Unfair Commercial Practices and Misleading Advertising

Advance Copy
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Executive summary

Unfair commercial practices and misleading advertising are some of the most traditional themes in the field of consumer protection. As misleading advertising and unfair commercial practices usually reach society, as a group, these topics are not only related to consumer legitimate rights to access proper information about products and services, but also: contract conditions, access to education and consumer authorities’ enforcement against unfair practices. In times of increasing propagation of the digital economy, consumers and consumer protection experts have been also dealing with new methods and new forms of unfair practices and misleading advertisement, what calls for the development of measures and policies to protect consumers both offline and online.

This study by the United Nations Conference on Trade and Development (UNCTAD) provides basic information on the topics of unfair practices and misleading advertisement for the Middle East and North Africa (MENA) region, which may envisage the adoption or improvement of policies and actions focused on the protection of consumers. The unfair practices and misleading advertisement study also provides international references from organizations and experts related to trends and experiences, inspiring capacity building activities, government’s officials, civil society organizations and other stakeholders’ representatives involved in procedures related to consumer protection policies.
**1. Introduction**

This study focuses on one of the most common themes in the field of consumer protection: *unfair practices and misleading advertisement*. In the eagerness to improve a business, to obtain an advantage, to reduce the price of a product by changing its features, to attract consumers, businesses sometimes fail to respect consumers rights. In times of increasing propagation of the digital economy, consumers and consumer protection experts have been also dealing with new methods and new forms of *unfair practices and misleading advertisement*.

In order to achieve a complete and diverse understanding of the meaning and the impacts of *unfair practices and misleading advertisement* and the importance of combating them, this study briefly refers to the History of Consumer Protection and the development of the Consumer Protection Movement (Background); secondly it refers to the objectives of this publication and the importance of addressing this very specific theme in order to protect consumers. In a third moment this study approaches the existing definitions of *unfair practices and misleading advertisement* and references about these topics. Lastly, this study refers to the United Nations Guidelines for Consumer Protection (2015), the role of consumer authorities and consumer associations (civil society) to protect and inform consumers against unfair practices. The study also refers to existing policies in different countries and regions and mechanisms to provide information to consumers. The study ends with its conclusions and recommendations.

The aim of this study is to provide not only information about *unfair practices and misleading advertisement*, but also the necessary information for the MENA countries to improve methods and approaches against these practices.

The content of this study was drafted based on various references of both developed and developing countries from different regions of the world. It also provides academic and experts’ references (European Union, Organisation for Economic Co-operation and Development and the United States Federal Trade Commission) facilitating access to additional information.
2. Background

Historically, consumers’ rights were first addressed by and demanded by the civil society. The consumer protection movement, is a result of a series of economic developments – mainly the establishment of capitalism – as the common economic system – based on private property, capital accumulation, wage labour, voluntary exchange, price system, markets and the distribution of goods and services mainly determined by market competition.

Such market freedom thus demanded the protection of consumers, who had their rights recognized mainly due to their vulnerabilities compared to providers, the ones selling goods and rendering services.

The first consumer protection civil society organization was founded in the United States of America in 19361: Consumer Reports, “formed as an independent, non-profit organization (...) serves consumers through unbiased product testing and ratings, research, journalism, public education, and advocacy (...)”

One of the most respected consumer protection civil society representative is the London based Consumers International, first founded in 19602 with the mission to “(...) champion Consumer Rights internationally in order to help protect and empower consumers everywhere (...)”.

The historical reference for the recognition of consumers’ rights and the first outline of what would be in fact consumer protection, is the former United States of America President John Kennedy who, on March 15th, 1962, speech to the American Congress affirming3:

“Consumers by definition, include us all,
They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group... whose views are often not heard.

Nearly all of the programs offered by this Administration - e.g., the expansion of world trade, the improvement of medical care, the reduction of passenger taxes, the strengthening of mass transit, the development of conservation and recreation areas and low-cost power - are of direct or inherent importance to consumers.

Additional legislative and administrative action is required, however, if the federal Government is to meet its responsibility to consumers in the exercise of their
These rights include:

(1) The right to safety […]

(2) The right to be informed–to be protected [information, advertising, labelling]

(3) The right to choose–to be assured, wherever possible, access to a variety of products and services at competitive prices […];

(4) The right to be heard [consideration of consumer interests in the formulation of Government policy] and fair and expeditious treatment in its administrative tribunals.

To promote the fuller realization of these consumer rights, it is necessary that existing Government programs be strengthened, that Government organization be improved, and, in certain areas, that new legislation be enacted.”

Following such official recognition of consumer’s rights, many countries began drafting their consumer rights laws, since the theme was then only addressed under commerce rules and laws.

The European Union

The Treaty on the Functioning of the European Union (TFEU) of 1957 (into force as from 1958) together with the Treaty on the European Union form the basis of the European Union Law. The TFEU refers to the shared competence among Member States, including Consumer Protection (Article 4). More specifically, under Title XV, Article 169 (ex Article 153 TEC), establishes the basis for the European consumer protection policies: health,

1 http://consumersunion.org/about/mission/ (accessed on May 18, 2017)
2 http://www.consumersinternational.org/who-we-are/about-us/ (accessed on May 18, 2017)
safety and economic interests of consumers, right to information and education.

The main objectives of the European Consumer Policies (CP) include the promotion of consumer information and education so that consumers can be empowered to make informed decisions as well as defend their rights.

In order to reach such aim, the European CP focuses on consumer legislation enforcement, product safety, clear and fair information.

The European consumer protection policy was adopted in April 2012 having as its main topics: consumer product safety, consumer access to information and redress.

In times of digital economy, the European Commission also focuses on e-commerce, collaborative economy, consumers vulnerabilities and sustainable choices.

The OECD

The Committee on Consumer Policy (CCP) was established at the Organisation for Economic Co-operation and Development (OECD) in 1969 gathering senior consumer protection experts and officials from government members and invited experts from non-members as well as representatives of the civil society. The OECD Committee on Consumer Policy has as aims the development and strengthening of markets by ensuring consumer protection from misleading practices as well as unsafe products. The CCP carries out studies and analysis providing the exchange of information among members, publishing guidelines on policies and recommendations that have become reference to most countries.

Upon the advent of the United Nations Guidelines on Consumer Protection, first adopted on April 9th, 1985, consumer movement gained strength by providing a basic model for the development of legislation and policies to protect and defend consumers’ rights.

The United Nations Guidelines for Consumer Protection (UNGCP) was as a clear recognition of the importance of the basic rights such as the right to safety, the right to be informed, the right to choose and the right to be heard. More than half a decade later there are still struggling to guarantee some consumers’ basic rights such as the right to be informed and the right to safety. Following the advent of the digital economy, broader and more facilitated access to products and services worldwide, such concerns have become even more significant.

Upon the advent of Consumer Law and the drafting of specific enforcement rules and procedures - a response to consumers' natural requests motivated by the development of Capitalism in some parts of the world, and the economic struggles in other parts (due to the control of prices in view of upward inflation) – themes such as access to information, consumer product safety and unfair practices gained importance in the consumers ‘rights movement.

Strongly connected to consumer’s right to information, the theme of misleading advertisement and unfair practices relates to consumer’s rights to clear, precise and accessible information on the products, on services, on the conditions of a purchase.

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5 https://www.ecommerce-europe.eu/ (accessed on 19 September 2018)
6 http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (accessed on 19 September 2018)
7 http://ec.europa.eu/environment/eussd/escp_en.htm (accessed on September 2018)
3. **Unfair Commercial Practices and Misleading Advertising Study**

The unfair practices and misleading advertisement Study provides basic information on the existing definitions and related public policies that Consumer Protection authorities can improve existing methods or create a new one.

Considering the development of technologies and the facilitated access to products and services, both offline and online, this study shall also address both offline and online rules and procedures in the field of unfair practices and misleading advertisement.

In a globalised and constantly changing world, it is useful to create rules and mechanisms of protection considering the evolution of commercial activities, products and services.

Apart from the protection of consumers’ rights, Consumer policies also ensure that consumers are well informed to make rational and informed decisions. Consumer law enforcement, market surveillance and effective information-communication-education are considered basic and important tools to address consumer rights.

Governments recognize the role that informed consumers’ play as drivers of innovation, productivity and competition. In order to drive competition, consumers need objective, transparent and easily accessible and manageable information to make informed decisions that best respond to their needs and interests. In this context, consumer empowerment has become more important in today’s changing markets of new and complex products and services. Consumer empowerment may be achieved through consumer education, as well as facilitated consumer access to information and enhancing the capacity of consumers to correctly assess information to make informed decisions.

Consumer protection benefits us all by ensuring that we all have the right: to access non-hazardous products; to adequate information to enable them to make informed choices according to individual wishes and needs; and to effective redress. Empowered consumers, who know their rights are subject to fewer abuses. This directly improves their welfare and the economy as well. It also contributes to creating a level playing field for businesses, which must apply a common set of standards, also positively impacting on competition.

The MENA Programme objective has as one of its main focus the development of Consumer Protection Policies. By the improvement of both Competition and Consumer Protection policies it is possible to guarantee a positive impact on regional economic integration and good governance – some of the MENA Programme aims.

When consumer rights are disrespected whether due to a lack of information, a product or a service flaw, an accident, an unfair practice or misleading advertisement, there is a loss to the entire market place: for there is a rupture in consumers’ trust.

Considering the development of technologies, the improvement of tools and its impact on commercial speed; on the access to products and services, nowadays reachable by one single “click”, negative impacts on consumer trust are as well propagated in a faster manner, via online complaints mechanisms or social media.

That is the reason why both consumer authorities and businesses are encouraged to work on consumer education, meeting consumers’ legitimate needs.

The development of policies and tools to avoid (and protect consumers against) unfair practices and misleading advertisement have a major importance in guaranteeing consumer protection for its impact on: access to proper information, fees and prices, terms, condition, in other words, consumers’ lives.

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10 UNGCP II. Scope of Application, 2. These Guidelines apply to the business-to-consumer transactions, including the provision of goods and services by state-owned enterprises to consumers (...)
4. UNFAIR COMMERCIAL PRACTICES

The consumption relationship puts consumers in a vulnerable position before businesses: consumers are considered consequently vulnerable before businesses due to the disparities of power and technology knowledge. Consumers are therefore vulnerable when compared to businesses due to their lack of financial power, legal power, technical knowledge and even, bargaining power. It is exactly due to these disparities that consumer protection is then justified.

The lack of technical knowledge, legal, political and financial power puts consumers in disadvantage when purchasing a product or hiring a service. In order to avoid unfair commercial practices or even the increase of consumers’ vulnerabilities, specific legislation and policies are drafted to prohibit information omissions, power abuses, unprecise information – meaning, practices that may increase consumer’s vulnerabilities or even take advantage of certain consumers for their increased vulnerabilities such as children and the elderly.

The European Union\(^{11}\) defines unfair business to consumer commercial practices (Directive 2005/29/EC\(^{12}\)) as those which: are contrary to the requirements of professional diligence and; are likely to materially distort the economic behaviour of the average consumer.

The EU Directive also recognizes that “certain consumers” are entitled to a higher level of protection due to their particular vulnerability to the practice or the product, their age (children or the elderly), their naivety or their mental or physical infirmity.

The directive also defines two categories of unfair commercial practice: misleading commercial practices (action or omission) and aggressive commercial practices.

On its Section 1, the European Union Directive clarifies some of the most common forms of unfair practices: misleading actions (Article 6) for containing false information or is presented in a deceiving manner, conducting consumers to take a decision that they would not take otherwise. Misleading or deceiving information may be related to the existence or nature of the product; the main characteristics of the product, its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and even complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product the extent of the trader’s commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product; the price or the manner in which the price is calculated, or the existence of a specific price advantage; the need for a service, part, replacement or repair; the nature, attributes and rights of the trader or his agent, such as identity and assets, qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or awards and distinctions; the consumer’s rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees and/or the risks he/she may face.

Article 7 of Directive 2005/29/EC refers to the unfair practices by misleading omissions; these are the cases when taking account of all its features and circumstances and the limitations of the communication, the business omits material information that the average consumer needs, according to the context, to take an informed decision and thereby causes or is likely to cause the average consumer to take a decision that he/she would not have taken otherwise.

Another unfair practice when businesses hide or provide unclear, unintelligible, ambiguous or untimely manner such material information or fails to identify the commercial intent of the commercial

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\(^{11}\) https://e-justice.europa.eu/content_unfair_commercial_practices_directive_200529-595-en.do

practice if not already apparent from the context, what also leads to consumers to take decisions not based in their fair and complete understanding of the commercial transaction.

According to the OCDE’s Recommendation of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders, unfair practices are the ones which cause harm to consumers for misleading their choices having impact in both consumers’ economic interests but also in the market place due to the negative results of consumer’s trust breach.

B. For the purposes of these Guidelines, “fraudulent and deceptive commercial practices” refers to those fraudulent and deceptive commercial practices that cause actual harm to consumers, or that pose an imminent threat of such harm if not prevented, such as:

1. A practice of making misrepresentations of material fact, including implied factual misrepresentations, that cause significant detriment to the economic interests of misled consumers;

2. A practice of failing to deliver products or provide services to consumers after the consumers have been charged;

3. A practice of charging or debiting consumers’ financial, telephone or other accounts without authorisation.

Apart from misleading practices by omission or action, there is as well the case of “Aggressive commercial practices”, which are also considered unfair for they prevent consumers to freely take informed decisions:

Transaction decisions must be made freely by the consumer. A practice is aggressive and unfair if by harassment, coercion or undue influence, it significantly impairs the average consumer’s freedom of choice and causes them to take a transactional decision they would not have otherwise taken.

Directive 2005/29/EC

According to the EU above mentioned Directive, there are specific conditions which shall be observed in order to identify if a commercial practice is aggressive. This refers to all aspects of the situation of the consumer – business relation, from the place, nature of the practice; to the language, approach or circumstance (taking as example the case of a consumer in an increased vulnerable situation – illness, in a hospital).

In 2013, the European Union launched the result of a study on the effectiveness of Directive 2005/29/EC: the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Unfair Commercial Practices Directive — Achieving a high level of consumer protection — Building trust in the internal market which concluded that: 1. there is a real challenge for enforcers to provide a rapid and efficient response in cross-border cases of unfair commercial practices; 2. that the Directive has a crucial role to play and the Commission has identified retail trade (including e-commerce), the travel and transport sector, financial services, the digital economy, energy and sustainability as key priority areas for unlocking the Single Market’s growth potential.

Unfair practices can therefore be classified as practices that harm consumers’ rights diminishing their access to information so that they can make decisions according to their need, to their economic rights. There are several types of unfair practices what leads legislations not to contain a limited list of practices but only examples of unfair practices such as: tie-in sale, lack of information regarding a product or service; products sent without consumers’ request; lack of budget estimate; products without legal specification; readjustment of price/ budget without consumer’s further notice or knowledge; change of contract conditions without consumer’s further notice or knowledge; improper collection, and, of course misleading advertisement.

In fact, the development and growth of the digital market, of new forms and manners to provide consumers products and services; the new accesses to products and services whether offline or online has been demanding new efforts and measures from authorities and all involved stakeholders to protect consumers from new forms of unfair practices.

According to the OECD studies, more specifically its Report on the implementation of the OECD Guidelines for protecting consumers from fraudulent and deceptive commercial practices


across borders, there has been an important increase in cross-border fraud, as more and more consumers with the tools to buy goods more quickly; it is now easier for traders to use virtual borders to evade regulations by setting up in one country and targeting consumers in another through pyramid and lottery schemes; Travel and credit-related ploys; Modem and web page hijacking as well as Telemarketing.

More recently, the OECD Directorate for Science, Technology and Innovation Committee on Consumer Policy launched a Report on “Consumer Protection Enforcement in a Global Digital Market Place, which apart from recalling the relevance and importance of international cooperation against unfair practices, recognizes that efforts are needed for implementing the above mentioned Recommendation of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices. Together with the OECD Recommendation of the Council on Consumer Protection in E-Commerce, a significant increase in the number of cross-border consumer complaints has been identified.

Abusive practices are, unfortunately, reinvented every day. They occur regardless of the value of the damage. Businesses rely on their technical resources and expertise so that they can increase profits and advantages that are not always bearable by consumers.

According to the OECD Report the increase of complaints are related to online commercial practices, leading, among other things, to another relevant topic: misleading advertising.

5. MISLEADING ADVERTISING

Referring again to the History of Consumer Rights Movement, since President Kennedy’s 18 speech, outlining consumer’s very basic rights, the right to be informed; has also included the right to be protected from misleading information, advertising, labelling or other practices, and to be given the facts one needs to make informed decisions, informed choices.

Misleading advertising is, perhaps, one of the most basic forms of unfair practices: for it hinders information; it may also provide unspecific information about a product or a service or even provide the necessary information but in a fashion that is not legible, obvious or reachable.

In order to better understand misleading advertising, it is valid to understand advertising: advertising is the center consumer society dynamism allowing the establishment of the business-consumer relationship and supposedly fostering trust and the will for owning a product or hiring a service.

The consumer-provider relationship starts with the advertisement, with the product-service offer to consumers by providers (businesses). Therefore, the advertisement is supposed not only to be attractive, appealing to consumers, but especially provide the necessary information such as product’s details, usage, purpose, weight, price, conditions – meaning – all the necessary information (and in the local language; or local official ones) so that consumers can make informed decisions corresponding to their needs and economic rights.

Example: considering the development of technology, sectors such as telecommunications and finance, have experienced significant impacts;

Although it is not the focus of the present study, it is relevant to clarify that advertisements can be misleading but also abusive. It happens when the advertisement incites violence, fear, when it is discriminatory or offensive; or even incites consumers to act in a manner that is harmful to their health and/or safety. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:2001:0606:FIN:EN:PDF (accessed on November 12, 2018)


18 President J. F. Kennedy’s speech to the Congress, https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx (accessed on October, 10 2018)
for their increasing relevance in consumers lives (essentially) as well as new forms, products and ways to access them. Consequently, due to the specificities, technical details and complexity of these two sectors, not to mention their novelties – it is harder for consumers to understand terms and conditions related to telecommunications and financial contracts, for instance.

Due to the technical information gap between consumers and businesses and having as a reference the United Nations Guidelines for Consumer Protection, IV. Principles for Good Business practices (c) Disclosure and transparency: businesses are required to provide complete, accurate and not misleading information regarding the goods and services, terms, conditions, applicable fees and final costs to enable consumers to take informed decisions. Businesses should ensure easy access to this information, especially to the key terms and conditions.

The advertisement is considered misleading when it leads the consumer to commit a mistake, an error; which the consumer would not commit if had otherwise received clear, specific information about contract conditions, product usage, price, etc.

A misleading advertisement can happen when the product or service is offered, when it is advertised on Television, Radio, Newspapers, Posters, walls, in the Internet, via email or letter, - and nowadays via applications, websites, blogs – all possible electronic communication.21

The very fact that advertisement can reach a broad collectivity of consumers, the impact of misleading advertisement is also considered for its scale.

It is also important and relevant to consider that especially vulnerable consumers, such as children and the elderly, can not only be reached by advertisements but also be a target to misleading advertisements.22

That is the reason why countries count on specific legislation to protect vulnerable and disadvantaged groups of society which may be targeted by specific sectors of the market or even be subjected to specific misleading advertising.

The UNGCP refers specifically to the promotion and protection of the economic interests of consumers, defending that Member States should intensify their efforts to prevent practices which are damaging to the economic interests of consumers through ensuring that manufacturers, distributors and others involved in the provision of goods and services adhere to established laws and mandatory standards. Consumer organizations should be encouraged to monitor adverse practices, such as the adulteration of foods, false or misleading claims in marketing and service fraud.

Considering the aspect of sustainability, the topic of unfair practices and misleading advertisement also gains relevance: 1. For it deals with consumer’s right to a proper and safe environment; 2. Consumer access to information about products and services, and of course, 3. misleading advertising since together with the advent of sustainable products, there are as well products which despite advertisements, they are proven not to be sustainable nor green products.

Bearing this in mind, UNGCP Guideline number 30 specifically calls Member States, manufacturers, distributors and consumer organizations to take measures regarding misleading environmental claims or information in advertising and other marketing activities. The development of appropriate advertising codes and standards for the regulation and verification of environmental claims should be encouraged.


22 In fact, advertisement directed to children is banned in some countries such as Sweden, or in some cases there are restrictions related to certain products such as food and non-alcoholic beverages. https://ec.europa.eu/jrc/en/health-knowledge-gateway/promotion-prevention/other-policies/marketing (accessed on November 12, 2018)
6. CONSUMER PROTECTION REFERENCES

European Union
Considering disparities among member states “harming consumers’ economic interests and creating many barriers affecting business and consumers” the European Directive 2005/29/EC covers the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material.

European Union, Directive, Article 6 “
“A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:
(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
(i) the commitment is not aspirational but is firm and is capable of being verified,
and
(ii) the trader indicates in a commercial practice that he is bound by the code.


OECD

The Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders of the Organization for Economic Cooperation and Development is perhaps, one of the most relevant documents of reference for the Organization expertise in the field not only of consumer policy but also as a pioneer on studies and investigations on E-commerce. The OECD Guidelines on deceptive commercial practices and Recommendation for protecting consumers against these practices recognizes that unfair and fraudulent practices have a negative impact on “both domestic and global markets” once they undermine consumer confidence, consumers’ trust in these businesses.

The document also refers to the development of technologies and consequent increase of cross-border problems such as unfair practices and misleading advertisement. Such situation encouraged the Organisation to work on international cooperation, engaging governments to work among themselves (enforcement agencies) as well as with the civil society and businesses to effectively prevent cross-border unfair practices and punish existing ones.

In times of digital economy, another document of relevance is the Guidelines for Consumer Protection in the Context of Electronic Commerce first approved on 1999 by the OECD Council was designed to assist authorities to guarantee consumer protection also when shopping online by developing and implementing online consumer protection mechanisms which have helped government, businesses and consumers, thus providing a fairer online market place.

The OECD E-commerce guidelines also refer to forms of cooperation, encouraging the private sector – businesses and consumer associations – in all relevant aspects for consumers' fair business, advertising and marketing practices; clear information about an online business’s identity, the goods or services it offers and the terms and conditions

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of any transaction; a transparent process for
the confirmation of transactions; secure
payment mechanisms; fair, timely and
affordable dispute resolution and redress;
privacy protection; and consumer and
business education.

Federal Trade Commission
The United States of America Federal Trade
Commission (FTC) has as well, a relevant work in the
field of consumer protection against unfair and
misleading practices. The FTC acts and campaigns
valuing the “truth” in advertising. The FTC not only
refers to the importance of truthful and non-
misleading advertising but even the support of
“scientific evidence”, when appropriate. Apart from
focusing on standard advertising (TV, Radio,
newspapers, whether online or offline), generally
affecting consumers economic rights, the
commission has a special dedication to practices
that may harm consumers’ health and safety.
The FTC is the enforcement agency in the United
States of America which monitors commercial
practices, enforcing the law and also providing
consumers information, education and awareness.
According to their legislation, Advertisement must
be truthful, cannot be deceptive or unfair, and must
be evidence-based. For some specialized products
or services, additional rules may apply.

Another significant field that has been gaining
importance is the advertisement of the so-called
“green products”. The Federal Trade Comission has
a Green Guide on environmental advertisement
(environmental marketing) which provides
businesses focused and specific guidance on 1. the
general principles that apply to all environmental
marketing claims; 2. how consumers are likely to
interpret particular claims and how marketers can
substantiate these claims; and 3. how marketers can
qualify their claims to avoid deceiving consumers.

Apart from monitoring the market, providing reports
and guidelines to businesses, the FTC is also
competent to file federal actions against businesses

27 /www.ftc.gov/news-events/media-
resources/truth-advertising (accessed on
November 12, 2018)
28 As above mentioned and like some European
countries, the United States of America also
restricts publicity and advertisement to children,
as the case of food and beverages (food
advertising to children and adolescents). For
more information on children related
advertisement see: Children’s Online Privacy
Protection Act.
(accessed on November 12, 2018)
30 https://www.ecfr.gov/cgi-bin/text-
idx?c=ecfr&SID=bce841cb851c93a436cc50e2996cc
9d4&tpl=/ecfrbrowse/Title16/16cfr260_main_02.t
pl (accessed on November 12, 2018)
7. UNGCP on Misleading Advertising and Unfair Commercial Practices

Consumers seek business that respect their rights; seek products that attend their needs; and considering the development of the digital economy consumers seek fast and expeditious: procedures, information, responses, deliveries.

Following the development of digital tools, consumers tend to be even more vulnerable to businesses activities, to unfair practices and misleading advertisement. Consumers are often not aware of the impacts and/or differences of purchasing a product onsite and online.

The United Nations Guidelines for Consumer Protection sets the basic rules and policies to protect consumers both online and offline. In fact, the principles that protect consumers against any misleading or unfair practice have not changed, they remain the same. What has changed is the variety of commercial channels, products, services making consumers even more vulnerable and disadvantaged.

In its chapter IV, on the Principles that shall rule business practices, Businesses are called to provide (a) Fair and equitable treatment, providing consumers fair and honest treatment throughout all stages of their relationship, particularly with respect to vulnerable and disadvantaged consumers;

businesses are also requested to abstain from any illegal, unethical, discriminatory or deceptive practices\(^3\), such as abusive marketing tactics that may pose unnecessary risks or harm consumers.

Following consumers’ basic rights, businesses are also encouraged to provide complete, accurate and not misleading information regarding the goods and services, terms, conditions, applicable fees and final costs to enable consumers to take informed decisions. Only by accessing information, especially to the key terms and conditions, consumers are empowered to take informed decisions according their needs and economic interests, regardless of the means of technology used;

As for consumers economic interests, the UNGCP refers to the commitment of Member States to enable consumers to obtain optimum benefit from their economic resources (Guideline 20) also intensifying efforts to prevent practices which are damaging to the economic interests of consumers (Guideline 21) through ensuring that manufacturers, distributors and others involved in the provision of goods and services adhere to established laws and mandatory standards.

Guideline 21 makes a special reference to the work of consumer associations (consumer organizations) also taking part in the consumer protection system by monitoring adverse practices: such as the adulteration of foods, false or misleading claims in marketing and service frauds.

Recalling the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the General Assembly in resolution 35/63 of 5 December 1980, Member States are encouraged to develop, strengthen or maintain (Guideline 21) measures relating to the control of restrictive and other abusive business practices which may be harmful to consumers, including means for the enforcement of such measures.

Businesses responsibilities shall be clearly defined by Member States policies and legislations (Guideline 23), thus ensuring that goods meet reasonable demands of durability, utility and reliability, (for both products and services) and are suited to the purpose for which they are intended, rights in contracts and unconscionable conditions of credit by sellers.

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\(^3\) UNGCP Guideline 26: Consumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential
and that the seller should see that these requirements are met.

The UNGCP in its Guideline 27 refers specifically to misleading advertising, stating that “Promotional marketing and sales practices should be guided by the principle of fair treatment of consumers and should meet legal requirements”. Again, it is highlighted the importance of access to information to enable consumers to take informed and independent decisions, as well as measures to ensure that the information provided is accurate.

Sustainability has a natural importance for consumer related matters, the Sustainable Development Goal number 12 refers to Responsible Consumption and Production, requiring actions that contribute to the protection and preservation of the environment - after all, as consumers, we are all entitled to a proper and healthy environment. That is the reason why authorities, consumers, civil society (consumer associations) also consider of relevance the control and accuracy of products and services which are supposed “green” or “environmentally friendly”.

As an example, UNGCP Guideline 29 refers to consumers’ legitimate right to access to accurate information about the environmental impact of products and services should be encouraged through such means as product profiles. Additionally, consumer related stakeholders may they be governments, manufacturers, civil society, distributors, are all are required to take measures regarding the impacts of products and services in the environment (Guideline 30), adapting and improving production mechanisms, advertising codes, standards and self-regulations.

Furthermore, Member States and Businesses shall as well work on the development of codes of marketing and other business practices to ensure adequate consumer protection, (Guideline 31) also taking into consideration the elaboration and implementation of standards at the national and international levels for the safety and quality of goods and services and give them appropriate publicity (Guideline 32).

Finally, reflecting the impacts of the digital economy, the UNGCP Guidelines 63 and 66, refers to two commercial fields most impacted by the new digital tools and mechanisms: Electronic Commerce and Financial Services. Here consumer trust is highlighted as an important tool for markets, thus requiring Member States to enhance consumer confidence in electronic commerce by the continued development of transparent and effective consumer protection policies, ensuring a level of protection that is not less than that afforded in other forms of commerce. As for financial services, considering the development of the field and its new products, services and new methods to access them, businesses are required to provide proper disclosure, proper information related to product and services (special regard to products and services that may impact consumer’s finances for its risks) as well as proper channels to access information and dispute resolution.

8. LAW ENFORCEMENT AGAINST MISLEADING ADVERTISING AND UNFAIR COMMERCIAL PRACTICES

When a consumer files a complaint or when a consumer authority engages in an investigation and eventually prosecutes a provider for unfair practice or a misleading advertisement, the main objective is to correct the situation and defend consumers. In what regards to misleading advertisement, since advertisement usually reaches consumers collectively,33 the consequences are broader, and businesses may not only be required to compensate consumers but also take specific measures such as counter-advertisement and/or suspend the misleading advertisement.

Certainly, one of the most efficient manners to engage businesses to respect consumer rights, it is to apply penalties for each consumer’s rights violation. Monetary compensation is therefore not only a right that consumers are entitled to, but also a tool for authorities to enforce legislation.

As monetary compensation can also be an incentive for providers to obey the law, the outcomes of a enforcement action may vary according to the chosen procedure or the consumer protection legislation. Monetary penalties are a very important measure when it comes to enforcement for its motivation for providers to obey the law and respect consumers’ rights. Therefore, it is relevant for consumer protection agencies to create a clear and precise penalty system in order to apply fines and penalties when needed.

In the case of misleading or abusive advertisement, the period which the product or service was advertised is considered among other factors (product price, offense severity or even the consumers involved – the case of extra vulnerable ones as children and elderly).

In order to develop enforcement policies regarding unfair practices and misleading advertisement, there are some relevant references to be considered such as international codes of practice and laws and existing Guidelines – as the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce and the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders.

90. Member States may wish to consider relevant international guidelines and standards on protecting consumers from fraudulent and deceptive cross-border commercial practices, in considering the legal authority to provide to their consumer protection enforcement agencies, and, where appropriate, adapt those guidelines and standards to their circumstances. In so doing, Member States may wish to study the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003)34

UNGCP 2015

In what refers to enforcement, in the ambit of the OECD governments have agreed on Guidelines outlining a framework for co-operation to protect consumers against the growing problem of cross-border fraudulent and deceptive practices, particularly on the Internet.

The guidelines35 are a response to the increase of deceptive actions, notably in the ambit of the Internet: together with the innovations provided by the development of technologies and new forms and accesses to products and services the variety of deceptive practices has as well increased in both variety and scale. They vary from pyramid schemes, credit related ploys, to simple lack of information, access to businesses after sales and misleading advertisement.

Considering that nowadays products and services are available internationally, cross-border unfair

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33 The case, for instance, of false advertisement, for it impacts on the collectivity of consumers.


practices and misleading advertisement have become as well international. The fact that businesses are based in one country and consumers in another becomes another challenge for consumer protection authorities to enforce law and for consumers to obtain redress. This has lately been the objective of organizations such as the OECD\textsuperscript{36} and authorities such as the United States of America Federal Trade Commission to develop actions, especially in the field of cooperation to tackle international fraud operators.

The OECD Guidelines were designed in a manner to provide and develop cooperation so that governments can act in a more effectively way to stop and prevent cross-border unfair practices and misleading advertisement.

The principles that governs consumers rights in the digital economy, are existing ones with regard to consumer access to information, education, clear, specific language and information about products and services; access to redress, access to the provider of the product or service. So, what has changed? The globalization of markets has been facilitating access to products and services to a larger public. The popularity and facilitated access to mobile-phones devices and thus to online markets are as well a reality to be considered.

Whereas products and services are more and more accessible; the access to justice, to information and redress has not followed consumers with the same speed. Therefore, international organizations, experts and consumer agencies have been focusing on cooperating “covering notification, information sharing, and assistance with investigations, also inviting the private-sector as a crucial stakeholder, setting the stage for consumer redress\textsuperscript{37}”.

The European Union Directive 2005/29/EC of May 2005 has a specific chapter on Enforcement referring to Member States’ need to provide adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of the Directive.

As examples of enforcement measures to combat unfair commercial practices the Directive 2005/29/EC mentions the commitment of related and relevant stakeholders to:

(a) take legal action against such unfair commercial practices; and/or

(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints\textsuperscript{38} or to initiate appropriate legal proceedings.

Member States are as well entitled to take urgent measures, via more expeditious mechanisms, even without proof of actual loss or damage or of intention or negligence on the part of the trader.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision:

(a) to require publication of that decision in full or in part and in such form as they deem adequate;

(b) to require in addition the publication of a corrective statement.

Directive 2005/29/EC

The United States of America Federal Trade commission (FTC) has developed at least two relevant documents related to unfair practices and misleading advertisement: the Guide to enforcement, a guidance to advertising and

\textsuperscript{36} It is relevant to clarify that the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders and the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce already sets the references and bases for cooperation among members.

\textsuperscript{37} http://www.oecd.org/sti/consumer/oecdgovernm

\textsuperscript{38} “It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints (…)” Directive 2005/29/EC. More on complaints can be found on the UNCTAD MENA Complaints Handling Study.
marketing rules in the Internet as well and the Guides Concerning use of endorsements and testimonials in advertising. According to the local legislation\textsuperscript{39}, advertising must tell the truth, based on substantiated claims and \textbf{not mislead consumers}. There is a special – and relevant – concern about consumers' health and safety when it comes to advertising.

As for the responsibility of businesses, the providers of products and services are the responsible for the goods they have advertised, and in some cases, advertising agencies and website designers may as well be liable for misleading advertisements.

The FTC suggests that all parties involved in the advertisement process must take the necessary precautions to provide substantiated information; objective, clear, fair. The FTC \textit{Guide to enforcement}\textsuperscript{40} provides businesses the basic path to be followed in order to avoid misleading advertisements, referring to disclaimers and disclosures, demonstrations, refunds (promised ones by businesses in case of consumer dissatisfaction), advertisements directed to children (for their natural vulnerabilities to discern information). It provides administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in general.

As for the Guides Concerning use of endorsements and testimonials in advertising\textsuperscript{41} it provides the basis for voluntary compliance with the law by advertisers and endorsers, setting the general principles that the Commission will use in evaluating endorsements and testimonials\textsuperscript{42}. The focus is to prevent and punish endorsements or testimonials that are considered deceptive based on the specific factual circumstances.

Considering that Consumer Protection constitutes a microsystem\textsuperscript{43} within society, gathering different actors (consumer agencies, consumers, consumer associations and businesses), interests and rights; when it comes to enforcement, it is crucial to engage all these actors. Thus, the next topic of this study focuses on the role of consumer associations and businesses in preventing and combating unfair practices and misleading advertisement.

\textsuperscript{39} https://www.ftc.gov/news-events/media-resources/truth-advertising (accessed on November 13, 2018)
\textsuperscript{40} https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road
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\textsuperscript{42} For purposes of the Guide, “an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser."
8.1 The role of consumer associations and businesses

The UNGCP refers specifically to the promotion and protection of the economic interests of consumers, defending that Member States should intensify their efforts to prevent practices which are damaging to the economic interests of consumers through ensuring that manufacturers, distributors and others involved in the provision of goods and services adhere to established laws and mandatory standards. Consumer organizations should be encouraged to monitor adverse practices, such as the adulteration of foods, \textit{false or misleading claims in marketing and service fraud}.

Consumer Associations together with business have a special status for their special access to consumers: they are the closest stakeholders to consumers. Therefore, they have access to information related to consumers’ preferences, consumers’ needs, consumers’ complaints, etc.

That status also puts both consumer associations and businesses\textsuperscript{44} in a more privileged position to provide consumers information as well as education.

Education, in fact, play a relevant role in consumer awareness about unfair practices and misleading advertising. Most of the times, consumers’ vulnerabilities related to misleading and unfair practices are related to a lack of knowledge, education, information.

The UNGCP, on its session G, on Education and information programmes, refers to the relevance of Member States to develop and encourage consumer education and information programmes, also referring to sustainable aspects of consumers’ choices. The UNGCP also suggests that such education programmes should be focused on enabling consumers to make informed choices of goods and services, in other words, conscious of their rights and responsibilities.

Consumer associations, as well as businesses and other relevant stakeholders are encouraged to take part in such programmes.

It is undeniable that education – access to information – better prepare and protect citizens. In this case, it is required special attention and care towards disadvantaged consumers, the elderly, children, rural areas and the illiterate, for example – for they not only need it, but they also represent a considerable number of consumers in developing countries.

\textsuperscript{44} UNGCP Guideline 46. Businesses should, where appropriate, undertake or participate in factual and relevant consumer education and information programmes.
Guidelines for Consumer Protection. Raising awareness shall not be limited to the responsibility of consumer protection authorities and the consumer associations (civil society) but all involved stakeholders – especially businesses – shall be involved in the development of consumer education and information programmes.

**Recommendation 1.** The creation of mechanisms which can enable the cooperation of governments, businesses and consumer associations focused on the education and awareness campaigns so that consumers are properly informed of their rights as consumers and of existing practices that may harm their rights as consumers.

Considering the advent of new methods of access to products and services as well as considering the constant development of new products and services thanks to the mechanisms of the digital economy, it is important for authorities to consider the possible impacts on consumers’ vulnerabilities.

**Recommendation 2.** Governments, consumer related authorities, the civil society (consumer associations) and businesses shall consider the increasing of consumer vulnerabilities regardless of their economic or social condition due to the appearance of new forms and methods of purchasing products and services, as well as new products and services available to consumers.

The impact of consumption in the environment has been calling for urgent and effective actions of all society, since as consumers and citizens, we are all entitled to a proper, healthy and safe environment.

**Recommendation 3.** Considering the importance of educating present and future generations about the impacts of their choices as consumers in the environment and the urgent need for preserving the environment, consumer education should be part of the curricula of educational systems, from primary schools to universities – so that a wider range of generations can be reached.

Businesses have a privileged position in the consumer relationship for their economic, legal and technical knowledge compared to consumers. Considering this privileged position and their powers implied, businesses shall be engaged in actions that benefit the whole society.

**Recommendation 4.** Considering Businesses economic, technical and legal power, and all the responsibilities implied, - including the ones related to consumers and to the environment -; governments shall work on policies that provide a better engagement of businesses in actions by which they benefit the entire society.

As for the urgent needs regarding the environment and the impacts of commerce, of businesses, of consumer choices, it is needed that the whole society engages in actions that are economically, socially and environmentally sustainable.

**Recommendation 5.** Thinking of present and future generations – considering the urgent actions to preserve and protect the environment from the impacts of commerce, governments, businesses and consumer associations are recommended to work in coordination to provide consumers information, education and awareness about consumer choices, products, services and commercial methods so that consumers can make informed decisions also based on the impacts of commerce in the environment.
9. CONCLUSIONS

The UNCTAD secretariat Note on Consumer protection in electronic commerce\(^{45}\) addresses the importance of tackling the challenges imposed by the digital economy, recognizing the relevance of international cooperation to improve consumer protection mechanisms.

Together with other relevant issues such as consumer data protection and privacy, unfair practices and misleading advertisement have gained new approaches due to the new forms and tools provided by technology developments and online commerce.

Hence, consumer vulnerability may be increased for the novelty of commercial tools and products; not to mention the globalization providing increasing access to goods and services – becoming inevitable for experts and authorities to develop mechanisms to protect consumers.

The OECD 2018 Report on Consumer Protection Enforcement in a Global Digital Marketplace\(^{46}\) admits the efforts of member countries in developing effective domestic frameworks for consumer protection enforcement authorities in line with the OECD Cross-border Fraud Recommendation and the E-commerce Recommendation. Nevertheless, the OECD also identifies that “authorities still face serious challenges in protecting consumers from fraudulent and deceptive commercial practices”.

> “Consumer issues will increasingly entail an international dimension and consumer protection enforcement authorities need to address these challenges in a dynamic globalised and digitalised environment. Increased enforcement co-operation will be an essential element for effectively addressing these challenges.”


This international dimension of consumer relations can only be managed with the engagement of all related actors of this microsystem: governments, consumers, businesses, and consumer associations.

Especial attention shall be addressed to consumption and sustainability. Apart from consumers’ responsibilities related to sustainable choices, consumers can also be victims of unfair and misleading advertisements related to “green products” and services. Here, businesses are also asked to engage in actions that provide consumers clear, precise, truthful access to information so that they can take informed decisions according to their needs.

Another important aspect is the access to complaints channels by both authorities and businesses. Access to information and to redress is a basic consumer right and in times of digital economy, consumers shall also be provided access to justice as expeditious and facilitated as the access to products and services.

The fact that products and services are increasingly reachable; that technologies have diminished distances facilitating access to goods regardless of consumers’ financial or social status, requires from governments and authorities also to act internationally. Consequently, international cooperation is a key tool in response to cross-border unfair practices that harms consumers irrespective of their country of residence.

**Recommendation 6.** For the positive impacts in international markets, on international commerce, governments are recommended to engage in international cooperation efforts, may they be bilateral, regional, multilateral; to protect consumers from unfair practices and misleading advertising whether offline or online.

Considering UNCTAD’s expertise in reviewing and advising member States on consumer protection laws and policies, conducting training and capacity-building activities in consumer protection issues for member States and supporting regional and international initiatives, governments and authorities are also recommended to work closely with international organizations and regional organizations, as well as with national authorities in this field.

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\(^{45}\) UNCTAD TD/B/C.I/CPLP/7

multilateral initiatives, bearing in mind that governments are encouraged to

"(b) Cooperate or encourage cooperation in the implementation of consumer protection policies to achieve greater results within existing resources. Examples of such cooperation could be collaboration in the setting up or joint use of testing facilities, common testing procedures, exchange of consumer information and education programmes, joint elaboration of regulations"

UNGCP, Guideline 79, (b).

All stakeholders are invited to develop, create and join international cooperation actions and initiatives to better protect consumers world-wide. The simple existence of an international cooperation exists to businesses world-wide a powerful message: that authorities, that governments are cooperating for the protection of consumers and therefore practices that may harm consumers will not be tolerated.

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47 The proposal for a Convention on Co-operation and Access to Justice for International Tourists in the ambit of the Hague Conference on International HCCH is an international initiative to protect consumers internationally, providing effective access to justice by the cooperation of member states consumer protection agencies and the judiciary. 

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UNCTAD Guidelines on Consumer Protection: Business Engagement

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