

Unfair Terms and Unfair Commercial Practices



Operational Programmes II – Cohesion Policy 2007-2013
Empowering People for More Jobs and a Better Quality of Life
Project part-financed by the European Union
European Social Fund (ESF)
Co-financing rate: 85% EU funds; 15% National Funds





What makes a contract term unfair?



A contract term is deemed unfair if on its own, or in conjunction with other terms, creates an imbalance between the rights and obligations of the contracting parties to the detriment of consumers. An unfair term tries to diminish or take away consumers' legal rights.

The unfairness of a term is also determined by taking into account the nature of the goods and services purchased, and also

whether consumers were subject to undue pressure or their lack of knowledge was improperly taken advantage of.

Some examples of unfair contract terms, include terms that:

- exclude or limit the liability of a trader;
- establish an unreasonably short period of time for notifying the trader of any defects;
- make an agreement binding on the consumer, whilst the provision of the goods or services is made subject to conditions depending on the will of the trader;
- allow the trader to retain sums paid by the consumer should the consumer decide to cancel the contract, but the consumer is prohibited from requesting compensation if it is the trader who cancels the contract;
- require a consumer to pay to the trader as compensation a sum which is disproportionately high to the value of the goods or services purchased or hired;
- prohibit the cancellation of the contract if the trader fails to fulfil his obligations;
- enable the trader to alter the terms of the contract unilaterally, without a valid reason which is specified in the contract;
- cause the price to vary by reference to factors depending only on the trader's will;
- give the trader the exclusive right to interpret any term of the contract;
- permitting the trader to establish or alter unilaterally the period for delivering goods or supplying a service;
- automatically extending a contract of fixed duration where the consumer does not indicate otherwise.



It is also prohibited to irrevocably bind the consumer to terms with which he had no real opportunity of becoming acquainted with before the conclusion of the contract.

What happens if an unfair term is included in a consumer contract?

Unfair terms are not binding on consumers. If the contract is unable to continue existing without the unfair term then the whole contract is not binding on the consumer.



Wording of consumer contracts

Consumer contracts should be written in plain and intelligible language which can be understood by the consumer to whom the contract is directed. If the meaning of a term is doubtful, then the interpretation most favourable to the consumer prevails.





What makes a commercial practice unfair?

A trading practice is considered unfair if it is likely to impair a consumer's ability to make an informed choice, or else leads consumers to a buying decision that otherwise they would not have made.

The majority of unfair trading practices are either **misleading** or **aggressive**.



Misleading commercial practice

A commercial practice is misleading if:

- it contains false information;
- is likely to deceive the average consumer even if the information presented is correct;
- leaves out important information when promoting products or services;
- the information provided is unclear and ambiguous.

Some examples of misleading commercial practices

- Fake "Free Offers" where businesses claim that a product is "free" when in reality consumers have to pay for it.
- Prize promotions where there is either no prize or consumers must make a payment in order to claim a prize.
- False claims that products can cure illnesses or disabilities.
- Limited offers where the trader falsely states that a product will only be available for a very limited time in order to elicit an immediate buying decision.
- Advertorials that fail to make clear that a trader has paid for media promotions.
- Creating the false impression that after sales service in relation to a product is available in a Member State other than the one in which the product is sold.



Aggressive commercial practice

A commercial practice is considered aggressive when the average consumer's freedom of choice is impaired through harassment, coercion, including physical force, or undue influence.

Aggressive practices include:

- sales tactics that try to intimidate or coerce consumers;
- the use of threatening or abusive behaviour;
- practices that try to take advantage of consumers that the trader could foresee as vulnerable because of mental or physical infirmity, age or credulity.

Some examples of aggressive commercial practices

- the trader creates the impression that the consumer cannot leave the premises until a contract is formed and signed;
- the trader refuses to leave a consumer's home after being requested to do so;
- taking a consumer to a remote destination with no apparent return transport;
- advertisements directly aimed at getting children to buy products or persuade adults to buy for them.



Banning of unfair commercial practices

Unfair commercial practices are prohibited in any business-to-consumer transaction, irrespective of the product or service, or the circumstance of the transaction, being it face-to-face, via telephone, internet or mail.



Reporting an unfair commercial practice

Unfair trading practices may be reported to the Office for Consumer Affairs, within the Malta Competition and Consumer Affairs Authority, in writing or by calling personally at Mizzi House, National Road, Blata l-Bajda, or by phoning on Freephone 8007 4400 or tel no 2395 2000.

Information, Education & Research Directorate
Office for Consumer Affairs
The Malta Competition & Consumer Affairs Authority
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