

**G-Regs™**

## Netherlands – Dutch Civil Code – Book 6



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Full title:	Book 6 Dutch Civil Code – Law of Obligations
Title of relevant sections:	Title 6.3: Tort (Unlawful Acts) Section 3A: Unfair commercial practices Articles 193a – 193j <u>Recent Amendment:</u> Act of 12 March, 2014 amending Books 6 and 7 of the Civil Code, the Consumer Protection Enforcement Act and other laws relating to the implementation of Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 Law on consumer rights. Entry into force: 13/06/2014 <a href="https://zoek.officielebekendmakingen.nl/stb-2014-140.html">https://zoek.officielebekendmakingen.nl/stb-2014-140.html</a> Amended Articles: 193f(b), 193i, 193j; section 2B inserted which includes Arts 230m and 230v (referenced at the foot of this document) – in relation to Information requirements for distance and off-premises contracts
Implementation	Section 3A (Unfair commercial practices) was inserted into Book 6 of the Dutch Civil Code by Article IIA of the following Act:  Law of 25 September 2008 (n. 397) adapting Books 3 and 6 of the Civil Code and other laws of the Directive on unfair commercial practices in the internal market. Entry into force: 15/10/2008.  This Law implemented the Unfair Commercial Practices Directive <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005L0293">2005/29/EC</a> (UCPD) <a href="https://zoek.officielebekendmakingen.nl/stb-2008-397.html">https://zoek.officielebekendmakingen.nl/stb-2008-397.html</a>
Article 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;

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- 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.
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#### Article 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 193c****Misleading Commercial Practices**

1. A commercial practice is misleading if information is provided which is actually incorrect or which deceives or is likely to deceive the average consumer, whether or not by means of an overall presentation of the information, like with respect to:
  - a. the existence or the nature of the product;
  - b. the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
  - c. the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
  - d. the price or the way in which the price is calculated, or the existence of a specific price advantage;
  - e. the need for a service, part, replacement or repair;
  - f. the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
  - g. the consumer's rights, including the right to repair or replace the supplied asset or the right to a price reduction, or the risks he may face,

which causes or is likely to cause the average consumer to take a transactional decision which he otherwise would not have taken.

2. A commercial practice is also misleading if:
  - a. due to any marketing of a product, including comparative advertising, confusion is created with any products, trade marks, trade names or other distinguishing marks of a competitor;
  - b. the trader does not comply with commitments contained in codes of conduct by which the trader has undertaken to be bound, as far as:
    1. the commitment is firm and recognizable;
    2. the trader indicates that he is bound by the code,

because of which the average consumer takes or may take a transactional decision which he otherwise would not have taken.

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**Article 193d****Misleading Omissions**

1. Moreover, a commercial practice is misleading if it involves a misleading omission.
  2. A misleading omission is every commercial practice where material information is omitted that the average consumer needs to be able to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
  3. It shall also be regarded as a misleading omission when material information meant in paragraph 2 is hidden or supplied in an unclear, unintelligible, ambiguous or untimely way or when the commercial intent of the commercial practice, as far as it is not already apparent from the context, does not show from the provided information, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
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4. The factual context, the limitations of the communication medium and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether material information has been omitted or hidden.
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**Article 193e****Misleading Purchase Invitation**

In the case of an invitation to purchase, if not already apparent from the context, the following information shall be regarded as material in the sense of Article 6:193d paragraph 2:

- a. the main characteristics of the product, to an extent appropriate to the medium and the product;
  - b. the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
  - c. the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
  - d. the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
  - e. if there is a right of withdrawal or cancellation, the existence of such a right.
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**Article 193f****Material Information in commercial communication**

If the commercial practice involves commercial communication, including advertising or marketing, then the information laid down in or under the following Articles shall in any case be regarded as material as referred to Article 6:193d, paragraph 2:

- a. Article 3:15d, paragraph 1 and 2, and Article 3:15e, paragraph 1, of the Civil Code (Book 6)<sup>1</sup>;
  - b. Article 230m, paragraph 1(a, b, c, e-h, o, p) and Article 230v, paragraphs: 1-3, 5, 6 (1<sup>st</sup> sentence), and 7 of Book 6 Civil Code<sup>2</sup> (*G-Regs* refer to the end of this document for relevant provisions of Art. 230m and Art. 230v).
  - c. Article 7:501<sup>3</sup>, paragraph 1, of the Civil Code (Book 7);
  - d. Articles 73 - 75<sup>4</sup> of the Medicine Act (*Geneesmiddelenwet*);
  - e. Articles 4:20, 4:73 and 5:13 of the Financial Supervision Act<sup>5</sup>;
  - f. Article 2b of the Pricing Act (*Prijzenwet*)<sup>6</sup>.
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<sup>1</sup> G-Regs Translation here: [http://www.gregsregs.com/downloads/NLBook3DCCArt15d\\_15eWR.pdf](http://www.gregsregs.com/downloads/NLBook3DCCArt15d_15eWR.pdf)

<sup>2</sup> This provision, as in Art. 193 f(b) has been amended by Art. 1A from Law 140/2014 (Dutch version here: <https://zoek.officielebekendmakingen.nl/stb-2014-140.html>)

<sup>3</sup> Article 7:501: Information to be provided prior to the conclusion of the travel agreement. If the tour operator issues a generally available brochure or other publication, then it shall indicate the price of the tour and other information to be provided pursuant to Order in Council. Book 7 – Title 7A - [NL](#)

<sup>4</sup> Medicine Act: [NL](#) - All repealed on 10-12-2013 – referred to info requirements on packaging of homeopathic products.

<sup>5</sup> Financial Supervision Act [NL](#) - Article 4:73 [repealed on 01-01-2013] Related to information requirements - before concluding a contract regarding a financial product, a broker shall inform the consumer, or, where it concerns insurance, the client, of the following matters. EN translation for Articles 4:20 and 5:15 [here](#)

<sup>6</sup> Pricing Act - [NL](#)

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**Article 193g**

Commercial Communications which are misleading in all circumstances

The following commercial practices are in all circumstances considered to be unfair:

- a. claiming to be bound to a code of conduct and to act in conformity with it when the trader is not;
- b. displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation;
- c. claiming that a code of conduct has an endorsement from a public or other body which it does not have;
- d. claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation;
- e. making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered ('bait advertising');
- f. making an invitation to purchase products at a specified price and then:
  1. refusing to show the advertised item to consumers, or;
  2. refusing to take orders for it or supply it within a reasonable time, or;
  3. demonstrating a defective sample of it, with the intention of promoting a different product ('bait and switch');
- g. falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice;
- h. promising to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction;
- i. stating or otherwise creating the impression that a product can legally be sold when it cannot;
- j. presenting rights given to consumers in law as a distinctive feature of the trader's offer;
- k. using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer ('advertorial');
- l. making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product;
- m. promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not;
- n. establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products;

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- o. claiming that the trader is about to cease trading or move premises when he is not;
  - p. claiming that products are able to facilitate winning in games of chance;
  - q. falsely claiming that a product is able to cure illnesses, dysfunction or malformations;
  - r. passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions;
  - s. claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent;
  - t. describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item;
  - u. including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not;
  - v. falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer;
  - w. creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.
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#### Article 193h

#### Aggressive Commercial Practices

1. A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.
  2. In determining whether a commercial practice is aggressive, account shall be taken of:
    - a. its timing, location, nature or the persistence which is demonstrated at the commercial practice;
    - b. the use of threatening or abusive language or behaviour;
    - c. the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
    - d. any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
    - e. e. any threat to take any action that cannot legally be taken.
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#### Article 193i

#### Commercial Practices which are aggressive in all circumstances

- The following commercial practices are in all circumstances considered to be aggressive:
- a. creating the impression that the consumer cannot leave the premises until a contract is formed;
  - b. conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified under national law to enforce a contractual obligation;
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- c. making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation;
  - d. requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights;
  - e. including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.;
  - f. demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer.<sup>7</sup>
  - g. explicitly informing a consumer that, if he does not buy the product or service, the trader's job or livelihood will be in jeopardy;
  - h. creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:
    1. There is no prize or other equivalent benefit; or
    2. Taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.
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#### Article 193j

Revised burden of proof with respect to correctness and completeness of 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. An agreement attained as a result of an unfair commercial practice is voidable.<sup>8</sup>
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#### REFERENCES

Reference to Arts 230m and 230v in Art. 193f(b)

If the commercial practice involves commercial communication, including advertising or marketing, then the information laid down in or under the following Articles shall in any case be regarded as material as referred to Article 6:193d, paragraph 2:

b. Article 230m, paragraph 1(a, b, c, e-h, o, p) and Article 230v, paragraphs: 1-3, 5, 6 (1st sentence), and 7 of Book 6 Civil Code

Art. 230m (Section 2b. Provisions for contracts between traders and consumers; ss 3: Requirements for distance and off-premises contracts)

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<sup>7</sup> Provision amended by Art. 1B of Law 140/2014; 2<sup>nd</sup> half of paragraph deleted.

<sup>8</sup> Art. 193(j)(3) has been inserted by Art. 1C of Law 140/2014

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1. Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner:
    - a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
    - b) the identity of the trader, such as his trading name;
    - c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;
    - e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;
    - f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;
    - g) the method of payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to provide the services and, where applicable, the complaint handling policy of the trader;
    - h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Art. 230(o) as well as the model withdrawal form set out in Annex I(B of the Directive (2011/83/EU)<sup>9</sup>)
    - o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
    - p) where applicable, the minimum duration of the consumer's obligations under the contract.

Art. 230v (Section 2b. Provisions for contracts between traders and consumers; ss. 5: Additional provisions for distance contracts)

1. With respect to distance contracts, the trader shall give the information provided for in Art. 230m para. 1 or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible (written in readable form).
  2. If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and
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<sup>9</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>

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prominent manner, and directly before the consumer places his order, of the information provided for in Article 230m paragraph 1 parts a, e, o and p.

3. The trader shall set up his electronic ordering process in such a way that the consumer, when placing his order, cannot accept an offer until it has been made clear to him in a manner not susceptible to misunderstanding that the order implies an obligation to pay. If the acceptance is made using a button or a similar function, the conditions of the previous sentence are met if, when placing the order in terms not susceptible to misunderstanding and in a legible manner that acceptance involves a payment obligation to the trader. A button or similar function shall be labelled in an easily legible manner with an unambiguous formulation indicating that placing the order entails an obligation to pay the trader. The phrase, 'order with obligation to pay' ("*bestelling met betalingsverplichting*") is considered to be such an unambiguous statement. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order.
  4. On websites where goods or services are offered by the trader, it is stated clearly and legibly at the beginning of the ordering process whether there are restrictions on the delivery and which payment methods are accepted.
  5. If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract, as referred to in Art. 230m, para. 1, points (a), (b), (e), (h) and (o). The other information referred to in Article 230m, para. 1 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.
  6. If the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall, at the beginning of the conversation with the consumer, disclose his identity and, where applicable, the identity of the person on whose behalf he makes that call, and the commercial purpose of the call.
  7. The trader shall provide the consumer with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins. That confirmation shall include:
    - a) all the information referred to in Article 230m, para. 1 unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract; and
    - b) where applicable, the confirmation of the consumer's prior express consent and acknowledgment in accordance with Art. 230p, point q.
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