



The Unfair Commercial Practices Directive in the *gambling* sector

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The Unfair Commercial Practices Directive in the gambling sector

- The concept of ‘gambling’ in EU legal measures
- No EU gambling law as such (gambling laws not harmonized at EU level – national gambling laws apply)
- It covers games of chance including casino games, lotteries and betting (E-commerce Directive, Recital 16 and Consumer Rights Directive, Recital 31)
- Gambling is excluded from most EU consumer protection measures – Member States are free to decide how to legally protect ‘gambling consumers’
- Excluded by most *not all* EU consumer protection measures...

The Unfair Commercial Practices Directive in the gambling sector

- Highly important 2005 EU consumer protection legislative measure
- It is part of the national laws of all EU Member States in the form of substantively identical provisions: the Directive one of...

Maximum Harmonization

(except in relation to immovable property and financial services)

- What maximum harmonization means?
 - In theory...
 - In practice...

Unfair Commercial Practices Directive in the gambling sector

- It does **NOT** exclude gambling from its scope
- **gambling providers** must employ commercial practices that comply with the Directive (strict financial sanctions by the Cyprus consumer protection authority)
- **governments** (through national laws) cannot restrict commercial practices by gambling providers to an extent greater than the Directive does
- The Directive controls fairness of commercial practices employed by traders (including gambling providers) directly connected with the promotion, supply or sale of a product (including a gambling service) to consumers – **VERY IMPORTANT**: it protects consumer economic interests, not health and safety
- VERY wide (all-inclusive) definition for the term 'commercial practice' - classic advertising included but **literally everything** a trader does or fails to do while addressing the consumer offline and online: promotional leaflets, emails, website banners and all other web material addressed to consumers

The Unfair Commercial Practices Directive in the gambling sector

How it achieves its purpose?

- *Simply:* by prohibiting unfair commercial practices [Article 5(1)]
- *In more detail:* in 3 different ways (tools) [one very specific, another very general and a third in between]

Unfair Commercial Practices

Directive: *the very specific way*

- A list of 31 sufficiently described commercial practices that are rendered automatically unfair by the Directive and thus prohibited [Article 5(5), Annex I]
- The easiest to use legal tool of control for authorities and courts: just one question to be asked in applying and enforcing the law
- Is the practice in the list?
- **It is unfair. Full stop!**
- Thus, it is prohibited, it should stop (via an injunction) + the trader may face administrative (in some MS, even criminal) sanctions



Unfair Commercial Practices

Directive: *the very specific way*

Examples of commercial practices in the list

(Black commercial practices are not gambling-specific of course, the Directive is an all-market measure – market neutral wording)

- Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorized by a public or private body when he/it has not (eg. stating that a provider is licensed by the National Betting Authority)
- Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time (eg. If you intend to offer a 100% deposit matching bonus permanently, for six months, for two months, just don't state this is a limited offer valid for a day or a week!)
- Stating or otherwise creating the impression that a product can legally be sold when it cannot (eg. be careful about the products you offer in your premises or your websites – if they are illegal gambling products or you cannot legally offer them, you breach unfair commercial practices law too)
- Claiming that products are able to facilitate winning in games of chance (eg. “how to win the lottery” products or claims) - vulnerable consumers are likely to be affected by such claims
- Describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything (eg. Free means free – if the consumer has to pay anything don't use the word ‘free’ – deposit matching bonuses are not free!)
- ‘Making persistent and unwanted solicitations by telephone, fax, email or other remote media (direct marketing is good but you should not overdo it)

Unfair Commercial Practices Directive: *the way in between*

- The Directive specifies two categories of unfair commercial practices: *misleading* and *aggressive* practices [Article 5(4)]
- It defines each category rather broadly - it does not list specific examples of practices that would fall in one or the other category
- This second tool does *not* provide for *automatically* unfair practices but requires a case-by-case assessment of all relevant circumstances

Unfair Commercial Practices Directive:

the way in between

- **Misleading practices:** misleading actions and misleading omissions
- **Misleading actions** [Article 6]

False information (lies) or deceptive + likely to result in consumer taking a transactional decision he would not have taken otherwise

(the falsehood or deception must relate to a number of elements listed in Article 6 - very long list as the Directive is an all-market measure)

Misrepresenting the odds of winning, the rules of the game, the return of the bet can lead the consumer to bet, to bet an X amount, to play that game and not the other (these are transactional decisions)



Unfair Commercial Practices Directive: *the way in between*

- **Misleading omissions** - an innovation of the Directive [Article 7(1): omits or fails to disclose information that the consumer needs to make an informed decision + likely to result in the consumer taking a transactional decision he would not have taken otherwise]
- No typical lying but half-truth telling *(the end result is the same: the consumer is deceived)*
- 'Send an **SMS** to participate in a draw without saying that the SMS is *not* to be charged at standard rates.
- *Just because the information is there, it does not mean it has not been omitted [hiding it or offering it in an unclear or ambiguous way still constitutes a misleading omission - article 7(2)]*

Unfair Commercial Practices Directive:

the way in between

- **Misleading omissions** in gambling

Examples

- Not saying (or hiding) the fact that the consumer must play for an X amount of time before being entitled to withdraw winnings
- Not saying that deposits or any part of them are non-refundable (or cannot be withdrawn)
- Not saying that a gambling provider can cancel bets or alter odds and clearly explain the circumstances in which such actions may be taken

Remember: because the information is there is not enough! Complex and unintelligible descriptions or terms and conditions cannot prevent a misleading omission

In the UK, the Competition and Markets Authority has been investigating online gambling providers in relation to such practices and their compliance with the unfair commercial practices law (

<https://www.gov.uk/government/news/cma-launches-investigation-into-online-gambling>
+ <https://www.gov.uk/cma-cases/online-gambling>)

Unfair Commercial Practices Directive:

the way in between

- No lies, false or omitted information but

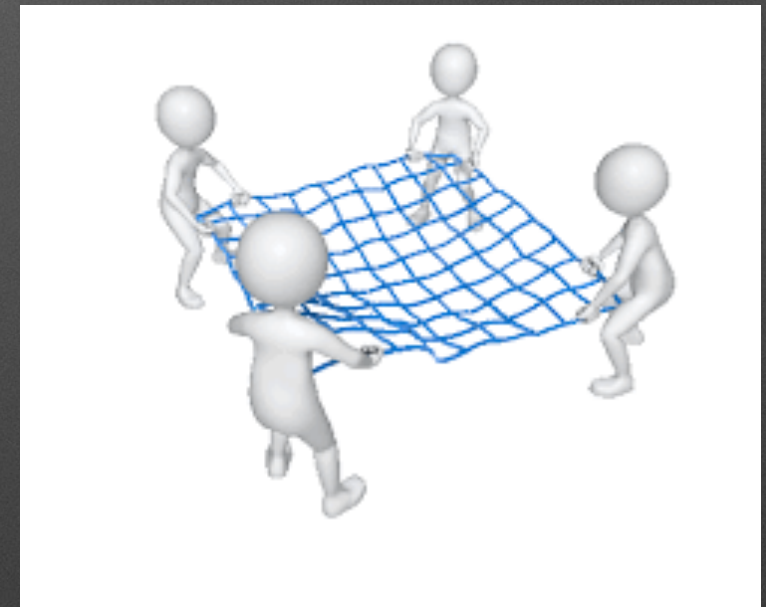


- The trader behaves in such a way that the freedom of choice or conduct of the consumer is restricted - the consumer appears to have made a decision, yet that decision is not really his or hers but has been forced, imposed by the trader
- Continuous/persistent SMSs, calls, emails offering gambling services, advertising to users who have been self-excluded from gambling, ignoring self-exclusion requests, requiring very long periods of playing or very high wagering amounts before releasing winnings
- **Aggressive practices** [article 8: through harassment, coercion or undue influence (exploiting a position of power over the consumer), they can significantly impair consumer freedom of choice and conduct + likelihood of consumer taking a transactional decision he would not have taken otherwise]
- Article 9 = assistance to enforcers in applying Article 8, thus deciding whether a practice is aggressive = a list of relevant factors = eg. **Timing, nature, location or persistence of the practice, taking advantage of a specific misfortune or circumstance of such gravity that impairs consumer judgement of which the trader is aware**

Unfair Commercial Practices

Directive: *the very general way*

- **The general clause (or general prohibition)** - Article 5(2): a practice is unfair if (a) *is not in accord with professional diligence* and (b) *is likely to distort the economic behaviour of the consumer*, that is, cause him to take a transactional decision he would not have taken otherwise
- The safety net of the law
- Very general test without specific guidance as to its application - enforcers must exercise own judgement regarding the fairness of a practice using very broad concepts such as 'honest market practice' and 'good faith'
- Basically, if 'something is not right' but cannot (clearly) qualify as misleading or aggressive, chances are (if the consumer is pushed towards a transactional decision he would not have taken otherwise), that it may be an unfair commercial practice
- Few practices would necessitate resort to this general test: 'cloaked' algorithms reducing the chances of winning in online gambling software (?), renewing subscriptions if the consumer does not take steps to prevent renewal without notifying the consumer or giving him the opportunity to prevent renewal (Commission Guidance, 2016)



Unfair Commercial Practices Directive *and* EU Commission on gambling advertising

2012 Communication by the EU Commission

Absence of EU Gambling law but worries about consumer protection in the gambling domain in Member States...(not all have gambling-specific consumer protection rules)

Called for a “a common set of principles elaborated at EU level should aim at ensuring a high level of consumer protection. These principles should include effective and efficient registration of players, age verification and identification controls – in particular in the context of money transactions, reality checks (account activity, warning signs, signposting to helplines), no credit policy, protection of player funds, self-restriction possibilities (time/financial limits, exclusion) as well as customer support and efficient handling of complaints”

Announced the issuance of a Recommendation for rules on responsible **advertising** (**territory of the Unfair Commercial Practices Directive**) → care not to recommend rules that are inconsistent with the maximum harmonization nature of the Directive (no explicit reference by the Commission)

It explicitly recognized the applicability of the Directive to gambling: “The Recommendation will complement the Unfair Commercial Practices Directive”.

Unfair Commercial Practices Directive *and* EU Commission on gambling advertising

2012 Commission Staff Working Document (accompanying the Communication)

- **More explicit reference to the application of the Directive to gambling-related commercial practices**

“...Although the UCPD is without prejudice to authorisation regimes such as the rules related to gambling activities, advertising and marketing practices fall within its scope. As a consequence, gambling advertising falls foul of the Directive if it is contrary to the requirements of professional diligence and if it is distorting the economic behaviour of the average customer or a clearly identifiable group with an underlying vulnerability, e.g. minors, where the gambling provider can reasonably expect such a distortion..”

- **States that the Directive should actually be exploited by regulators and enforced to ‘cleanse’ the gambling domain from unfair commercial practices**

“Whilst gambling services are not subject to sector-specific regulation at EU level the advertising and marketing of the offer and promotion of gambling services are covered by the Unfair Commercial Practices Directive. The Commission believes that in a competitive online cross-border environment consumers need to be sufficiently informed on the choices they make and they should feel that enforcement of existing provisions for online services is adequate”.

“Finally, the Unfair Commercial Practices Directive has contributed to better protection of consumers against misleading or aggressive marketing....the Commission will undertake a more prominent role in monitoring the Directive in the Member States”.



No doubt that the Directive must be one of the laws to be considered **by gambling providers** (it concerns them) and **by enforcement authorities** (the Consumer Protection Service, Ministry of Commerce will certainly have another domain to look at, the NBA should look for synergies with the said Service – gambling advertising is not solely in its own remit, the largest part is actually outside its own remit

Unfair Commercial Practices Directive *and* EU Commission on gambling advertising

2012 Commission Staff Working Document (accompanying the Communication)

- Explicitly encourages Member States to adopt the rules in the Recommendation as mandatory rules (as law)

"The Commission will adopt, a Recommendation on Responsible Gambling Advertising. The aim is to draw up common rules of conduct at European level according to the specifics of the sector...The objective is to provide Member States with the parameters to undertake adequate protection measures, including therefore sanctions for non-compliance or for knowing or repeated breaches which in themselves are an incentive for operators to abide by them". ..The Commission will encourage Member States to endeavour to take up its provisions of within their regulatory frameworks. Member States may set out more detailed provisions at national level, in law or in regulatory practices..."

Any problem with the maximum harmonization of the Directive?

- Not necessarily...

CJEU case-law on compatibility of national provisions with the Directive (C-206/11, Köck, 17 January 2013; Case C-559/11, Pelckmans Turnhout NV, 4 October 2012; C-540/08 Mediaprint, 9 November 2010):

- Does the rule regulates a 'commercial practice' within the meaning of the Directive? (If no, no problem, if yes, go to next question)
- Is the objective of the rule the protection of consumers? (if no, no problem provided the other objective is the sole objective, if yes or if consumer protection is amongst the objectives of the law, go to next question)
- Is the consumer interest that the rule intends to protect economic? (if no, no problem, if yes, go to next question)
- Does the rule deviates from the Directive, that is, is it more lenient or even stricter than the Directive? (if no, no problem, if yes.....

 **It is inconsistent with the Directive and thus, unenforceable** (gambling operators cannot be prosecuted or otherwise, suffer sanctions by way of application of the rule)

Unfair Commercial Practices Directive *and* EU Commission on gambling advertising

The 2013 Commission Recommendation (applying the 'compatibility test' to the Recommendation)

- Do the rules regulate 'commercial practices'?

Most definitely!

Rules 39-45 are entitled 'commercial communications', Rules 46-48 'sponsorship', others Rules too, concerning gambling websites and terms and conditions

- Is the objective of the rules the protection of consumers?

Most definitely!

The Commission mentions 'consumer protection' multiple times as the aim of the rules

- Is the consumer interest that the rule intends to protect economic?

The Commission says No!

"(9) The aim of this Recommendation is to safeguard the health of consumers and players and thus also to minimise eventual economic harm that may result from compulsive or excessive gambling"



That leads to a NO COMPATIBILITY PROBLEM CONCLUSION

Unfair Commercial Practices Directive *and* EU Commission on gambling advertising

The 2013 Commission Recommendation (13-page document with 8 different categories of rules)

- **Example recommended rules (1)**

EXAMPLE 1 (Recommended rules 4(c)-(d), 40 and 41(d) and (e))

“The following information should be displayed prominently on the landing page of the operator’s gambling website and be accessible from all pages on the website:...a ‘responsible gambling’ message, which no more than one click away provides: (i) information that gambling can be harmful if not controlled; (ii) information about the player support measures on the website; (iii) self-assessment tests for the players to check their gambling behaviour”

“Member States should ensure that commercial communications of online gambling services carry messages including at least the risks for health of problem gambling, in a practical and transparent manner”.

“Commercial communications should not: ...(d) portray gambling as socially attractive or contain endorsements by well-known personalities or celebrities that suggest gambling contributes to social success; (e) suggest that gambling can be a resolution to social, professional or personal problems”

(d) a link to at least one organisation providing information and assistance in respect of gambling disorders.

One can see the ‘health and safety’ objective behind these Rules (gambling is widely-recognized as entailing risks to health and personal life)

These go beyond the Directive – the Directive does not automatically prohibit endorsement of a gambling product by a celebrity, this practice is not in the black list...

Yet no compatibility problem

Unfair Commercial Practices Directive *and* EU Commission on gambling advertising

The 2013 Commission Recommendation (13-page document with 8 different categories of rules)

- **Example recommended rules (1)**

Some of the rules seem mainly to have a rather economic rational (protection of economic interests rather than prevention of gambling addictions)

“The terms and conditions of the contractual relationship between the operator and the consumer should be provided in a concise and legible manner. They should: (a) contain information at least about timeframes and limits regarding withdrawals from the player account, any charges concerning the player account transactions and a link to the applicable payout percentages for every game” (Rule 5(a))

“Member States should ensure that the operator on whose behalf the commercial communication is made is clearly identifiable” (Rule 39)

Member States that permit unsolicited commercial communication by electronic mail should ensure: (a) that such commercial communication is identifiable clearly and unambiguously; (Rule 44(a)).

If beyond the Directive → a compatibility problem, yet these rules are only few

Unfair Commercial Practices Directive *and* EU Commission on gambling advertising

Main Conclusions

- ❖ As a result of the Unfair Commercial Practices Directive and the EU Commission Recommendation, gambling advertising should be considered as heavily regulated – one ad may breach multiple laws attracting multiple sanctions (of concern to gambling providers and providers of advertising services) *You simply don't just publish a nice ad!*
- ❖ Given the major role of the Directive in this area, a synergy between *the NBA, Ministry of Finance* and *the Consumer Protection Service, Ministry of Commerce* is warranted **plus** gambling becomes a new domain where the latter should look at in complying with its enforcement duties
- ❖ In introducing gambling-specific advertising laws, Cyprus and other Member States **have in mind the 'compatibility trap'** existing as a result of the applicability of the Directive in the particular sector and try to avoid it – falling into **it may result in unenforceable rules**, failed prosecutions, unnecessary costs and resource waste.



Thank you!