

# Unfair Trading

*The Consumer Protection from Unfair Trading Regulations  
2008: 1277 ECA as amended by 2011: 2085, 2013: 783,  
2013: 3134, 2014: 549, 2014: 870, 2015: 1629, 2015: 1630,  
2018: 1326 and CRA*

*Time limit: 3 years from commission, 1 year from discovery (earliest)*

## Definitions

### 1). Average consumer:

- ♣ In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers - account must be taken of the material characteristics of such an average consumer, including his being reasonably well informed, reasonably observant and circumspect.
- ♣ 'average consumer' means, in addition, the average member of a *particular group* of consumers
  - ♥ where the practice is directed to that group, **or**
  - ♥ where
    - ♦ the group is a clearly identifiable group of consumers which 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 foresee, **and**
    - ♦ the practice is likely to materially distort the economic behaviour only of that group. **NB:** This does not stop advertising puff.

### 2). Business includes

- ♣ a trade, craft or profession, **or**
- ♣ the activities of any government department or local or public authority.

### 3). Code owner means a trader or a body responsible for

- ♣ the formulation and revision of a code of conduct, **or**
- ♣ monitoring compliance with a code of conduct.

4). Commercial practice means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to **or** from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.

5). Consumer – any individual acting for purposes that are mainly or wholly outside his business.

6). Digital content - data produced and supplied in digital form.

7). Goods - any tangible moveable items, including water, gas and electricity put up for sale in a limited volume or set quantity.

8). Invitation to purchase means a commercial communication which indicates characteristics of the product, **and** the price, in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase.

9). **Material information** means

- ♣ the information which the average consumer needs, according to the context, in order to take an informed transactional decision, **and**
- ♣ any information requirement which applies in relation to a commercial communication as a result of a Community obligation,

**and** where a commercial practice is an invitation to purchase, the following information will also be material if not already apparent from the context:

- ♣ the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated **and** the product,
- ♣ the identity of the trader, eg his trading name, and the identity of any other trader on whose behalf he is acting,
- ♣ the trader's address **and** the address of any other trader on whose behalf he is acting,
- ♣ either
  - ♥ the price, including any taxes, **or**
  - ♥ the manner in which the price is calculated (where the nature of the product prevents the price being calculated in advance),
- ♣ where appropriate, either
  - ♥ all additional freight, delivery or postal charges, **or**
  - ♥ the fact that such charges may be payable (where such charges cannot reasonably be calculated in advance),
- ♣ the following matters where they depart from the requirements of professional diligence:
  - ♥ arrangements for payment,
  - ♥ arrangements for delivery,
  - ♥ arrangements for performance,
  - ♥ complaint handling policy,
- ♣ for products and transactions involving a right of withdrawal or cancellation - the existence of such a right.

10). **Materially distort the economic behaviour** means, in relation to an average consumer, appreciably to impair the average consumer's ability to make an informed decision thereby causing him to take a transactional decision that he would not otherwise have taken.

11). **Premises** includes any place, stall, vehicle, ship (including any boat and any other sort of vessel used in navigation) or aircraft.

12). **Product** -

- ♣ goods,
- ♣ a service,
- ♣ digital content,
- ♣ immoveable property,
- ♣ rights or obligations, **or**
- ♣ where a trader who demands payment from a consumer in full or partial settlement of the consumer's liabilities (**or** purported liabilities) - that trader is to be treated as offering to supply a product to that consumer. That product comprises the full or partial settlement of those liabilities or purported liabilities.

13). **Professional diligence** means the standard of special skill and care, which a trader may reasonably be expected to exercise towards consumers, which is commensurate with either

- ♣ honest market practice in the trader's field of activity, **or**
- ♣ the general principle of good faith in the trader's field of activity.

14). **Trader** –

- ♣ a person acting for purposes relating to his business, whether acting personally or through another person acting in his name or on his behalf, **and**
- ♣ includes a person acting in the name of or on behalf of a trader.

15). **Transactional decision** means any decision taken by a consumer, whether it is to act or to refrain from acting, concerning

- ♣ whether, how and on what terms to
  - ♥ purchase-,
  - ♥ make payment in whole or in part for-,
  - ♥ retain or dispose of-,
 a product, **or**
- ♣ whether, how and on what terms to exercise a contractual right in relation to a product.

## **Civil Prohibitions**

1). Unfair commercial practices are prohibited. See 'What is an Unfair Practice?', below.

2). The promotion of any unfair commercial practice by a code owner in a code of conduct is prohibited.

## **Criminal Offences**

*3 years from commission / 1 year from discovery (earliest)*

### **Must not engage**

- ♣ knowingly or recklessly in a commercial practice which contravenes the requirements of professional diligence (see all of note (a) in 'What is an Unfair Practice?', below) **NB:** a trader recklessly engages in a practice if he has no regard to whether the practice contravenes the requirements of professional diligence, even if he has no reason to believe that the practice might contravene those requirements,
- ♣ in a commercial practice
  - ♥ which is a misleading action (see 'What is an Unfair Practice?' note (b) below) **unless** it is a practice mentioned in the italicised paragraph in note (b),
  - ♥ which is a misleading omission (see 'What is an Unfair Practice?' note (c) below),
  - ♥ which is aggressive (see 'What is an Unfair Practice?' note (d) below),
  - ♥ set out in any paragraphs **except** 11 and 28 of the List of Unfair Commercial Practices (below).

## **What is an Unfair Practice?**

A commercial practice is unfair

- ♣ (a) if it
  - ♥ contravenes the requirements of professional diligence, **and**
  - ♥ materially distorts, or is likely to materially distort, the economic behaviour of the average consumer with regard to the product,

- ♣ (b) if it is a misleading action; an action is misleading
  - ♥ if
    - ♦ it contains false information and is therefore untruthful in relation to any of the matters in the List of Misleading Actions below, **or** if it, **or** its overall presentation, in any way deceives, **or** is likely to deceive, the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct, **and**
    - ♦ it causes, or is likely to cause, the average consumer to take a transactional decision he would not otherwise have taken, **or**
  - ♥ if it concerns
    - ♦ any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor, **or**
    - ♦ *\*any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, where*
      - ♠ *the trader indicates in a commercial practice that he is bound by that code of conduct, **and***
      - ♠ *the commitment is firm and capable of being verified and is not aspirational,*

**and** it causes or is likely to cause the average consumer to take a transactional decision he would not otherwise have taken, taking account of its factual context and all its features and circumstances,
- ♣ (c) if it is a misleading omission; it is misleading if, in its factual context, taking account of
  - ♥ all the features and circumstances of the practice,
  - ♥ the limitations of the medium used to communicate the practice (including limitations of space or time), **and**
  - ♥ any measures taken by the trader to make the information available to consumers by other means (where the medium used to communicate the practice imposes limitations of space or time),

the commercial practice

  - ♥ omits material information,
  - ♥ hides material information,
  - ♥ provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, **or**
  - ♥ fails to identify its commercial intent, (**unless** this is already apparent from the context),

**and**, as a result, it causes, or is likely to cause, the average consumer to take a transactional decision he would not otherwise have taken,

- ♣ (d) if it is aggressive; it is aggressive if, in its factual context, taking account of all of its features and circumstances,

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\*Contravention of this paragraph does not give rise to criminal sanctions.

♥ it significantly impairs, **or** is likely significantly to impair, the average consumer's freedom of choice **or** conduct in relation to the product, through the use of

- ♦ harassment,
- ♦ coercion (including the use of physical force), **or**
- ♦ undue influence (ie exploiting a position of power so as to apply pressure (with or without using, or threatening to use, physical force) in a way which significantly limits the consumer's ability to make an informed decision).

**NB:** the harassment, coercion and undue influence should be assessed by taking into account

- ♦ its timing, location, nature or persistence,
- ♦ the use of threatening or abusive language or behaviour,
- ♦ the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision about the product,
- ♦ any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader, **and**
- ♦ any threat to take action which cannot legally be taken, **and**

♥ it thereby causes or is likely to cause him to take a transactional decision he would not otherwise have taken, **or**

♣ (e) if it is in the List of Unfair Commercial Practices below.

## **List of Unfair Commercial Practices**

- 1). Claiming to be a signatory to a code of conduct when he is not.
- 2). Displaying a trust mark, quality mark or equivalent without authorisation.
- 3). Claiming that a code of conduct has an endorsement from a public body or other body which it does not have.
- 4). Falsely claiming that a trader (including his commercial practices), **or** a product, has been approved, endorsed or authorised by a public body or private body, or making such a claim without complying with the terms of the approval, endorsement or authorisation.
- 5). Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply, **or** procure another trader to supply, those products (or equivalent products) at that price for a period that is, **and** in quantities that are, reasonable, having regard to
  - ♣ the product,
  - ♣ the scale of advertising of the product, **and**
  - ♣ the price offered (bait advertising).
- 6). Making an invitation to purchase products at a specified price and then

- ♣ refusing to show the advertised item to consumers,
  - ♣ refusing to take orders for it or deliver it within a reasonable time,  
**or**
  - ♣ demonstrating a defective sample of it,
- with the intention of promoting a different product (ie bait and switch).
- 7). Falsely stating that a product will only be available
- ♣ for a very limited time, **or**
  - ♣ on particular terms for a very limited time,
- in order to elicit an immediate decision and deprive consumers of sufficient opportunity **or** time to make an informed choice.
- 8). Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not
- ♣ English (in the case of a trader located in the UK), **or**
  - ♣ an official language of the EEA State where the trader is located,
- and** then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
- 9). Stating, **or** otherwise creating the impression, that a product can legally be sold when it cannot.
- 10). Presenting rights given to consumers in law as a distinctive feature of the trader's offer.
- 11). *\*Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).*
- 12). Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.
- 13). Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
- 14). Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
- 15). Claiming that the trader is about to cease trading or move premises when he is not.
- 16). Claiming that products are able to facilitate winning in games of chance.
- 17). Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
- 18). Passing on materially inaccurate information on
- ♣ market conditions, **or**
  - ♣ 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.

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\*Contravention of this paragraph does not give rise to criminal sanctions.

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

20). 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.

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

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

23). Creating the false impression that after-sales service in relation to a product is available in

- ♣ the UK (if the product is sold there), **or**

- ♣ an EEA State other than the one in which the product is sold.

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

25). Conducting personal visits to the consumer's home and ignoring the consumer's request to leave or not to return, **except** in circumstances and to the extent justified to enforce a contractual obligation.

26). Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media **except** in circumstances and to the extent justified to enforce a contractual obligation.

27). Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, **or** failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.

28). *\*Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.*

29). Inertia Selling has been omitted from this list by The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, but see 'Inertia Selling', below.

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

31). Creating the false impression that the consumer has already won-, will win-, or will on doing a particular act win-, a prize or other equivalent benefit, when in fact either

- ♣ there is no prize or other equivalent benefit, **or**

- ♣ taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

## **Inertia Selling**

**Except** where the product is a substitute supplied in accordance with the Distance Selling Regs, where a trader demands

- ♣ immediate or deferred payment for-,

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\* Contravention of this paragraph does not give rise to criminal sanctions.

- ♣ the return of-, **or**
  - ♣ safekeeping of-,
- an unsolicited product,
- ♣ the consumer is not obliged to pay for it,
  - ♣ the consumer's failure to acknowledge receipt does not mean that he has to pay for, return, **or** take care of the product, **and**
  - ♣ the consumer can keep or dispose of it as if it was a gift.

## **List of Misleading Actions**

- 1). The existence or nature of the product.
- 2). The main characteristics of the product, including
  - ♣ its availability,
  - ♣ its benefits,
  - ♣ its risks,
  - ♣ its execution,
  - ♣ its composition,
  - ♣ its accessories,
  - ♣ after-sale customer assistance concerning it,
  - ♣ the handling of complaints about it,
  - ♣ its method and date of manufacture,
  - ♣ its method and date of provision,
  - ♣ its delivery,
  - ♣ its fitness for purpose,
  - ♣ its usage,
  - ♣ the quantity of the product,
  - ♣ its specification,
  - ♣ its geographical or commercial origin,
  - ♣ the results to be expected from its use, **and**
  - ♣ the results and material features of tests or checks carried out on it.
- 3). The extent of the trader's commitments.
- 4). The motives for the commercial practice.
- 5). The nature of the sales process.
- 6). Any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product.
- 7). The price or the manner in which the price is calculated.
- 8). The existence of a specific price advantage.
- 9). The need for a service, part, replacement or repair.
- 10). The nature, attributes and rights of the trader, including his
  - ♣ identity,
  - ♣ assets,
  - ♣ qualifications,
  - ♣ status,
  - ♣ approval,
  - ♣ affiliations or connections,
  - ♣ ownership of industrial, commercial or intellectual property rights, **and**
  - ♣ awards and distinctions.
- 11). The consumer's rights or the risks he may face, including rights under the Sale of Goods Act 1979 Part 5A **or** the Sale of Goods and Services Act 1982 Part 1B.



## **Persons Liable for Offences**

1). Where a body corporate has committed an offence, the body corporate is liable, and any of its officers (including directors, managers and secretaries or similar officers, and persons purporting to act in those capacities) are also liable where the offence has been committed with their consent or connivance, **or** is attributable to any neglect on their part.

2). Where a Scottish partnership commits an offence, the partnership is liable, and any partner (including any person purporting to act as a partner) is also liable where the offence has been committed with his consent or connivance, **or** is attributable to any neglect on his part.

3). Where X

- ♣ commits an offence involving a misleading action, misleading omission, aggression, or an Unfair Commercial Practice, **or**

- ♣ would have committed such an offence if he did not have a defence (see below),

**and** the commission of the offence, (or what would have been an offence if he did not have a defence), is due to the act or default of Y, Y is guilty of the offence (unless he has a defence),

- ♣ whether or not Y is a trader, **and**

- ♣ whether or not Y's act or default is a commercial practice,

**and** Y may be charged with and convicted of the offence whether or not proceedings are taken against X.

## **Defences**

1). The usual due diligence defence is available, but only for offences involving a misleading action, misleading omission, aggression, or an Unfair Commercial Practice.

2). Where an offence involving a misleading action, misleading omission, aggression, or an Unfair Commercial Practice is committed by the publication of an advertisement (including a catalogue, a circular and a price list) - a defence is available if the defendant

- ♣ is a person whose business is publishing, or arranging for the publication, of advertisements,

- ♣ received the advertisement for publication in the ordinary course of business, **and**

- ♣ did not know and had no reason to suspect that its publication would amount to an offence.