

## Amendments to Unfair Competition Law enter into force

The most noteworthy amendments to the Unfair Competition Law are the following:

- (i) Marketing a good as being identical to a good marketed in another Member State when that good has a significantly different composition or characteristics is classified as a misleading practice.
- (ii) The scope of covert commercial practices is expanded to information society services, social media and online searches.
- (iii) Three new types of misleading practices in the digital market are created: (a) reselling tickets purchased by bots, (b) stating that reviews have been submitted by consumers who purchased the products when no reasonable steps were taken to verify this, and (c) posting or commissioning false consumer reviews.
- (iv) Visiting a consumer's or user's home and organising excursions with the aim or effect of promoting or selling products, whenever certain regulatory requirements are not met, are considered aggressive practices.

### 1. INTRODUCTION

On 28 May 2022 the amendment of Law 3/1991 of 10 January on unfair competition ("**Unfair Competition Law**" or "**UCL**") will enter into force. The amendment was introduced by Royal Decree-law 24/2021 of 2 November,<sup>1</sup> with the aim of transposing Directive (EU) 2019/2161<sup>2</sup>.

The Directive has three main purposes: (i) to establish an effective and proportionate penalties system in order to deter and sanction intra-Union infringements; (ii) to establish individual remedies for consumers harmed by breaches of consumer-protection legislation; and (iii) to modernise the legislative framework in view of the continuous developments in digital tools. The Spanish legislature considered that national legislation already offers sufficient protection in relation to the first two points and, as such, the

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<sup>1</sup> Royal Decree-law 24/2021 of 2 November transposing European Union directives on covered bonds, cross-border distribution of collective investment organizations, open data and re-use of public sector information, exercise of author's rights and related rights applicable to certain online transmissions and to radio and television broadcasting, temporary exemptions for certain imports and supplies, for consumers and for the promotion of clean and energy efficient road transport vehicles ("**Royal Decree-law 24/2021**").

<sup>2</sup> Directive (EU) 2019/2161<sup>2</sup> of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules ("**Directive**").

corresponding provisions of the Directive need not be transposed.<sup>3</sup> As a result, Royal Decree-law 24/2021 essentially updates the UCL to reflect the reality of the digital market.

The amendments relate to specific cases of misleading practices (articles 5, 26 and 27 UCL) and aggressive practices (article 31 UCL) that, although already included in the general regulation of unfair acts and practices, require specific protective measures due to their increasing effects on the market.

## 2. ARTICLE 5 UCL ON MISLEADING PRACTICES

A third section is added which states that *“it is unfair to market a good in one Member State as being identical to a good marketed in other Member States when that good has a significantly different composition or characteristics, unless justified by legitimate and objective factors”*.

This situation was already implicitly included within the scope of misleading practices under article 5 UCL, but the EU legislator has considered that it should be referred to specifically.

This article is a response to the issue of the dual quality of products that EU institutions have reported in recent years. For example, according to the Commission, consumers from various EU countries have complained that the composition of products such as soft drinks, coffee or fish sticks in the country where they were originally sold differs from that of the products sold under the same trademark and with very similar packaging in other Member States. This has been confirmed by several comparative investigations, which have evidenced the existence of products in the EU market with a similar trademark and presentation but that contain, for example, differing amounts of meat or fish, or a higher fat content or different types of sweeteners depending on the Member State where they are sold.

The corresponding authorities will now assess and address such practices on a case-by-case basis according to Directive 2005/29/EC. These assessments will take into account (i) whether such differentiation is easily identifiable by consumers; (ii) traders’ right to adapt goods of the same brand to different geographical markets due to legitimate and objective factors, such as national legislation, the availability or seasonality of raw materials or voluntary strategies to improve access to healthy and nutritious food; and (iii) traders’ right to offer goods of the same brand in packages of distinct weights or volumes in different geographical markets.

## 3. ARTICLE 26 UCL ON COVERT COMMERCIAL PRACTICES

This article has been amended to clarify that consumers must be informed when *“any advertisement, promotion or preferential classification of different products or services has been paid for”* with the aim of avoiding covert advertising.

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<sup>3</sup> Given that (i) articles 47 *et seq.* of Royal Legislative Decree 1/2007 of 16 November approving the restated text of the General Law for the Defence of Consumers and Users and other complementary laws (“RTGLDCU”) establish a penalties system which takes into account the criteria foreseen in Articles 1 and 2 of the Directive and (ii) article 33 of the Unfair Competition Law grants consumers standing to bring actions under the UCL to protect their interests.

### 3.1 COVERT ADVERTISING IN INFORMATION SOCIETY SERVICES AND IN SOCIAL MEDIA

The first section of the article is slightly amended to include covert advertising in information society services and social media.

Although, in recent years, advertising by influencers has become one of the main commercial communication channels, there were no specific rules for such advertising that suited its distinctive features.

One of the main concerns posed by influencers' activities has been covert advertising, i.e. advertising which is not identifiable as such by its addressees.

The content influencers publish usually takes the form of express recommendations of products, or simply photographs or videos in which products appear. It is often unclear if this is advertising that has been organised by the advertiser or content that the influencer has posted independently.<sup>4</sup>

Although the UCL requires that communications of a commercial nature be identified as such, it seems that the system is insufficient to avoid some influencers publishing covert advertising in their profiles or, at the very least, it is not always easy to determine if a given publication is advertising.

Given the importance that advertising on social media and other information society services has acquired in recent years (and still has), particularly among younger people, in October 2020 the Spanish Advertisers' Association and Autocontrol, together with the Ministry for Economic Affairs and Digital Transformation and the Ministry for Consumption, signed a "Protocol to encourage self-regulation in digital media".

This protocol became the "Code of conduct on the use of influencers in advertising" and came into force on 1 January 2021 ("**Code**"). The Code sets various ethical standards that, although not applicable to companies or influencers that are not adhered to the Spanish Advertisers' Association, Autocontrol or the Code, are used as a reference to determine:

- (i) when an advertisement should be identified as advertising that has been paid for:

*"Mentions or content shall be considered to be advertising mentions or content – graphic, audio or visual – when cumulatively:*

*a. are aimed at promoting products or services;*

*b. are disclosed in the context of reciprocal partnerships or commitments, where the disclosure of such content is the subject of payment or the exchange of other consideration by the advertiser or its representatives; and*

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<sup>4</sup> At the end of 2019, an individual filed a claim before the Autocontrol Jury against Paulina Eriksson's (an influencer) advertising of Urbanista wireless headphones. The advertising contained an image of a girl holding a mobile phone near the headphones and text in which the influencer detailed the benefits and characteristics of the product. The Jury concluded that this constituted covert advertising that contravened the authenticity principle under rule 13 of Autocontrol's Code of Advertising Conduct since (i) the content and characteristics of the post were sufficient to demonstrate that there was an intention to advertise, given that it focused on one product (the headphones) and exclusively praised its virtues and advantages; (ii) the addressee could not identify the message as advertising because it was included on the social media of an opinion-leader, which would make him or her think that it was only a personal opinion; and (iii) the message was not expressly and sufficiently identified as an advertisement because, even though the influencer had included the word "Ad", it was inserted at the end of the message and could go unnoticed by the addressees.

*c. the advertiser or its agents exercise editorial control over the disclosed content (by pre-establishing all or part of the content and/or validating it).*

*In contrast, content of a purely editorial nature, as well as content disseminated by influencers at their own initiative, with no relation to the advertising company or its agents, shall not be considered as advertising content and, therefore, this Code shall not apply to them”.<sup>5</sup>*

(ii) in which cases it should be considered that advertising has been paid for:

*“Among others, the following shall be considered as consideration: direct payment (or indirect payment, through agencies), free delivery of a product, free tickets to events, free provision of a service, gift vouchers, gift bags and trips”.*

(iii) how it should be reported:

*“The advertising nature of mentions made by influencers or of the digital content they publish that are considered as advertising must be identifiable by their followers.*

*In cases in which such advertising nature is not clear and evident in view of the mention or content itself, an explicit, immediate and appropriate indication of the advertising nature of such mentions or content, appropriate to the means and message, must be included.*

*a. For such purposes, it is recommended that clear generic indications be used, such as “advertising”, “ad”, “in collaboration with” or “sponsored by” or, alternatively, descriptive indications depending on the specific collaboration in question (e.g. “Ambassador of [brand]”, “Thanks to [brand]”, “Gift from [brand]”, “Sponsored trip”).*

*b. In contrast, generic statements are discouraged (such as “information”, “legal” or similar), instructions that require the user take an action (e.g. to click somewhere), as well as unclear indications (such as “Colab”, “Sponso” or “sp”).*

*c. The indication that a mention or content is advertising shall be maintained or added when the influencer shares or reposts the content subject to this Code on other networks, platforms or websites”.*

This was an attempt to regulate, through the Code, the issues that leading academics in the field and practitioners had identified.

Since the Code entered into force, Autocontrol has already ruled on claims filed by individuals and by the Communication Users’ Association (AUC, according to its initials in Spanish) in relation to covert advertising by influencers. These claims can be divided into two groups: those relating to (i) influencers’ publications in which it was not made clear that they contained advertising because “ad” was included in such a way that its effect was diluted by other indications and hashtags,<sup>6</sup> and (ii) Instagram Stories (i.e. publications made available only for a specific period of time, during which followers can ask the influencer questions) in which influencers announced the chance to earn money with bets on sporting events and

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<sup>5</sup> In its ruling of 12 March 2021 (*Nesquik Internet*), the Autocontrol Jury dismissed the complaint filed by an individual against Nestlé España, S.A. on the basis that the content lacked a promotional purpose that was the result of a collaborative framework over which the advertiser exercised editorial control, among other reasons.

<sup>6</sup> Ruling of the Autocontrol Jury of 16 April 2021 (*Valor 99% Negro Influencer Internet*) arising from a complaint brought by an individual against Chocolates Valor, S.A. for advertising by Patry Montero; opinion of the Autocontrol Jury of 9 April 2021 (*Oppo Influencer Internet*) arising from a complaint brought by an individual against Brand New Ways Comunicaciones, S.L. for advertising by Carolina Denia, and ruling of the Autocontrol Jury of 5 March 2021 (*Samsung influencer*) arising from a complaint brought by an individual against Samsung Electronics Iberia, S.A. for advertising carried out by Sandra Barneda.

ended their posts with redirects to professional tipsters<sup>7</sup> profiles.<sup>8</sup> In all these cases the Autocontrol Jury concluded that there was covert advertising.

### 3.2 COVERT ADVERTISING IN ONLINE SEARCHES

A second section has been added to article 26 UCL to regulate, as a covert advertising practice, providing “search results in response to consumer or user online search queries without clearly disclosing any paid advertisement or payment made specifically to achieve a higher ranking for products or services within the search results, where ranking is considered to be the relative prominence of what traders offer or the importance given to search results as presented, organised or communicated by providers of an online search functionality, regardless of the technical means used for such presentation, organisation or communication”.

As such, whenever a trader directly or indirectly pays the provider of an online search functionality to rank a certain product higher in its searches results, the provider must inform consumers of that circumstance in a brief, accessible and comprehensible manner.

The Directive provides examples of what could constitute an indirect payment, and specifically mentions the acceptance by a trader of any additional obligations towards the provider of the online search functionality which specific effect is to achieve a higher ranking, as well as remuneration schemes that specifically lead to a higher ranking. It clarifies that payments for general services, such as listing fees or membership subscriptions, that address a broad range of functionalities offered by the provider of the online search functionality to the trader, should not be considered to constitute payment for specifically getting products ranked higher, provided that such payments are not intended to achieve a higher ranking.

## 4. ARTICLE 27 UCL ON OTHER MISLEADING PRACTICES

Three additional types of misleading practices are added to the list in article 27 UCL:

*“Likewise the following practices are considered to be unfair because they are misleading: [...]*

*6. Reselling entertainment tickets to consumers or users if the trader purchased them by using automatic means to avoid a limit imposed on the number of tickets that may be acquired by each person or any other rule applicable to the purchase of tickets.*

*7. Claiming that reviews of a good or service are posted by consumers and users who have actually used or purchased the good or service, without taking reasonable and proportionate steps to verify that those reviews belong to such consumers and users.*

*8. Adding or instructing another natural or legal person to include false consumer reviews or approvals, or distorting consumer or user reviews or social approvals[(e.g. likes, upvotes)] to promote goods or services”.*

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<sup>7</sup> A tipster is a person who, in return for payment, shares sports betting forecasts and betting tips.

<sup>8</sup> The Communication Users’ Association filed its claim against the advertiser and the influencers that carried out the advertising, which led to rulings of the Autocontrol Jury of 19 February 2021 against Westapuesta, S.L., James Lover, Marina Yers, Paulagarciamaciaa, Jesuseda and Ggpica.

#### **4.1 RESELLING TICKETS PURCHASED BY BOTS**

Lately, it has no become uncommon for tickets for several events to sell out just a few hours after they are put on sale. Although many tickets are acquired by fans, there is evidence that some tickets are purchased by bots so that they can be resold on independent websites at a higher price.

Given that this practice seriously harms consumers' rights, the EU legislator has considered that it is essential to prevent traders from reselling tickets for cultural and sports events that are acquired using software programs such as bots that allow them to purchase a number of tickets that exceeds the technical limits set by the primary seller of the tickets or to avoid other technical means used by the primary ticket seller in order to ensure tickets are accessible to as many people as possible.

This prohibition is in line with the measures taken by other countries such as the United States, which passed the Better Online Ticket Sales (BOTS) Act in 2016 to restrict the same conduct.

Although this issue affects more than just the sale of tickets for events, no reference is made to other cases in which bots limit consumers' access to products, such as popular toys, where a similar phenomenon occurs.

In the United States, in response to the scarcity of many of the most popular toys and their subsequent resale at inflated prices, the 2021 Stopping Grinch Bots Act was introduced in the House of Representatives. The bill is intended to complement the Better Online Ticket Sales Act by extending the prohibitions relating to the sale of "events' tickets" to products and services in general.

The Spanish legislature has therefore opted to simply transpose what is established in the Directive, without taking into consideration the latest trends in this area and without including additional measures, as the Directive provides.

#### **4.2 REVIEWS OF PRODUCTS AND SERVICES**

The last two sections of the article are closely linked issues: many consumers base their decisions to purchase on other consumers' reviews of products and services, which is why the truthfulness of such reviews should be guaranteed.

Precisely because of the importance that these reviews have in a consumer's decision-making process, a market has been created for reviews in which consideration is exchanged for positive reviews of a product or service.

Although the amendment seeks to eliminate this practice, it does not appear that its transposition into Spanish law will have a significant impact on the market given that the main operators have already taken measures to ensure the truthfulness of reviews on their websites based on the Directive. For example, it is currently quite common to see "verified reviews", which are those posted by consumers that have in fact purchased the product.

## 5. ARTICLE 31 UCL ON OTHER AGGRESSIVE PRACTICES

A fourth section has been added to this article which provides that “*unsolicited visits by a trader to consumers’ or users’ homes, or excursions organised by a trader with the aim or effect of promoting or selling products or services, where the restrictions established by article 19.7 RTGLDCU are not respected*” are considered abusive practices and therefore unfair.

Article 19 RTGLDCU has been amended in order to include a seventh section which states that “*the competent public authority, with the aim of further protecting the legitimate interests of consumers, shall be able to restrict, in terms that will be established, certain forms and aspects of unsolicited visits by a trader at users’ and consumers’ homes, or excursions organised by him or her with the aim or effect of promoting or selling products. Any such provisions must be proportionate and non-discriminatory and must not prohibit those sales channels as such, except for those cases in which they are adopted on grounds other than consumer protection, such as public interest or respect for consumers’ private life*”.

Article 19.7 will also come into force on 28 May 2022 and, as can be seen, requires regulatory development. This means that while article 31.4 UCL will come into force in May, until these further regulations are passed, the practical application of this provision will be limited.

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