

CERHA HEMPEL CEE NEWSLETTER

Hungary

Price Cuts, Discounts, Online Commerce and the Digital Economy

The European Commission's interpretation of the [UCP Directive](#) was published in the form of a Notice on 17 December 2021. The Commission also published notices on the interpretation of other consumer protection directives (e.g. on price indication and consumer rights) on the same day. The publication of these [documents](#) was all the more timely because national consumer protection regulations will change significantly on 28 May 2022 due to the transposition of the [Omnibus Directive](#). One of the objectives of the notices is to provide assistance to businesses, consumers and legal professionals concerning the interpretation of the regulations and the legal assessment of commercial practices pursued in a digital environment.

There are still major differences in the interpretation of certain provisions of the regulations that have transposed the UCP Directive into national law and in the severity of the punitive sanctions applied under such regulations. The updated Notice, which includes the latest case law of the ECJ up to the date of the Notice and also describes a few national cases, will prove to be a valuable tool that will enable national regulatory authorities to finally interpret the Directive (and the national regulations transposing it) in a uniform manner.

Transactional decisions, dark patterns and consumer shaming: stricter rules

When it comes to assessing whether a commercial practice is unfair, consumer protection authorities examine whether it is capable of distorting a consumer's transactional decision. Authorities have applied a very broad definition of

transactional decision, and such an approach appears to have been confirmed by the Notice. The Commission argues in the Notice that clicking on an online link or advertisement, the continued browsing of a website or scrolling through a feed can also qualify as a transactional decision.

The term "dark patterns" is applied to methods that can be used to manipulate consumers, such as the creation of a user interface where users are induced by the dark pattern to make decisions that they would not otherwise make. For example, dark patterns include practices where a website is designed in such a way that the "buy" button is very conspicuously placed while the button to cancel the transaction is in a much less prominent position, or where the position of 'yes' and 'no' buttons are strategically switched midway through the buying process to increase the chance that consumers will click as the website operator wants them to. The Notice also mentions "confirm shaming", a practice where traders attempt to shame consumers if they do not make the choice that the trader wants. The Notice states that such practices can qualify as unfair commercial practices.

The Commission has taken notice of influencers and gamers

The issue of 'influencer marketing' is addressed by the Commission for the first time, and the Notice makes it clear that the content produced by influencers to promote products and services can in many cases involve misleading practices. The Commission notes that it is not necessary that the influencer should receive monetary payment for the relevant content to have a commercial element; any form of consideration (including unsolicited gifts) is sufficient. In order to avoid a breach of the regulations, the commercial element/nature of influencer content must be disclosed

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clearly and appropriately in the light of its context, placement, timing, duration, language, and target audience, etc.

The Commission also applies a strict approach to video, mobile and online games. The Commission argues that the publishers of games can be guilty of misleading or aggressive commercial practices if the existence of in-game promotions and advertisements is not made sufficiently clear for players and if they are not distinguishable from gameplay. For example, this requirement also dictates that the prices of virtual products must also be displayed in a real currency, and that a purchase must not be made without the player's express consent even if the payment method is saved as a default setting. Further, a game can only be lawfully advertised as free if it offers a reasonable and appropriate gaming experience even without in-game purchases. The practice of urging players to execute micro-transactions (make low-value purchases) at critical points in a game can also qualify as an aggressive practice. If a game involves elements of gambling (e.g. prize wheels, loot boxes, etc.), their presence should be disclosed clearly and in a manner that it is clearly distinguishable from gameplay, including an explanation of the probabilities of receiving a (random) item.

Application in Hungary

The approach used by the Hungarian Competition Authority, the competent national regulatory agency, is forward-looking in the sense that it has examined practices that will be blacklisted after 28 May 2022 in light of the current regulations. Such practices include automated ticket sales examined in the recent [Viagogo case](#) or the moderation of consumer opinions examined in the [Hermina Bau](#) case. The evaluation of whether these

and other practices in the digital sector comply with consumer protection rules will probably be easier now with the addition of new chapters to the Notice, but this does not mean that businesses will find it easier to comply with the stricter requirements. However, if our hopes are realised and the UCP Directive is indeed interpreted consistently across the EU as intended by the Commission, awareness of the Notice will help Hungarian businesses as well as companies that operate in several Member States achieve voluntary compliance, which can also result in the avoidance of increasing fines.

For more information

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