

## EDiMA response to European Commission Consultation on the application of the Unfair Commercial Practices Directive (2005/29/EC)

The European Digital Media Association (EDiMA)<sup>1</sup> is pleased to provide its response to the European Commission's consultation on the application of the *Directive on unfair commercial practices* (hereafter, "UCPD"). Protecting European consumers from unfair commercial practices, and pursuing a principles-based approach to online consumer protection legislation, rather than overly prescriptive rules, are laudable objectives that EDiMA fully supports.

EDiMA members have, however, encountered problems in the interpretation and/or application of some UCPD provisions in different EU jurisdictions. EDiMA supports efforts to identify and address such problems and inconsistencies and believes that additional guidance from the Commission on how to interpret the UCPD, rather than the introduction of new or more prescriptive rules, would help mitigate legal uncertainty and promote the objectives of the Directive.

The digital environment and the development of the EU's Digital Single Market offer significant potential for empowering European consumers and businesses. EDiMA believes that the consideration of any consumer protection legislation impacting the online environment, including a potential review of the UCPD, must be evidence-based, marked by a harmonised approach aimed at facilitating the development of the Digital Single Market, recognise the benefits of the online environment for consumer empowerment, and provide a clear, strong set of consumer rights marked by legal certainty.

In this context, EDiMA provides below its responses to relevant and corresponding aspects of the UCPD stakeholder questionnaire.

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### Member State implementation of the Directive: differing interpretations

Given that the UCPD is a maximum harmonization Directive, there is clearly less scope for transposition variation between Member States; as such, one should expect that the Directive has been adequately transposed into Member State legislation. However, EDiMA members have experienced significant variation in the national and local interpretation(s) and application(s) of key concepts of the Directive, creating significant and unhelpful legal uncertainty for businesses such as e-commerce platforms.

EDiMA's members operate and provide online e-commerce services across the EU and have been confronted with a differing application(s) of certain UCPD definitions and concepts such as '**average consumer**', '**transactional decision**', '**misleading omission**', '**misleading action**', and '**professional diligence**', to name a few. Such concepts can be vague in nature and, naturally, interpretations can be broad or narrow. The lack of uniform interpretations acts as a barrier to achieving a true Digital Single Market, as companies are potentially dissuaded from offering goods and services in certain Member States due to resulting legal uncertainty.

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<sup>1</sup> EDiMA, the European Digital Media Association, is an alliance of new media and Internet companies whose members include Amazon EU, Apple, eBay, Expedia, Google, Microsoft, MIH Group, Nokia, Yahoo! Europe, Orange, and others. EDiMA's members provide Internet and new media platforms offering European consumers a wide range of online services, including E-content, media, E-commerce, communications and information/search services. EDiMA represents the interests of the new media and Internet sectors in Europe in policymaking.

### **Definitions/concepts**

The way authorities and national courts have interpreted and applied legislation transposing the UCPD and, in particular, the definition of “unfair commercial practice”<sup>2</sup> contained in Article 5.2, has in many instances been inconsistent and problematic. There is a need to clarify this definition and, more specifically, the criteria for what constitutes “professional diligence”<sup>3</sup>.

For instance, in Germany corresponding provisions (including the reference to “professional diligence”) were transposed in 2008 via the Law against Unfair Competition (UWG). Up to this point, the concept of ‘**professional diligence**’ did not exist in the German unfair competition legislation. However, despite the transposition, experience shows that German courts have consistently and completely ignored the requirement of a breach of professional diligence to establish an unfair commercial practice. In practice, there has been absolutely no change regarding the application of German unfair competition legislation since the implementation of the UCPD in 2008.

German courts continuously take the view that in Germany, the claim for injunctive relief exists independently of fault and they consider the new criteria of professional diligence as irrelevant. Therefore, German courts have thus far ignored any claim focusing on the argument that professional diligence has been met. The standards and criteria applied by the German courts to determine a breach of professional diligence are excessive and challenge the viability of online business models, despite such models being endorsed and explicitly desired by the German legal order.

Example: To provide an illustrative example: online retailers usually rely on manufacturers’ indications regarding product-specific information, assuming that it is accurate (e.g. information regarding energy efficiency classification, net product weight, etc.), which it may not always be. Or, an e-commerce platform sells products with non-visible properties (therefore, unrecognizable for the platform), which are then claimed to be misleading. In both cases, even with the utmost diligence, it is impossible for the trader to detect the inaccuracy/contestability of the product or product description. This is even truer in cases where an online retailer’s portfolio comprises several million different products. Nevertheless, and contrary to the wording as well as the spirit and purpose of the UCPD, German courts consider this as being a breach of professional diligence and hence, an unfair commercial practice.

Furthermore, while the concept of the ‘**average consumer**’ has been linked to a ‘reasonable person’ test under UK law, it remains unclear as to what this means in compliance terms. ‘**Transactional decision**’ has been interpreted by some enforcement authorities as being much broader than simply the decision by a consumer to complete their purchase, encompassing for example the decision to visit a website or visit a physical business. Clearly, consumers would expect different levels of information at different points in the purchase flow. Yet there are no guidelines as to what level of information would be considered sufficient at each point in the transactional process to avoid a ‘misleading omission.’ In the absence of any meaningful body of case law, the result has been considerable legal uncertainty. As such, it may make sense to try and limit the concept of transactional decision to a decision by the consumer to

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<sup>2</sup> Article 5.2. of the UCP Directive defines as an unfair commercial practice any behaviour that is “*contrary to the requirements of professional diligence*”.

<sup>3</sup> Article 2 (h) defines professional diligence as “*the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.*”

confirm their purchase, or at the very least provide much clearer guidance at different points in the transactional journey.

### **Price information**

The rules on price information can also give rise to interpretation problems and ensuring compliance in the context of cross-border trade is by no means straightforward. For example, some national authorities declare that the price information indicated in an advertisement must be offset against the "first impression" of the consumer reading such information. Such a vague interpretation again gives rise to legal uncertainty, which can then impact effective competition by hindering traders' ability to issue competitive advertisements online.

Furthermore, an online seller offering a product for shipping within or from outside the EU/EEA, may not know the ultimate destination of the buyer until the purchase has been concluded and/or may not be able to advise a potential buyer as to the scale of any relevant import duties/taxes. The seller therefore can only offer a range of shipping options to be added to the final price along with an estimate of relevant import duties/taxes. Given such inherent complexity, it can be very challenging for businesses - particularly SMEs - to incorporate this information into a 'final' price.

Such difficulty is recognised by the recently adopted Consumer Rights Directive, which stipulates that, in the case of distance contracts, the trader shall provide the consumer with information on the total price including additional freight, delivery or postal charges and any other costs. However, that provision also provides that "*where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable*" is sufficient information to the consumer for the trader to be in compliance with the information requirement. We believe this approach must also be reflected in the interpretation and application of the requirements of the UCPD.

### **Black List**

EDiMA supports the objective of the black list to provide certainty to businesses and consumers on practices which are always deemed to be unfair commercial practices. However, our members have found that in practice the black list is often a 'grey list' marked, again, by different Member State interpretations. EDiMA believes that more needs to be done to provide business with guidance, both formal and informal, as to how generalised concepts apply in practice. While local enforcement may make sense for more specific pieces of consumer protection legislation where requirements are clearer, it leads to duplication, conflicting interpretation, and regulatory uncertainty when principles-based legislation, such as the UCPD, is being enforced.

### **Scope of application of the Directive**

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EDiMA believes the current scope of the Directive is adequate and should remain limited to aggressive or misleading commercial practices that may materially distort the economic behaviour of the average consumer to whom they are addressed. EDiMA would not support the application of the Directive to C2C transactions, as the problems of applying generalised concepts would be even greater for consumers who do not have access to, nor an understanding of, legal databases of relevant precedents. The Directive cannot create new grounds of liability conflicting with other Community rules regulating other aspects of unfair commercial practices, the use of intellectual property rights, or the provision of intermediary information society services, nor can the Directive be the basis for harmonising national tort law.

## The Digital (online) environment

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EDiMA believes that principles applying to unfair commercial practices in digital environments should be no different from those applying to such practices in the physical world. Given the scope and wording of the Directive, EDiMA believes there is no need for sector-specific regulations for the online environment.

A principles-based approach to consumer protection legislation, particularly for the online environment, is far preferable to overly prescriptive rules that may fail to account for technological developments or worse, hinder the pace of such innovation. Technical developments and innovation increasingly allow online consumers to access new services anytime and anywhere through an increasing variety of devices and media. As new business models and services emerge to meet accelerating consumer demand for greater convenience and ubiquitous connectivity, regulation needs to find flexible and modern ways to balance the need for consumers to have sufficient information to make informed choices and their desire to take advantage of new services presented in convenient formats, particularly online.

Accordingly, EDiMA believes that the consideration of any consumer protection legislation pertaining to the digital environment, including discussions in the context of a potential review of the UCPD, must take into account the following principles:

- **Evidence-based approach** – Any legislation should be proposed on tangible evidence of harm being caused to consumers' welfare rather than the possibility of any harm occurring. Only as a matter of last resort should legislators take recourse to impose sector-specific ex ante regulation upon specific industries, services, or technologies.
- **Harmonised approach aimed at facilitating the development of the Digital Single Market** – A harmonised and coherent legislative framework will benefit consumers dramatically by facilitating the development of a robust marketplace marked by lower prices, greater consumer choice, higher levels of consumer confidence, and greater legal certainty for businesses.
- **Recognition of the benefits of the online environment for consumer empowerment** – The online environment continues to empower European consumers by providing access to a much greater choice of products and services at more competitive prices. Via online product reviews, feedback opportunities, discussion forums, and 24/7 customer service availability – facilitated via email, or even online chat – consumers are better able than ever to research, compare, and ultimately make more informed choices about the goods and services they purchase, whether online or offline. The development of corresponding policy, or consideration thereof, should recognise the immense benefit to consumers which the online environment has provided and be careful not to unintentionally restrict or discourage consumers and businesses from taking further advantage of such benefits online.
- **Legal certainty** – Addressing obstacles behind legal fragmentation, such as varying UCPD interpretations, provides businesses, particularly SMEs, greater legal certainty for taking further advantage of the opportunities provided by the Internal Market, thereby improving competition and enhancing consumer confidence.

## Issues related to the enforcement of the UCPD

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EDiMA believes Member State national authorities have sufficient means to effectively enforce the provisions set forth in the Directive (and, as implemented in national legislation). The current status quo is a balanced approach to the protection of consumer interests and the capabilities of authorities. Moreover, as the authorities in different countries currently and often act upon different interpretations

of UCPD provisions, extending their capabilities could potentially create even greater problems of fragmentation and legal uncertainty.

### **Self Regulation/ADR mechanisms**

With respect to ADR mechanisms, EDiMA member companies provide users with a variety of tools for online dispute resolution. EDiMA believes that the following principles underpin successful dispute resolution:

- First, dispute resolution mechanisms must be available for the use of consumers and businesses alike.
- Second, such mechanisms should reflect the fact that most problems are best resolved with early and direct communication between the trading partners.
- Third, the European legal landscape must allow for private internal dispute handling systems, and must refrain from imposing an arbitrary and inflexible system.

It is crucial that the European legal landscape facilitates the set-up of private internal dispute handling systems and refrains from imposing a straitjacket in this regard. Here, in the context of the Commission's parallel consultation on ADRs, we believe the current framework of two Commission Recommendations setting out minimum guarantees is satisfactory. It has the necessary flexibility so that ADR or ODR systems can be set up by industry internally to provide for quick, simple, and effective resolution, can be adapted to specific disputes, and can be further developed based on experience.

Indeed, policy efforts to encourage consumers and traders to use ADR must promote and endorse existing systems, including internal industry schemes. EDiMA would therefore caution against efforts that mandate adherence by traders or consumers to a particular ADR scheme or make the use of certain ADR schemes a mandatory first step before court.

### **Conclusion**

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The passage of the UCPD marked a significant shift in consumer protection legislation away from prescriptive rules to principles-based law, which EDiMA supports. However, while the underlying objectives of such legislation are entirely laudable, our experience has shown that UCPD implementation in practice has led to considerable regulatory uncertainty as a result of divergences in Member State interpretations. As the Commission has highlighted in various and corresponding contexts, a fragmented regulatory framework for consumer protection in EU Member States creates significant barriers to cross-border trade. This is detrimental to both consumers and businesses and hinders both the creation of a Digital Single Market in the EU and the rollout of new services to consumers.

Accordingly, EDiMA would welcome additional guidance from the Commission on how to interpret the UCPD. While the establishment of a database of relevant court judgments is a helpful first step, policymakers should focus on providing guidance aimed at facilitating consistent national and local UCPD interpretations. We would support the dissemination of much more comprehensive guidance both about the key principles of the UCPD and the definitions which support them in order for consumers to have clearer information regarding their rights, and for businesses to have greater regulatory certainty in terms of compliance.