area; contribution, if necessary; quality; services; maps, etc.); legal status of the property (registered ownership, liens and encumbrances, guarantees, etc.); public status and conditions of use and maintenance (Book of the Building). Finally, Section 13 regulates the information that offers for leases must include, such as economic conditions of the lease or, at least, those related to the rent, revision methods, duration, fees, features of the property, services, etc.

• Decree 218/2005, of 11 October 2005, that passes the Regulation of consumer’s information in housing purchases and leases (Andalusia): according to Section 3, Decree 218/2005 is applied to offers, promotions and advertising addressed to consumers for the sale or lease of housing within a business or professional activity, including the intermediation. It also applies as supplementary law to offers, promotions and advertising of state subsidized housing. General rules are foreseen in Section 4. In this sense, offers, promotions and advertising must provide consumers with truthful, sufficient, updated and understandable information about the features of the sale or lease and the property itself. This information cannot be misleading or conceal essential information and compliance can be requested although its content is not expressly foreseen in the contract. Section 5 establishes the information that offers, promotions and advertising for the sale or lease of housing must include (if the property is only planned, under construction or constructed; location of the building; information about the developer; number of properties; description of the property; price of sale, taxes and other expenses; rent; communal expenses; payments in advance; right to get a copy of the Abridged Informative Document, whose content is regulated in Sections 6 and 7 –sale of housing– and 11 –lease of housing–, etc.). Section 8 deals with the informative note about the price and payments methods that those who offer the sale of housing must provide to consumers. Sections 9 and 10 regulate the pre-contractual information and documentation that consumers must receive before concluding the contract in case of first sale (Abridged Informative Document; informative note; copy of the use or occupation authorisations; copy of the rules of the homeowner’s association; insurances and guarantees; Book of the Building; instructions on evacuation in case of emergency, etc.) and second and subsequent sales (address; general description of the property and the building; price of sale, payment methods and dates of expiration; registered ownership, easement rights, etc.; date of construction; participation in the homeowners’ association; etc.).

• Act 2/2007, of 1 March 2007, on housing (La Rioja): according to Section 17, advertising must observe the good faith and truthfulness principles and cannot
be misleading or conceal essential information. Advertising must include, as a minimum, the following information: developer and location of the building, description of the property, price of sale or lease and financing conditions, and the financial entity that guarantee the amounts delivered on account. Information included in advertising can be requested although it is not expressly foreseen in the contract. Act 2/2007 also includes specific rules for advertising on surface area (Section 18) and annexes (Section 19). Section 20 establishes information that offers for the sale of housing must include in case of first sales: information about the developer and constructor (name or registered name, address and registration in public registries); economic conditions (full price; payments in instalments; guarantees); conditions in case of mortgage subrogation; features of the property (surface area, quality, maps, services, etc.); legal status of the building (registered ownership, liens and encumbrances, guarantees, etc.); public status (licenses, etc.). In case of second or subsequent sales, offers must include the following information: seller and, if necessary, person or legal entity that mediates among the seller and the purchaser; economic conditions (full price, financing conditions); features of the property (surface area; contribution, if necessary; quality; services; maps, etc.); legal status of the property (registered ownership, liens and encumbrances, guarantees, etc.); public status.

Act 18/2007, of 28 December 2007, on the right to housing (Catalonia): according to Section 58, those who participate in the construction and renovation of housing and render real estate services must observe the rules that prohibit unlawful advertising. In this sense, offers, promotions and advertising for the sale or lease of housing cannot be misleading or conceal essential information. Information included in offers, promotions and advertising can be requested although it is not expressly foreseen in the contract. Finally, marketing and advertising of immovable property on somebody else’s account without a previous order is forbidden. Section 59 regulates the information that must be included in advertising (place where the property is located; situation of the property and if it is finished, under construction or only planned; number of the authorisation to construct and date of expiration; surface area; information about the developer, constructor, etc.; responsible of marketing, address and phone). Section 60, regarding the offer for the sale, establishes the right of consumers to receive in writing, before any payment on amount, a minimum information: information about those who participate in the transaction; description of the property; information about registration; full price, taxes and other expenses; date in which the building works start and date of delivery; specific information in case of state subsidized housing; and, if the payment on account exceeds 1% of the price, description of the property, age of the building, information about the occupation of the property, information about registration, liens, encumbrances, etc., communal contributions and expenses, economic and financial conditions of the sale, specially the payment methods and instalments, authorisations to construct and to occupy the building and, in
case of state subsidized housing, date of the provisional and definite qualification and rights, obligations and restrictions to their use, if any. Finally, Section 61 regulates the offers for the lease, which must include the essential conditions of both the property and the contract. This information must be delivered before any payment on account. The offer must include as a minimum the following information: description of the property; full price of the rent and revision methods; duration of the lease; deposit and other guarantees.

- Act 18/2008, of 29 December 2008, on housing (Galicia): according to Section 83, advertising must observe good faith and truthfulness principles and cannot include misleading information or conceal essential information. Information included in advertising can be requested although it is not expressly foreseen in the contract. The minimum content of advertising is foreseen in Section 84: reference to the condition of state subsidized property or property under construction, date of the authorisations, if it is included in a residential development, surface area, etc. According Section 85, advertising regarding the price will include the full price as well as specific information in case of payment by instalments. Regarding the content of the offers for sale and lease, Sections 86 and 89 establishes the obligation of developers and real estate agents to provide consumers with essential information about the features of the transaction in writing and before the conclusion of the contract. Section 87 establishes the information that offers for sale must include: information about the developer and the contractor; legal regime of the property; location of the building; if the property is finished, under construction or only planned; duration of the construction and date of delivery; description of the property; surface area; full price and financing conditions; financial entities that guarantees the payments on account. Specific information will be included when the mortgage subrogation is expected or the object of sale is a state subsidized property. Finally, Section 90 regulates the content of the offer for lease: features of the property; rent and revisions methods; duration, and expenses.

- Act 9/2010, of 30 August 2010, on the right to housing (Castilla y León): according to Section 23, advertising for the sale or lease of housing must observe the following principles: information about the features of the property and the legal and economic conditions of the transaction must be clear, accurate and true; advertising cannot include misleading information or conceal essential information. Furthermore, advertising must include, as a minimum, the following information: information about the developer or owner; location of the building; description of the property; if the property is finished, under construction or only planned; full price and, if necessary, the financing conditions; entities that guarantees the payments on account; if it is a state subsidized property. Act 9/2010 also establishes specific provisions for the advertising of annexes (Section 24). Information included in advertising can be requested although it is not expressly foreseen in the contract (Section 25). The obligation of those who participate in the construction to provide
consumers with truthful, objective and sufficient information, without leading to error or confusion, is foreseen in Section 26. Section 27 regulates the minimum information that offers for sales must include in first sales: information about the developer and the contractor (name or registered name, address and registration); economic conditions (full price; payments in instalments; guarantees); features of the property (materials, orientation, services, etc.); legal status of the building (liens and encumbrances, etc.); administrative status (authorisations, etc.). Section 28 establishes the minimum information that offers for sales must include in second or subsequent sales: information about the seller and, if necessary, those who mediates among the seller and the purchaser; economic conditions (full price, financing conditions); description of the property (surface area; age of the building; services, etc.); legal status of the property (registration, liens and encumbrances, etc.); if the property is a state subsidized property. Finally Section 29 establishes the information that lessors must provide lessees about the essential conditions of both the property and the contract and, in particular, the description of the property and, in case of state subsidized properties, the information about the definite classification and the maximum price of the rent.
<table>
<thead>
<tr>
<th>Document Control</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tender No.</strong></td>
</tr>
<tr>
<td><strong>Prepared by</strong></td>
</tr>
<tr>
<td><strong>Checked by</strong></td>
</tr>
</tbody>
</table>
10.1 Introduction

The Unfair Commercial Practices Directive (UCPD)\(^1\) was adopted in 2005; and requires Member States to empower bodies to take preventive action against unfair business to consumer practices.\(^2\) This has been implemented in the UK by the Consumer Protection from Unfair Trading Regulations (CPRs) 2008.\(^3\) The CPRs treat unfair practices (as defined in the UCPD) as forms of ‘Community infringement’ under the Enterprise Act (EA); thereby providing enforcement authorities with the powers to seek enforcement orders against such practices.\(^4\) This now co-exists with the pre-existing powers to seek enforcement orders against other practices that represent ‘Community infringements’ and those that represent ‘Domestic infringements’.\(^5\) The main responsibility for enforcing the CPRs in the fields of financial services and immovable property lies with the Office of Fair Trading (OFT). However, there is an agreement between the OFT and the Financial Services Authority (FSA) on division of responsibilities for financial services matters (on which see below at note 15).

Acting unfairly within the meaning of the Directive has also been criminalised,\(^6\) subject to the traditional defences based on the ‘default of another’, ‘due diligence’ and ‘innocent publication of an advertisement’;\(^7\) while the pre-existing criminal measures (under the Trade Descriptions Act 1968 and Part III of the Consumer Protection Act 1987) on false statements as to goods, services and prices have been repealed.\(^8\)

---

\(^1\) 2005/29/EC

\(^2\) See articles 3 and 11.

\(^3\) CPRs 2008, SI 1277.


\(^5\) Enterprise Act, 2002, Ss. 211-212. ‘Domestic infringements’ cover actions amounting to breaches of traditional domestic norms, including breaches of contract and duty and of criminal law standards; while ‘Community infringements’ cover actions in breach of EU consumer protection directives.

\(^6\) CPRs, regulations 3-12.

\(^7\) CPRs, regulations 16-18.

\(^8\) CPRs, Schedule 4, Part 1.
10.2 Financial services

10.2.1 Legislative framework

10.2.1.1 National implementation legislation(s) of the UCPD

The above described CPRs regime clearly catches financial service transactions. Following the language of the UCPD, it covers commercial transactions in relation to a ‘product’, which is defined as ‘any goods or service’.9 This obviously covers the various different forms of financial service: whether banking, investments, insurance and credit. There is no sub-division in the CPRs in terms of the treatment of these various financial services. They are all covered by the general rules. So, UK consumers of all financial services certainly receive at least the minimum level of protection required by the UCPD.

Of course, under Article 3 (9), financial services are excluded from the ‘internal market clause’ in Article 4. It is useful by way of introduction to emphasise that the CPRs certainly do not provide any greater level of protection to consumers of financial services than to consumers generally. The same standards (reflecting the UCPD) are applied to all trade sectors, including all financial services. The question, then, for the purposes of this study, is to what extent other UK regulatory10 rules (for example those outside the CPRs) are in some way more protective of consumers than the UCPD/CPRs standards.

10.2.1.2 National legislation relevant for the field of financial services

Before dealing with ‘misleading actions’, ‘misleading omissions’, and ‘aggressive practices’ in turn, it is necessary to introduce at a more general level the UK ‘home grown’ regimes that apply to misleading actions and omissions, and to aggressive practices; and to make some general points about their relationship with the UCPD. This makes it much easier to understand the specific comments that then follow on ‘misleading actions’, ‘misleading omissions’ and ‘aggressive practices’. (It should be noted here that the term ‘home grown’ is used to distinguish UK implementation of the UCPD from other regulatory requirements not derived from the UCPD. This national regime involves a mix of rules and requirements which implement the numerous sectoral EU financial services Directives and requirements, together with some additional UK requirements that do not directly implement EU legislation (such as the FSA Principles for Businesses and supporting material, the regime for Approved Persons, and a number of specific rules and requirements relating to the conduct and behaviour of regulated firms and individuals).

---

9 UCPD, Article 2/CPRs, reg 2 (1).

FSA Regulation

Currently secured credit (covering the first legal charge over a borrower’s home) and other financial services are regulated by the FSA under the Financial Services and Markets Act (FSMA) 2000. In addition to the CPRs, this is done under the rules in the FSA Handbook (specific and detailed rules dealing with specific practices); the general principles for business; the Treating Customers Fairly (TCF) Outcomes; and the CPRs (the regime implementing the UCPD).

Before explaining more about the Handbook, the general principles of regulation and TCF, it should be noted that, at the time of implementation of the UCPD, the FSA view was that no significant reforms to this regime were required; as it adequately reflected the standards in the UCPD.

The Handbook subdivides into separate ‘sub’ books on such issues as mortgages and home finance; insurance; banking; client assets; building societies; collective investment; credit unions; and dispute resolution. This is supported by, in particular,

11 The FSA is responsible for both protecting consumers and maintain confidence in the financial markets (FMSA, ss. 2, 3 and 5); and see the rule making powers in FMSA, s. 138, as amended by Financial Services Act 2010, ss. 3 (4) and 26 (1) (c). No firms are allowed to operate (provide regulated financial services) in the first place until the FSA has given them permission to do so.

12 Available at http://www.fsa.gov.uk/Pages/handbook/index.shtml.


15 On the approach of the FSA to the UCPD/CPRs generally see http://www.fsa.gov.uk/Pages/About/What/International/ucp/index.shtml

Note also that the OFT is the main enforcer under the CPRs, but there is an agreement between the OFT and the FSA on division of responsibilities for financial services matters-see Concordat between the OFT and FSA, November 2009, at https://webmail.dmu.ac.uk/exchweb/bin/redir.asp?URL=http://www.fsa.gov.uk/pubs/other/concordat_fsa_oft_08.pdf.

16 FSA, Reforming Conduct of Business Regulation (CP 06/9).

17 Each of these will tend to contain a large number of rules and sub rules dealing with the relationship from the stage of advertising and promotion, through advice, sales, information disclosure, assessment of suitability, performance, enforcement and dispute resolution.

18 http://fsahandbook.info/FSA/html/handbook/MCOB.

19 http://fsahandbook.info/FSA/html/handbook/ICOBS.


21 http://fsahandbook.info/FSA/html/handbook/CASS.

22 http://fsahandbook.info/FSA/html/handbook/BSOCS.

23 http://fsahandbook.info/FSA/html/handbook/COLL.
a regulatory guide, ‘The Responsibilities of Providers and Distributors for the Fair Treatment of Customers’ (RPPD); the general principles for business and the TCF Outcomes.

The ‘general principles for business’ are as follows:

1. A firm must conduct its business with integrity;
2. A firm must conduct its business with due skill, care and diligence;
3. A firm must take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems;
4. A firm must maintain adequate financial resources;
5. A firm must observe proper standards of market conduct;
6. A firm must pay due regard to the interests of its customers and treat them fairly;
7. A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading;
8. A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and a client;
9. A firm must take reasonable care to ensure the suitability of its advice and of discretionary decisions for any customer who is entitled to rely on its judgement;
10. A firm must arrange adequate protection for its client's assets when it is responsible for them;
11. A firm must deal with its regulators in an open and co-operative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice.

The ‘TCF Outcomes’ (see note 14 above) are as follows:

1. Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture;
2. Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly;

24 http://fsahandbook.info/FSA/html/handbook/CRED,
25 http://fsahandbook.info/FSA/html/handbook/DISP,
26 http://fsahandbook.info/FSAextra/4720.pdf. The function of the RPPD is to explain the application of the general Principles for Businesses and the TCF Outcomes.
3. Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale;

4. Where consumers receive advice, the advice is suitable and takes account of their circumstances;

5. Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect;

6. Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

**OFT Regulation**

Unsecured credit (as well as second or equitable charges over the borrower’s home) is regulated by the OFT under the Consumer Credit Act (CCA) 1974. OFT regulation at the prudential level is exercised through its licensing role. This includes the power to vary, impose conditions upon and revoke licences, as well as to issue regulatory guidance.

In 2006, a new provision on ‘unfair relationships’ was added as section 140 A of the CCA 1974, which, to re-emphasise the point above, does not cover first legal charge mortgages. If a relationship is ‘unfair’ within the meaning of the provision, there can be private law consequences. However, the provision can form the basis of preventive control over unfair practices. Enforcement action can be taken where the ‘unfair relationship’ (typically in the form of a systematic practice) harms the collective interests of consumers.

---

27 However, by 2012 the FSA is likely to have been replaced by the new Consumer Protection and Markets Authority (CPMA); which will take over regulation of second and equitable charges from the OFT. HM Treasury, Mortgage Regulation: A Consultation (2009), available at http://www.hm-treasury.gov.uk/d/consult_mortgage_regulation.pdf. In the 2010 Budget the government announced plans to take this approach.

28 CCA, ss. 25 and 29. This licensing role means that the CCA operates as a positive authorization regime in relation to financial service providers; although this is beyond the scope of this study.

29 CCA, ss. 31-33 and 33 A-E.


32 This includes ordering repayment of money by the creditor; requiring the creditor to do (or cease to do) anything in connection with the agreement; reducing or discharging money owed by the debtor or a surety; requiring the return of property to a surety; setting aside any duty owed by the debtor or a surety owed under this or a related agreement; altering the terms of the agreement; or directing accounts to be taken.

33 See Enterprise Act, ss. 211; and see OFT, Unfair Relationships-Enforcement action under Part 8 of the Enterprise Act 2002 (NB that an updated version is due in summer 2011).
Under the test, there may be an ‘unfair relationship’ based on the terms of the contract. This overlaps with the regimes on fairness of terms but extends beyond these in catching the interest rate (a term that would be a core term under the Unfair Terms in Consumer Contracts Regulations). However, there can also be an unfair relationship based on:

1. The way the lender has exercised or enforced his rights, or
2. Anything done or not done by the lender before or after the agreement.

In short, the test seems able to cover any form of unfairness from the ‘cradle to the grave’ of the relationship; or anything from the marketing or promotion stage, through negotiation, agreement, and performance, to renegotiation and enforcement.

The test has been heavily criticised for its breadth and vagueness. For instance it has been said not to ‘identify any badges of unfairness or, indeed, supply any meaningful criteria for identifying an unfair credit relationship’. At the same time, there is no doubt that it provides maximum flexibility.

**Comparing Levels of Protection under the Home Grown Regime(s) to Protection under the UCPD**

So, from the above overview, we can see that the broad question is whether or not the FSA general principles for business, the TCF Outcomes, the FSA Handbook rules and the ‘unfair credit relationships’ concept set higher standards of protection than the UCPD. It is not at all easy to answer this question:

---


35 S. 140A (1) (a).


37 S. 140A (1) (b).

38 S. 140A (1) (c).

39 House of Lords EU Committee 36th Report of Session 2005-6, Consumer Credit in the EU (HL 210-1) para 192; and, in similar vein, see the view of Professor R. Goode, suggesting that the vagueness deprives the test of much of its utility (at para 22).

40 P. Cartwright, The Vulnerable Consumer of Financial Services: Law, Policy and Regulation (2011), The Financial Services Research Forum, Nottingham University Business School, p. 12. Patel v Patel (above at note 34) shows the High Court taking into account a wide range of factors in finding a loan agreement to be unfair. This included the trust placed by the borrower in the lender, the poor record keeping of the lender and the inconsistent approach to keeping the borrower informed as to what was owed. Morrison and Morrison v Betterpace Ltd (Lowestoft County Court, unreported, September 1, 2009) again shows a variety of factors being taken into account in finding the agreement to be unfair: including failure to inform the borrower that the interest rate on a second loan was significantly higher than that on a previous loan and failure by the lender to update records (resulting in the borrower being charged for multiple default letters each month).
Firstly, due to the difficulty in making definitive comparisons between the often very open textured general principles for business, TCF Outcomes and ‘unfair credit relationships’ concept; and the similarly open textured (but differently worded) definitions of ‘unfair’ practices from the UCPD;

Secondly, due to the enormous volume of more specific rules contained in the FSA Handbook, supporting and complementing the more general FSA principles of fairness (see also the initial discussion of these specific rules above). The problem here is to say whether (as well as reflecting the broad FSA principles), these Handbook rules can be said to represent a natural ‘unpacking’ of the broader UCPD standards of fairness; or whether they go beyond this and provide greater protection;

And thirdly, due to the limited case law (at ECJ or UK national level) interpreting and applying the UCPD concepts in a way that would help to make the key comparisons identified above.

Despite these difficulties in making comparisons, the broad conclusion (which appears to be in congruence with the views of UK regulators and which it is worthwhile flagging up at this stage) is that the home grown standards may often set higher standards than the UCPD; and that full harmonisation in this field would be a highly retrograde step.

One important reason for this, as the discussion below highlights, is that there are a number of things that must be proven in order for there to be unfairness under the UCPD (such as that a given practice is likely to affect a consumer’s ‘transactional decision making’) that are usually not required for practices to fall foul of the home grown general principles and specific rules.

More accurately, against unfairness.

ECJ case law has tended simply to repeat the text of the UCPD tests and insist that Member States apply these tests in order to justify banning a practice that is not on the Blacklist in UCPD Annex I (see Joined cases VTB-VAB NV v Total Belgium NV (C-261/07) and Galatea BVBA v Sanoma Magazines Belgium NV (C-299/07); and MediaprintZeitungs- undZeitschriftenverlag GmbH & Co KG v Österreich-Zeitungsverlag GmbH (C-540/08). So far, no cases have reached the appeal courts (Court of Appeal and Supreme Court). Only a very few cases have even reached High Court level on the CPRs: OFT v Purely Creative [2011] EWHC 106 Ch, OFT v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch) and OFT v Peter Hall (available at http://www.oft.gov.uk/news-and-updates/press/2010/38-10). Only the Peter Hall case touches on financial services. It involved an injunction preventing Peter Hall from carrying out credit businesses and holding himself out as being entitled to do so. This was, inter alia, based on his intimidatory behavior; which would so clearly count as coercion under the UCPD as to not be of much help in addressing subtle points as to the precise boundaries of the UCPD concepts as compared with the home grown concepts.

On misleading omissions and actions and aggressive practices.

See interview with FSA, May 2011; interview with OFT, April 2011; and interview with Financial Ombudsman Service (FOS), May 2011. See also, UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.
a) Commercial practices in the area of financial services banned by national legislation which are not included in the Black List (Annex I) of the UCPD

Legislation, as such, does not ban practices in the financial services sector; (other than the copy out of the ‘blacklist’ in Annex 1 of the UCPD in Schedule 1 of the CPRs), which of course, applies to all sectors. However, one feature of the home grown regime described below is that (in those areas it regulates) the Financial Services Authority (FSA) has the power (derived from legislation) to make rules regulating commercial practices. These rules involve both providing for what must, in positive terms, be done; and what must not be done. The latter sort of rule is a form of ban. Such ‘bans’ are not on the UCPD blacklist; and they were not drafted based on the misleading or aggressive practice clauses from the UCPD. They were, rather, based on the general principles of fairness that underpin the FSA regime. One might list many hundreds of such rules. Clearly this is not practical; and, in any event, the point of the study is to analyse the extent to which national rules provide a higher degree of protection than the UCPD provisions, including the misleading and aggressive practice clauses. As such, the next section describes the general features of the home grown regimes; and then goes on to consider whether it offers a greater degree of protection than the UCPD in relation to misleading actions, omissions and aggressive practices. This analysis takes into account the general principles underpinning the home grown regime; as well as examples of the specific rules or ‘bans’ in the FSA Handbook.

b) National legislation regarding misleading actions

There are at least three ways in which the FSA and/or the OFT regimes just outlined may provide greater protection than the UCPD misleading action concept:

Firstly, violation of the UCPD ‘misleading action’ provision must involve information as to one of the matters on the list contained in Article 6 (1) (a)-(g), possibly an exhaustive list, which, although very broad in scope, does not necessarily cover every potential type of information.

However, a practice might be considered to be misleading, and therefore unfair under the FSA or OFT regimes despite not involving such information. FSA general principle 7 (see above) refers to the obligation to “communicate information to [consumers] in a way which is clear, fair and not misleading”; and this applies whatever the subject matter of the information. The CCA ‘unfair relationships’ test covers “anything done or not done by the lender before or after the agreement”. This clearly covers misleading statements; but, again, there is no restriction at all on the subject matter of the information.

Secondly, the question under the UCPD is simply whether the information is ‘misleading’. However, FSA general principle 7, as we can see, refers also to whether information is ‘fair’; raising the possibility of a more onerous obligation.

Lastly, under the UCPD, it is not sufficient to establish that the practice would mislead the average consumer. It must, in addition, be shown that the impact of the practice is or is likely to be such that the average consumer would take a
‘transactional decision’ different from that which they would take otherwise. This requirement can make a difference to whether a practice is unfair or not. For instance, a price or other charge that is understated by a few pence arguably still misleads the average consumer; but may be unlikely to cause him or her to contract for a service or product that they would not have bought in any case. If not, the understated price or charge will not be misleading under the UCPD.

In contrast, there is no need to establish the ‘transactional decision making’ element under either the FSA general principles or under the general unfair relationships test.

c) National legislation regarding misleading omissions

Here, there may be even more ways in which the FSA/OFT regimes are capable of giving greater protection than the UCPD.

(i) The UCPD test turns on whether the information is ‘material’ and is ‘needed’ by the ‘average consumer’. There is no such explicit requirement under the CCA unfair relationships test; and the TCF says simply that consumers should be provided with “clear information and ... kept appropriately informed”.

More specifically, the general Handbook provides that information:

“is accurate and in particular does not emphasise any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks”.46

It seems at least possible that more risks are ‘relevant’ (as required here) than are necessarily ‘material’ (as under the UCPD). Further, even if the risks are material, disclosure is only required under the UCPD where this information is ‘needed’ by the ‘average consumer’; and these needs are measured on the basis that this average consumer is ‘reasonably well informed, reasonably observant and circumspect’.47 It seems very plausible that a risk could be ‘relevant’; but be considered to be one that such an informed, observant and circumspect consumer would be capable of working out for him or herself (so that it is not ‘needed’ for an informed decision and, therefore, failure to disclose it is not a misleading omission under the UCPD).

(ii) Again, the UCPD concept turns on whether the omission is likely to be such that the average consumer would take a ‘transactional decision’ different from that which they would take otherwise.48 As indicated above, there is no such requirement in the FSA general principles or under the CCA unfair relationships test;

---

45 UCPD, Article 6 (1).
47 UCPD, Preamble, recital 18/UTCCR, reg 2 (2).
48 Article 7 (1).
(iii) The Insurance Handbook imposes various requirements to provide ‘oral’ disclosure as to the characteristics, benefits and risks of a policy.\(^{49}\)

There appears to be some uncertainty as to whether such information could always be said to be ‘needed’ or ‘material’ under the UCPD test.\(^{50}\) Again, the particular problem may be that it can often be arguable that the ‘reasonably well informed, reasonably observant and circumspect’ consumer is capable of working out for him or herself at least some of the information about which oral disclosures must be made.

(iv) The FSA wrote to the payment protection insurance industry to remind them of common failings at the point of sale which had come to the FSA’s attention through thematic work, mystery shopping and enforcement actions. One of these failings was that:

“The firm did not take reasonable steps to ensure the customer only bought a policy for which he was eligible to claim benefits”.\(^{51}\)

Again, there is at least room for debate (which seems to be shared by the FSA\(^{52}\)) as to whether information as to eligibility would necessarily be ‘needed’ or ‘material’ under the UCPD test.

(v) It has been decided recently in a case involving ‘payment protection insurance’ that there was an ‘unfair credit relationship’ under the CCA based on the failure of the trader to disclose (a) that he received a commission for the sale and (b) that the consumer was free to look elsewhere for such insurance.\(^{53}\)

It cannot be said with certainty that failure to disclose these matters would have fallen foul of the misleading omissions clause. Is such information (particularly as to the commission) said to be ‘needed’ as required under the UCPD test?

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence

Again, there are several ways in which the home grown standards may be more protective than the UCPD/CPRs.

(i) There are a cluster of requirements that are specific to the UCPD/CPRs ‘aggressive practices’ clause that do not need to be established for there to be


\(^{50}\) See interview with FSA, May 2011.

\(^{51}\) Consultation Paper 10/6, The assessment and redress of Payment Protection Insurance complaints Feedback on CP09/23 and further consultation, Appendix 3, Point 6. N.B. also that the problem of mis-selling of PPI seems to have arisen in both advised and non-advised sales.

\(^{52}\) See interview with FSA, May 2011.

\(^{53}\) MBNA v Thorius, above at note 34; but see also the recent Court of Appeal case of Harrison v Black Horse [2011] EWCA Civ 1128, where it was held that there was no unfairness under s.140A CCA where the lenders failed to disclose that they had received commission for selling PPI.
unfairness under the FSA or CCA regimes. These requirements may mean that the FSA and CCA regimes provide a higher level of protection than the UCPD/CPRs regime. So, under the UCPD/CPRs, one route to establishing an aggressive practice is to show that there is ‘coercion or harassment’ leading to an actual or likely ‘significant restriction’ on the average consumer’s ‘freedom of choice or conduct’.54 Otherwise, it must be shown that there is ‘undue influence’; for which it must be shown that there is ‘exploitation’ of a ‘position of power’ through ‘pressure’, which ‘significantly’ impairs (or is likely to so impair) the average consumer’s ‘freedom of choice or conduct’; specifically, here, by ‘significantly’ limiting the ability of this average consumer to take an ‘informed decision’.55

None of these criteria are mentioned in discussing fairness/unfairness in general under the FSA/CCA regimes. So, it is plausible that practices (pressure selling, aggressive enforcement etc) might fail to meet these particular UCPD/CPRs criteria; but still be sufficient to amount to unfairness under the more open textured FSA and CCA regimes.

(ii) Again, there is the requirement of ‘transactional decision making’ which applies to all UCPD/CPRs concepts. In the case of any practice claimed to be aggressive under the UCPD/CPRs provisions, it must be shown that the result of the coercion, harassment or undue influence would be or be likely to be that consumers would take a transactional decision different to the one they would have taken otherwise.56 The concepts of fairness under the FSA and CCA regimes do not contain such a requirement. So, there could be aggressive behaviour that is of a more one sided, unilateral nature, where the business simply imposes a detrimental outcome on a consumer or withdraws a service from a consumer. This has the potential to be viewed as unfair under the general FSA concepts of fairness and the CCA ‘unfair relationships’ test; but it would be more difficult to show that it affects consumer transactional decision making as such (as required under the UCPD).57

(iii) Finally a ‘case study’ on the issue of complaints handling also seems to highlight the greater scope for protection from aggressive practices offered by the FSA regime in particular compared with the UCPD.

First of all, the general TCF Outcomes include the provision that:

54 Article 8.
55 Arts 8 and 2 (j).
56 UCPD Article 5.
“Consumers [should] not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint”.  

In contrast, the guidance on aggressive practices under the UCPD refers to taking into account: “any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract”.  

It is immediately noticeable here that there is no explicit reference to the situation of making complaints as such; so this might cast some doubt on the effectiveness of the aggressive practices clause to deal with this. Of course, it is a general clause; and not to be unduly restricted by the guidelines. Nevertheless, we must bear in mind that, in practice, such guidelines will often provide a strong steer for regulators; and influence the compliance culture of traders.  

Turning now to more specific guidance in the FSA Dispute Resolution and Complaints Handbook, it is provided that, in assessing complaints about payment protection insurance:

- The firm should consider, in the light of all the information provided by the complainant and otherwise already held by or available to the firm, whether there was a breach or failing by the firm;
- The firm should seek to establish the true substance of the complaint, rather than taking a narrow interpretation of the issues raised, and should not focus solely on the specific expression of the complaint. This is likely to require an approach to complaint handling that seeks to clarify the nature of the complaint;
- A firm may need to contact a complainant directly to understand fully the issues raised, even where the firm received the complaint from a third party acting on the complainant’s behalf. The firm should not use this contact to delay the assessment of the complaint;
- Where a complaint raises (expressly or otherwise) issues that may relate to the original sale or a subsequently rejected claim then, irrespective of the main focus of the complaint, the firm should pro-actively consider whether the issues relate to both the sale and the claim, and assess the complaint and determine redress accordingly;
- If, during the assessment of the complaint, the firm uncovers evidence of a

58 TCF Outcome 6—see text above and see note 14 above.
59 UCPD, Article 9 (d)/UTCCR reg 7 (2) (d).
60 DISP Appendix 3; and see also now the FSA power to require firms to set up redress schemes (FMSA, ss. 404 and 404A, amended by Financial Services Act 2010, s. 14).
breach or failing not raised in the complaint, the firm should consider those other aspects as if they were part of the complaint;

- The firm should take into account any information it already holds about the sale and consider other issues that may be relevant to the sale identified by the firm through other means;
- The firm should consider all of its sales of payment protection contracts to the complainant in respect of re-financed loans that were rolled up into the loan covered by the payment protection contract that is the subject of the complaint. The firm should consider the cumulative financial impact on the complainant of any previous breaches or failings in those sales.

Various, rather protective, themes run through this guidance: not taking narrow, self-interested interpretations of issues; being proactive in investigation and communication with the consumer; and taking a broad, sympathetic view as to the overall impact on the customer.

There must be at least some doubt as to whether failing on these rather demanding approaches to dispute resolution would be sufficient to amount to ‘coercion’ or ‘harassment’; or even a violation of the overarching professional diligence clause. So, again, it is quite possible that if the UCPD aggressive practices standard represented the maximum level of protection in the context of dispute resolution, there is a strong possibility that this might necessitate a reduction in protection as compared with what is provided for in the FSA Handbook.

e) Other national legal provisions on unfair commercial practices in the field of financial services

This section highlights rules dealing with practices that may not fall into either the misleading or aggressive practices categories because they either do not necessarily involve misleading or aggressive conduct and/or they do not involve an actual or potential ‘transactional decision’ by consumers.

At a general level here, we should remember that both the FSA principles and the CCA test refer generally to acting in a ‘fair’ manner (FSA) or not being ‘unfair’ (CCA). This may catch behaviour that is not, as such, misleading or aggressive. Further, as has been mentioned already, neither the FSA or CCA concepts require transactional decision making to be an actual or likely consequence of the practice.

A particular example may illustrate the point. The Insurance Sourcebook provides that insurers should not reject a claim based on consumer non-disclosure of material facts where the consumer could not have been reasonably expected to disclose the facts or where he or she has not been negligent in not disclosing the facts.61

Again, it may be that the FSA may doubt whether this is covered by the UCPD. There seems to be legitimate cause for this concern. Rejection of a claim is certainly not ‘misleading’; and it is at least questionable whether it is ‘aggressive’. Finally, it may be difficult to conclude that it leads to a ‘transactional decision’ by consumers. Consumers, rather, are simply left without a claim.

10.2.1.3 The concept of “consumer” applied in financial services compared to the concept of “consumer” in general

Again, it seems that the home grown concepts may be more protective than the UCPD.

(i) Running through all the UCPD clauses is the requirement that the practice must affect or be likely to affect the ‘average consumer’, this being understood as a consumer that is ‘reasonably well informed, reasonably observant and circumspect’. By contrast, neither the FSA nor the CCA regimes are based on such a test. It would be open, for instance, under these provisions, to routinely assess the impact of a practice by reference to the impact on more vulnerable consumers; or even if the average consumer is the measure, to consider the average consumer not to be particularly observant or circumspect, or to be no more than a ‘passive glancer’.

(ii) The UCPD average consumer yardstick is varied to the average member of a ‘clearly identifiable group’ that is ‘particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee’. However, it is not clear if this extends to taking into account the poor financial literacy of some consumers; that is whether they can be said to suffer from ‘credulity’. This could be very significant in providing the basis

62 See interview with FSA, May 2011.
63 Arts 5-8.
64 UCPD, Preamble, recital 18/UTCCR, reg 2 (2).
65 The FSA and CCA regimes are not even restricted to private consumers in the general (‘EU’) sense of those buying for private purposes. The ‘customer’ notion under the FSA regime extends to all customers; and, although, levels of protection are adjusted to different needs, there is no ‘well informed etc’ consumer model. At the same time the FSMA, s. 5(2) sets out factors that the FSA must have regard to when considering what degree of consumer protection may be appropriate (including, for example, the general principle that consumers should take responsibility for their decisions).

The CCA regime protects small businesses as well as the classical ‘EU consumer’ (CCA ss. 8 and 15); and there is no ‘well informed etc’ consumer model.


67 Article 5 (3). One important aim here is to provide protection to those suffering from mental incapacity. On this, see the Mental Capacity consultation (OFT 1293con), available at http://www.of.t.gov.uk/news-and-updates/press/2010/127-10.
for the application of higher standards of fairness (better information, more explanations, a lower acceptable threshold of pressure in selling) for such consumers. Certainly, there is no provision in the UCPD test to take account of the poverty of categories of consumers; and the extent to which this makes the impact of the practice more serious. The provision, to reiterate, simply allows for account to be taken of ‘mental or physical infirmity, age or credulity’; factors going into decision making capabilities and how such capabilities might be affected by trader practices. So, it does not allow for account to be taken of factors (such as poverty) that cause a practice to have a more significant impact than it would have on the average consumer.68

The FSA and CCA regimes, not being restricted in these ways, could set a higher standard by taking into account lack of financial literacy and poverty.

10.2.1.4 Level of protection provided by national legislative framework compared to UCPD

The above discussion shows that, in a number of ways, the UCPD may not offer as high a level of protection as the home grown FSA and CCA concepts of fairness. The broad reason for this is that the UCPD concepts tend to contain requirements (such as ‘transactional decision making’, ‘materiality’, or ‘coercion’) that do not, as such, need to be established in order to justify controls on practices under the FSA/CCA regimes.

There is a final, broader point; which may be very important to the regulators.69 The risk that the home grown regime sets higher standards than the UCPD might mean that, if full harmonisation was extended to financial services, the home grown regime would have to be set aside. It would surely be unstable as a regulatory regime if it was constantly at risk of challenge on the basis that it provided greater protection than the UCPD; and if this was not an issue that could easily be resolved either way.

Yet, the specific rules in the FSA Handbook provide a vital certainty for the FSA as a regulator and for firms seeking to comply with the regime; in that they tell firms in positive, detailed terms, what they must do. In addition, these rules tend to be better known and understood by regulators and businesses.

These enforcement and compliance benefits would be seriously undermined if such positive, detailed and specific rules were removed, leaving only the UCPD general clauses and the relatively short black list, which (notwithstanding their restrictions) are very broad in character and which focus on what must not be done, rather than on what, in positive terms, should be done.


69 See interview with FSA, May 2011; Interview with OFT, April 2011; UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.
10.2.2 Most common unfair commercial practices in the area of financial services

10.2.2.1 Description of the most common unfair commercial practices

(i) Mis-selling of Payment Protection Insurance (PPI)

In terms of scale, frequency and consumer losses this has been by far the most problematic practice in recent years in the UK. For instance, figures from the Financial Ombudsman Service (FOS) show that 51% of all the complaints made to them in 2010 related to PPI. This is a much bigger percentage of overall complaints than is the case with any other form of practice. It amounted to 104,597 complaints. The PPI complaints statistics have been consistently very high in recent years; but the 2010 figures are the highest yet.

About 75% of the complaints seem to have been about the way in which the PPI has been sold. A key issue is often that of ‘eligibility’ (or, rather, lack of it), that is the policy is not suitable for the consumer. This is typically because there is very restricted eligibility to claim under it; so that the consumer finds that he or she is not covered for the sort of things they might have expected to be covered for. Another issue arising is that consumers may be given the impression that they have no choice but to take out the PPI policy.

In terms of the impact on consumers, the research tends to highlight financial and confidence losses. Not surprisingly, based on the numbers of consumers affected, and the fact that the policies could involve paying premiums over a long period of time, it has been estimated that the overall figures in terms of financial losses run to ‘billions’ of pounds. Of course, the other forms of loss are more difficult to measure. However, it is

70 Financial Ombudsman Service (FOS), Annual Review, 2011, p. 32; and UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services. Note also here that (after PPI at 51%) complaints about banking and credit were the second highest for the FOS (at 31%) (Annual Review, 2011, p. 34). However, 45% of these were about charges and, in practice, this is an issue of the fairness of the contract terms under the Unfair Terms Directive/UK Unfair Terms in Consumer Contracts Regulations 1999, rather than a commercial practice issue as such under the UCPD. The remainder of the complaints divide into four separate categories that are not large in themselves and do not easily translate into particular commercial practices.

71 Ibid.

72 Ibid; and also see statistics reported in the response to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.

73 Responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services. It is worth noting here that the problem of mis-selling also applies still in relation to endowment policies sold with mortgages; and again a key issue is ‘eligibility’, that is the ability (or, rather, the lack of ability) of the product to perform as the consumer would have expected. However, this is not nearly as big a problem as it had been some years ago, it only accounted for 1.5% of overall complaints to FOS on recent figures (see FOS, above, note 70, at p. 33).

74 See interview with FSA, May 2011.

75 UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.

76 UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.
plausible that being mis-sold a PPI policy would damage self-confidence as well as confidence in the financial services provider and possibly the sector more generally. Equally, it is plausible that distress would be caused where consumers find that they cannot claim on a policy, for example in circumstances where they become ill or unemployed; especially as this is likely to have come as an unpleasant surprise, having already made a significant financial outlay on premiums.

(ii) ‘Cold Calling’

This refers to the practice of making unsolicited contact with consumers to promote financial services. The problem, in broad terms is an invasion of privacy combined with the likely pressure to purchase without making a really free and informed choice. Cold calling of credit services (including unsecured credit, credit brokerage, claims management and debt management services) is reported to be a very significant problem by the Citizens Advice Bureaux (CAB). Indeed, the problem is so significant that the CAB issued a ‘super-complaint’ in relation to the practice recently. It has separately been cited as one of the most common unfair practice (after mis-selling of PPIs). The scale and frequency is hard to find precise figures on. However, both seem to be very significant; given that the surveys carried out during the course of this study report significant enforcement and other action (including issuing guidance for businesses and consumers). Losses are cited as involving financial (obviously a large commitment may be made based on a cold call); time (time wasted when call made and later, for example, in dealing with problems); confidence (whether affected by being pressured or by later realisation of detrimental consequences); and impact on mental health (again, from the immediate stress of the cold call or later when running into payment problems).

(iii) Aggressive Debt Collection and Enforcement

This is reported to be a very significant problem in relation to mortgages, loans and credit cards. It can come in various forms: whether misleading the consumer about what is owed or about his or her rights, or what action can be taken against him or her;

77 UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.


‘Super-complaints’ can be made to the OFT by other enforcement bodies (such as local authority trading standards authorities, Citizens Advice or the FSA) where it is considered that features of a market are significantly harming consumer interests. The OFT must respond within 90 days indicating what action will be taken and giving reasons (see OFT, Super-complaints, available at www.of.t.gov.uk/OFTwork/markets-work/super-complaints/).


82 UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services; Interview with OFT, April 2011.
refusing to accept suggestions for compromises or payment plans; or harassing, threatening, or contacting the consumer at work or at night repeatedly or after having been asked not to. The scale and frequency are very significant. For instance, the CAB reported complaints figures of 18,286 (2008), 19,585 (2009) and 15,665 (2010). The CAB also reported significant losses in terms of financial loss, loss of confidence and mental distress.\textsuperscript{83} It is fairly self-evident that losses of this nature would result from aggressive debt collection and enforcement. The financial losses may flow from paying what cannot be afforded; paying it before it can be afforded; or paying what, in some cases, is not even owed (where the consumer has been misled as to what is owed). Further, loss of self-confidence and confidence in the firm and the sector, as well as mental distress, are all quite likely to result from aggressive enforcement; especially when the consumer is, by definition, already in financial difficulty.

Other unfair practices reported by respondents include credit being lent irresponsibly, inappropriate advice being given, failure to abide by the terms of voluntary codes of conduct and misleading use of terms such as ‘guaranteed’. For more information relating to common unfair practices reported by respondents to this study please see Annex 2.

10.2.2.2 \textit{Cross-border dimensions of most common unfair commercial practices}

The surveys suggest that there is no significant cross border dimension to the PPI, cold calling or aggressive enforcement practices.\textsuperscript{84}

10.2.2.3 \textit{Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation}

\textit{(i) Mis-selling of PPI}

The high complaint figures may be based on at least three factors:

1. PPI clearly became a very popular and profitable product in recent years and financial service providers rapidly became very effective at selling it. In addition, the range of those potentially affected is so huge; as PPI can be sold with so many everyday financial service products, such as credit cards, mortgages and loans. Even if a regulatory regime covers a problem, it is very difficult to have more than moderate success when the problem is based on such a widespread practice.

2. It will often be the case that the problem is only one that comes to light for consumers a few years after initial purchase. It may take this time for the consumer to fall ill, lose a job, or have a relationship breakdown; and therefore struggle to make the payments on the core product. It is only at this point that the consumer realises that the product does not cover the sort of things that he or she needs it to cover and expected it to cover. It is at this point that the complaint is made; so that the recent high figures are probably partly based on selling that went on several years ago.

\textsuperscript{83} UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.

\textsuperscript{84} UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.
3. It may be that a very significant factor in the high complaints figures is the role of claims management companies in driving forward the complaints process.\(^8^5\)

Given the above context, the home grown approach probably addresses the problems rather well. First of all, at the level of ‘high level’ general principle, we saw above that one of the FSA’s TCF Outcomes provides that:

“Where consumers receive advice, the advice is suitable and takes account of their circumstances”.\(^8^6\)

Also, we saw above that the FSA requires firms to take “reasonable steps to ensure the customer only bought a policy for which he was eligible to claim benefits”;\(^8^7\) and that the CCA ‘unfair relationships test’ has been interpreted such that it can be viewed as unfair not to point out to the consumer that he or she was free to look elsewhere for such insurance.\(^8^8\) The FSA also address this latter issue. They cite as a ‘common failing’ when a firm

“leads the consumer to believe that the payment protection policy had to be taken in order to obtain the loan (or other goods or services) or would improve his prospects of doing so; … or [the firm does] not disclose to the customer, in good time before the sale was concluded, and in a way that was clear, fair and not misleading, that the payment protection policy was optional”.\(^8^9\)

Further, taking into account PPI issues is subject to specific FSA guidance that seeks to improve the fairness of the approach of firms to dealing with complaints about PPI. More specifically, the FSA has issued guidance recently seeking to improve the fairness of the approach of firms to dealing with complaints about PPIs.\(^9^0\) This guidance was challenged in the High Court by the British Bankers Association (BBA); the challenge failed,\(^9^1\) and it

\(^{8^5}\) See This is Money, Ministry of Justice to target ‘high risk’ PPI management firms as complaints surge, 20 July 2011, at http://www.thisismoney.co.uk/money/cardsloans/article-2016803/Ministry-Justice-target-high-risk-PPI-management-firms-complaints-surge.html.

\(^{8^6}\) Principle 4 at 1.2.1.2 above; and also (at 1.2.1.2) see the the FSA Principle for Business 9 on the ‘suitability of advice’.

\(^{8^7}\) Consultation Paper 10/6, The assessment and redress of Payment Protection Insurance complaints Feedback on CP09/23 and further consultation, Appendix 3, Point 6.


\(^{8^9}\) Consultation Paper 10/6, The assessment and redress of Payment Protection Insurance complaints Feedback on CP09/23 and further consultation, Appendix 3, Point 1.

\(^{9^0}\) FSA, 10/12 The assessment and redress of Payment Protection Insurance complaints, August 2010, chapter 3 and Appendix 1, available at www.fsa.gov.uk/pubs/policy/ps10_12.pdf.

\(^{9^1}\) R (on the application of the British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin).
seems that the BBA will not appeal the decision;\textsuperscript{92} so that the guidance provides a stable basis for the future.

Surveys of regulatory bodies confirm that it is the above home grown concepts that are used to address the PPI issue, rather than the provisions of the UCPD, and that use of the UCPD would not have led to the same outcome with respect to consumer redress.\textsuperscript{93} This is most likely because regulators view application of the UCPD as less certain. This is supported by the questions raised above\textsuperscript{94} as to whether the UCPD provisions are capable of being understood as broadly as the home grown concepts. So, does failure to point out particular ineligibilities definitely amount to a ‘misleading omission’ under the UCPD; i.e. is this information that is necessarily always needed by the ‘reasonably well informed and reasonably circumspect consumer’ or is such a consumer expected to research some such questions him or herself?\textsuperscript{95} More generally, above we discussed uncertainties as to the scope of the UCPD ‘aggressive practices’ clause.\textsuperscript{96} Applying this to PPI, giving the impression that PPI is compulsory could of course be viewed as coercion or undue influence; in that there is a ‘significant’ restriction on ‘freedom of choice’ and/or the provider is taking advantage of his superior knowledge (his ‘position of power’) so as to apply ‘pressure’ and this leads to an ‘uninformed’ decision. However, it is hard to be certain that these various criteria would be satisfied. Again, much turns on what degree of personal responsibility is adjudged to be expected of the ‘reasonably well informed and reasonably circumspect consumer’. Nevertheless, one can certainly conclude that the home grown regime is more protective than the UCPD regime at least in the sense that (as just illustrated), it is much more focussed on the specifics of the PPI problem.

(ii) ‘Cold Calling’

As with PPI, a key reason for the prevalence of the practice is likely to be simply that it is very profitable; as large amounts of money can be made by signing consumers up to financial products with long term commitments. There will also often be a commission involved for the sales person. In addition, very large numbers of sales people will be involved at grassroots level; so, whatever the rules may provide for, it will always be difficult to control.

The problem, as indicated above, is an invasion of privacy combined with the likely pressure to purchase without making a really free and informed choice. The home grown regime takes a reasonably firm stand on cold calling (in the form of a call, visit or other

\textsuperscript{92} ‘In the interests of providing certainty for their customers, the banks and the British Bankers Association have decided that they do not intend to appeal.’ (BBA statement, BBC news, May 9, 2011).

\textsuperscript{93} UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in financial services.

\textsuperscript{94} See 1.2.1.3 above.

\textsuperscript{95} Ibid (b).

\textsuperscript{96} Ibid (c).
interactive dialogue). For example, under the FSA mortgage regime firms are not entitled to make an unsolicited promotion unless the consumer has an established existing relationship with the firm, such that the consumer envisions receiving unsolicited promotions. In order to count as a solicited promotion, the contact must take place only where it has been initiated by the consumer or is in response to an express request from the consumer. Further, it must be clear, in all the circumstances, that credit will be discussed.

The problem with the UCPD in this context is that it does not address cold calling per se. Of course, (UCPD defined) misleading actions or omissions or aggressive practices may take place (and are quite likely to do so) during a cold call. However, in general, it could not be said that there is a misleading action, omission or aggressive practice simply on the basis that the promotional call was unsolicited and there was no established existing relationship between the firm and the consumer. This would surely not be taken to mislead in itself, whether by action or omission. Also, it would not, of itself, necessarily amount to the sort of coercion or pressure or compromise on freedom of choice or informed decision making that would be required for there to be an aggressive practice.

(iii) Aggressive Debt Collection and Enforcement

This is obviously difficult to control; especially in current economic circumstances; and given that a lot of debt collection is likely to be delegated down to large numbers of third party firms; whose remuneration will depend, at least to an extent, on speedy recovery of the full amounts claimed to be owed. As indicated above, the problem could come in the form of misleading consumers about what is owed or about their rights or what action can be taken against them refusing to discuss reasonable solutions or payment plans; or it could involve harassing, threatening, contacting at work, at night etc.

The home grown regime addresses the problem of aggressive collection and enforcement in various ways. Section 40 of the Administration of Justice Act 1970 makes it a criminal offence to harass consumers with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject them or members of their family or household to alarm, distress or humiliation. It also covers misleading enforcement practices: it is an offence to falsely represent, in relation to the money claimed, that criminal proceedings lie for failure to pay it; to falsely represent

97 MCOB, see above, note 18, rules 3.7.1 and 3.7.3.


Note also that cold calling is of significant concern in relation to other products, such as investments; and similar FSA rules to those cited above exist in Chapter 4 of the Conduct of Business Sourcebook in relation to investment products. http://fsahandbook.info/FSA/html/handbook/COBS/4/8.

99 Administration of Justice Act, S. 40 (1) (a).
oneself to be authorised in some official capacity to claim or enforce payment; or to issue a document that is falsely represented to have some official character or purporting to have some official character which he or she knows that it does not have.\textsuperscript{100}

More broadly, any form of aggressive collection and enforcement could potentially amount to an ‘unfair credit relationship’ under s. 140 of the CCA.\textsuperscript{101} It seems that the OFT tends to deal with the issue often by reviewing the fitness of the business to hold a credit license.\textsuperscript{102} There is also a detailed OFT guide on the issue; which, inter alia, addresses the relationship between the rules and the Consumer Credit Directive of 2008.\textsuperscript{103}

Under the FSA regime, there are detailed rules in the Mortgage Handbook requiring, inter alia, generally fair treatment (enshrined in a written policy); communicating with the consumer and seeking to reach an agreement on alteration of payment schedules; seeking alternatives to repossession; not repossessing unless all other reasonable alternatives have failed.\textsuperscript{104}

Again, standards of protection would clearly be potentially compromised if this were all swept away and the UCPD ‘aggressive practices’ rule was all that was left. It is clear that there is more flexibility in the general ‘unfair relationships’ concept and the very broad licensing powers operated by the OFT; than under a regime where regulators were required to establish the specific requirements as to ‘coercion’, undue influence’, ‘freedom of choice’, impact on ‘transactional decision making’. Also, such concepts clearly do not provide the same level of certainty for regulators and firms as the detailed FSA Handbook rules (the Mortgage regime just cited contains 11 separate sections, many of these subdivided into further provisions).

All of this said, the UCPD aggressive practices concept is certainly a useful adjunct to the overall regulatory regime. The OFT have indicated that they are finding it a useful starting point to have the additional detail provided by the aggressive practices concept.\textsuperscript{105} The OFT guidance on aggressive practices under the UCPD certainly views the concept as covering making contact with consumers at unreasonable times or places (such as late at night or at work) or requiring consumers to discuss debts by making contact on premium rate lines.\textsuperscript{106} In addition, the OFT chose to use the UCPD misleading action concept as part of their successful case for an injunction against the

\begin{itemize}
\item \textsuperscript{100} Administration of Justice Act, s. 40 (1) (b)-(d)
\item \textsuperscript{101} See section 1.2.1.3 above.
\item \textsuperscript{102} Interview with OFT, April 2011.
\item \textsuperscript{104} See MCOB, above, note 18, rule 13.3
\item \textsuperscript{105} Interview with OFT, April 2011.
\item \textsuperscript{106} OFT/BERR Guidance, supra, note 4, at para 8.11. See also discussion of the scope of the aggressive practices concept in C. Willett, “Unfairness under the Consumer Protection from Unfair Trading Regulations”, supra, note 4, pp. 360-7.
\end{itemize}
Middlesbrough private landlord, estate agent and property management agent, Peter Hall. He had misled by claiming (incorrectly) to be properly licensed to provide credit under the CCA.\textsuperscript{107}

10.3 Immovable property

10.3.1 Legislative framework

10.3.1.1 National implementation legislation(s) of the UCPD

Unfair commercial practices affecting immovable property are outlawed by the Unfair Commercial Practices Directive enacted in 2005.\textsuperscript{108} As indicated above, this was implemented into UK law by the CPRs.\textsuperscript{109} Implementation took place across the United Kingdom, although it was a devolved issue in Northern Ireland and any amendment might now be devolved in Scotland and/or Wales as well.

English land has a complex tenurial system. Most houses are owned freehold, which is effectively absolute ownership, the same as \textit{propriété} or \textit{Eigentum}. Some houses and flats that are owned are leasehold, that is they are held for a long fixed period of years, usually at least 99 years and often 999 years; in flats the freehold and common parts are generally held by a management company. Both freeholds and long leaseholds are usually registered.

Leasehold property is generally subject to recurrent charges, a ground rent which is relatively low and a service charge which is paid to the management company to provide for the maintenance of the block. Service charges may lead to disputes and they can be operated abusively. For example in some blocks the freehold is retained by the original builder rather than being given to a management company representing the interests of all flat owners, and there is then an incentive to make a profit from the service charge, for example by dividing the cost of insurance premiums between the owners of the flats without accounting for commission on the premium. There are provisions to enable leasehold estates to be extended, though the extension has to be paid for.

Houses and flats are almost always bought with mortgage finance, and most are marketed by estate agents. Each party to a sale has separate legal representation from a solicitor or other conveyancer; the buyer’s conveyancer generally acts for the mortgage lender as well. Lenders invariably insist that the physical condition of the property is ascertained by a professional survey – this is in contrast to the practice elsewhere in Europe. A final characteristic of the English property market is the use of chains, by which the sale of one house is concluded on the same day that the seller buys his next house, chains often being six to ten transactions long.

The above applies across England, Wales and Northern Ireland, but the Scottish system is rather different, not least in its terminology. In Scotland private houses are normally sold by individual transactions without chains; this greatly reduces the organisation involved in conveyancing and generally means that a contract is concluded at an earlier stage, but it does mean that buyers must either sell their previous home first, leaving a period of time when they need to rent or incur the cost of bridging finance, or a period of

\textsuperscript{108} See footnote 1 above.

\textsuperscript{109} See footnote 3 above. Legislative competence is partially devolved in Scotland, Wales and Northern Ireland, but these regulations affect the entire United Kingdom.
time when they have two homes. The OFT found that consumers in Scotland may be more satisfied with the process and that the Scottish system has some advantages, including earlier commitment by the parties in the process and the Scottish Home Report, which includes a seller commissioned survey.\textsuperscript{110}

People holding a freehold or a long leasehold will regard themselves as owners. By way of contrast there is the rental market where residential accommodation is rented for a substantial rent (a rack rental). The market is divided into a public/social sector (mainly housing associations) and the private sector. Almost all private sector residential accommodation is let on assured shortholds, where the landlord has a guaranteed right of possession so security of tenure is strictly limited and rents should be set at market levels. There is scope for unfair practices in relation to finding accommodation, tenants’ deposits, and in the operation and termination of the tenancy. Legislation in the rental sector is similar across the United Kingdom.

\textit{Geographical spread}

An issue to be debated is the use of national consumer protection laws affecting the marketing of land.\textsuperscript{111} Normally when EU law exempts land specifically it does so on the basis that the land is immovable within the territory of the Member State in which it is situated. However the territorial reach of legislation concerned with marketing is much more complex. An English agent may market land sited in Spain and an English internet portal may be used by a consumer in Germany. The transaction might involve the sale of the land but also rental agreements, holiday lets and timeshares. (This discussion ignores the use of land as security). The UCPD includes land but allows greater consumer protection than the European base-line. Superficially the Directive would allow national legislation which controlled both marketing activities outside the national territory and marketing within the national territory of land situated elsewhere in Europe.

So it is necessary to consider the geographical reach of existing UK legislation. The main legislation in issue, the Property Misdescriptions Act 1991,\textsuperscript{112} defines its geographical reach elliptically. It prescribes certain matters which must be included in the particulars of sale of land. ‘Land’ is defined\textsuperscript{113} in relation to the estates in land bought and sold in England and Wales and Scotland. The official guidance suggests that one can extrapolate from this to find a restriction of ‘land’ to the territory of the United Kingdom

\textsuperscript{110} Home Buying and Selling – A Market Study (OFT, 1186, February 2010), 1.23.

\textsuperscript{111} Land includes buildings: Property Misdescriptions Act Guidance (Department of Business Innovation and Skills, 2011) p. 2. There is a general interpretative provision which gives an extended meaning to land, including buildings, land covered by water, estates and rights in land: Interpretation Act 1978, c 30, sch.

\textsuperscript{112}‘PMA 1991’, c 29; this was not devolved at the time of enactment in Wales and Scotland; it was a devolved matter in Northern Ireland but adopted by the devolved authority.

\textsuperscript{113} For England and Wales and for Northern Ireland this is by reference to the provisions of the Estate Agents Act 1979, c 38, s 2 to cover sales of freehold and of leasehold property having a capital value and for Scotland the reference is to the Land Registration (Scotland) Act 1979, which defines an interest in land to mean a heritable right over land, but excluding a lease which is not a probative lease exceeding 20 years.
and leading to the exclusion of the marketing of property elsewhere,\textsuperscript{114} although this interpretation is open to question.

\textit{Land as a product}

European consumer protection legislation had generally shied away from trying to control the marketing of land, but rules against unfair commercial practices marks a decisive shift away from this self-denying ordinance.\textsuperscript{115} The target is any practice affecting a product, a term with a broad natural meaning which is defined even more widely to embrace immovable property.\textsuperscript{116}

Since land is a product and since this term ‘product’ is an integral part of the definition of the commercial practices which the UCPD proscribes, the effect is to cover immovable property. In the UK implementation the natural definition of a product to include ‘any goods or service’ is similarly extended to include immovable property. Hence the national regulations “apply to the practices of traders concerned with the sale or lease of land to consumers”.\textsuperscript{117} The legislative technique is to take the wide meaning of ‘product’ as a component part of the definition of ‘commercial practices’,\textsuperscript{118} from which each of the specific unfair practices is defined. As a result any contravention within the UCPD is within the scope of the UK Statutory Instrument. Enforcement powers apply to land in the same way as to goods and other movables\textsuperscript{119} and criminal sanctions are attached to each of these forms of unfair commercial practice,\textsuperscript{120} with strict liability but subject to a defence of due diligence.\textsuperscript{121}

\textit{Rules of contract law}

This country report does not consider the impact of unfair commercial practices on contracts made after malpractice. UK law did not impose a statutory duty to avoid unfair commercial practices, so there is no direct civil remedy and the European regime does not directly affect the validity of contracts.\textsuperscript{122} Were things otherwise the UCPD would

\textsuperscript{114} Consultation on the Repeal of the Property Misdescriptions Act 1991 (Department of Business, Innovation and Skills, January 2011) [4.7].

\textsuperscript{115} P Sparkes \textit{European Land Law} (Oxford, Hart, 2007) [5.05-5.15].

\textsuperscript{116} UCPD Article 2(c). CPRs reg 2(1) ‘product’. In both cases the extension is to include ‘immovable property, rights and obligations.’ See also the discussion above at note 9 (and related text) as to ‘product’ covering also services.

\textsuperscript{117} Consumer Protection Unfair Trading – Guidance on the UK Regulations Implementing the Unfair Commercial Practice Directive (OFT/Department of Business, Enterprise and Regulatory Reform, 2008) [14.17], [14.18]

\textsuperscript{118} CPRs reg 2(1) ‘commercial practice’.

\textsuperscript{119} CPRs part 4, reg 19ff, Home Buying and Selling – A Market Study (February 2010, OFT, OFT 1186) [5.40] (England and Wales), [8.49] (Scotland).

\textsuperscript{120} CPRs regs 8-12. The maximum penalty for conviction on indictment is a fine and two years imprisonment. The Crown is not criminally liable but a person in the public service of the Crown could be.

\textsuperscript{121} CPRs reg 18.

\textsuperscript{122} UCPD recital (9), Article3(2); CPRs reg 29.
have required substantial changes to UK property laws, not least because of the temporal scope applying to commercial practices “before, during and after a commercial transaction in relation to a product”.\(^\text{123}\)

The Law Commissions in England and Wales and in Scotland are currently consulting on whether to provide a remedy in damages. It is particularly noteworthy that the initial proposal excludes land purchases (though it includes rentals), on the basis that almost all buyers are professionally advised.\(^\text{124}\) It has been pointed out in response to this consultation that the main use of a remedy in damages would be to protect against abusive service charge demands, and it remains to be seen what form of legislation will ultimately be recommended.

10.3.1.2 National legislation relevant for the field of immovable property

For goods the European standard is both a minimum and a maximum level of protection, a uniform standard across the internal market at least after a six year transitional period.\(^\text{125}\) The CPRs ensure a common European standard where there was previously no specific legislation in the UK. This has the twin aim of:

- A high level of consumer protection;\(^\text{126}\) and
- A consistent internal market with reduced costs of cross border marketing and promotions.\(^\text{127}\)

For land, national laws must reach the European base line but they do not have to stop there since more restrictive or prescriptive requirements can be imposed.\(^\text{128}\) The rationale is that “immovable property, by reason of [its] complexity and inherent serious risks, necessitate[s] detailed requirements, including positive obligations on traders”.\(^\text{129}\)

a) Commercial practices in the area of immovable property banned by national legislation which are not included in the Black List (Annex I) of the UCPD

None have been identified. National competence has instead been exercised in the following regards:

\(^{123}\) UCPD Article 3(1).


\(^{125}\) UCPD Article 3(5).

\(^{126}\) UCPD recitals (1), (2).

\(^{127}\) UCPD recitals (1), (2).

\(^{128}\) UCPD Article 3(9).

\(^{129}\) UCPD recital (9), Article 4,’Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive’. 
b) National legislation regarding misleading actions
The Property Misdescriptions Act 1991 does operate on misleading particulars issued by estate agents.

c) National legislation regarding misleading omissions
The Property Misdescriptions Act 1991 does not specify the content required in particulars issued by estate agents.

d) National legislation regarding aggressive practices, or the use of harassment, coercion and undue influence
Legislation falling into this category, and discussed below, covers estate agents, accommodation agencies and tenancy deposit schemes.

e) Other national legal provisions on unfair commercial practices in the field of immovable property
None have been identified.

10.3.1.3 The concept of “consumer” applied in immovable property compared to the concept of “consumer” in general
Unfair commercial practices are proscribed in the B2C pattern of transactions. The focus on consumer protection creates an inevitable dislocation between consumer and commercial sectors. It also creates a divide between marketing by professional agents and marketing by individuals (C2C as opposed to B2C), since only the former is covered. This is shown most markedly in the reach of the Property Misdescriptions Act 1991, though the same would be true of European-based legislation. This divide was reduced while all sellers of land had to produce Home Information Packs giving pre-contractual information at the time of marketing. This problem is under investigation by the Office of Fair Trading. Most initial marketing of land is now done through internet portals, though this is merely a new route to traditional estate agents which underlie these portals. Internet portals are generally closed to self-marketers, the reason offered being that they will not be subject to the full rigour of the regime that applies to professional parties.

10.3.1.4 Level of protection provided by national legislative framework compared to UCPD
Legislation affecting marketing of land to consumers is assessed as follows:

- Sales: Property Misdescriptions Act 1991;

130 UCPD Article 3(1); CPRs reg 2(1) ‘commercial practice’; and see the discussion above at notes 63-8 and related text on the ‘average consumer’ and other consumer benchmarks.

131 Apart from misleading business advertising, which is proscribed in the UK by the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

132 See below at 3.1.4.

133 Home Buying and Selling – A Market Study (OFT, 1186, February 2010), 1.5.

134 Home Buying and Selling – A Market Study (OFT, 1186, February 2010), 4.126.
Sales: Abandonment of the Home Information Pack;
Sales: Regulation of Estate Agents;
Rentals: Accommodation Agencies;
Rentals: Tenants' Deposits;
Timeshare.

Mortgages are discussed above in the context of financial services.

*Property Misdescriptions Act 1991*

The Property Misdescriptions Act 1991 requires information provided by an agent in particulars of sale to be accurate, but it does not state what information must be provided. So, although there is a major overlap with the CPRs, it is relatively easy to map the UK offences which are concerned only with misleading actions onto the European regime.

It became an offence for estate agents auctioneers and property developers, when selling property, to make false or misleading statements about property being offered for sale. An order lists 33 specific matters, including:

- Location, aspect, outlook;
- Services;
- Measurement and sizes;
- Forms of construction and fitness;
- Repairs, improvements and treatments;
- Conformity to standards;
- History;
- Outgoings and service charge, council tax;
- Planning and building controls; and
- Rights over and in favour of neighbouring land.

Both European and UK schemes provide criminal sanctions and comparable enforcement regimes and in neither case does a breach directly affect the validity of any resulting contract.

---

136 As opposed to conducting conveyancing.
138 Strict liability for offence subject to due diligence: PMA 1991 s 2.
It is difficult to understand the official view that the two are not directly comparable.\textsuperscript{141} Clearly the unfair commercial practices regime is wider, so for matters such as the unauthorised use of logos by estate agents prosecutions must occur under the Consumer Protection Rules,\textsuperscript{142} and also when a blacklisted practice occurs. Within the area of estate agents’ particulars, the European based scheme applies both to sins of omission and to sins of commission: it might be an unfair commercial practice to neglect to refer to known physical defects reported in an adverse survey. The overlap occurs where positive statements are made in the particulars of sale of a property issued by an estate agent. The UK Act does not say what information must be given\textsuperscript{143} but merely says that information that is given must not be misleading and so fits only into that part of the European regime which deals with misleading actions.\textsuperscript{144}

In this small area there is a significant difference in the operation of the two schemes. An offence occurs under the Property Misdescriptions Act when particulars of sale are false to a material degree; under the CPRs a commercial practice is only unfair if it causes an average consumer to take a different transactional decision.\textsuperscript{145} (Neither scheme requires proof that a specific consumer saw and was misled by the particulars). The transactional decision test is ‘principles based’ and much less specific than the checklist of potential property misdescriptions. An analysis by the Department of Business Innovation and Skills has concluded that most cases enforced under the Property Misdescriptions Act could equally have been prosecuted under the Consumer Protection Rules. A breach of the former is easier to prove: if room dimensions are stated wrongly it is necessary only to show that the mistake is material and not necessary that it would put off the average consumer.\textsuperscript{146}

Although, the Government is leaning towards repeal of the sector specific legislation,\textsuperscript{147} it appears that there is a broad consensus among consultees that the specific UK legislation should continue.\textsuperscript{148} If a repeal is decided upon, there may be extra guidance

\textsuperscript{139} PMA 1991 s 3, sch. The general view is that the CPRs involve more expense but mainly because of unfamiliarity. PMA Repeal Consultation [6.19ff].
\textsuperscript{140} PMA 1991 s 1(4).
\textsuperscript{141} Consultation on the Repeal of the Property Misdescriptions Act 1991 (Department of Business Innovation and Skills, January 2011) Evidence Base p. 35.
\textsuperscript{142} PMA Repeal Consultation [5.9], [6.14].
\textsuperscript{143} Contrast the specification of what information is material to an invitation to purchase under EU law: UCPD Article 7(4).
\textsuperscript{144} UCPD Article 6. It is difficult to see why enforcement costs should be increased by having to assess which article of the UCPD applies.
\textsuperscript{145} UCPD Article 6(1); CPRs reg 3(1).
\textsuperscript{146} PMA Repeal Consultation [6.11]
\textsuperscript{147} PMA Repeal Consultation [2.5].
\textsuperscript{148} Examples are the responses on behalf of Which?, the consumers organisation, the Trading Standards Institute,
on the application of the unfair commercial practice regime to estate agents particulars. The UK test which criminalises any material misdescription is not really applying a higher standard but is running counter to the ethos of the European regime. This is because the UK regime favours liability arising from the making of a misstatement whereas the European regime confines itself to statements and to errors (in such statements) that would impact on the mind of an average consumer; the UK bar is not set higher but in a different place. On the other hand, consumers are better protected by having a specific list of matters which must be right, since less wriggle room is left for estate agents facing prosecution for producing inaccurate particulars.

It is submitted that it would be better to enact the specific list of factors to be considered within the unfair practices legislative structure. This would improve the coherence of UK law whilst retaining the advantages of specificity. It is open to doubt whether any significant cost savings from a repeal have been identified.149

**Home Information Packs**

These were required between 2007 and May 2010 when domestic property was put on the open market for sale in England.150 It included an energy performance certificate, local authority searches, title documents, guarantees and a property information questionnaire. These requirements are now suspended apart from the energy performance certificate. The initial rationale was to reduce broken sales arising from defects in properties found by surveys conducted after a sale had been agreed, but the implemented packs did not include surveys. In practice packs added to the up-front cost of marketing houses and were rarely referred to by potential purchasers. However, the real problem was that they were introduced when the market had begun to slow, and there was therefore a significant problem of packs becoming out of date. The coalition government suspended the packs soon after their election and will repeal the underlying legislation.151

This legislation set out disclosure requirements in marketing land and therefore corresponded to the misleading omissions of the unfair commercial practices regime. The UK legislation on Home Information Packs would seem far to exceed the European base line that an invitation to purchase should specify the main characteristics of the product, since it required detailed information and could cost up to £450 to produce. It follows that the legislation depended upon the ability of Members States to impose more representing enforcement authorities, and the Property Ombudsman.

---

149 PMA Repeal Consultation [7.1ff]; the Regulatory Policy Committee (18 November 2010) found the estimated £4.1M costs of compliance unreliable.


151 Suspended with effect from 21st May 2010 by the Coalition government (apart from the need for an Energy Performance Certificate) and legislation will follow.
prescriptive requirements in the field of immovable property,¹⁵² that detailed requirements could be imposed including positive requirements on traders, and this is permitted provided the object was to ‘protect the economic interests of consumers’.¹⁵³ However, it is not proposed to discuss this further since the scheme is no longer in use.

Regulation of Estate Agents

At the time of the implementation of the Unfair Practices Directive the UK housing market involved 1.6 million sales a year with a monetary value of £361 billion, though it has fallen back since with the economic downturn.¹⁵⁴ The sector is serviced by 14,500 residential estate agents.¹⁵⁵

Legislation affecting estate agents is the Estate Agents Act 1979, as amended most recently by the Consumers Estate Agents and Redress Act 2007. Part of this legislation overlaps with the unfair commercial practices regime. This is mainly in connection with:

- Information in advance about the basis of business (eg sole agency) and charges: an estimate of charges and how these are calculated;
- Information to prevent conflicts of interest – estate agents must disclose any connection to people (such as lenders, insurers and removal firms) providing additional services and declare any personal interest in transactions;
- Handling negotiations – estate agents must not make misleading statements about offers received.

Enforcement powers include warning orders and prohibition orders. Estate agents handling residential property are now required to be a member of an approved redress scheme.¹⁵⁶ This is in addition to rules governing professional conduct such as for example holding deposits in a client account. When the UCPD was implemented the legislation on estate agents was not seen as being in conflict with the new European regime, so its continuance was not seen as being reliant on the minimum harmonisation for immovables proviso.¹⁵⁷ It is a regime laying down professional standards is the same way that, say, the solicitors’ profession is regulated. The OFT produced draft guidance on the applicability of the CPRs and the Business Protection from Misleading Marketing Regulations 2008 (BPRs) to estate agents and others in relation to the buying or selling of property or land in the UK in December 2011.¹⁵⁸

¹⁵² UCPD Article 3(9).
¹⁵³ UCPD recital (9).
¹⁵⁴ Home Buying and Selling – A Market Study (OFT, 1186, February 2010), 1.1.
¹⁵⁵ Home Buying and Selling – A Market Study (OFT, 1186, February 2010), 1.2.
¹⁵⁶ Estate Agents Act 1979 s. 23A, as amended by the Consumers, Estate Agents and Redress Act 2007, c17, s. 53, sch. 6, as from 1st October 2008.
¹⁵⁷ UCPD Article 3(9).
Accommodation Agencies

The Government carried out an extensive analysis of existing legislation before implementation of the Unfair Commercial Practices Directive, which identified the Accommodation Agencies Act 1953 as the only legislation requiring scrutiny in this sector. This makes it an offence for any person to demand or accept payment for various activities in the course of running an accommodation agency, that is (a) registering the name and requirements of a person seeking a tenancy of a house, (b) supplying particulars to houses to let to those seeking accommodation and (c) listing a property as to let without the owner’s authority. The Act remained unrepealed in 2007 because it was concluded that these activities, especially (a), would not necessarily be treated as unfair commercial practices, but that in any event they were within the immovable property exception. Repeal of these provisions would enable agencies to charge people, using up money that was likely to be needed to take up the tenancy, and so the provisions served a useful purpose of deterring the exploitation of low-income people desperately seeking somewhere to live.

Tenancy Deposits

Since the unfair practices implementation, new legislation has required tenancy deposits to be held in a tenancy deposit scheme. This applies to any deposit taken by a landlord or letting agency for an assured shorthold tenancy (and now corresponding Scottish equivalents). When a deposit is paid, the landlord must pass it to an authorised deposit holder and notify the tenant which scheme is being used within 14 days. At the end of the tenancy either the parties agree about how the deposit is to be returned or any dispute will be resolved by alternative dispute resolution. Sanctions for non-compliance include some restrictions on repossession and the landlord being ordered to pay the tenant triple the amount of the deposit as a penalty. The author has not traced any specific consideration of the EU Directive in this context, but it seems clear that the schemes provide a high level of consumer protection in the field of immovable property.

Timeshare

A new timeshare directive was adopted in 2008, and this has led to repeal of all existing UK legislation and the adoption of a single regime copying out the European model.

---

159 Consultation on Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation (DTI, December 2005, URN 05/1815); Summary of Responses (DTI, June 2006, URN 06/1243).

160 Statute 1953 c 23, s1(1) paras (a)-(c).


163 Timeshare Directive 2008/122/EC.

10.3.2 Most common unfair commercial practices in the area of immovable property

10.3.2.1 Description of the most common unfair commercial practices

Information was collected from the Office of Fair Trading, the Property Ombudsman and the consumers’ organisation Which?. The main target is the house sales market.

House sales

The Office of Fair Trading identified misleading claims and omissions by estate agents as the most prevalent unfair practice in relation to land. Their statistics revealed 1,013 complaints in 2009 and 888 in 2010. The Property Ombudsman found the most common misdescriptions to relate to aspect, room size, access and glazing. The fact that these two categories are grouped together in the official statistics is most interesting: misleading claims are within both CPRs and PMA whereas misleading omissions can only be covered by the European inspired CPRs. This rather begs the question whether the PMA is adequately drafted, or whether it needs both to specify what must be accurate in estate agent’s particulars, but also a minimum content they should have.

After that the next largest category of complaint was substandard services by estate agents; the OFT logged 1,443 such complaints in 2009 and 1,383 in 2010. This category would include many matters not covered within the European prohibition on unfair practices, which does not govern the standard of service provision. The Property Ombudsman received a significant number of claims arising from a failure by agents to clarify the fees basis; to the extent that these complaints were justified they clearly fell within the national Estate Agents Act 1979; some but not all might have fallen within the UCPD scheme.

Finally the OFT identified the business practices of estate agents. They received 778 complaints in 2009 and 726 in 2010. These could, if differently categorised, fall within the CPRs. Which? thought there were a significant number of cases where estate agents did not disclose a reason (such as a personal connection or interest) for recommending a particular offer; such complaints would clearly be dealt with under the national Estate Agents Act 1979.


168 The Property Ombudsman response to the Civic Consulting survey on the application of Directive 2005/29/EC in immovable property, Q82. They received 113 complaints in 2009 and 235 in 2010.


Rentals

The main information collected relates to the house sales market. Nevertheless the OFT statistics did include issues arising from rentals. The most important complaint (ranked first in lettings and second in the whole field of immovables) was substandard service by letting agencies. They identified 1,553 such complaints in 2009 and 1,727 in 2010.\textsuperscript{171} This category would include many matters not covered within the European prohibition on unfair practices, which does not govern the standard of service provision.

For more information relating to common unfair practices reported by respondents to this study please see Annex 2

10.3.2.2 Cross-border dimensions of most common unfair commercial practices

Little statistical evidence is available beyond the well-documented problems in timeshares. There may not be a clear route to redress; for example the jurisdiction of the Property Ombudsman is limited to land in the UK. Anecdotal evidence is clear that UK buyers of overseas property encounter significant problems because the information they are given when buying second homes abroad is not adequate to avoid major problems created for example by the zoning laws in Spain or by the problems with obtaining title deeds in Cyprus (see section on common unfair practices for further information). It is not clear that aggressive marketing of land for sale is a problem, as it was with timeshare marketing before European intervention. It is beyond the scope of this study, but applicable law and jurisdiction rules both present problems.

10.3.2.3 Assessment of whether such practices are adequately covered either by the provisions of the Directive or by more prescriptive national legislation

The response from consumers’ association \textit{Which?} suggests that there are both gaps in the UCPD and a lack of use of existing provisions by enforcers.\textsuperscript{172} The OFT has stated that more resource in this area would lead to more effective enforcement.\textsuperscript{173}

There is strong support across the board for the retention of the national legislation covering the practices of estate agents.\textsuperscript{174} The Property Misdescriptions Act 1991 covers similar ground to the UCPD in tackling misleading claims in estate agent’s particulars, but is thought to be superior both in giving agents’ a checklist of matters that must be correct and in opening the possibility of enforcement whenever a mis-statement is material, which is thought to be more readily susceptible of proof than to show that an average consumer’s transactional decision would be affected. The volume of complaints

\textsuperscript{171} Office of Fair Trading response to the Civic Consulting survey on the application of Directive 2005/29/EC in immovable property, Q82.


\textsuperscript{174} See UK responses to the Civic Consulting survey on the application of Directive 2005/29/EC in immovable property, Q335; various responses to the PMA Consultation.
and the relative effectiveness of the Act suggests that there would be strong national resistance to any proposal to remove the Article 3(9) exemption in relation to land.
ANNEX 1: Fact sheet – legal framework and enforcement
Implementing legislation of the Unfair Commercial Practices Directive (UCPD)


National legal provisions on unfair commercial practices

Overview of relevant provisions which are not based on EU legislation

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The Financial Services and Markets Act 2000, as amended, and the resultant FSA regulations and guidance (including Principles for Businesses 2, 6 and 7)</td>
<td>• Property Misdescriptions Act 1991</td>
</tr>
<tr>
<td>• Consumer Credit Act 1974 (though this is largely based on Directive 2008/48/EC)</td>
<td>• Estate Agents Act 1979</td>
</tr>
<tr>
<td></td>
<td>• Consumers, Estate Agents and Redress Act 2007</td>
</tr>
<tr>
<td></td>
<td>• Accommodation Agencies Act 1953</td>
</tr>
<tr>
<td></td>
<td>• Housing Act 2004</td>
</tr>
</tbody>
</table>

Reasons why enforcement bodies apply these national legal provisions

Financial services

According to the Financial Services Authority and the Office of Fair Trading, the national provisions in the area of financial services are more specific, comprehensive and tailored, and are better known and understood by enforcers and businesses. It is also easier to obtain a result under this legislation/requirements than the UCPD.

The Office of Fair Trading also added that national provisions are better known and understood by consumers.

The Financial Services Authority pointed out that national provisions go beyond the level of protection provided by the UCPD. National legislation provides the enforcement body with powers to obtain redress and restitution for consumers, impose unlimited penalties for civil offences, and prohibit individuals from carrying out regulated activities.

Immovable property

The Office of Fair Trading reported that the national provisions in the area of immovable property go beyond the level of protection provided by the UCPD, are more specific, and are better known and understood by enforcers and businesses. In addition there is existing case law relating to this legislation.

Relevant case law

Financial services

• OFT vs. Hall

The Office of Fair Trading (OFT) used the Consumer Protection from Unfair Trading Regulations 2008 (misleading actions) to secure an injunction against a lender while they were in the process of removing the credit license of this lender. The OFT concluded that this lender fraudulently obtained a consumer credit licence in September 2007 by failing to declare unspent criminal convictions, including offences of theft, harassment and grievous bodily harm, in breach of the Consumer Credit Act 1974. As a result he was misleading consumers into believing he was a legitimately licensed lender in breach of the Consumer Protection from Unfair Trading Regulations 2008.

Please also see Civic Consulting UK Country Report for other relevant cases.

Immovable property

The OFT reported that there is a range of case law under, for example, the Property Misdescriptions Act relating to the sale of properties. However, there has been little use of the UCPD in relation to immovable property so far.
**Enforcement**

**Responsibility for enforcing the UCPD**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Financial Services Authority and the Office of Fair Trading A concordat was made between FSA and OFT, setting out the division of responsibilities. A separate, independent Financial Ombudsman Service also collects complaints and provides a complaints resolution service between business and consumers.</td>
<td>The Office of Fair Trading and the Local Authority Trading Standards Services</td>
</tr>
</tbody>
</table>

**Means of enforcement of UCPD**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>By public law and criminal law</td>
<td>By criminal, public, and private law. The Office of Fair Trading also reported by using ADR as a complement to effective enforcement (for example through ombudsman schemes).</td>
</tr>
</tbody>
</table>

**Who can bring an action under the national legislation implementing the UCPD**

<table>
<thead>
<tr>
<th>Public authorities and individual consumers</th>
<th>Public authorities and organisations representing consumer interests.</th>
</tr>
</thead>
<tbody>
<tr>
<td>According to Which? some consumer organisations have been granted special powers which allow them to bring civil actions under the UCPD.</td>
<td></td>
</tr>
</tbody>
</table>

**Main obstacles for enforcing unfair commercial practices legislation reported**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
</table>
| The Office of Fair Trading reported:  
• For commercial practices which are banned in all circumstances: Lack of clarity over the precise meaning of the provisions.  
• For misleading omissions: Knowing what information is material in what circumstances.  
• Aggressive practices: Protecting vulnerable consumers appropriately (gathering evidence; setting protection at the right level).  
• Other unfair commercial practices: The precise meaning of the text is often less clear then ideal in Annex I. | The Office of Fair Trading reported:  
• For misleading actions: Sheer number of transactions.  
• For misleading omissions: Legal complexity (for example what is material information? Who has to give it? At what point in the process?). |

**Problems relating to cross-border enforcement of unfair commercial practices legislation reported**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
<tbody>
<tr>
<td>None reported</td>
<td>According to the Office of Fair Trading, the applicable law/jurisdiction for timeshare and timeshare resale scams in particular, but also for property investment can be an obstacle. It is very difficult in practice to hold individuals and companies liable in cross border situations.</td>
</tr>
</tbody>
</table>

**Codes of conduct and self-regulation**

<table>
<thead>
<tr>
<th>Financial services</th>
<th>Immovable property</th>
</tr>
</thead>
</table>
| • FSA Code of Practice for Approved Persons  
This Code sets down a range of principles and behavioural standards for approved persons that also extends to their conduct vis-à-vis their firms and the FSA. It also includes principles that concern the responsibilities of approved persons vis-à-vis the internal governance and control functions within firms.  
• Finance & Leasing Association (FLA) Lending Code  
The FLA Lending Code requires members to deal fairly and | • Code of Practice for Residential Estate Agents  
This reflects the requirements of the legislation but sets standards for all aspects of an estate agency business and rather than being legally precise pursues the concept of reasonableness of approach.  
In addition, The Consumers, Estate Agency and Redress Act 2007 requires that Estate Agents belong to an ombudsman approved by the OFT. There are currently two approved ombudsmen, one of whom is also a member of the Consumer |
responsibly with their customers. The Code gives customers more rights than those provided by law. It sets out standards of good practice in consumer lending. It is intended to provide assurance to customers that they may buy with confidence from full members of the FLA. To be a full member, companies are bound by the Code at all times. In tandem with the Code, the FLA operates a conciliation procedure for consumer complaints and has an independent arbitration scheme operated by the Chartered Institute of Arbitrators. These schemes are free to consumers.\(^{(5)}\)

Codes Approval Scheme (CCAS) which is not specific to immovable property.

(a)See: http://www.fsa.gov.uk/pubs/other/concordat_fsa_oft_08.pdf
(b)See: http://fsahandbook.info/FSA/html/handbook/APER
(c)See: http://www.fl a.org.uk/consumers/The_Lending_Code
ANNEX 2: Fact sheet – most common unfair commercial practices reported
<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Financial product most frequently complained about</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK-FS-1</td>
<td>Credit was lent irresponsibly and mis-sold. Most often, this related to: mortgages, secured loans, credit cards, and other loans (including consumer credit).</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>1,406 1,445 1,253</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X</td>
<td>Yes</td>
<td>X X X X X X X X X X X X X X X X</td>
</tr>
<tr>
<td>UK-FS-2</td>
<td>There were failings in relation to the advised sales of payment protection insurance (PPI) which meant that the products were mis-sold.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>31,066 49,196 104,597</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X X X X X</td>
<td>Yes</td>
<td>X X</td>
</tr>
<tr>
<td>UK-FS-3</td>
<td>Traders engaged in aggressive debt collection. Most often this related to “other loans” including consumer credit.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X X RF RF RF RF RF</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X</td>
<td>Yes</td>
<td>X X X X</td>
</tr>
<tr>
<td>UK-FS-4</td>
<td>Payment protection insurance was mis-sold. This includes problems with advice, that the price was not transparent, that other features were not transparent, that consumers were informed they had to buy the product when they were purchasing another product, as well as other issues.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X</td>
<td>Yes</td>
<td>X X X</td>
</tr>
<tr>
<td>UK-FS-5</td>
<td>Consumers were cold called for credit services, including unsecured credit, credit brokerage, claims management, and debt management services.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X</td>
<td>Yes</td>
<td>X X X</td>
</tr>
<tr>
<td>UK-FS-6</td>
<td>There was unfair treatment and failure to lend responsibly with respect to mortgage customers in arrears or with payment difficulties.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X</td>
<td>Yes</td>
<td>X X X</td>
</tr>
<tr>
<td>UK-FS-7</td>
<td>Traders engaged in misleading debt management, consolidation, and advice.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X</td>
<td>Yes</td>
<td>X X X</td>
</tr>
<tr>
<td>UK-FS-8</td>
<td>There were excessive auxiliary charges on certain financial products.</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>X</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X</td>
<td>Yes</td>
<td>X X X</td>
</tr>
<tr>
<td>UK-FS-9</td>
<td>There were aggressive debt collection and enforcement practices. Most often this related to: mortgages, secured loans, credit cards, and other loans (including consumer credit).</td>
<td>Banned commercial practice which is included in the Black List (Annex I) of the UCPD</td>
<td>18,286 19,585 15,665</td>
<td>Life insurance  Health insurance  Motor insurance  Other insurance  Stocks or shares  Bonds  derivatives  collective investments  Savings account  Mortgage  Secured loan  Credit card  Other loans (including consumer credit)  Other retail financial service</td>
<td>X X X X X X X X X X</td>
<td>Yes</td>
<td>X X X X X X X X X X</td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
<td>X</td>
<td>X</td>
<td>RF</td>
<td>RF</td>
<td>RF</td>
<td>X</td>
</tr>
<tr>
<td>--------</td>
<td>------------------------------------------------------------------------------</td>
<td>---</td>
<td>---</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>---</td>
</tr>
<tr>
<td>UK-FS-10</td>
<td>Traders failed to give customers suitable advice when selling investment products. Most often, this related to: stocks or shares, bonds, derivatives, collective investments, structured products, and private pension plans.</td>
<td></td>
<td></td>
<td>RF</td>
<td>RF</td>
<td>RF</td>
<td>X</td>
</tr>
<tr>
<td>UK-FS-11</td>
<td>Savings and investment products were mis-sold.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK-FS-12</td>
<td>There were failures by firms to keep to commitments in voluntary codes of guidance, which is related to many unfair commercial practices.</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK-FS-13</td>
<td>Consumers in stressful financial situations, perhaps facing repossession or other debt related difficulties, suffered through entering into a sale and rent back agreement when other solutions would be more suitable. Firms did not fully explain the risks and misled consumers by applying excessive charges late in the process (when the consumer could not pull out) or through promises of retained equity which the consumer actually loses under a complex contract. Consumers have also lost out on long term security of tenure.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>RF</td>
<td>RF</td>
<td>RF</td>
</tr>
<tr>
<td>UK-FS-14</td>
<td>The results that could be expected from &quot;cautious funds&quot; were misrepresented. A cautious fund is a fund in which (i) a minimum of 30% is invested in fixed interest investments and cash and (ii) a maximum is invested in shares. At least 50% of assets in a cautious fund must be held in Pound or Euro.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK-FS-15</td>
<td>There was misleading use of terms, such as &quot;guaranteed.&quot; Most commonly, the sale of structured deposits were described as &quot;guaranteed&quot; where no third-party guarantee existed.</td>
<td>X</td>
<td>RF</td>
<td>RF</td>
<td>RF</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>UK-FS-16</td>
<td>Some traders failed to give appropriate advice in relation to pensions-switching.</td>
<td>X</td>
<td>X</td>
<td>RF</td>
<td>RF</td>
<td>RF</td>
<td>X</td>
</tr>
</tbody>
</table>

Source: Citizens Advice (UK-FS-1; UK-FS-5; UK-FS-9; UK-FS-12); The Financial Services Authority (UK-FS-2; UK-FS-6; UK-FS-10; UK-FS-13; UK-FS-15; UK-FS-16); Office of Fair Trading (UK-FS-3; UK-FS-7); Which? (UK-FS-4; UK-FS-8; UK-FS-11; UK-FS-14).

Note: VF: Very frequently, RF: Rather frequently, S: Sometimes.
### Common unfair practices reported in the area of immovable property

<table>
<thead>
<tr>
<th>ID</th>
<th>Unfair commercial practice</th>
<th>Legislative category</th>
<th>Number of complaints</th>
<th>Sector</th>
<th>Evidence</th>
<th>Loss suffered</th>
<th>Actions taken</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>2008</td>
<td>2009</td>
<td>2010</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Buying property</td>
<td>Renting property</td>
<td>Timeshare</td>
<td>Don't Know</td>
<td>Complaints data</td>
</tr>
<tr>
<td>UK-IP-1</td>
<td>Traders misdescribed aspects of some properties. For example, they misrepresented the size of rooms or something that was single glazed as double glazed. Another example is regarding access across shared land; traders said, for instance, that a driveway belonged to the potential buyer's property without mentioning that somebody else has access to it, or that the driveway actually belongs to somebody else though the potential buyer has access to it.</td>
<td>X</td>
<td>X</td>
<td>75</td>
<td>50</td>
<td>60</td>
<td>X</td>
</tr>
<tr>
<td>UK-IP-2</td>
<td>There were misleading property descriptions (both misleading actions and omissions).</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK-IP-3</td>
<td>There were misleading claims and omissions by estate agents.</td>
<td>X</td>
<td>X</td>
<td>VF</td>
<td>1013</td>
<td>888</td>
<td>X</td>
</tr>
<tr>
<td>UK-IP-4</td>
<td>Estate agents failed to properly clarify the fee basis. In the UK, agents charge a percentage of the sales price or a fixed fee. Both are perfectly acceptable ways of charging a fee, but most people think that if, for example, they sell their house for 50,000 Pound less than the asking price that they will pay a lower fee. However, this is not always the case. People don’t realise this either because they don’t read the contract or the contract is not clear. Sometimes, when the negotiator was with the seller doing a market appraisal of the property, they said they would put the house on the market at 200,000 Pound and charge the seller 2%. The seller then heard they will pay 2% of the fee, but what the negotiator really meant was that they will charge 2% of 200,000 Pound. Under the code of practice, they are required to make it very clear whether they are charging on a percentage basis and what an example fee might be, or if it’s on a fixed fee basis what exactly this</td>
<td>X</td>
<td>80</td>
<td>113</td>
<td>235</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>UK-IP-5</td>
<td>Estate agents failed to fully disclose the reasons why they were recommending a particular purchaser (for example, because they have an existing relationship). Often this manifests itself by the seller accepting a lower offer than the property is actually worth.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>UK-IP-6</td>
<td>There was sub-standard service by letting agents when renting properties.</td>
<td>X</td>
<td>VF</td>
<td>1553</td>
<td>1727</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>UK-IP-7</td>
<td>There was sub-standard service by estate agents when buying properties.</td>
<td>X</td>
<td>VF</td>
<td>1443</td>
<td>1383</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>UK-IP-8</td>
<td>Estate agents behaved unacceptably in their business practices. For example, there have been complaints regarding not passing on offers and agents personally benefitting from properties.</td>
<td>X</td>
<td>RF</td>
<td>778</td>
<td>726</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>UK-IP-9</td>
<td>Consumers in stressful financial situations, perhaps facing repossession or other debt related difficulties, suffered through entering into a sale and rent back agreement when other solutions would be more suitable. Firms have not fully explained the risks and have misled consumers by applying excessive charges late in the process (when the consumer could not pull out) or through promises of retained equity which the consumer actually loses under a complex contract. Consumers have also lost out on long term security of tenure.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>RF</td>
<td>RF</td>
<td>RF</td>
</tr>
</tbody>
</table>
ANNEX 3: References


Civic Consulting (2011). UK Citizens Advice, FS.


Civic Consulting (2011). Interview with FSA.

Civic Consulting (2011). Interview with OFT.


Department of Business, Innovation and Skills (2011). Consultation on the Repeal of the Property Misdescriptions Act 1991 (January 2011) [4.7].


FSA (2010). The assessment and redress of Payment Protection Insurance complaints Feedback on CP09/23 and further consultation (CP 10/6).


