

Consumer Protection in the EU Financial System

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Dr. Christina Livada

Table of contents

- A. The Treaty on the Functioning of the European Union
- B. Protection of the economic interests of consumers of financial services
- C. The Basic Concepts
- D. Unfair Commercial Practices
- E. Unfair Contractual Terms
- F. Consumer Credit
- G. Mortgage Credit

A. The Treaty on the Functioning of the European Union

Article 169

(ex Article 153 TEC)

1. In order:
 - to promote the interests of consumers and
 - to ensure a high level of consumer protection,the Union shall contribute to protecting the:
 - health, safety and
 - **economic interests of consumers,**
 - as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

A. The Treaty on the Functioning of the European Union

Article 169

(ex Article 153 TEC)

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

A. The Treaty on the Functioning of the European Union

Article 169

(ex Article 153 TEC)

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

B. Protection of the economic interests of consumers of financial services

1. Rationales for regulatory intervention

The policy concern consists both in:

- reducing the **information asymmetry** that exists between consumers and financial providers,
- addressing the problem of consumers' **reduced negotiating capacity** vis-à-vis financial service providers, mainly due to the expanded use of general terms of transactions
- addressing the problem of **over-indebtedness** especially as regards consumer lending: in recent years the combating (i.e. prevention and containing) of consumers' over-indebtedness has been elevated to a separate rationale for regulatory intervention with a view to avoid negative consequences of over-indebtedness socially and economically

B. Protection of the economic interests of consumers of financial services

2. Policy instruments: reducing information asymmetry

- the **provision of adequate information** to consumers in connection with the transactions and the content of the contracts they conclude (prior, at the conclusion and during the contract)
- the **prohibition of unfair commercial practices**

B. Protection of the economic interests of consumers of financial services

2. Policy instruments: addressing the problem of reduced negotiating capacity (cont.)

- the elimination of abusive contractual terms
- the safeguarding of certain crucial consumers' rights (i.e. the right of withdrawal, the right of early repayment)
- the possibility of a recourse either to justice or to out-of-court settlement systems

B. Protection of the economic interests of consumers of financial services

2. Policy instruments: addressing the problem of over-indebtedness (cont.)

Rules on:

- **responsible lending** and
- **consumers' bankruptcy**

B. Protection of the economic interests of consumers of financial services

Dynamics and variability of the policy objectives justifying regulatory intervention in the financial system, given the conditions prevailing in the economy and in society.

Examples of:

- the objective of combating consumers' over-indebtedness, which arose in the late 1990s, as a result of the full liberalisation of consumer credit and the subsequent extensive exposure of households to debt,
- the rationale pertaining to the combating of terrorist financing through the financial system arose mostly following the terrorist attacks in the USA on September 11, 2001

C. The basic concepts

‘consumer’ means:

- any natural person
- who is acting for purposes which are outside his trade, business, craft or profession;

‘trader’ means:

- any natural or legal person
- who is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

C. The basic concepts

The **average consumer**

The fairness or unfairness of a commercial practice is assessed against the “average consumer” benchmark.

The average consumer, as interpreted by the Court of Justice of the European Union, is:

- “reasonably well-informed and
- reasonably observant and circumspect”,
- taking into account social, cultural and linguistic factors.

If a commercial practice is directed at a particular group of consumers (such as vulnerable categories of consumers), then an average member of that group is the benchmark

D. Unfair Commercial Practices

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')

- **Unfair** commercial practices shall be **prohibited**.

A commercial practice shall be unfair if:

- (a) it is contrary to the requirements of professional diligence,
- and
- (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

D. Unfair Commercial Practices

In particular, commercial practices shall be unfair which:

(a) are **misleading** as set out in Articles 6 and 7 (of the Directive),

or

(b) are **aggressive** as set out in Articles 8 and 9 (of the Directive).

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

D. Unfair Commercial Practices

A commercial practice (**action**) shall be regarded as **misleading** if:

- it contains **false information** and is therefore untruthful or in any way, including overall presentation,
- **deceives or is likely to deceive** the average consumer, even if the information is factually correct, in relation to one or more of the ***following elements (see next slide)***, and
- in either case **causes or is likely to cause him to take a transactional decision that he would not have taken otherwise,**

D. Unfair Commercial Practices

A commercial practice shall be regarded as **misleading** if: ...

(a) the existence or nature of the product;

(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;

D. Unfair Commercial Practices

A commercial practice shall be regarded as **misleading** if: ...

(c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

(e) the need for a service, part, replacement or repair;

D. Unfair Commercial Practices

A commercial practice (**omission**) 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 would not have taken otherwise.

D. Unfair Commercial Practices

A commercial practice shall be regarded as **aggressive** if:

- in its factual context, taking account of all its features and circumstances,
- by harassment, coercion, including the use of physical force, or *undue influence*,
- it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and
- thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise

D. Unfair Commercial Practices

Undue influence?

YES: If a consumer is already indebted to a trader and behind with payments, the trader would be using undue influence if he said he would reschedule the debt on condition that the consumer bought another product.

NO: Offering an incentive to a consumer, such as a free bus to an out-of-town store, or refreshments while shopping, is not undue influence. The consumer's ability to make an informed transactional decision would not be impaired. In the same way, it would be acceptable to offer a sales promotion.

D. Unfair Commercial Practices

EXAMPLE

High-speed WiMAX Internet for just €29.95 per month... and UNLIMITED telephone support!

Manuel purchases an Internet connection from ShoveIT.

He's a bit wary at first because WiMAX is a relatively new technology, but decides to go ahead since the advertisement says that the subscription includes unlimited telephone support.

He assumes that the telephone support is included in his monthly subscription.

D. Unfair Commercial Practices

1st EXAMPLE

High-speed WiMAX Internet for just €29.95 per month... and UNLIMITED telephone support!

Sure enough, Manuel has some trouble with his connection.

When he calls the technical support hotline, however, a lengthy welcome message says that the call will cost 50 cents per minute.

Manuel is put on hold for nearly 10 minutes. When he finally gets through to a support engineer, the call is disconnected before the technical issue is resolved.

An exasperated Manuel dials in again and is put on hold for another 10 minutes. Now he knows why the company is called “ShoveIT”.

D. Unfair Commercial Practices

Price Transparency

In the case of commercial communication (advertising, website of the trader) including the description of the product or the service and its price, the trader must provide information on:

- *the main characteristics of the product;*
- *its geographical address and identity;*
- *the price inclusive of taxes and all additional charges (freight, delivery, post etc.);*
- *the arrangements for payment, delivery, performance and the **complaint-handling policy** if they depart from the requirements of professional diligence;*

D. Unfair Commercial Practices

2nd EXAMPLE

Sophie sees the following advertisement in a women's magazine.

Get it for free

SweetDreams™ the exclusive fragrance from Yves Blanchard

To receive your complementary fragrance sampler, please send in the attached reply card with your credit card authorisation for €29.95 to defray the cost of shipping and handling.

She sends in the reply card and receives her bottle of fragrance. Later on, however, she sees the same 100 ml bottle of fragrance available in a shop for only €14.95.

Question: Is Sophie the victim of an unfair commercial practice?

D. Unfair Commercial Practices

3rd EXAMPLE

Congratulations!

You've won over €100 in prizes!

Call now to collect your prizes. Offer expires 31 May 2008.

The company behind this ad never awards the prizes or awards prizes with a value substantially less than €100.

On the contrary, when consumers call the number in the advertisement, they are proposed to buy some cosmetic products.

D. Unfair Commercial Practices

4th EXAMPLE

Pressure selling: "Yes, you can leave once the paperwork is done"

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

A boat trip from hell...

Jan and Marijke, an elderly couple from Amsterdam, were on vacation in the Mediterranean. They took a pleasant boat trip to some offshore islands to look at some holiday homes. They saw a home that they liked but told the estate agent that they wanted to think about it. Just when they were about to return to the mainland, however, the estate agent demanded that they sign a contract to hold the property. It seemed like he wouldn't bring them back until they signed. Since it was getting late, the couple had to catch an early flight the next morning and it seemed like the only way off the island, they reluctantly signed the contract.

D. Unfair Commercial Practices

Answer: Yes

The fragrance sampler is not actually free because the consumer has to pay €29.95 (which is also actually far more than the cost of shipping and handling).

Sophie should now contact one of her national consumer associations or the Ombudsman and ask them for advice on how to lodge a complaint against the retailer.

D. Unfair Commercial Practices

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

Misleading commercial practices (indicative)

- Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions
- Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent
- *Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item*

D. Unfair Commercial Practices

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

Aggressive commercial practices (indicative)

- Creating the impression that the consumer cannot leave the premises until a contract is formed
- Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation
- *Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media* except in circumstances and to the extent justified under national law to enforce a contractual obligation. *This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC (1) and 2002/58/EC*

E. Unfair Contractual Terms

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts - The rationales

■ the laws of Member States relating to the terms of contract, and in particular the laws relating to unfair terms, between:

- the seller of goods or supplier of services, and
- the consumer of them,

show **many disparities**, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States;

■ responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms;

E. Unfair Contractual Terms

Council Directive 93/13/EEC on unfair terms in consumer contracts

The rationales

- responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms;
- generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;

E. Unfair Contractual Terms

Council Directive 93/13/EEC on unfair terms in consumer contracts

The rationales

- in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts;
- more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms;
- those rules should apply to all contracts concluded between sellers or suppliers and consumers;

E. Unfair Contractual Terms

Council Directive 93/13/EEC on unfair terms in consumer contracts The purpose of the Directive and the principle of minimum harmonization

- The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer (article 1)
- Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by the Directive, to ensure a maximum degree of protection for the consumer (principle of minimum harmonization) (article 8)

E. Unfair Contractual Terms

Council Directive 93/13/EEC on unfair terms in consumer contracts The definitions (articles 2-3)

‘Unfair term’:

- a contractual term
- which has not been individually negotiated: a term shall always be regarded as not individually negotiated:
 - where it has been drafted in advance and
 - the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. *The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.*

E. Unfair Contractual Terms

Council Directive 93/13/EEC on unfair terms in consumer contracts

The definitions (articles 2-3)

‘Unfair term’:

A term shall be regarded as unfair if, contrary to the requirement of **good faith**, it causes a **significant imbalance** in the parties' rights and obligations arising under the contract, to the detriment of the consumer

The question is whether the term causes the significant imbalance:

- against the customer, and
- in a manner or to an extent which is in breach of good faith (fair and open dealing)

E. Unfair Contractual Terms

Openness requires that the terms should be expressed:

- fully,
- clearly and
- legibly

containing no concealed pitfalls or traps.

Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the customer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract

Significant imbalance:

- one connotation is that the imbalance must be really serious or exceptional
- another connotation of 'significant' is important

E. Unfair Contractual Terms

Annex - An indicative and non-exhaustive list of the terms which may be regarded as unfair: Terms which have the object or effect of:

- inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
- permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

E. Unfair Contractual Terms

Annex - An indicative and non-exhaustive list of the terms which may be regarded as unfair: Terms which have the object or effect of:

- requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

E. Unfair Contractual Terms

Annex - An indicative and non-exhaustive list of the terms which may be regarded as unfair: Terms which have the object or effect of:

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

it is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately

it does not apply to:

- transactions in transferable securities, financial instruments and other products or services, where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control
- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;