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## **Draft consultation document Guidelines**

# **Protection of the online consumer Boundaries of online persuasion**

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## Summary

The final version of these guidelines will include a summary of the standards applied in them.

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# 1. Introduction

The Netherlands Authority for Consumers & Markets (ACM) is an independent regulator. ACM's mission is to ensure that markets function well for both people and businesses. It does this in part by overseeing the laws and rules that professional parties must comply with in their dealings with consumers. ACM's oversight helps Dutch consumers to take informed decisions and participate in economic activity with confidence. ACM aims to ensure that consumers' options are not unnecessarily restricted and that a healthy balance is struck between businesses and consumers in terms of knowledge and options. It also protects businesses against unfair competition from businesses that do not comply with the rules.

Consumers must be able to take an informed decision on a purchase. Their ability to do so often depends greatly on the way in which a business presents products, services, and choices to consumers.<sup>1</sup> Consumers use *mental rules of thumb*<sup>2</sup> to take fast decisions. For example, they may be more likely to choose a product or service if they know that others are doing the same. ACM notes that businesses in the online economy use behavioral insights<sup>3</sup> when setting up their online choice architecture<sup>4</sup>. The set-up of that environment influences the way in which consumers make their choices.

In these 'Guidelines on the protection of the online consumer' ('guidelines') ACM seeks to explain how it applies consumer rules to persuasion techniques commonly used in online choice architectures. It indicates the boundaries with regard to the extent to which businesses are permitted to persuade/nudge consumers in their decisions. It does this by means of practical examples and explanations. ACM thus provides guidance enabling businesses to assess what is and what is not permitted in terms of nudging consumers in the online choice architecture. The guidelines also provide insight for consumers and consumer organizations into the way in which ACM assesses influence in online choice architectures.

## 1.1 Background of the guidelines

Businesses try to entice consumers to buy their products or services. That is a natural part of commercial activity and is certainly not unique to the online world. Consumer law sets a framework within which traders are permitted to nudge consumers in their decision-making processes. That framework is largely technology-neutral. That means it applies to various channels in which businesses and consumers come into contact with each other, for example in retail stores, or online by computer, mobile phone, or digital assistant. So why has ACM focused these guidelines

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<sup>1</sup> A. Tversky and D. Kahneman, 'The framing of decisions and the psychology of choice', *Science* 1981/211, pp. 453-458. And R. Thaler, 'Toward a positive theory of consumer choice', *Journal of Economic Behavior & Organization* 1980 issue 1, pp. 39-60.

<sup>2</sup> Also known as heuristics. See glossary.

<sup>3</sup> See glossary.

<sup>4</sup> See glossary.

specifically on online choice architectures?

ACM notes that consumers are increasingly buying online. 28% of their total spend is now online. In the case of services, the figure is as much as 80%.<sup>5</sup> In the online economy, consumers potentially have more opportunities to take informed decisions. It is easier for them to browse the offerings from different businesses. They can also more easily compare products with the aid of independent advice. At the same time, ACM notes that consumers behave differently online than offline, posing new risks in terms of undesirable persuasion. The large amount of information available online means they rely more on standard mental rules of thumb and are prone to making simplified choices that limit their search time.<sup>6</sup> There are also indications that consumers pay less attention online than in a brick-and-mortar store,<sup>7</sup> so they understand information less well.<sup>8</sup>

Businesses that offer their products or services online have greater potential to steer consumers' behavior during their specific customer journey<sup>9</sup> (the 'journey' linking all the contact points between the consumer and the business, product, or service). That is due not only to the large volume of aggregated data they can collect and analyze (or *have* collected and analyzed) in online transactions. The ability to nudge consumers more effectively is also down to algorithms<sup>10</sup> that use data dynamically in real time during the interaction with the consumer. These algorithms enable a business to focus the choice architecture on a consumer. This is also referred to as *hypernudging*.<sup>11</sup> It is carried out, for example, on the basis of aggregated data on consumer behavior, information on relevant circumstances, and personal and other data, including data on the consumer's searching and clicking behavior during their customer journey. Businesses can also continually test the effects that different changes in the choice architecture have on consumers' behavior. They can then use that knowledge to make continual adjustments to choice architectures.

Businesses can steer behavior in a way that produces a benefit for the consumer, anticipating their wishes and preferences. But they can also nudge consumers towards choices that are contrary to their interests. In today's dynamic, data-driven online choice architecture, it is increasingly difficult for consumers to know whether and how they are being nudged. That may limit their ability to take informed decisions. It is for that reason that ACM has focused these guidelines specifically on online choice architectures.

In these guidelines, ACM makes statements about the effects of choice architectures on consumers'

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<sup>5</sup> Source: Thuiswinkel Markt Monitor, 4 July 2019.

<sup>6</sup> K. Jerath, L. Ma, & Y.H. Park, 'Consumer click behavior at a search engine: The role of keyword popularity', *Journal of Marketing Research* 2014/51, issue 4, pp. 480-486.

<sup>7</sup> J. Firth et al., 'The online brain: how the Internet may be changing our cognition', *World Psychiatry* (2019/18, issue 2, pp. 119-129.

<sup>8</sup> A. Mangen, B.R. Walgermo, & K. Brønnick, 'Reading linear texts on paper versus computer screen: Effects on reading comprehension', *International journal of educational research* 2013, issue 58, pp. 61-68.

<sup>9</sup> See glossary.

<sup>10</sup> See glossary.

<sup>11</sup> K. Yeung, 'Hypernudge: Big Data as a mode of regulation by design', *Information, Communication & Society* 2017/20, issue 1, pp. 118-136.

behavior. These statements are based on publicly available behavioral science research. ACM is aware that the results of this research do not always apply fully to the specific situation of any one business. The effects in that situation may differ from the research that ACM has used. Businesses themselves often have information on the effect on consumer behavior in the context of their choice architecture. ACM can only discover what these effects may be if businesses provide the relevant insights. Businesses' sharing of reliable, valid research with ACM will contribute to greater knowledge on the effects of choice architectures on consumer behavior. It may also influence ACM's opinion of commercial practices.

## **1.2 The consumer's bounded rationality**

We know from behavioral science that people's rationality is bounded.<sup>12</sup> This means we are not machines that internalize all the information we receive in order to make an optimum choice. We have a short attention span, and limited time and opportunities, so we use heuristics: rules of thumb that help us to make fast choices. Our bounded rationality makes us susceptible to biases, cognitive fallacies that influence our choices. Here are some examples of biases:

- anchoring effect: people's inclination to rely excessively on the initial information – the anchor – for future decisions;
- bandwagon effect: individuals' inclination to value something more highly because others value it;
- default effect: individuals' inclination to stick with options that are standard;
- framing effect: the phenomenon where individuals make different choices based on the same information, depending on the way in which such information is presented or 'framed';
- Scarcity bias: people's inclination to attach greater value to things that are scarce;
- sunk cost fallacy: individuals' inclination to continue an action if they have invested in it (e.g. time and money), even if the action has a negative effect on the result.

Businesses can use their insights into biases and psychological vulnerabilities to help consumers make the right choice. But they can also abuse information asymmetry and biases. They can also build in friction to make it more difficult for consumers to make a particular choice.

## **1.3 Whom are these guidelines intended for?**

These guidelines help professional market participants set up online choice architectures for consumers. They are mainly intended for businesses offering consumers products in online choice architectures, such as online retailers, online selling platforms, and price-comparison websites, but also businesses that provide services in exchange for personal data, such as providers of online games and social-media services.

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<sup>12</sup> Various Nobel prizewinners – Shiller, Akerlof and Thaler – have written about man's bounded rationality, and how businesses abuse cognitive biases and psychological vulnerabilities.



These guidelines will also be of use to businesses that design online choice architectures for consumers for or provide other services to operators of online choice architectures for consumers (e.g. marketing, conversion, UI and UX service providers<sup>13</sup>, but also legal advisers).

Finally, consumers and consumer organizations can use these guidelines to understand what ACM considers to be permissible and non-permissible persuasion in online choice architectures.

## **1.4 Status of the guidelines and disclaimer**

With these guidelines, ACM provides guidance on the application of consumer rules to techniques used to influence behavior in online choice architectures. Where possible, ACM does this on the basis of existing guidance issued by the European Commission, national and European case law and opinions issued by self-regulatory bodies such as the Dutch Advertising Code Commission, insofar these enforce consumer-protection rules.

Where these sources do not yet provide sufficient direction to assess persuasion techniques in an online, data-driven, and dynamic commercial environment, the guidelines show how ACM applies the statutory provisions.

ACM has limited the scope of these guidelines to general consumer protection rules. The precise definition can be found in Section 2.2. The ultimate interpreter of European consumer law is the Court of Justice of the European Union (CJEU).

First and foremost, businesses must ensure they comply with the rules themselves. The guidelines can help them do so. The final assessment in any particular case usually depends on the circumstances. These guidelines describe a number of persuasion techniques commonly used in online choice architectures, and, therefore, are not exhaustive. Nor do they prejudice any court rulings or regulatory changes. ACM will, of course, take these into account in its final opinion.

## **1.5 Structure of the guidelines**

In Chapter 2, ACM explains the statutory rules it applies in these guidelines to the use of persuasion techniques in online choice architectures, as well as the main principles of this legal framework.

In Chapter 3, ACM highlights a number of phenomena that determine the context of online choice architectures. The guidelines also explain how that context affects the legal assessment of persuasion techniques used online.

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<sup>13</sup> See glossary.

In Chapter 4, ACM presents concrete examples to assess a number of commonly used persuasion techniques.

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## 2. Legal framework

### 2.1 What is the basis for ACM's oversight?

Among other things, ACM enforces businesses' compliance with the provisions of consumer law in the Dutch Act on Enforcement of Consumer Protection and the CPC regulation. In that context, a key duty is tackling violations that impinge upon the collective interests of consumers.

### 2.2 Scope

#### 2.2.1 What rules do these guidelines cover?

As previously stated, ACM has limited the scope of these guidelines to generic consumer protection rules. The guidelines focus on design choices in the online choice architecture that may influence consumers' decisions on whether to enter into a contract with a business. They aim to define the boundary between permissible and non-permissible persuasion during a customer journey.

The most relevant legal provisions concerning influence on online choice architectures are those of the Dutch Civil Code (BW), which are based on the European unfair commercial practices directive<sup>14</sup>, particularly the regulations set out in Section 6.3.3A of the Code. This is also referred to as the Dutch Unfair Commercial Practices Act, although it is not a separate act. The examples discussed in these guidelines therefore emphasize the application of these rules on unfair commercial practices (UCPs).

Other generic consumer rules are relevant in some examples, such as the Civil Code provisions based on the European consumer rights directive.<sup>15</sup>

The examples do not amount to an exhaustive description of all possible consumer protection rules that may be applicable. Nor do they address the question of which rules take precedence in cases where rules are concurrent.<sup>16</sup>

These guidelines do not give examples of the application of generic consumer rules to financial activities and services, because the only competent regulator in that area is the Netherlands Authority for the Financial Markets (AFM).

An overview of the relevant consumer protection rules covered in the examples in these guidelines is included in the annex.<sup>17</sup>

ACM bases its interpretation of the rules on existing case law of the Court of Justice of the European

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<sup>14</sup> [Directive 2005/29/EC](#).

<sup>15</sup> [Directive 2011/83/EU](#).

<sup>16</sup> The order of precedence of concurrent rules is often set out in the legislation itself. Article 6:193F of the Netherlands Civil Code states with regard to unfair commercial practices, for example, that the information obligations under the consumer rights directive also concern "essential information" as referred to in the rules on unfair commercial practices.

<sup>17</sup> See Annex 3.

Union and national jurisdiction. It also builds on the existing guidance from the European Commission, including the guidelines on the application of the unfair commercial practices directive. The rules in these guidelines may also be based on relevant rulings of self-regulatory bodies such as the Dutch Advertising Code Commission.<sup>18</sup>

### **2.2.2 What rules do these guidelines not cover?**

The UCP rules and other consumer protection rules are generic, which means they apply to all sectors, unless specific exceptions have been defined.

As well as generic rules, sector-specific rules may also apply to some online choice architectures, such as rules from the directive on package travel and linked travel arrangements.<sup>19</sup> In addition, antitrust-based rules also apply. These rules are outside the scope of these guidelines. One exception is the Dutch Telecommunications Act, a number of whose provisions have a broad effect on online traders and are addressed in these guidelines.

Online choice architectures are also subject to regulations over which ACM has no direct oversight. In some cases, however, these rules are closely related to ACM's regulatory purview, for example because terms used in them are important for the provisions which ACM oversees.

This mainly applies to the General Data Protection Regulation<sup>20</sup> (GDPR), which is enforced by the Dutch Data Protection Authority (AP). In various places, these guidelines describe activities and scenarios in which personal data is collected, analyzed, and used for profiling or traded with third parties. These activities are subject not only to consumer law, but also to the GDPR. These guidelines do not include any consideration or assessment of the conditions under which these activities and scenarios are permitted under the GDPR. In describing these activities, ACM assumes that a business is compliant with the GDPR when processing personal data.<sup>21</sup>

## **2.3 Rules on unfair commercial practices: why and how do they work?**

As stated above, these guidelines focus on the rules concerning unfair commercial practices. In this chapter, we deal briefly with the underlying objectives of these rules.

### **2.3.1 Why are there rules on unfair commercial practices?**

The rules on unfair commercial practices are intended to protect consumers' *economic interests*. The

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<sup>18</sup> The Advertising Code Commission assesses complaints about possible violations of the Dutch advertising code. The Dutch advertising code is a self-regulatory instrument drawn up by representatives of advertisers, advertisement producers and distribution channels, consumer organizations, and civil-society actors. Unfair commercial practices play a major role in this code. Standards of decency and good taste also form part of the code. In addition to the Advertising Code Commission, there is also an Appeals Board, which can assess complaints in the second instance.

<sup>19</sup> [Directive 2015/2302/EU](#).

<sup>20</sup> [Regulation \(EU\) 2016/679](#).

<sup>21</sup> The controller is required to carry out an advance assessment of the lawfulness of an intended personal data processing operation (intended use) on the basis of the GDPR.

Treaty on the Functioning of the European Union aims to protect consumers' health, safety, and economic interests. This aim is also enshrined in various European charters and treaties.<sup>22</sup> In relation to businesses, the consumer is often the 'weaker party'. They often have less information or expertise than the professional party, and therefore often have little influence on the conditions under which they can purchase products. It is therefore important to protect the consumer's economic interests.

The setting of boundaries means that the rules on unfair commercial practices provide a high degree of consumer protection. The boundaries define the extent to which businesses are allowed to influence decisions that consumers take on products and services. The rules apply in the relationship between traders and consumers. They protect the interests of both consumers and businesses. Consumers are protected against practices that lead them to take transactional decisions they would not otherwise have taken. If all businesses adhere to the rules, the result will be a level playing field.

The rules on unfair commercial practices are consistent with ACM's mission: to ensure that markets function well for people and businesses.

ACM cannot discuss all the details of the applicable rules in these guidelines. Specific examples can be found in Chapter 4. A more detailed explanation of the rules on unfair commercial practices can be found in the annex. Further information on the rules or advice can be obtained from an industry organization or legal adviser. ACM ConsuWijzer provides practical information on the rules for consumers.

### **2.3.2 How do the rules on unfair commercial practices work?**

The member states of the European Union decided to draft the rules on a *technology-neutral* basis, so they can also be applied to commercial practices in the future. The main features are as follows:

#### ***A. Broad scope of application:***

ACM can apply the rules on unfair commercial practices broadly, and to many situations. That is also reflected in a broad interpretation of the term 'commercial practices'. This includes all activities directly relating to the promotion, sale, or supply of a product to consumers. That means that advertising, ordering processes, the handling of warranty claims, and collection activities are also commercial practices.

The rules protect consumers against commercial practices that may significantly disrupt their economic behavior. The expression 'economic behavior' is also broad. It includes entering into, or not entering into, a contract, but also, for example, clicking through an advertising banner or visiting an online marketplace.

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<sup>22</sup> See Article 38 of the Charter of Fundamental Rights of the EU; and Articles 12, 114, and 169 of the Treaty on the Functioning of the EU.

The rules apply to both products and services, across all economic sectors. The rules also cover commercial practices for services for which a consumer makes no monetary payment but which generate another economic benefit for the trader, such as services in which the consumer's attention has economic value, for example in the form of advertising income or through the marketing of the data that a trader collects on the consumer.

### ***B. The rules contain many open standards***

The unfair commercial practices directive includes standards against which assessments must be made. These are often open standards. For example, the directive requires a business to provide important information on a product on time, in an easy-to-understand and unambiguous way, and not to conceal it. But the definition of what constitutes important information may differ depending on the product. Terms such as 'ambiguous' and 'easy-to-understand' must also be assessed and interpreted on a case-by-case basis.

The unfair commercial practices directive has two main categories of unfair commercial practices:

- **Misleading commercial practices.** The business supplies factually incorrect or misleading information, omits information, or is unclear about it.
- **Aggressive commercial practices.** The business exerts undue influence on the consumer, for example through intimidation, coercion, and force.

The question of whether a commercial practice is misleading or aggressive usually depends on the circumstances.

In addition to the prohibition of aggressive and misleading commercial practices, there is also a general prohibition of contravening the requirements of professional diligence. That is deemed to mean *good* business conduct. The *professional standard* ('good faith') applicable to the business and honest market practices play a role in that regard. The business must conduct itself in accordance with that professional standard.

In order to assess whether a business has behaved unfairly, regulators look, for example, at commercial practices in a particular sector, a code of conduct, or an oath or statement that is sworn. These standards are also open, and therefore differ on a case-by-case basis. What is usual in the online gaming world will differ from what is usual in the online retail sector.

### ***C. The main test: the consumer's ability to take a decision***

Whether a commercial practice is unfair ultimately depends on whether the commercial practice "may cause the average consumer to take a transactional decision he would not otherwise have taken". This test is also known as the *transaction test*. That is another test based on open standards that differs from case to case.

The transaction test concerns the principal aim of the unfair commercial practices directive, i.e. protecting the consumer against practices that prevent them from taking an informed decision. Regulators do not have to demonstrate that consumers have actually taken a wrong decision, or that they have made a purchase they would not have otherwise have made. They must demonstrate that the consumer could have been given an inaccurate picture, or was inappropriately influenced in such a way that they *could* have taken a wrong decision.

#### **D. The average consumer**

The transaction test is based on the *average consumer*. That is generally a 'reasonably informed, circumspect, and observant' consumer. Among other things, this consumer is expected not to believe everything they hear. For example, if a business advertises an anti-wrinkle cream with the claim "look up to 10 years younger!", the consumer would be expected to take it with a pinch of salt. The consumer would also be expected to actually read information that has been supplied in a clear and easy-to-understand manner.

However, there are many conceivable factors that make an average consumer in a group less 'reasonably informed, circumspect, and observant'. Social, cultural, and linguistic factors play a role in assessing what can be expected of an average consumer. ACM assesses the fairness or unfairness of a commercial practice from the perspective of the 'average member' of the group on which the commercial practice is focused. This may be a group of 10 million consumers, or in the case of extensive personalization a single consumer. For example, if a trader focuses specifically on children, the trader must take account of the fact that children value information differently than adults. Consumers in vulnerable situations are therefore afforded extra protection.

#### **E. Some commercial practices are always unfair: blacklists<sup>23</sup>**

In addition to the aforementioned open standards, there are also practices that are unfair and, hence, prohibited under all circumstances. NB: the transaction test therefore does not apply to these practices.

The practices that are prohibited under all circumstances are set out in two *blacklists*. There is a blacklist of misleading commercial practices, and a blacklist of aggressive commercial practices.

Examples of blacklisted misleading practices:

- describing a product as 'gratis', 'free' or 'without charge' when, in fact, costs are involved;
- falsely claiming that a product is available only for a limited period, or only under special conditions.

Examples of blacklisted aggressive practices:

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<sup>23</sup> See Articles 193g and 193h of Book 6 of the Netherlands Civil Code.

- giving the impression that the consumer has won a prize or other benefit, when, in fact, there is no prize, or making the consumer incur costs to receive the prize;
- including in an advertisement a direct exhortation to children to buy a product or persuade their parents to buy it for them.

***F. Member states are not permitted to set stricter rules***

The unfair commercial practices directive includes maximum harmonization. EU member states are not permitted to impose stricter rules at the national level than those in the European directive.

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## 3. Application of legal framework in dynamic online choice architectures

### 3.1 Relevant facts and circumstances

Except for blacklisted provisions, the question of whether a commercial practice is unfair from a legal perspective depends on the facts and circumstances of the case.

Below, ACM addresses a number of facts and circumstances in online choice architectures and their significance for the application of consumer law.

### 3.2 Personal data: economic value online

During their online customer journey, consumers often supply personal and other data that businesses can subsequently use. Personal and other data on the internet is worth money. Consumers are not always aware how that works, even if they have not given consent for their behavior to be monitored or for their personal data to be processed in any other way.<sup>24</sup> What data are they sharing precisely? Why is it relevant, and for what businesses? And how much is it worth? Businesses that base their business models on monetizing personal and other data often have an interest in holding the consumer's attention as often and as long as possible. Take the example of social-media platforms, which are designed to retain the consumer's attention as long as possible. Longer and more frequent visits generate higher income for these businesses. And the data the business processes concerning consumers results in those same consumers receiving targeted approaches. Persuasion techniques aimed at retaining consumers' attention can also influence consumers' economic behavior. These techniques can therefore also fall within the scope of consumer protection rules.

Businesses can also obtain the personal or other data from consumers before the start of their online customer journeys with these businesses. This could include previous contacts with a particular business, but also purchased personal and other data. Businesses can also use *big data* analyses<sup>25</sup> carried out in-house or sourced from third parties to make predictions about a consumer's behavior. In addition, it can obtain big data by combining data from different platforms and businesses, which, in turn, are all owned by the same business.

### 3.3 Data: better, more focused, and more personal behavior predictions

*What is happening with regard to behavior predictions based on data?*

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<sup>24</sup> The requirements for consent for the processing of personal data are set out in the GDPR.

<sup>25</sup> See glossary.

Technological developments are enabling businesses to predict consumer behavior with increasing accuracy using personal and other data. For example, businesses are increasingly well informed about consumers' personal preferences and choices, in some cases better than the consumers themselves. Examples of this are:

- *Nowcasting* - predicting today, the very near future, and the very recent past (in the economy). Example: a business notices from its traffic data that another social-media app is suddenly becoming very popular.
- *Predictive analytics* - for example where a business uses analyses to identify a strong probability that a consumer who bought product X in the past month will also buy product Y. This analysis method is part of big-data analysis.

ACM notes that methods such as nowcasting and predictive analytics are influencing consumers' behavior. Businesses can thus opt for online strategies best suited to their commercial and other objectives, such as gathering as much personal and other data as possible from consumers, or selling as many products as possible. In this way, businesses can steer consumers' behavior very effectively, potentially affecting the autonomy of consumers.

Businesses can also use this kind of insight to the detriment of consumers, for example by accurately predicting who is most sensitive to *dark patterns*<sup>26</sup> (specific ones or in general), and then working individually on that consumer. A consumer who is exposed to such influence in a digital environment to which there is no alternative is particularly vulnerable. When businesses use a personalized approach to exploit specific characteristics or specific situations of a consumer or group of consumers, they must take account of the interests of that specific group. When assessing whether their commercial practice is fair, they must take the average member of that specific group as their benchmark.<sup>27</sup>

*What is happening in the case of monitoring?*

Businesses are becoming increasingly adept at monitoring the actions of consumers online. They can use the consumers' environment to experiment live with different versions of a website for each consumer. A simple example is a business that places an 'order' button in different places on the screen for different consumers. This is known as *A/B testing*.<sup>28</sup>

### 3.4 Personalization: not always visible to the consumer

*What is personalization in online choice architectures?*

Businesses can generally have much greater, or, in any case, very different, prior knowledge of a consumer and their preferences in an online choice architecture than in an offline environment, such

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<sup>26</sup> See glossary.

<sup>27</sup> See also Section 2.3.2. sub D.

<sup>28</sup> See glossary.

as a brick-and-mortar store. In addition, online businesses are increasingly able to anticipate the consumer's circumstances when they approach the consumer. That gives businesses more scope to treat consumers differently. Those differences may lie in the contact and the approach, but also in the price and conditions under which they offer products to consumers.

Businesses can use increasingly refined criteria to distinguish consumers. It is easy for an online business to personalize an advertisement or offer to a high degree, even if the consumer is in 'contact' with the business for the first time. Online businesses could theoretically produce a unique offer for each consumer, but, in practice, many businesses apply less extensive types of distinctions. They use various features and circumstances of that particular consumer.

All these types of tailor-made distinctions are referred to in these guidelines as personalization. A personalized advertisement or a personalized offer can be advantageous to the consumer if it matches that consumer's actual interests and preferences. For example, they will not be served any advertisements that are irrelevant to them, or they will save time searching because their preferred products appear at the top of their ranking. But businesses can also use knowledge of a consumer to exploit specific vulnerabilities.

One example of a personalized offer requiring relatively little prior knowledge of the consumer is showing more expensive products higher up the web page to a person living in a postcode area containing mainly expensive private homes. Another example is a business that shows more expensive accommodation on its travel website to a consumer who uses an expensive make of computer or telephone to visit the website. A consumer who is a member of a business's loyalty scheme (such as a customer card or savings scheme) can receive personalized discounts based on previous purchase behavior or interests.

### **3.5 Self-learning and other algorithms: who is shown what, and how?**

*What distinguishes an algorithm from a physical retailer?*

A salesman in a brick-and-mortar store assesses how he should approach the consumer himself. In the online environment, that is done by algorithms. Some algorithms are self-learning, so the underlying mechanism is more difficult to verify. A business opting for self-learning algorithms remains responsible for the decisions taken by the algorithm and their practical consequences. The business and the algorithm must not significantly disrupt economic behavior. The business is therefore also responsible for intervening if consumer law is violated. In order to fulfil that responsibility, ACM recommends that businesses themselves test and monitor the algorithms (or have it done by others). ACM cannot lay down any standards for the way in which a business sets up and checks its algorithm. What it *can* do, is collect information (including the algorithm) from businesses in order to test the results of algorithms against consumer regulations.

## 4. Examples of online persuasion

In these guidelines, ACM uses examples of persuasion that it encounters in the market: examples from the literature (academic or otherwise) on behavioral persuasion in online choice architectures, and examples provided by market participants. Where available, ACM takes examples from existing case law from national jurisdictions and from the Court of Justice of the European Union. In that context, the guidelines make as clear as possible whether certain practices are permitted under consumer law. In many cases, the final assessment depends on the specific circumstances of the case.

Businesses steer consumers through the online choice architecture in a complex context. The use of an unfair persuasion technique is often not an isolated practice. In its commercial statements, for example, a business may falsely claim a product is scarce, produce an opaque ranking of options (the order of which is not explained), display incomplete prices, and use long, difficult-to-understand terms and conditions. These commercial practices are more likely to cause serious damage if a business combines different persuasion mechanisms in a single customer journey. ACM takes this into account when assessing whether to prioritize the practices of an individual business for enforcement and, if so, what instrument to use.<sup>29</sup>

Another factor in ACM's prioritization is the extent to which a business's operations are data-driven. The more data and knowledge a business has on a consumer, the more likely it is to be able to exert significant influence on that consumer. This means the business has a responsibility to take the consumer's interests into account.

In this chapter, ACM distinguishes a number of nudging categories, based on insights gained in part from behavioral and computer sciences.<sup>30</sup> Each section first describes the general nudge category in the online choice architecture and the effect on consumers' choices. That is followed by tips to boost compliance with consumer law. Finally, a number of examples are given for each category, with an indication of whether they are permitted.

The examples are given for informational purposes, and are not exhaustive. ACM's opinion on the examples is based on facts and circumstances as described in each example. A requirement of each example is that the commercial practice could have led the average consumer to take a different transactional decision than they would otherwise have done, except where a commercial practice is 'blacklisted'. The average consumer is 'reasonably informed, circumspect, and observant'. If a commercial practice is focused on a specific consumer group, the determination is based on the average member of that group.

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<sup>29</sup> See also: <https://www.acm.nl/nl/publicaties/publicatie/15613/Prioritering-van-handhavingsonderzoeken-door-ACM>.

<sup>30</sup> See for example the categorization in the Princeton HCI study, Arunesh Mathur et al., 'Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites, 25 June 2019, <https://webtransparency.cs.princeton.edu/dark-patterns/assets/dark-patterns.pdf>.

## 4.1 Price notification

### 4.1.1. General

When a consumer takes a transactional decision, price is the decisive factor.<sup>31</sup> Online businesses are increasingly offering their product as 'free', but it is not always made clear that the consumer will pay in a non-monetary way for the use of the product. The consumer needs to have a clear price in good time in order to take an informed decision. Businesses have far more scope to experiment and differentiate their prices online than offline. For example, they can use big data and algorithms to continuously adjust their prices. A business can use methods such as webscraping<sup>32</sup> to keep track of competitors' prices. It can then continually adjust its own prices. Furthermore, businesses often have an interest in showing the lowest possible price. The online offering is also growing steadily. It therefore remains important to state prices clearly.

#### *Hidden costs*

Businesses can also mislead consumers in other ways, for example by displaying a price that is lower than the price consumers ultimately have to pay, because the unavoidable additional costs are only stated later in the purchasing process. If businesses do not show full price details, and confront consumers with unavoidable, pre-ticked extra costs later in the process, consumers are less likely to abandon the purchase. This is because they have already invested time in the process, so they are very likely to accept the extra costs.

### 4.1.2. What is and what is not permitted?

- If a business calls its product 'free' (or something similar) or earns money mainly from collecting and selling personal data, that may be unfair in certain circumstances, for example if it gives consumers the false impression that a product is non-commercial.
- Businesses must state a clear total price, including all additional costs. They must do so before consumers make online purchases.

If businesses cannot state the total price in advance, for example because it depends on a choice that consumers make later in the ordering process, they must state clearly how those extra costs are calculated. If businesses say nothing about extra costs, consumers do not have to pay them. This information must always be provided, even if there is limited space to do so, for example on a mobile website or in an agreement sent by SMS.

- If a subscription is involved, the total cost for each billing period must be clearly stated.
- Businesses must not mislead consumers by omitting or concealing the above-mentioned price information.
- Businesses must also not give the false impression that there is a specific price advantage.
- Businesses must not falsely advertise a product or service as 'free'. It may, however, charge a fee for sending a parcel, for example. This must be clearly stated in the offer.<sup>33</sup> Calling a product 'free'

<sup>31</sup> CJEU 26 October 2016, C-611/14 (*Canal Digital Danmark A/S*), legal consideration 55.

<sup>32</sup> See glossary.

<sup>33</sup> See also: ACM [20 May 2011 \(Garant-o-Matic II\)](#), sanctions decision, decision on administrative appeal, final). Other

without saying that consumers will subsequently receive further products that have to be paid for each month is also prohibited.

- Businesses must not pre-tick any additional costs (optional or otherwise).

#### **Example 1: Additional unavoidable disposal charge<sup>34</sup>**

An online store sells vehicle parts, such as wheels and tires, to consumers. The tires can be found on price comparison websites, and are quoted at a unit price on the business's own website. The consumer is statutorily required to pay a fixed disposal charge per tire. These unavoidable costs are not included in the price. That is not permitted. The business must state the disposal charge and include it in the price of the tire.

#### **Example 2: Additional unavoidable booking fees**

An airline ticket website offers a return flight to Madrid on the home page of its website for EUR 120. There is an asterisk next to the amount in the clickable advertisement. At the bottom of the home page, in a part that is only visible if the consumer scrolls or swipes down, just above the footer<sup>35</sup> menu, there is another asterisk with text stating that the consumer is required to pay a EUR 25 booking fee. If the consumer clicks on the offer and wishes to book the ticket, the booking fee is added to the cost summary on the payment page. That is not permitted. The online store must state the variable unavoidable costs whenever it states the price,<sup>36</sup> i.e. not at the bottom of the page or in small print, where they would be unclear.<sup>37</sup>

#### **Example 3: A bungalow with additional costs<sup>38</sup>**

A national chain of bungalow parks places the following advertisement, with its name and logo, in an online newspaper:

'Enjoy a weekend of nature! Special offer! All our parks have *four-person bungalows available for only EUR 160* for a weekend between 1 January and 15 March!'

When the online booking is completed, the cost turns out not to be EUR 160. There are additional charges for final cleaning and bed linen (both are mandatory). These were not included in the

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cases involving the use of the word 'free' can also be consulted: [Celdorado](#), [Garant-o-Matic II](#), [Goltex Vertriebs GmbH & Co](#), [Lecturama Uitgeverij B.V.](#), Joint action in relation to CPC: Online games (Google & Apple): [CPC app stores](#).

<sup>34</sup> See also: <https://www.acm.nl/nl/publicaties/acm-dwingt-juiste-prijsvermelding-autobanden-af>

<sup>35</sup> See glossary.

<sup>36</sup> There is a difference between fixed unavoidable costs (e.g. the price of the package holiday is per person and the additional fee is also per person) and variable unavoidable costs (e.g. the price of the package holiday is per person but the additional fee is per booking). ACM allows a provider to exclude variable costs from the price and to state the nature and amount of such costs transparently immediately next to the price.

<sup>37</sup> The Dutch Trade and Industry Appeals Tribunal, 15 May 2018, [ECLI:NL:CBB:2018:145](#) (ACM/Corendon).

<sup>38</sup> Example taken from: Consumentenautoriteit, 'De wet oneerlijke handelspraktijken toegelicht' (information leaflet for businesses), winter 2008, p. 11, available at <https://www.acm.nl/nl/publicaties/publicatie/7211/Brochure-oneerlijke-handelspraktijken-voor-ondernemers>.

advertised price. The total cost is therefore EUR 215. That is not permitted.

In the case of a 'purchase invitation', too, a vendor must state the total price and all unavoidable (fixed or variable) costs.

## 4.2 Personalization of prices and offers

### 4.2.1 General

Businesses can use big data and algorithms to personalize their offer to consumers in all kinds of ways. They can send targeted advertisements and determine which offer a consumer will see. Fashion websites, for example, can adjust the presentation of products on the basis of the consumer's searching and purchasing behavior. A consumer who has searched for a particular product is shown products that they will probably like.

The displayed products may also be linked to the price segment in which the consumer has previously purchased. If a consumer often purchases or searches for fashion in a fairly high price category on the website, they may be shown more expensive products than a consumer who often searches for cheaper fashion on the same website.

Businesses also have plenty of options to personalize prices online. They can offer different prices to different consumers. There are many types of price personalization, from weak to very strong.<sup>39</sup> Businesses may run algorithms, for example, to calculate up-to-date supply and demand. This is called a dynamic pricing policy. It is used extensively by airline ticket websites and taxi platforms. Apart from the price, a business can also determine which products the consumer will see,

Businesses have ever greater knowledge of their customers. They can use data they gather on consumers to offer them personalized prices. Some stores, for example, have cards or apps that enable them to make personal offers to consumers based on their purchasing behavior. Personalized pricing can have benefits for consumers. For example, businesses may decide to offer products below the average price to consumers who have less money to spend, for example.

Businesses can also anticipate circumstances under which consumers will be willing to pay more. For example, an online store may charge higher prices to consumers who shop on their smartphone than to consumers who visit the site on a laptop. A consumer who shops on a smartphone spends less time comparing prices and will therefore more readily pay a higher price. And a taxi company with an app can charge a higher fare to a consumer whose mobile phone battery is almost empty.

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<sup>39</sup> for example, showing the same price to all consumers, dynamic pricing, price differentiation (different prices for different consumers or groups of consumers), members' discounts, nudging (showing prices in a personalized order), strong personalization of websites, and price discrimination (personalized prices).

#### **4.2.2. What is and what is not permitted?**

##### **Personalization and the average consumer**

If a business distinguishes between consumers or groups of consumers, or approaches these consumers in different ways, all these different approaches must comply with the rules. Depending on the features and specific vulnerabilities in the group targeted by the business, the standard for what constitutes an 'unfair commercial practice' may be different. A business is therefore not permitted to approach consumers in a way that takes advantage of specific vulnerabilities that make it easier to mislead that group than other consumers. The more a business personalizes its offer, the smaller will be the group of consumers that it targets. In extreme cases, the average consumer in a personalized offer may be the same as the individual consumer targeted by the offer.

Businesses continuously gather knowledge of the way in which different groups of consumers are affected by a particular design of the choice architecture, for example, by means of A/B testing. That knowledge entails obligations. First, all test variants that are trialed in the live environment on real consumers must comply with the law. Businesses must also treat consumers' interests with care. If they carry out A/B testing in order to better understand consumers' preferences, that helps them fulfil their professional diligence obligations. But if they use such knowledge to take advantage of specific vulnerabilities of consumers, thereby disrupting their economic behavior, that constitutes an unfair commercial practice.

##### **Transparency concerning personalization**

- ACM sees personalization as an essential feature of an offer. Businesses must therefore state clearly that the offer has been personalized – and how that has been done.
- A business must not give a false impression that the consumer is receiving an offer intended for them personally and that they will benefit from it. That is misleading.
- If a business is not transparent about the way in which it uses data for personalized prices, that may be misleading. If a business exerts undue influence, for example misusing knowledge of a consumer's vulnerable circumstances, possibly by offering products on instalment credit to financially vulnerable and/or indebted consumers, that may constitute an aggressive commercial practice.
- If the price that a consumer sees has been personalized by an algorithm using automated decision-making, the business must clearly inform the consumer so that they can take account of possible risks in the purchase.
- If the business provides information on the personalization of its offer, it must not mislead the consumer about the extent to which it has taken account of their interests and preferences.
- A business must not give the false impression that a personalized offer is more advantageous than the offer made to other customers.



- If a business uses personal data for price differentiation, it must, of course, also comply with the GDPR.

#### **Example 1: The personalized price for a television**

An online consumer-electronics store states the following in an advertisement:

“Create an account now so we can send you personal offers and you can place orders more easily.”

Consumers with an account sometimes see special offers when they are logged into their account. The business does give discounts on products to consumers with an account, but not to consumers without an account. Consumers with an account then see the following message next to the price of the product: “Personal offer! Normal price EUR 299. Your price EUR 255.”

But sometimes consumers with an account also see a *higher* price for a product than consumers without an account. In those cases, there is no clear information (or no information at all) on any personalized prices whatsoever. That is not permitted.

The business must actively inform consumers about personalized prices. It can do so, for example, by placing a message next to the personalized price, such as: “we have used information about you to determine the price we can offer you. This price may differ from the price offered to other customers.”

### **4.3 Unfair business models for games**

#### **4.3.1 General**

Businesses offering games use various techniques to increase consumers’ engagement in the game, and encourage them to spend money on it. The more time and energy players have put into a game, the more likely they are to respond to persuasion techniques that encourage them to spend money.<sup>40</sup> The increasing gaming addiction<sup>41</sup> among younger people shows how effectively game developers are using persuasion techniques to encourage players to spend more time and money on the game.

Examples of techniques used to stimulate purchases include the use of:

- *loot boxes*<sup>42</sup>
- special offers valid for a limited period
- hidden advertising
- microtransactions

<sup>40</sup> D.L. King, and P.H. ‘Predatory monetization schemes in video games (e.g. ‘loot boxes’) and internet gaming disorder’, *Addiction* 2018/113 issue 11, pp. 1967-1969.

<sup>41</sup> See also: <https://www.platform-investico.nl/artikel/12-jarige-gameverslaafden-melden-zich-bij-verslavingskliniek/>

<sup>42</sup> See glossary.

- use of other currencies
- price personalization
- algorithms that determine the optimum sale strategy.<sup>43</sup>

Below, we discuss some examples of online persuasion in games: the freemium business model, loot boxes, different currencies, and early-access games.

#### *Freemium business model*

Businesses providing games often use the freemium business model. This means the game can be downloaded for free but includes an option or requirement to make purchases within the game. Consumers can usually buy extra game content or add-ins.<sup>44</sup> This involves small payments that are also known as microtransactions. The use of the freemium model makes the game more accessible to new players.

#### *Loot boxes*

Loot boxes are virtual 'containers' that players can win or buy. A loot box contains items and adaptations, such as weapons, more powerful weapons or an outfit for an online character. The contents of the box are random, and only revealed when the player opens the box.

If the player can trade the content of the loot box, it is subject to the Dutch Games of Chance Act.<sup>45</sup> Businesses must be licensed to offer these types of game of chance to Dutch consumers.

Loot boxes pose the risk that other, possibly susceptible, players of the game will be drawn in and persuaded to make purchases. Each case amounts to a few euros, but, over time, they can add up to a large sum. The player is unaware of the probability of winning rare items. That exploits the player's vulnerabilities to gambling, so a business may be committing a violation even if the content of a loot box cannot be traded. ACM may then take action.

#### *Different currency*

Many games use their own currency. The game only shows the value in the player's own currency (euros) when they buy the game currency. That breaks the association with real money and causes users to spend more readily.

#### *Early access*

An early-access game is a game in the development phase. The consumer pays for early access. Game developers also use the concept as a form of crowdfunding. They use the money they receive to develop their game further, but there is no guarantee that development of the game will continue.

<sup>43</sup> D.L King, P.H. Delfabbro, S.M. Gainsbury, M. Dreier, N. Greer, and J. Billieux, 'Unfair play? Video games as exploitative monetized services: An examination of game patents from a consumer protection perspective', *Computers in Human Behavior* 2019 issue 101, pp. 131-143.

<sup>44</sup> Examples of such add-ins are virtual items, weapons, cosmetic items/skins or currency.

<sup>45</sup> See also the investigation into loot boxes by the Netherlands Gaming Authority 'Loot boxes: een buit of een last?' (19 April 2018) <https://kansspelautoriteit.nl/onderwerpen/a-z/loot-boxes/onderzoek/>.

That risk is often not clearly stated in early-access games.

#### 4.3.2 What is and what is not permitted?

Businesses that sell games have a responsibility<sup>46</sup> to ensure that their customers are not put under unacceptable pressure or misled into taking decisions they would not otherwise have taken. If a business encourages purchasing among consumers by exploiting consumer vulnerabilities, that may constitute an unfair commercial practice. This may involve, for example, linking players of different levels to encourage novices to buy more so as to progress further in the game.

When assessing these unfair commercial practices, ACM looks at the whole context of the game, including the situational vulnerability of gamers and the vulnerability of children.<sup>47</sup> Below are a number of examples in which ACM sets out the obligations<sup>48</sup> of game providers.

##### *Calling games free*

Games can only be called 'free' if they are actually entirely free. Games with in-app purchases must not be sold as 'free'. Even before consumers buy or download a game, a provider must state whether it includes in-app purchases. The provider must make clear what parts of the game are free, and what elements can be purchased. Consumers then know what additional costs they can expect.<sup>49</sup>

##### *Payment settings*

A business is not permitted to switch on standard purchasing options without the consumer's consent. Nor is a business allowed to set an automatic timeslot for the validity of consent in a game. That also requires the consumer's consent. If a game is frequently played by children, the business must design the payment settings in such a way that children cannot make any purchases without parental supervision, for example, by requiring a password for each purchase.<sup>50</sup>

##### *Exerting undue pressure on players to make purchases*

Games that are aimed at or may appeal to children must not directly encourage them to buy items in a game. Examples are "buy now" or "upgrade now".

Businesses that sell games sometimes use techniques to boost sales of products with microtransactions. If these techniques put such pressure on consumers that they can no longer make an informed choice, ACM deems this to be undue pressure. That constitutes an aggressive commercial practice. An example is the use of algorithms that determine the price, the offer, or the time of the offer based on data concerning the player's psychological vulnerabilities.

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<sup>46</sup> under professional diligence.

<sup>47</sup> Children qualify as a vulnerable target group in consumer law.

<sup>48</sup> In 2014, European regulators drafted a common position paper on the rules governing commercial practices in online games: [https://ec.europa.eu/info/sites/info/files/commonposition\\_of\\_national\\_authorities\\_within\\_cpc\\_2013\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/commonposition_of_national_authorities_within_cpc_2013_en_0.pdf).

<sup>49</sup> See also section 4.1 on the use of 'free'.

<sup>50</sup> See also previous statements by ACM on this subject: <https://www.acm.nl/nl/publicaties/publicatie/14880/Apple-en-Google-bieden-spellen-niet-langer-als-gratis-aan>.

### *Loot boxes*

The rules on price notification (see 4.1) also apply to loot boxes. For example, the business must clearly state the price of the loot box in real currency just before the purchase. The probability of winning various rare items is also an important feature of the product. This must therefore be stated in the offer of the loot box.

### *Different currency*

The price of a product is one of its main features. It must therefore be stated with each purchasing invitation. It is not sufficient to state the price in the game's currency. When selling products, providers must also show the product costs in euros with each offer.

### *Early-access games*

Consumers must know what they are getting into before they take part in an early-access game. These games are frequently offered through a platform. The provider must give consumers full information on the status of the game before they buy it, including an indication that the game's development may cease. If a game has already been in early access for a long time, the provider must make that known to consumers before purchase. If there is doubt as to whether the developer is still working on the game at all, that must also be clearly stated.

#### **Example 1: Free-to-play game with in-app purchases<sup>51</sup>**

A business offers a game as 'free'. Before the consumer downloads the game, they cannot see that it allows in-app purchases, for example for extra lives, weapons, or coins. That means they do not know whether to expect additional charges. That is not permitted.

A business is not permitted to offer a product as 'free' if the consumer is offered the possibility of making in-app purchases when playing the game. In this case, a game is offered as free even though it includes all kinds of in-app purchase options.

#### **Example 2: Loot boxes**

A business has developed a video game with loot boxes that contain outfits for the consumer's avatar. The offer clearly states the probability of the loot box containing a rare outfit. This probability is not manipulated, for example, on the basis of the consumer's player profile.<sup>52</sup> The outfit is only intended for decoration and cannot be traded. That is permitted.

<sup>51</sup> This example is based on the common legal position adopted by CPC authorities on online games in 2013: "Common position of national authorities within the CPC, see [https://ec.europa.eu/info/sites/info/files/common-position\\_of\\_national\\_authorities\\_within\\_cpc\\_2013\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/common-position_of_national_authorities_within_cpc_2013_en_0.pdf).

<sup>52</sup> D.L. King, P.H. Delfabbro, S.M. Gainsbury, M. Dreier, N. Greer, and J. Billieux, 'Unfair play? Video games as exploitative monetized services: An examination of game patents from a consumer protection perspective', *Computers in Human behavior*, 2019, issue 101, pp. 131-143.

### Example 3: Development of an early-access game is discontinued

A platform offering early-access games releases a new PC video concept produced by a developer who wants to continue developing the game. The game costs EUR 20. The platform carrying the game clearly states that it is an early-access game. It also states that there is a chance that development of the game will be discontinued, and that the consumer must be prepared to pay the purchasing price for the game in its current state. That is permitted.

It subsequently turns out that the game developer has ceased development of the game. The platform continues to offer the game as an early-access game. It does not state that the game has had no new updates in quite a while, and that nothing has been heard from the developer for a long time. That is not permitted.

## 4.4 Scarcity messages

### 4.4.1 General

Businesses use messages to arouse a sense of urgency in the consumer. They do this by emphasizing scarcity (of time or stock) in the form of a deal, discount, or special offer. This may include messages such as: “this offer is valid for a limited period”, “only a few items still available”. Such messages lead consumers to make faster choices with a greater readiness to buy.<sup>53</sup>

Reports of low availability of products can be useful for the consumer if they are factually true. But if they are not based on actual availability, or are not specific enough, and give a false impression of the actual scarcity, enticement can turn into deception.

Businesses can use different types of scarcity messages, such as:

- *‘Limited stock’ messages* - online stores often inform visitors about the availability of their products. They do this, for example, by showing the quantity of each product remaining available. If a product is almost sold out, there are sometimes messages such as “Only three items left!” or “Almost sold out!”.
- *Countdown timer* - Another kind of scarcity message is the combination of a text and a countdown timer showing how much time remains to take advantage of the special offer. This happens, for example, in the case of online auctions. Online stores typically use a countdown in seconds. This can trigger a strong urge in the consumer to act immediately. In the case of large and/or complex purchases, such as a laptop or extra minutes for your voice

<sup>53</sup> Praveen Aggarwal and Rajiv Vaidyanathan, ‘Use It Or Lose It: Time-Limited Promotions And Purchase Behavior’ in: Harlan E. Spotts (Ed.), Proceedings of the 2002 Academy of Marketing Science (AMS) Annual Conference, Springer International Publishing, Cham, 2–2, 2015.

Robert B Cialdini, Influence: Science and practice. Vol. 4. Pearson Education, Boston 2009.

J. Jeffrey Inman and Leigh McAlister, Do Coupon Expiration Dates Affect Consumer Behavior?, *Journal of Marketing Research* 31, 3 (1994), 423-428.

plan, the use of minutes, hours, days, or even weeks can arouse a similar sense of urgency.

#### **4.4.2 What is and what is not permitted?**

##### **What is permitted?**

###### Limited stock

Is the business really almost sold out of a product? Does the announcement really give the consumer the full story? Does the business say, for example, that it will get additional stock later? Or are the similar rooms in the hotel on that site on the chosen date really almost sold out? If so, the business is permitted to use 'limited stock' messages.

###### Countdown timer

- If a product is temporarily available at a lower price, a business is permitted to show how long this special offer will last. It can do that, for example, with a timer that counts down to the end of the special offer.
- A business is permitted, in principle, to keep a product in the sale for longer if it still has stock and can also extend a special offer, but this must not become a habit or a permanent practice.

##### **What is not permitted?**

###### Limited stock

- Factually incorrect claims about the availability of items are not permitted. For example, the business is not permitted to say that only five items are left if that is not the case.
- Incomplete claims about availability are also misleading, so they are similarly not permitted. The business cannot say, for example, that only five rooms are left in the hotel if that is not true in the period for which the customer is searching, or if rooms in the hotel are or may be available on that date through another site.

###### Countdown timer

- A business must never falsely claim that the product is only available for a very limited period, or that it will only be available for a very limited period under special conditions, to prompt the consumer to take an immediate decision. The consumer then has no opportunity or insufficient time to make an informed decision.
- If the special offer does not end after the timer stops, a timer must not be used.
- A business must not continuously claim that a product is in a 'sale', as that would mislead the consumer about the availability of the offer.

**Example 1: The not-so-temporary offer**

An online store has a large supply of a particular product as it can repeatedly reorder it at a similar price, but it acts as if it is offering these products at a temporarily reduced price. In reality, that price is not at all temporary; the product has been available at that same price for a long time. The consumer is misled about the price advantage. That is not permitted.

**Example 2: false availability information**

A business that sells concert and event tickets online advertises an artist's concert as follows:

"Your chance to order the last few tickets from us for the sold-out concert for EUR 80."

But the concert is not sold out. Tickets are still on sale through the 'official sales outlets' at EUR 60 each. The business is misleading consumers about one of the main features of the product, namely its availability. It gives the impression that the concert is sold out and that consumers can order the last few tickets through it, whereas, in reality, the concert is not sold out. That is not permitted.

**Example 3: Last few remaining!**

An online fashion store promotes some products with the message "Last few remaining!". The online store has hired a firm to optimize the website and boost sales. The firm has built an algorithm that sends out this message for all products when they are viewed more than 200 times a day and for longer than 20 seconds but are sold less than five times. The firm's A/B tests show that this boosts sales of those products. The message is not based on actual availability. That is not permitted.

**Example 4: Only three rooms left!**

A hotel comparison and booking website offers hotel rooms in various hotels. When only a few rooms are left, the business posts a message stating how many rooms remain available:

"Only three rooms left! Book quickly".

In reality, the statement only concerns the availability of the rooms on *its* website. There may well be more rooms available on other websites. The price comparison website must not falsely claim that only a few products are left if more products are or may be available from providers on other websites. The description is incomplete and therefore misleading.<sup>54</sup> The price comparison website would thus be misleading the consumer about the availability of the product. That is not permitted.

<sup>54</sup> See: RCC (preliminary relief proceedings) 2015/01218, 15 April 2016 (Booking.com; schaarste: "nog één kamer beschikbaar") <https://www.reclamecode.nl/uitspraken/schaarste/reizen-en-toerisme-2015-01218/150012/> and CMA Guidance for the Online Accommodation Booking Sector,

The Dutch Advertising Code Commission also took the same view in a similar situation. A message such as “only three rooms available on this website” or “x people have viewed this hotel for the same dates” is permitted, but that information must be truthful.

## **4.5 Unclear information: who will you be buying from and what will you buy?**

### **4.5.1 General**

A business will often have more or better information than the consumer. Information obligations are intended to narrow this gap. Consumers need information in order to take an informed decision on a product. The way in which businesses provide that information is very important, but, in practice, it does not always work well.

In the ‘unclear information’ category, ACM is referring in particular to the use of unclear formulations, long texts, or hiding information. These may make it harder for consumers to find or understand information that is important to them, so they cannot take it fully into account when making their choices.

There are many rules governing the information businesses are required to give the consumer and the way in which they must do so.<sup>55</sup> These are often absolute information obligations. The law specifies the information that must be provided in a particular situation, regardless of other circumstances.

Below, ACM gives a few examples of situations that occur frequently in the online domain. A risk of unclear information in the online domain arises, for example, in the case of information to be supplied just before the contract is concluded (known as precontractual information) and general terms and conditions. ACM has previously produced a checklist of information obligations for businesses selling to consumers over the Internet.<sup>56</sup>

### **4.5.2 What is and what is not permitted?**

The business must provide important information on the product clearly and in good time. Any omission or vague or ambiguous presentation of important information may be misleading. Depending on the legal requirement, the business must provide the information, for example, in a way that is: ‘easy, direct and permanently accessible’, ‘clear and easy-to-understand’, or also ‘in plain and easy-to-understand language, and in legible form’.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781624/webteam\\_online\\_booking\\_services\\_principles.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781624/webteam_online_booking_services_principles.pdf).

<sup>55</sup> All the provisions of Annex A of the Dutch Act on Enforcement of Consumer Protection, among other provisions, include information obligations.

<sup>56</sup> ‘Checklist voor verkoop via internet’ of 1 May 2017 <https://www.acm.nl/nl/publicaties/publicatie/17200/Checklist-voor-verkoop-via-internet>. NB: this checklist does not yet include the obligations relating to Online Dispute Resolution (ODR), Alternative Dispute Resolution (ADR), and Geoblocking.



In some cases, the information obligations also include performance obligations, for example no information must be supplied that is factually inaccurate or could mislead the average consumer, or the information must lead to rapid contact, and direct and effective communication. Consumers must be able to see the information that is important for their choice of a product before they start ordering or creating an account.

Furthermore, advertising must always be recognizable as such. A business that fails to make clear that a media statement is of an advertising or commercial nature is also misleading consumers.<sup>57</sup>

#### General terms and conditions

General terms and conditions must be formulated in a way that is 'clear and easy-to-understand'. Extensive case law is available on the practical interpretation of this requirement. It is also interpreted in guidance on the European directive on unfair contract terms.<sup>58</sup>

#### Context and role of the communication medium

When assessing whether essential information has been omitted or hidden, ACM looks at the *actual context and the limitations of the medium used*. The online environment is unlikely to cause limitations in this regard. A business can provide full information for consumers on its website, but if it also uses another medium, such as an app, there may be limitations. The business can then provide additional information by referring to a page set up for that purpose on its website.<sup>59</sup>

#### **Example 1: Unclear directory assistance services<sup>60</sup>**

A business has a website for a directory assistance service that forwards calls to the telephone number of a government agency. The website shows a premium-rate number. If the consumer calls this number, they have to pay charges in addition to the normal charges for calls from their telephone. The service supplied by the business consists only of a connection to that government agency's free telephone number.

Anyone looking for the agency's number is quite likely to use a search engine. The first search results include the business's directory assistance service. The business has invested in search engine optimization, and includes the name of the agency the consumer is searching for in its

<sup>57</sup> The requirement of recognizability of advertising also applies under the Dutch Media Act, which is enforced by the Dutch Media Authority. Rules on the recognizability of advertising and transparency concerning other forms of commercial persuasion by social influencers are prescribed on a self-regulation basis in the [Advertising Code for Social Media & Influencer Marketing 2019](#). A number of influential YouTubers have also applied the YouTube Social Code since 2017.

<sup>58</sup> [Guidance on unfair contract terms in consumer contracts](#).

<sup>59</sup> Example taken from: Consumentenautoriteit, 'De wet oneerlijke handelspraktijken toegelicht' (information leaflet for businesses), winter 2008, p. 12, <https://www.acm.nl/nl/publicaties/publicatie/7211/Brochure-oneerlijke-handelspraktijken-voor-ondernemers>.

See also: CJEU 30 March 2017, C-146/16, [ECLI:EU:C:2017:243](#), (*Verband Sozialer Wettbewerb eV vs DHL Paket GmbH*).

<sup>60</sup> See also: <https://www.acm.nl/nl/publicaties/acm-pakt-misleiding-bij-doorschakeldiensten-aan>.

advertisements. Instead of the agency's telephone number, the business shows the number of the directory assistance service.

The business's advertisements give the impression that the number on the website is the direct number of the service for which the customer is searching. The website resembles that of the government agency in terms of its design and use of language. The business also provides no clear information on the identity of the business or the content and price of the service. This is a misleading practice. That is not permitted.

#### **Example 2: Automatic renewal per the general terms and conditions**

A dating site offers a free one-month trial period. If the consumer does not cancel the membership at least one month before the end-date, it is automatically converted into a €40 per month membership that can be cancelled on a monthly basis. This information is 'hidden away' in a long text containing the general terms and conditions. That is not permitted.

A business must describe the main features of a product in its invitation to purchase (the offer). It is not acceptable if the consumer only learns about the automatic renewal in the general terms and conditions.

## **4.6 Social proof**

### **4.6.1 General**

Consumers like to take other people's experiences and behavior into account in their purchasing decisions. Other people's positive experiences may be a sign of quality for the consumer and help them make their choice.<sup>61</sup> Consumers share their experiences in different ways, for example by writing reviews, awarding 'likes', or giving ratings based on a number of stars.

Businesses can boost consumers' trust in their products by referring to other people's experiences with them, so-called 'social proof'. A business may decide to use this technique to influence the consumer's decision. The rise of social media has increased the potential for this practice.

#### **Online reviews**

Consumers increasingly use reviews when enquiring about products and deciding what to purchase<sup>62</sup> They use them as an additional source of information or verification. ACM has previously published guidelines for businesses on the use of online reviews.<sup>63</sup> A review is defined as an assessment by a consumer of a business or its product. Reviews are usually managed by a different company.

<sup>61</sup> Abdul Talib, Yurita Yakimin & Mat Saat, Rafeah. (2017). Social proof in social media shopping: An experimental design research. SHS Web of Conferences. 34. 02005. 10.1051/shsconf/20173402005.

<sup>62</sup> See also: <https://www.acm.nl/nl/publicaties/publicatie/17216/Onderzoek-onder-consumenten-naar-het-gebruik-van-online-reviews-bij-aankopen>.

<sup>63</sup> See <https://www.acm.nl/nl/publicaties/publicatie/17218/Richtlijnen-voor-ondernemers-voor-gebruik-online-reviews>.

Businesses take advantage of reviews, for example, by placing positive reviews prominently on their websites or publishing only the positive reviews they receive on the sold product.

It is not always clear whether the reviews were submitted by real people, as the business may have published self-made reviews or quoted accounts by people who have not used the supplied product. In some cases, businesses pay others to publish reviews, for example by having influencers advertise their products. Also, it is not always clear whether the proportion of positive reviews relative to negative reviews or the total number of reviews is genuine.

### **Testimonials**

A testimonial is also an assessment by a consumer of a business or its product. Testimonials are obtained and managed by the business that markets the product. Businesses themselves therefore have full control of the content of a testimonial. If a business uses people in a positive testimonial, consumers cannot be sure whether it did so for payment, whether the people actually used the product, or whether a combination of both factors was involved.

### **Followers and likes**

Businesses can use the number of followers or likes (or other consumer rating systems) to give a positive impression of the rating of their product. There are businesses that sell fake followers and fake likes to other businesses to make them appear more popular than they actually are. A consumer may then choose the product, in part or entirely because they think other people rate it highly, whereas that is not necessarily the case. People will be more inclined to choose it if the consumer's friends or acquaintances appear in the list of followers or likes.

### **Activity messages**

Businesses can place messages on their website describing other consumers' current or past activities and actions. These activity messages vary in form, from static to dynamic and from abstract to specific:

- Messages stating that other consumers have just bought a product, such as "Norma and Joe have just bought this headset"
- Messages stating how many consumers have a particular item in their shopping basket, such as "46 people currently have this dress in their shopping basket"
- Messages stating how many people are currently visiting the website, such as "there are currently 287 visitors on the website"
- Messages stating how many consumers are currently looking at the product, such as "12 people are currently looking at this hotel"
- Messages stating how many consumers have bought the product, such as "this product has been sold 3,000 times", or a more abstract message: "this is the best-selling product on our website"

These messages exploit consumers' inclination to observe and copy other people's behavior, particularly if they are in doubt. They often also exploit people's perception of scarcity by giving

consumers the impression that others might get in first and buy the product if they do not act quickly enough.

Techniques using the social proof<sup>64</sup> principle influence consumers' behavior by accelerating the selection and purchasing process. Consumers consequently look less critically at the product, and are less inclined to compare products.

#### **4.6.2 What is and what is not permitted?**

A business is allowed to highlight reviews on a website if the source is clearly traceable. The business must not therefore use reviews that are completely unverifiable or left anonymously. It must not use reviews from real people who have never purchased the product. When publishing reviews, the business must not treat negative and positive reviews differently and highlight only positive reviews.

A business is permitted to use testimonials, but these must be truthful. An experience shared in a testimonial must be an experience of a 'real' consumer. If the consumer is paid for writing a testimonial, that must be clearly stated.

A business must not use fake followers, fake likes, or other fake rating systems to promote its online commercial statements.<sup>65</sup>

A business may use activity messages, but these must be truthful and complete. An activity message must be based on consumers' actual activity. It must not give a false impression of the availability or popularity of products by omitting relevant information. The message "76 people are currently looking at this flight" is misleading if a consumer has searched on a specific date, whereas the message concerns *all* possible dates. It gives the impression that the flight on that date is being viewed by 76 people when, in fact, that is not the case.

##### **Example 1: Reviews by non-existent people**

A cosmetics business has a website on which the front page contains experiences of satisfied consumers who have given the product a four-star or five-star rating. Examples of the experiences are:

"After using this product, all my skin problems disappeared in two weeks!" and  
"Thoroughly recommended, I'll never buy any other product!"

There are no names accompanying the reviews. Later, it emerges that the people who supposedly left the reviews do not exist. That is misleading. That is not permitted.

<sup>64</sup> R.B. Cialdini, *Invloed-De zes geheimen*, Amsterdam: Academic Service 2019.

<sup>65</sup> [See for example Article 4 of the Advertising Code for Social Media & Influencer Marketing.](#)

**Example 2: Review by a family member who has never actually bought the product**

A business sells garden equipment and decides to highlight garden hoses on the front page of its website. It quotes a consumer organization:

“Good value for money.”

If that really is a recent quotation, it is permitted.

The business also shows a video message in which a family member says:

“I accidentally ran over the hose with my lawnmower but there wasn’t a scratch on it. Top quality!”

But the family member did not actually buy or use the garden hose. That is misleading. That is not permitted.

**Example 3: Randomly generated activity messages**

A business sells toys and decides to hire a third party to increase the conversion rate on the website. The third party includes a function on the website that generates random activity messages and displays them next to products. For example, “15 people are currently looking at this item” appears next to a toy. But this number is not based on reality; there are no other people looking at the item. That is misleading. That is not permitted.

**Example 4: incomplete activity messages**

A business offers hotel rooms and displays the following message next to the rooms on the product page:

“There are currently six people looking at this room”

Before the search results appeared, the consumer had already entered the dates for which they needed a hotel. The options they see are available on those dates. The message concerns the total number of people looking at the hotel room for all dates combined, and falsely gives the impression that a lot of people are looking at the room for the date the consumer wants. That is misleading. That is not permitted.

## 4.7 Unclear information on data protection

### 4.7.1 General

Data on consumers is worth money to businesses. Businesses collect and study this data on consumers and their behavior.<sup>66</sup> They can then better understand and predict consumers' behavior (see also Chapter 3). Businesses can use that knowledge to tailor special offers to consumers and persuade consumers to take decisions on transactions that they would not have taken without such influence. The consumer must also be able to compare products in terms of the use of personal and other data and then make an informed choice based on how a business will use and process this data.

### 4.7.2 What is permitted? What is not permitted?

If a business offers a product and sets out conditions on the use of personal data, ACM considers this to be a key feature of the product. That means the business is committing a misleading omission if it fails to disclose information on the use of that data, discloses it too late, or conceals it in the terms and conditions. The business will also commit a deception if it supplies false information on this to the consumer. The information the business is required to provide under the Dutch Unfair Commercial Practices Act includes, in any case, the information it is required to provide under the GDPR.

This also means that a business must clearly inform the consumer what will happen to his personal and other data. It must be made clear to the consumer that the business is using their personal and other data commercially. If a business processes personal data, the situation described in these guidelines is subject to both consumer law and the GDPR.

#### Example 1: Information on the use of personal and other data in app stores<sup>67</sup>

An app store informs the consumer among other things about some of the key features of:

the app  
the developer  
customer ratings  
price  
compatibility  
any age restrictions.

Information on the way in which the apps use personal and other data only appears right at the bottom of the page containing information on the app. This is misleading because this information is a key feature of the product. That is not permitted.

<sup>66</sup> If it is personal data, it is covered by the GDPR. This includes rules on lawfulness/transparency/information provision. In this section, however, information on data protection is viewed from the perspective of consumer protection law and not the GDPR. See also Section 2.2.2.

<sup>67</sup> See also: <https://www.acm.nl/nl/publicaties/acm-initieert-internationale-oproep-aan-apple-en-google-over-appstores>.

Research shows that consumers compare apps on the basis of the way in which the apps use personal and other data, as long as the correct information is supplied to them transparently in advance.<sup>68</sup> If consumers receive clear and timely information on the personal and other data used by the app, they can deliberately choose an app on the basis of the way in which a business uses personal and other data and shares it with third parties. The app store must enable the apps to inform users about this. If the app provider does not operate through an app store, it must provide this information itself.

This information must be easy for the consumer to find, so must not be displayed in very small print right at the bottom of the page. The consumer must also not have to scroll or swipe to find it. The information should ideally be displayed close to the price.

## **4.8 Standard settings**

### **4.8.1 General**

There are various ways in which a business can nudge a consumer in the direction it wishes. One way is by using default settings. Most consumers will not change the default settings or choices that have been made for them.

Here are some examples:

1. The business has a pre-ticked box on its site indicating paying customers' agreement to receive a newsletter from the business.
2. The business's default setting for flight bookings is a flight without checked baggage.
3. The business's default payment setting enables a customer who has paid to make payments for 15 minutes without having to enter their password each time.<sup>69</sup>

### **4.8.2 What is and what is not permitted?**

A business can use a default setting that gives the consumer maximum protection. The basic principle is that this setting should be the one that is most favorable for the consumer. That is good practice on the part of the business (see example 1).

If the options are set by default to a less favorable choice for the consumer, the less favorable the default setting is to the consumer, the more likely it is to constitute an unfair commercial practice. Important information on a product must be stated in a way that is easy-to-understand and unambiguous for the consumer and must not be 'hidden away'.

<sup>68</sup> Kelley, Patrick & Cranor, Lorrie & Sadeh, Norman. (2013). Privacy as part of the app decision-making process. Conference on Human Factors in Computing Systems - Proceedings. 3393-3402. 10.1145/2470654.2466466. Kang et al., "Visualizing Privacy Risks of Mobile Applications", 2015.; Lliccardi, et al., "No technical understanding required: Helping users make informed choices about access to their personal data". In Proc. MOBIQUITOUS '14. ICST, 2014. <http://people.csail.mit.edu/ilaria/papers/LiccardiMobi.pdf>

<sup>69</sup> See also: "Common position of national authorities within the CPC, [https://ec.europa.eu/info/sites/info/files/common-position\\_of\\_national\\_authorities\\_within\\_cpc\\_2013\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/common-position_of_national_authorities_within_cpc_2013_en_0.pdf).

A business is only permitted to send unsolicited messages for commercial (or idealistic or charity) purposes to existing customers for similar products that it supplies. It must offer an opt-out at the start of the customer relationship and with every sent message. It is not therefore permitted to advertise products from other parties. It may send messages to third parties, but only with the consumer's specific consent.<sup>70</sup>

**Example 1: A password for every purchase**<sup>71, 72</sup>

A business has produced a game including in-app purchases that enable the player to extend their playing time (by buying lives). In order to buy these lives, a password must be entered for each purchase. This is the default setting. It provides optimum protection for the consumer against unwanted purchases. This is the required starting position.

**Example 2: Sending a newsletter**

A consumer has just placed an order with a business. The box for receiving a newsletter from the seller is pre-ticked. That is permitted.

The business is permitted to send paying customers a commercial message advertising comparable products by e-mail, even without their explicit consent. This is one of the few cases in which a pre-ticked box can be used. However, the seller must give the customer an opportunity to unsubscribe in each subsequent edition of the newsletter. Unsubscribing must not be made unnecessarily difficult for the consumer.<sup>73</sup>

**Example 3: Information hidden in terms and conditions**<sup>74</sup>

A consumer orders a book through an online store. A few weeks later they receive an e-mail from the store telling them they must place an order for a minimum of EUR 25 each quarter. This was in the general terms and conditions that they accepted. The box in front of the words "I accept the general terms and conditions" was pre-ticked at the time of the order. The consumer is now required to place an order each quarter. That is not permitted.

The subscription was 'hidden away' in the terms and conditions. The consumer was not informed in the correct way. This important information should have been stated next to the offer. The consumer

<sup>70</sup> See also Section 11.7(3) of the Dutch Telecommunications Act (spam prohibition).

<sup>71</sup> This example is based on the common legal position adopted by the CPC authorities with regard to online games in 2013: "Common position of national authorities within the CPC, see [https://ec.europa.eu/info/sites/info/files/common-position\\_of\\_national\\_authorities\\_within\\_cpc\\_2013\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/common-position_of_national_authorities_within_cpc_2013_en_0.pdf).

<sup>72</sup> Apple and Google changed their policy in this area in 2015, partly due to pressure from ACM. See <https://www.acm.nl/nl/publicaties/publicatie/14880/Apple-en-Google-bieden-spellen-niet-langer-als-gratis-aan>

<sup>73</sup> See also Article 7(3) of the GDPR: "The data subject shall have the right to withdraw his or her consent at any time. (...) It shall be as easy to withdraw as to give consent."

<sup>74</sup> Example based on: Consumentenautoriteit, 'De wet oneerlijke handelspraktijken toegelicht (voorlichtingsbrochure voor ondernemers)', winter 2008, p. 11, available at <https://www.acm.nl/nl/publicaties/publicatie/7211/Brochure-oneerlijke-handelspraktijken-voor-ondernemers>.



also did not make an active choice, because the box had been pre-ticked.

## 4.9 Unfair order and presentation

### 4.9.1 General

Consumers can search for products online using:

- search engines
- trading points
- app stores
- platforms for the sharing economy
- price comparison websites
- user rating tools
- social media
- collective buying platforms.<sup>75</sup>

The consumer's choice can be greatly influenced by the order in which the business displays the options. For example, after an online search the consumer will click on one of the first four search results, regardless of their quality or relevance, in 75% of cases.<sup>76</sup> In app stores, they will choose an app from the top five shown in 87% of cases.<sup>77</sup> People have a preference for the first options they are offered, including online.<sup>78</sup>

Businesses can influence the order of search results, but such influence is not always in the consumer's interest. Since the order of results is important, a business's influence may quickly become unfair if there is a lack of information about it, and if this leads to the consumer making a different choice than they would have made without that influence.

#### Order and presentation not based on the consumer's interests

Consumers trust that the order of presentation when they browse or search online will reflect the relevance to them, in accordance with the entered search criteria.<sup>79</sup> But businesses also base the order on criteria that serve the interests of the business itself, for example by placing the results on which they earn most money at the top. This arises in different forms:

- Positioning based on the trader's economic benefit: this occurs if the business providing the

<sup>75</sup> For further details, see the [guidelines on the unfair commercial practices directive](#). See in particular Search engines (Section 5.2.6), E-commerce platforms (trading points) (Section 5.2.3), App stores (Section 5.2.4), Sharing economy (including platforms) (5.2.5), Comparison tools (Section 5.2.7), User rating tools (Section 5.2.8), Social media (Section 5.2.9), Collective buying platforms (Section 5.2.10).

<sup>76</sup> European Commission, Statement of Objections (SO) Google Search case (AT.39740), legal considerations 353-359.

<sup>77</sup> L. Dogruel et al., 'Choosing the right app: An exploratory perspective on heuristic decision processes for smartphone app selection', *Mobile Media & Communication* 2015, Vol. 3(1) p. 125-144.

<sup>78</sup> J. Teevan, 'How people recall, recognize, and reuse search results', *ACM Transactions on Information Systems (TOIS)*, 2008/ 26, issue. 4, article 19.

J. Murphy, C. Hofacker, R. Mizerski, 'Primacy and Recency Effects on Clicking Behavior', *Journal of Computer-Mediated Communication*, 2006/11, issue 2, pp. 522-535.

<sup>79</sup> L. Marable, 'Consumer reaction to learning the truth about how search engines work', <http://www.consumerwebwatch.org/pdfs/false-oracles.pdf>.

ranking places a product higher the more it benefits from the sale of this product. Examples are a higher margin on the product, a commission, or preferential treatment of products from businesses that are part of the same group as the business providing the ranking.

- Paid inclusion: this is where the business providing the results list only includes the seller of the product in the results list in exchange for payment and excludes the business if it does not pay.
- Personalization of the order of results: this can lead to an order that matches the wishes and interests of the consumer themselves, for example because the consumer themselves expressed certain preferences.

#### **4.9.2 What is and what is not permitted?**

A business can use a ranking of search results in many different situations. How can the business present these effectively? Some general and greatly simplified suggestions are provided below.

A business that presents a ranking of products or services as part of its communication with consumers on behalf of itself and/or other businesses must ensure that the ranking does not amount to deception.

This means, among other things, that, where the ranking results from the preferences stated by the consumer, that provider:<sup>80</sup>

- a) does not omit or block any search results;
- b) arranges search results on the basis of the sorting and filters used in the search;
- c) presents them in a neutral way. Color, form, font, illustrations, and format, as well as the remainder of the layout, play a role in the assessment of neutrality;
- d) delivers 'natural' or 'organic' search results (which would be expected on the basis of relevance) that are relevant to the consumer's search.

If certain products are temporarily unavailable, the business can leave it to the consumer to decide whether to include them in the results. For example, the consumer can choose either to wait until the stock is replenished or to use the service on another date. If products have been discontinued, the search results will be clearer for the consumer if the business omits them from the search results.

#### **Ranking based on economic benefit for the trader**

Consumers do not always recognize which results are based on the ranking that benefits the business.<sup>81</sup> They also rarely adjust the way in which the website presents the ranking. Messages in paid results are not always seen, understood, or recognized.

The effectiveness of transparency on the way in which the ranking is arrived at depends greatly on the business's degree of transparency about it. By means of A/B tests, businesses can choose a

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<sup>80</sup> [Guidance on the unfair commercial practices directive](#), 5.2.6 (search engines).

<sup>81</sup> Gaskell, G., Tornese, P., Vila, J., Gómez, Y., Allen, A., Veltri, G., & Codagnone, C. (2018). *Behavioural study on the transparency of online platforms*

transparency measure that has the least possible effect on consumers' behavior, so they continue to sell the products on which they make the most money, rather than the product that is most relevant to or in the interest of the consumer. This is detrimental to consumers, because the aim of transparency obligations is that the consumer also actually sees and understands this information, and can therefore take a well-informed decision on a transaction.

In view of the major effects of ranking on consumers' choice and the limited effectiveness of transparency, ACM believes that paid ranking can be misleading in some cases, even if the business provides information on it. The misleading of consumers is more serious in comparisons of products that are difficult to understand, very expensive, or necessary, such as health insurance or energy contracts, for example. In some cases, transparency can be a solution enabling businesses to continue using a paid ranking, but the business must then meet the following conditions.

The business that provides products or services in a ranking is sufficiently transparent about the interests involved if it meets all the conditions below.<sup>82</sup> The business

- states sufficiently clearly what criteria it applies in determining the order;
- informs the consumer clearly and prominently if the order of their search results is affected by the relationships (financial or otherwise) that the business providing the search results has with businesses that appear in the search results;
- labels 'paid-for' search results sufficiently clearly, for example if a payment has been received for a predetermined or prominent position;
- distinguishes 'paid-for' search results [sufficiently clearly] from 'not paid-for';
- complies with all the above conditions in all types of searching, i.e. for general and specialist search services provided by a search service company.

#### **Example of paid placement<sup>83</sup>**

A business has a website offering homes for sale. On the website, the homes marketed by real-estate agents affiliated with a real-estate agents' association are given a higher ranking than homes that are not offered through those agents. For this, the business receives a fee from the real-estate agents' association concerned. The offer does not state that the homes marketed by real-estate agents affiliated with that association will appear earlier and why that is the case. That is not permitted.

The average consumer is more inclined to click on the top search results, but they are unaware that

<sup>82</sup> These criteria have been aligned with the CMA's criteria. CMA Guidance for the Online Accommodation Booking Sector, see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781624/webteam\\_online\\_booking\\_services\\_principles.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781624/webteam_online_booking_services_principles.pdf).

<sup>83</sup> Example taken from <https://www.acm.nl/nl/publicaties/publicatie/16278/Woningaanbod-op-Funda-duidelijker-voor-consumenten>.

these only include homes from certain real-estate agents.

#### **Example of unclear financial relationships**

Through a website, a business offers consumers search, selection, and review services for restaurants. In each set of search results, the business first shows the suggestions for restaurants that have a special offer for bookings made through the business. The business is likely to benefit financially from this arrangement, but this is not stated anywhere. In that case, this method of presenting the order is misleading for the average consumer. That is not permitted.

It is permitted, however, if it is clearly stated. The consumer must immediately recognize the distinction.

## **4.10 Difficult cancellations**

### **4.10.1 General**

If it is easy for a consumer to sign up for a service but difficult to terminate the resulting contract, they may be stuck with a contract that they no longer want. There are various ways in which a business can make it difficult to terminate a contract, for example by concealing or omitting the information on the way in which he can easily cancel or terminate it, or by presenting it in an unclear way.

Alternatively, for example, it may steer the consumer towards terminating it by telephone or in a physical store, so there is more chance that they will not continue with the termination, and the business's employees will have an opportunity to persuade them to change their mind.

### **4.10.2 What is and what is not permitted?**

It must always be clear, i.e. even in advance, how and under what conditions the consumer can terminate the contract. This requirement is fulfilled if the business ensures that the consumer can easily find the information on the business's website before the contract is concluded. Even after the termination of the contract, the consumer must be able to find this information in a logical place on the website. If the consumer enters into a contract through a website, they must also be able to terminate it through the website.

If termination is possible through the website, but the consumer has to contend with unnecessarily high barriers in order to do so, for example, answering a large number of questions before they can terminate it or having to give notice by registered letter, that is not permitted.

**Example: Contract can be concluded online but terminated only offline**

An online beauty store offers a subscription in which a surprise package of six beauty products is sent to the consumer's home every month. These are tailored to the profile that the consumer has selected. The consumer takes out the subscription by completing a form on the home page. If the consumer wishes to terminate the subscription, they have to find the relevant information in the general terms and conditions on the website, which states that termination is only possible monthly by telephone. That is not permitted.

The information on cancelling a subscription must be easy to find, for example by means of a link entitled 'Cancel' on the home page that leads to a separate page with cancellation information. Since the consumer can take out the subscription by means of an online form, they must also be able to cancel it by means of an online form.

## 4.11 Abuse of automatic behavior

### 4.11.1 General

If a consumer makes purchases in an online environment such as a website or an app and the options menu is designed in such a way that they cannot work out what they are clicking on, they may make unintended choices. Practices that take advantage of consumers' instinctive behavior to nudge them towards particular choices that are not in their interest are misleading.

### 4.11.2 What is and what is not permitted?

A business must design its website in such a way that the consumer understands what they are clicking on. This means buttons, pull-down menus, and click sequences are presented in such a way that they are not misleading.

The business must design its website in a way that does not lead the consumer to click automatically, and thereby make choices they would not otherwise have made. The icons, colors, and illustrations on the website must therefore be used in a way consistent with their usual meaning.

If a website has been designed in a way that nudges the average consumer in a particular direction, for example as a result of unclear menus or the use of illustrations, icons, and colors, and the consumer may consequently take a different decision on a transaction, that is misleading and is not permitted.

If a business uses a sequence of clicks in the ordering process, it must not change the sequence unexpectedly. A change would clash with people's instinctive reactions whereby they continue clicking in the same way. The average consumer will continue clicking automatically according to a particular pattern, in the expectation that the user interface has remained the same. Changes to click sequences can be misleading.

#### **Example 1: A changing click sequence**

A consumer looks for gift items in an online store. During the ordering process a pop-up menu asks them several times to choose 'yes' and 'no':

Would you like to be kept informed about similar offers?

Would you like to subscribe to the newsletter?

Can we use your details to personalize our offer?

Halfway through the click sequence, the buttons 'yes' and 'no' are reversed. The consumer has clicked 'no' several times, but now clicks 'yes' in the same place but does not realize it. The consumer has therefore now accidentally clicked 'yes' to the question asking whether they want to subscribe to the newsletter. That is not permitted.

**Example 2: Crosses that do not close the window**

A consumer visits a website to buy new shoes. During the search process, an ad appears with a special offer. At the top of the ad window is a red cross that the consumer clicks thinking they can hide the ad. But that proves not to be the case: when they click on the cross, they are taken to the ordering process for the advertised product. That is not permitted.

**Example 3: Illogically colored buttons**

A consumer visits a price comparison website. During the ordering process, they are asked to enter details, and see various option windows in which the color of the 'yes' button is bright red and 'no' is bright green. That is not permitted.

**Example 4: Concealed travel insurance<sup>84</sup>**

An airline offers travel insurance. To decline the insurance, the consumer has to click the "I don't want travel insurance" option in an alphabetically arranged drop-down menu listing a series of countries. In this menu, the consumer clicks 'automatically' on their country of origin. That is not permitted.

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<sup>84</sup> This example is based on the 2013 Ryanair case in which the airline was fined:  
[https://www.acm.nl/sites/default/files/old\\_publication/publicaties/11252\\_sanctiebesluit-ryanair.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/11252_sanctiebesluit-ryanair.pdf)

## 5. Conclusion

These guidelines may be amended to take account of rapid developments, particularly in the digital world. Therefore, these guidelines may evolve gradually over time. ACM will continue to monitor developments, and update the guidelines regularly where necessary.

With these guidelines, ACM aims to ensure that all market participants and other involved parties have a basis on which to assume their responsibilities and afford consumers the protection that is required by law. ACM assumes that businesses will bring their commercial practices into line with the applicable laws and regulations and the positions adopted by ACM, to the extent that they have not already done so. ACM intends to take enforcement action if they fail to do so. ACM invites the sectors concerned to ensure individually and collectively that clear standards are in place to protect consumers.

In that way, we can jointly ensure that the digital consumer has greater confidence in the online choice architecture, freedom of choice, and healthy relationships with businesses.

The 'digital economy' is one of ACM's Agenda topics for 2020-2021. Within that topic, ACM will intensify its oversight of misleading practices online. These guidelines mark the starting point of that approach.



## Annex 1: Abbreviations used in the guidelines

ACM	the Netherlands Authority for Consumers and Markets
AFM	the Netherlands Authority for the Financial Markets
AI	Artificial intelligence
AP	the Dutch Data Protection Authority
GDPR	General Data Protection Regulation
BW	the Netherlands Civil Code
CPC	Consumer Protection Cooperation
EU	European Union
Ksa	the Netherlands Gaming Authority
UCP	Unfair commercial practices
Tw	the Dutch Telecommunications Act
UI	User interface
UX	User experience
Whc	The Dutch Act on Enforcement of Consumer Protection

## Annex 2: Terms used in the guidelines

These guidelines use various terms that in the context of these guidelines have the meanings shown below. They are set out below in alphabetical order.

**A/B test:** An A/B test is a test that compares two (or more) variants of a website. Businesses use the A/B test to optimize conversion rates for websites, newsletters, advertisements, and direct marketing, among other things.

**Algorithm:** A finite sequence of associated instructions that solve a particular problem or carry out a particular task. A **self-learning algorithm** requires no human input but can improve itself to achieve the best result.

**Algorithmic decision-making:** Many decisions that used to be taken by humans are now taken by algorithms. An example is an algorithm that Facebook uses to compose the timeline for its users.

**Artificial intelligence, AI:** Applications based on analyzing large volumes of diverse data using techniques such as self-learning. The techniques used in AI applications are 'intelligent' in the sense that they are able to optimize rationally: for a given task they are able to select the best action to achieve a specific goal, taking account of set criteria.

As well as the use of intelligent techniques, data is also an essential, integrated part of AI applications. The development of AI is being driven by the larger volumes and diversity of available data. The guidelines use the term 'big data' to refer to this increase in usable data.<sup>85</sup>

**Behavioral insights:** Insights into consumers' behavior, usually drawn from behavioral science.

**Behavioral persuasion techniques:** Techniques, such as a nudge, that businesses use to change behavior, for example to nudge consumers towards more online purchases.

**Big data (technology):** A large volume of personal and other data. There are various definitions of big data. In some cases, big data is taken only to mean large volumes of unstructured data, but it can also mean large volumes of structured data. These guidelines use the term big data to mean both structured and unstructured data. Businesses use big-data technology because the volume of data is too great to be maintained using regular data-management systems. Big-data technology generally refers to three aspects of technical innovation and large data sets: automated parallel computation, data management schemes, and data mining.<sup>86</sup>

**Business:** These guidelines use the term 'business' rather than trader, seller, or service provider.

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<sup>85</sup> See also: <https://www.afm.nl/~profmedia/files/rapporten/2019/afm-dnb-verkenning-ai-verzekeringssector.pdf>.

<sup>86</sup> See also: <https://www.sciencedirect.com/topics/computer-science/big-data-technology>.

These are the legal terms used in consumer protection rules to define the party to which the rules apply. Consequently, these are always businesses that supply products or services to consumers.

**Case law:** Court rulings. This excludes, for example, rulings of bodies based on self-regulation.

**Cognitive fallacies:** systematic fallacies that affect people's judgement and decisions.

**Customer journey:** The route(s) that the consumer takes from enquiring about a product to a decision on whether to purchase it, and the exercise of rights after purchase, as well as the associated information supplied to them.

**Dark patterns:** User interfaces (also: UI) that have been designed in such a way that they exert negative influence on the user, and cause them to take a decision desired by the designer. Dark patterns can constitute unfair commercial practices. Unfair commercial practices are not permitted. These guidelines provide a basis for assessing whether practices are unfair.

**Data aggregation:** A process in which information is gathered and expressed in summary form, for purposes such as statistical analysis. A familiar objective is to obtain more information on certain groups. The information on these groups can then be used to personalize websites by adapting the content and advertising to the individual.

**Data-driven:** A business that operates on a data-driven basis makes strategic decisions based on data analysis and interpretation.

**Data scraping:** A technique in which a computer program reads personal and other data from another program and turns it into output that can be read, and hence understood by humans. In the case of **webscraping**, this is done with personal and other data that can be found on the web.

**Dynamic pricing:** A pricing strategy in which businesses set flexible prices for products based on current market demand.

**Evil nudge / evil nudging:** See 'Nudge'.

**Footer:** The block of text that is loaded at the bottom of each page of a website.

**Heuristics:** Rules of thumb that people use to attribute significance to a situation rapidly and with the least possible effort. We use most heuristics unconsciously. An example of a rule of thumb is 'the more expensive it is, the better it must be'; when taking a rapid decision we assume that the most expensive product will be of the highest quality. As these are rules of thumb, they do not always produce the right result.

**In-game / in-app purchase:** Purchase options in games or other types of app that enable the consumer to obtain additional functions.

**Loot boxes:** A loot box is a purchase in an online game that comprises a virtual container that rewards players with items and adaptations on a random basis. It may take the form of a game element or virtual clothing, weapons or a map, for example. Loot boxes and other transactions or microtransactions are used increasingly to improve the profitability of games that can be played 'free' but require immediate payment.

**Nudge / Nudging / Evil nudge / Hypernudge:** Each aspect of the way in which choices are presented that changes people's behavior in a predictable way. **Evil nudge:** This is a psychological mechanism used to the detriment of the consumer.<sup>87</sup> **Hypernudging** is a practice involving algorithms whereby a business can use aggregated data on consumer behavior and information on relevant circumstances, as well as personal and other data (including data on the consumer's searching and clicking behavior during the customer journey) to focus the choice architecture on that consumer. That enables the business to manipulate the consumer's behavior in minute detail. See also: Data aggregation.

**Online choice architecture:** The context that a professional party offers the consumer, and in which the consumer can take a decision on the purchase of products. The context may be a website, a mobile site, or an app, for example. The choice architecture includes the form of the commercial statement (what you see), the underlying processes (what happens under the hood), and, where relevant, what precedes it (predirection). For example, the online choice architecture can include the order process but also all possible phases in which a consumer takes decisions, from initial enquiries to post-purchase decisions. The design of the choice architecture includes in any case:

- the customer journey (see 'Customer journey').
- the user interface (see 'User interface'). Other terms often used in the context of online choice architectures are:

**Online review:** See 'Review'.

**Opt in**

**Opt out**

**Personalization:** Making something personal, for example when a business gears its products more to the specific preferences and/or characteristics of the consumer.

**Product:** the provisions on unfair commercial practices in the Dutch Civil Code use a broad definition

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<sup>87</sup> Based on the definition used by the AFM.

of the term 'product', which includes tangible goods and articles, digital content, services and energy. The term 'product' is also used in this broad sense in these guidelines.

**Price differentiation / price discrimination:** differentiating the online price of identical products or services on the basis of information that a business holds on a potential customer.

**Review:** A review is a consumer's assessment of a business and/or its product. The reviews are usually organized and managed by another company.

**Self-learning algorithm:** See 'Algorithm'.

**Social proof:** people's inclination to copy other people's behavior. This inclination is stronger in uncertain situations where people are unsure what the best choice is. They assume that other people have more information on the situation and therefore know what the best choice is.

**Testimonial:** A testimonial is a statement made by a third party, such as an expert, to demonstrate the quality of a product, for example in advertising. They occur in all kinds of sectors.

**Unavoidable costs**<sup>88</sup> All costs associated with the take-up of the offer as presented and which the consumer cannot avoid. If these costs are a fixed amount per person, for example, this amount must be included in the advertised price. If they are variable, for example per booking, the amount of variable, unavoidable costs to be added must be clearly stated immediately next to the advertised price. The amount of the costs, or the way in which the consumer can calculate them, must also be stated next to the price.

**User interface (UI):** This is the point where the interaction between the person and the computer takes place. It may involve screens with input fields, check boxes and buttons, for example.

**User experience (UX) design:** The overall design of user interfaces that guide the consumer during his customer journey as he takes decisions and supplies information.

**Webscraping:** See 'Data scraping'.

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<sup>88</sup> See [Points for attention with regard to price transparency enforcement in the travel sector.](#)

## Annex 3: Overview of regulations in these guidelines

- European unfair commercial practices directive ([Directive 2005/29/EC](#)), in particular the regulations set out in part 6.3.3A of the Dutch Civil Code (Sections 6:193a to 6:193j inclusive) concerning unfair commercial practices.
- Consumer rights directive ([Directive 2011/83/EU](#)), in particular the regulations set out in part 6.5.2B (Sections 6:230g to 6:230z inclusive) of the Dutch Civil Code concerning provisions of contracts between traders and consumers and Sections 7:5 (1), 7:7 (2), 7:9 (4), 7:11 and 7:19a of the Dutch Civil Code concerning consumer purchases;
- Directive on the indication of the prices of products ([Directive 98/6/EC](#)), in particular the regulations set out in Sections 2b and 3 (in conjunction with 2b) of the Dutch Prices Act and the Decree on the Indication of Product Prices;
- Directive on unfair terms in consumer contracts ([Directive 93/13/EEC](#)), in particular the regulations set out in part 6.5.3 (Sections 6:231 to 6:247 inclusive) of the Dutch Civil Code concerning terms and conditions;
- e-Privacy directive (Directive 2013/11/EU), in particular the regulations set out in Sections 11.7 and 11.7a of the Dutch Telecommunications Act concerning the protection of personal data and privacy;
- Electronic commerce directive (Directive 2000/31/EC<sup>1</sup>), in particular the regulations set out in Sections 3:15a, 3:15c to 3:15f inclusive and Sections 6:196c, 6:227a to 6:227c inclusive of the Dutch Civil Code;
- Services directive ([Directive 2006/123/EC](#)), in particular the regulations set out in part 6.5.2A (Sections 6:230a to 6:230f inclusive) of the Dutch Civil Code concerning information on service providers and their services.

## Annex 4: Notes to the Dutch Unfair Commercial Practices Act

### 1. What are unfair commercial practices?

A *trader* is a natural person or legal entity acting in the course of a professional practice or business.

A *commercial practice* refers to all activities directly relating to the promotion, sale, or supply of a product to the consumer. That is a broad definition. It includes, for example,

- advertising and marketing by a business,
- information (including inaccurate or unclear information) that it provides on its product or
- the information it omits.

The rules apply to *both products and services* and across *all economic* sectors. It therefore covers, for example, purchases of clothing, a refrigerator, a subscription to a streaming service, travel bookings, and in-app purchases.

The rules apply *to the phases before, during, and after the purchase*. They therefore cover information that the business supplies to the consumer before they make a purchase, but also misleading acts after the purchase, for example in the processing of warranty claims. The law includes a general prohibition of 'unfair commercial practices'.

#### **When is a commercial practice *unfair*?**

If a business approaches a consumer in a way that exerts unfair influence on his decision whether to buy a product, or *could* have influenced his decision, and they are enticed into making a purchase they might not otherwise have made, that constitutes an unfair commercial practice.

There are two main categories of unfair commercial practices:

- misleading commercial practices; and
- aggressive commercial practices.

These two main categories are explained below.

### 2. When is a commercial practice misleading?

A commercial practice is misleading:

- When a business puts out false information. Or when the business puts out information that is factually correct but misleads the average consumer, for example about the features of a product or service, the price, or the business itself. This is called a 'misleading act'. Or;
- If a business fails to supply information that is important to the average consumer in order to make the right choice concerning a purchase. The average consumer may then take a decision on a purchase that he would not otherwise have taken. This is called a 'misleading

omission'.

**NB:** it is not necessary for the consumer to actually be misled. Nor do they actually have to take a decision or make a purchase. The point is that the average consumer could have been given a misleading picture as a result of the misleading commercial practice and hence could have purchased the product. They might not otherwise have made that purchase.

#### *Normal advertising practices*

Advertising often includes exaggerated statements or statements that should not be taken literally. This type of advertising is not misleading in itself.

#### **What is a misleading act?**

A consumer must be able to form a good picture of the product or service he is buying. Businesses must not therefore provide information that is inaccurate or liable to mislead the average consumer, including with regard to:

- **the main features of the product**, including availability, benefits, risks, implementation, composition, accessories, customer service and complaint handling, procedures and date of manufacture, delivery, potential uses, volume, geographic or commercial origin, and expected results
- **the price** or the way in which it is calculated, or the existence of a price advantage
- **results and features of tests or** checks carried out on the product
- **capacity**, identity, characteristics, and rights of the trader
- **rights of the consumer**, such as the right to a repair or replacement of the supplied product. Or the right to a discount in the event of a defect in the product.

A commercial practice is also misleading if the marketing of the product causes confusion, for example concerning products, trademarks, trade names or other characteristics by which a competitor distinguishes itself and the average consumer consequently takes or is liable to take a decision they otherwise would not have taken, for example as a result of improper use of comparative advertising.

#### *Codes of conduct*

If a business states that it is bound by a code of conduct, the consumer may assume that it also complies with its obligations under that code of conduct. This may also influence the consumer's decision to choose that business. If the business fails to comply with the obligations in the code of conduct, that also constitutes a misleading commercial practice.

#### **What is a misleading omission?**

A business may also mislead consumers if it does not provide certain information, for example by omitting important information on its website. or by concealing it in its general terms and conditions. This must be important information (essential or otherwise) that the average consumer needs in order to take an informed decision on a purchase. This could include:



- information on the features of the product;
- the price;
- the identity of the trader;
- the method of delivery and;
- complaint-handling.

In the case of commercial communication such as advertising and marketing, information required under other consumer regulations is also considered 'essential'. This concerns, for example, information that must be supplied in the case of distance selling, e-commerce, or the sale of package holidays.

Each case differs in terms of the precise definition of 'essential' information. Different information will be required for a large or complex purchase than for the purchase of an item of clothing through an online store.

**NB:** important information on a product must be supplied on time and in a clear, unambiguous way, and must not be 'hidden away'.

***Is consideration also given to the type of medium used?***

The assessment of whether essential information has been omitted or concealed takes account of the so-called *factual context* and *the restrictions of the communication medium used*. For example, it is unlikely that a business will be able to provide full information for the consumer in an SMS/text message or a pop-up on a website. It must then do so through another medium, such as a website. And the business must draw the consumer's attention to this.

***Essential information in an invitation to purchase***

An *invitation to purchase* is a commercial message such as an advertisement where a business specifically names a product or service with the price, enabling the consumer to make a purchase. This does not include advertisements aimed at increasing product recognition.

If there is an 'invitation to purchase', certain information is essential and the business must supply it in all cases.

A business must **always** provide the following information with an invitation to purchase:

- the main features of the product (to the extent it is appropriate, considering the medium and the product)
- the identity and the address (geographic) of the business
- the price, including tax and additional charges, or – if the price cannot be calculated in advance – the way in which the price is calculated
- the method of payment, delivery and implementation
- if there is a right of withdrawal (cooling-off period) or a right to cancel: the existence of this right.

The business only has to provide this information to the extent that it is not already evident from the *context*. The business is only required to state the method of payment, delivery, and fulfilment if it differs from the requirements of 'professional diligence'.<sup>89</sup> Here too the *medium used* may entail restrictions. In that case the information must be stated elsewhere and the business must draw attention to it.

### **Blacklist of misleading commercial practices**

The Act includes a 'blacklist' of commercial practices that are misleading under all circumstances and are therefore always prohibited. Some examples are given below.

#### *Concerning quality marks/codes of conduct:*

- affixing a trust mark, quality mark, or similar label without the required consent;
- falsely claiming that the business is subject to and complies with a code of conduct when that is not the case;
- claiming that a code of conduct is recognized by a public or other body when that is not the case.

#### *Concerning prices and availability:*

- describing a product as 'gratis', 'free' or 'without charge' when in fact costs are involved
- falsely claiming that a product is available only for a very limited period, or only under special conditions
- offering a product at a particular price, but without stating that the product probably could not be supplied at that price or in a reasonable volume having regard to the advertising (known as bait advertising).

#### *Other practices, including:*

- claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described
- falsely claiming that a product is able to cure illnesses and dysfunctions, etc.
- including in marketing material an invoice which gives the consumer the impression that they have already ordered the marketed product.

### **3. When are commercial practices aggressive?**

A commercial practice is *aggressive* if a consumer is pressured to buy a product through:

- intimidation
- coercion, including the use of physical force, or
- undue influence

as a result of which the average consumer takes or may take a purchase decision he would not otherwise have taken. As in the case of misleading commercial practices, it makes no difference

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<sup>89</sup> The average standard of 'good business conduct' in a particular case, as demonstrated, for example by practices in the sector. See also Section 1.1.4.

whether they actually buy the product.

Whether a commercial practice is aggressive depends on various factors, such as:

- the time, place, nature, and
- persistence of a business
- the use of threats or threatening or abusive language
- exploitation by the business of certain setbacks or circumstances that are so serious that they may limit the consumer's judgement
- threats of measures that would be illegal.

#### **Blacklist of aggressive commercial practices**

There is also a *blacklist* for aggressive commercial practices. Prohibited practices include:

- making persistent and unwanted solicitations by telephone, e-mail, fax, etc.
- asking consumers to pay for, return, or store a product that the business has supplied, but which the consumer did not request (sending of unsolicited goods)
- giving the impression that the consumer has won a prize or other benefit when in fact there is no prize or the consumer has to incur costs to receive the prize.
- including in an advertisement a direct exhortation to children to buy a product or persuade their parents to buy it for them.

#### **4. General prohibition**

A commercial practice may still be unfair even if it does not appear on any of the blacklists and also falls outside the general criteria described above. The law includes a general prohibition for such cases. This prohibition specifies that a commercial practice is unfair if a business acts:

- contrary to the requirements of *professional diligence*, and
- the consumer's ability to take an informed decision is or may be appreciably restricted, as a result of which he takes or may take a decision he would not otherwise have taken.

#### ***What does professional diligence mean?***

By this, ACM means *good* business conduct with the *professional standard* ('good faith') applicable to the business as well as fair market practices playing a role. In order to assess whether a business has behaved unfairly, ACM looks, for example, at commercial practices in a particular sector, a code of conduct, or an oath or statement that is sworn.

#### **5. What is the average consumer or a vulnerable group?**

The assessment of whether a commercial practice is unfair is based on the *average consumer*. This is a 'reasonably informed, circumspect, and observant' consumer. Social, cultural, and linguistic factors play a role. If a commercial practice is focused on a *specific consumer group*, the determination is based on the average member of that group. The fairness or unfairness of a commercial practice is then assessed from the perspective of the 'average member' of this group.

This also applies if a trader can reasonably expect a certain group to be particularly sensitive to its

sales method or product, such as the children target group in the case of purchases for online games. Vulnerable consumers, such as children, seniors, and people with disabilities, are thus afforded extra protection. A child, for example, may fall victim to a practice that would arouse suspicion in the average adult consumer.

## **6. Relationship with other legislation**

These rules are distinct from general contract law, which governs the conditions relating to the creation, validity, or consequences of contracts. They are important in, among other things, determining the consequences for contracts entered into by parties under the influence of an unfair commercial practice.

A contract that results from an unfair commercial practice can be annulled. That means the consumer can cancel it and the business must repay the money. If the business believes the commercial practice is not misleading, it must demonstrate that it has given the consumer sufficient, accurate information. The consumer must demonstrate that their purchase decision was influenced by the lack of the essential information.

**NB:** as stated earlier, specific information obligations apply under other regulations such as rules on distance selling, e-commerce, and package holidays. In the case of distance selling, for example, the business must provide information on the existence of the right of withdrawal, terms and conditions, and time limit relating to the use of that right. The business must also provide a sample form for cancellation of the purchase.

ACM also considers that these information obligations (additional or otherwise) constitute essential information – in addition to the essential information from the rules on unfair commercial practices and the rules on unfair commercial practices themselves. Its omission is then a violation not only of that specific legislation but also of the Dutch Unfair Commercial Practices Act.

For the relationship between these rules and other consumer and other rules under European law, see *inter alia* the Guidance on the Unfair Commercial Practices Directive<sup>90</sup>, the Guide to Consumer Rights<sup>91</sup>, and the Guide to Unfair Contract Terms.<sup>92</sup>

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<sup>90</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1469512881522&uri=CELEX:52016SC0163>.

<sup>91</sup> Directive 2011/83/EU.

<sup>92</sup> [Guidance on unfair contract terms in consumer contracts](#).