

THE NETHERLANDS

Dutch Civil Code

BOOK 6 THE LAW OF OBLIGATIONS

TITLE 6.3 TORT

Section 3A Unfair commercial practices

Article 6:193a

Definitions

1. For the purpose of this Section the following terms will have the meaning as defined below:

- a. ‘consumer’: of natural person who, in commercial practices covered by this Section, does not act in the course of his professional practice or business;
- b. ‘trader’: any natural or legal person who, in commercial practices covered by this Section, is acting in the course of his professional practice or business and anyone acting in the name of or on behalf of such a trader;
- c. ‘product’: any movable or immovable property, including electricity, and any service;
- d. ‘commercial practice’: any act, omission, course of conduct or representation, commercial communication, including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;
- e. ‘transactional decision’: any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;
- f. ‘professional diligence’: the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, in accordance with his conscientiousness, arising from the general principle of good faith in the trader's field of activity and honest market practices;
- g. ‘invitation to purchase’: a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;
- h. ‘undue influence’: exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;
- i. ‘code of conduct’: a set of rules not imposed by or pursuant to law, which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;
- j. ‘code owner’: a legal person or a group of traders, responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;
- k. ‘Directive’: Directive 2005/29/EC of the European Parliament and of the Council of the European Union of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149).

2. In this Section by an ‘average consumer’ is understood as well: the average member of a specific group to which the trader addresses himself or the average member of a specific group of which the trader reasonably can foresee that its members due to their mental or physical restrictions, their age or naivety are in particular susceptible for the commercial practice or for the underlying product.

3. This Section does not apply to the certification of goods of precious metal and the indication of the level of precious metal for these goods.

Article 6:193b

Unfair commercial practices

1. A trader acts tortiously (unlawfully) towards a consumer if he conducts a commercial practice that is unfair.
2. A commercial practice is unfair if a trader acts:
 - a. contrary to the requirements of professional diligence, and

b. the ability of the average consumer to take a decision on the basis of sufficient information is noticeably limited or may be noticeably limited,
because of which the average consumer takes or may take a transactional decision which he otherwise would not have taken.

3. In particular, commercial practices shall be unfair, if a trader conducts:

- a. a misleading commercial practice as meant in Articles 6:193c up to and including 6:193g, or;
- b. an aggressive commercial practice as meant in Articles 6:193h and 6:193i.

4. The common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally, does not in itself make an advertisement unfair.

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Article 6:193j

Revised burden of proof with respect to the correctness and completeness of the provided information

1. When, pursuant to Articles 6:193b up to and including 6:193i, a right of action (legal claim) or an application as meant in Article 3:305d, paragraph 1, of the Civil Code is brought to court, the burden of proof rests on the trader as far as it concerns the material correctness and completeness of the information he has provided, if that seems to be appropriate in view of all circumstances of the case and taking into account the legitimate interests of the trader and of each other party in the proceedings.

2. If the trader has acted tortiously (unlawfully) in the sense of Article 6:193b, then he is liable for the damage caused as a result, unless he proves that he is not to blame for the damage and that he is neither accountable for it on another ground.

3. A contract which has been concluded as a consequence of an unfair commercial practice is voidable.