



Mis-selling and unfair contract terms in financial products

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Tomasz Dolny

Consumer and Marketing Law Unit



Mis-selling of financial products

Unfair Commercial Practices Directive (UCPD)



The Unfair Commercial Practices Directive

Exception from full harmonisation

- In relation to financial services Member States may impose **requirements which are more restrictive or prescriptive** than the Directive in the field which it approximates (Article 3(9)).
- Rationale (Recital 9): Financial services, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders.



Safety net against mis-selling

- Several **sector-specific Directives** are relevant as regards consumer protection in relation to financial services.
- Problem of deliberate or negligent selling of financial products where certain material aspects are misrepresented or the product is clearly unsuitable for consumer needs
- **Mis-selling is prohibited by the UCPD** based on case-by-case assessment, as it breaches professional diligence requirements and has an impact on consumer decision-making.



Article 5(2)(a) Requirement of professional diligence

- **Article 5(2)(a): particularly relevant** to traders acting vis-à-vis consumers within the field of financial services.

Articles 6 and 7: Information requirements

- **Articles 6(1)(b) and 7(4)(a):** information to consumers should not be false, deceptive, unclear, unintelligible or ambiguous, particularly with regards to the **benefits, expected results and the risks** in relation to a financial product or service.
- Traders should not exaggerate economic benefits, not omit information about financial risks to consumer and **not over-rely on past performance** on the financial product.



Examples of the UCPD application in financial services

***Examples** from the Commission Study on the application of the UCPD in the areas of financial services and immovable property:*

- pre-contractual and contractual **information obligations**: advertisement for money exchange services in Spain
- prohibition of taking advantage of **particular vulnerabilities**: advertising that a loan may be granted without documentary proof of the consumer's financial position in France
- prevention of **conflicts of interest**: prohibition on banks financing their clients' purchase of shares issued by the bank itself in Denmark

Questions:

- Could you give examples of cases of mis-selling of financial products in breach of the UCPD?
- What are the enforcement challenges?
- Are there any (planned) special rules on mis-selling of financial products going beyond the UCPD?



Unfair terms in financial products

Unfair Contract Terms Directive (UCTD)



Application of the Unfair Contract Terms Directive in financial services

- A term which has not been individually negotiated is **unfair and not binding**, if it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer.
- The contract normally continues to exist, if it is capable of continuing its existence without the unfair terms (n.b. important for mortgage loans).
- Contracts must be drafted in plain, intelligible language, i.e. consumer must understand economic consequences.



Examples of cases concerning unfair terms in financial products

- Risks in **foreign exchange (FX) loans** (e.g. currency spreads)
- Imbalances in variable interest loans related to **minimum interest rates** (e.g. floor clauses)
- Unclear and complex provisions on **additional charges**. Difficult for the consumer to understand the economic mechanism.
- Limited protection when the contract is enforced based on **accelerated procedures** (e.g. limited opportunities to raise the unfairness or to have it assessed by the court)



Procedural aspects of the protection against unfair terms

- EU consumer protection directives focus on the substantive law and **do not harmonise the rules of procedure.**
- The Court of Justice emphasises that the consumer is in weak position vis-à-vis the trader.
- The procedural autonomy of the Member States is limited in so far as it affects the application of EU rights (e.g. consumer rights).
- Obligation of an ex officio control complemented by the principles of equivalence and effectiveness of EU law.



Ex officio assessment of unfair terms

Obligation to examine the fairness of contractual terms and apply necessary consequences of their own motion

- The court is required to examine the term where it has available to it the legal and factual elements necessary for this task.
- Where the court considers that the term is unfair, it must not apply it, except if the consumer opposes that.



Rules applying to EU rights must not be less favourable than those applying to similar rights under national law (principle of equivalence)

- Non-binding character of unfair terms is equivalent to public policy considerations. The UCTD must be regarded as a rule of public policy

National rules may not make it impossible or excessively difficult to exercise EU rights (principle of effectiveness)

- The national court must assess legal and factual circumstances which may act as an obstacle
- **Example 1:** use of other types of procedures instead of an ordinary civil procedure to deprive consumers of the protection
- **Example 2:** where national procedures prevent a consumer from raising the unfairness of the contract term



Questions:

- Are consumers adequately protected against unfair terms in the contracts for financial products?
- Do the courts assess the unfairness of terms ex officio, i.e. also when the consumer has not raised the potential unfairness, as required by the CJEU case law?
- Do you see any obstacles for the effective protection of consumers against unfair terms in financial products?



Thank you!

Tomasz Dolny
Consumer and Marketing Law Unit
tomasz.dolny@ec.europa.eu

