

## Client Alert

### **EU Companies Beware! Communicating Erroneous Information Must Now Be Classified as 'Misleading Commercial Practice'**

**April 2015**

The EU Court of Justice recently found that the communication of erroneous information to a consumer must be classified as a 'misleading commercial practice' within the meaning of the Unfair Commercial Practices Directive, even though that information concerned only one single consumer (Case C 388/13 of 16 April 2015).

#### **The Facts**

The request for a preliminary ruling to the ECJ had been made in proceedings between the Hungarian consumer protection authority and UPC Magyarország Kft. (UPC), a provider of cable television services. A private individual, Mr. Szabó, who was a long-term subscriber with UPC, wished to terminate his contract with that company. In response to a question from Mr. Szabó, UPC stated that the most recent annual invoice related to the 'period between 11.01.2010 and 10.02.2011 inclusive'. Mr. Szabó, who wished to ensure that the end of the contract with UPC would coincide with the last day of service already paid for, requested that the contract be terminated effective February 10, 2011. In March 2011, however, Mr. Szabó received an invoice from UPC related to the period between January 11, 2011 and February 14, 2011. Apparently, an error had been made in UPC's response to Mr Szabó's question. This response erroneously mentioned that Mr. Szabó had already paid for the period up to February 10, 2011, whereas Mr. Szabó, in fact, had only paid for the period up to January 10, 2011.

Mr. Szabó lodged a complaint with the Hungarian consumer protection authority. The case was brought before the Hungarian Supreme Court, which referred the matter to the ECJ for a preliminary ruling. The ECJ was asked whether a communication of false information to a single consumer may be regarded as a misleading commercial practice within the meaning of Directive 2005/EC of May 11, 2005, concerning unfair B2C commercial practices in the internal market (Unfair Commercial Practices Directive or UCPD).

#### **The ECJ's Ruling**

In its ruling, the ECJ refers to the wording of Article 6(1) of the UCPD, according to which a commercial practice is to be regarded as misleading if it contains false information and is therefore untruthful or in any way deceives—or is likely to deceive—the average consumer, and if it causes—or is likely to cause—the consumer to make a commercial decision that otherwise would not have been made.

The ECJ found that all the factors set out in that provision are present: a consumer exercised his right to terminate a contract for professional services, and the professional responded by providing erroneous

information as to the duration of the relationship between the two parties. The mistake prevented the individual from making an informed choice and, moreover, caused him to incur additional costs.

The Court then stated that the fact that the misleading conduct took place on only one occasion and affected only one consumer is immaterial. The UCPD does not establish a threshold, whether in terms of frequency or number of consumers affected, for an act or omission to come within the scope of the directive.

The fact that the conduct concerned is allegedly unintentional is also entirely irrelevant, says the ECJ. Article 11 of the UCPD expressly provides that the application of measures taken by the Member States in order to combat unfair commercial practices is independent of evidence of intention, or indeed negligence, on the part of the professional, and is independent of evidence of actual harm suffered by the consumer.

In addition, the ECJ regarded as irrelevant UPC's assertion that the consumer, in this case, could himself have obtained the correct information. The objective of the UCPD, which is to offer full protection to consumers, is based on the assumption that the consumer is in a weaker position, particularly with regard to the level of information.

The ECJ concludes that it is for the Member States to provide for an appropriate system of sanctions with regard to professionals who employ unfair commercial practices, while ensuring that those sanctions comply, in particular, with the principle of proportionality. It is in this context that due account can be taken of factors such as the frequency of the practice complained of, whether or not it is intentional, and the degree of harm caused to the consumer.

## **Conclusion**

In its judgment, the ECJ once again confirmed the particularly wide scope of the UCPD. In this case, however, the Court's ruling is rather surprising. Until now, case law and doctrine indeed often considered that the use of the term 'commercial practice' in the UCPD required the existence of a certain policy by the undertaking, which would exclude isolated acts adversely affecting a single consumer. This was also the opinion of the Advocate General in this case, who stated that the 'obvious precondition' for the directive to apply is that the conduct in question constitutes a 'practice' which implies that (1) the conduct is directed towards an unspecified group of addressees, or (2) the conduct is repeated in relation to more than one consumer. The ECJ, however, decided not to follow the opinion of the Advocate General. Its ruling can be considered to be an important heads-up for undertakings that can find themselves confronted with the risk of proceedings based upon the UCPD even in case of isolated errors in respect to a single customer.

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