



**17th EU-China Competition Week
Beijing, 15-18 October 2018**

The Unfair Commercial Practices Directive 2005/29/EC ("UCPD")

**Christoph Decker
European Commission
DG Justice and Consumers
Beijing, 17 October 2018**

Presentation Overview

Context



Key features



Enforcement



The 2016 UCPD Guidance



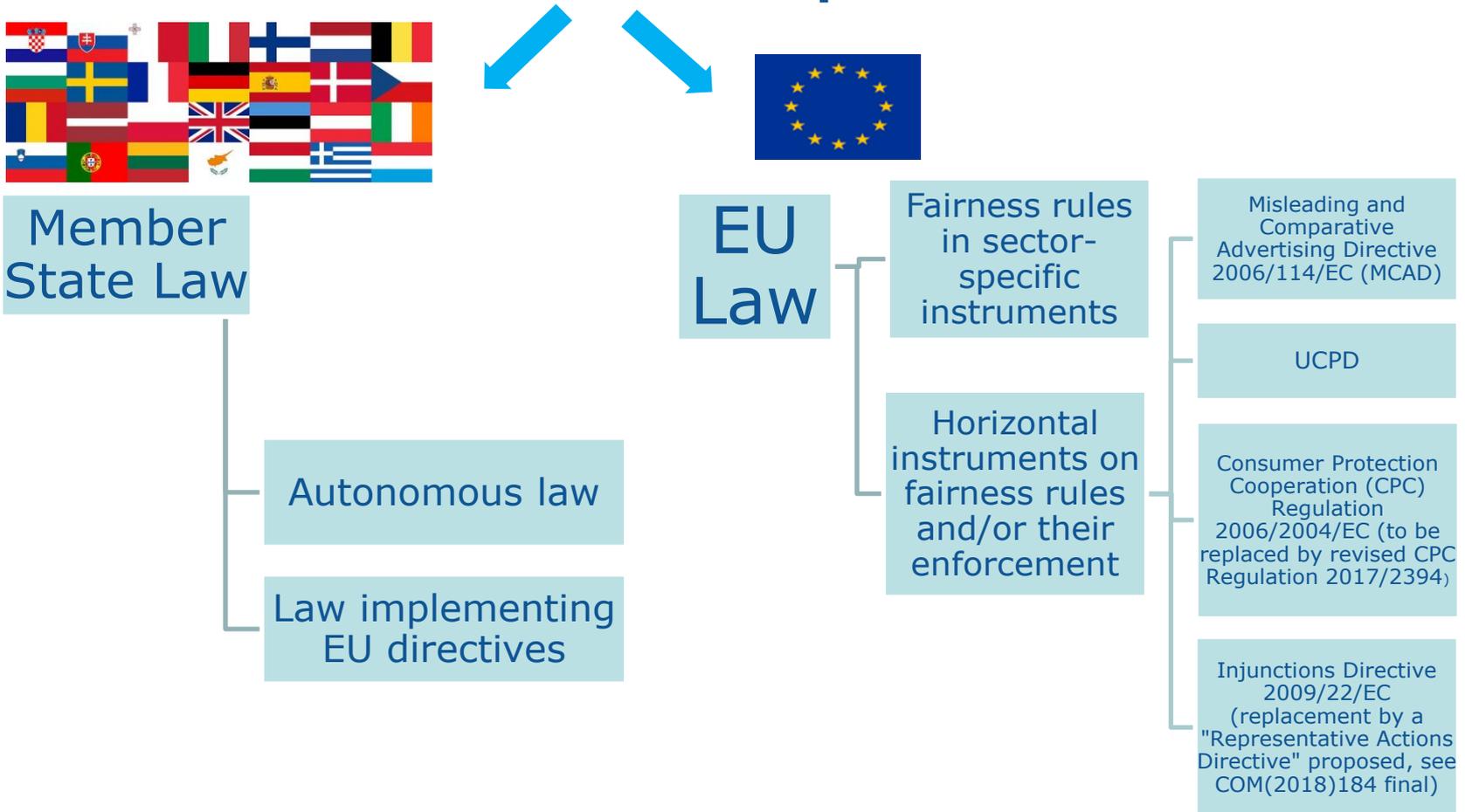
European
Commission

Context

The law of Unfair Commercial Practices in the EU

- ***Why is it important?***
 - UCPD as a tool ensuring fair and trusted retail markets
 - Divergencies in Member States' fairness regimes as a potential impediment to exercising market freedoms in the EU's Single Market
- ***Where can I find it?***
 - The multi-level system of European Union law and its enforcement

The law of unfair commercial practices in the EU



Key features

Scope

The Directive applies to

- unfair **business-to-consumer** commercial practices
- **before, during** and **after** a commercial **transaction** in relation to a **product**
- harming consumers' **economic** interests

Article 2(d)

'business-to-consumer commercial practices' (hereinafter also referred to as commercial practices) means 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.

Guiding principles

- honest trader in an openly competitive market
- consumer taking a free transactional decision
- benchmark: average consumer/average member of a group of consumers

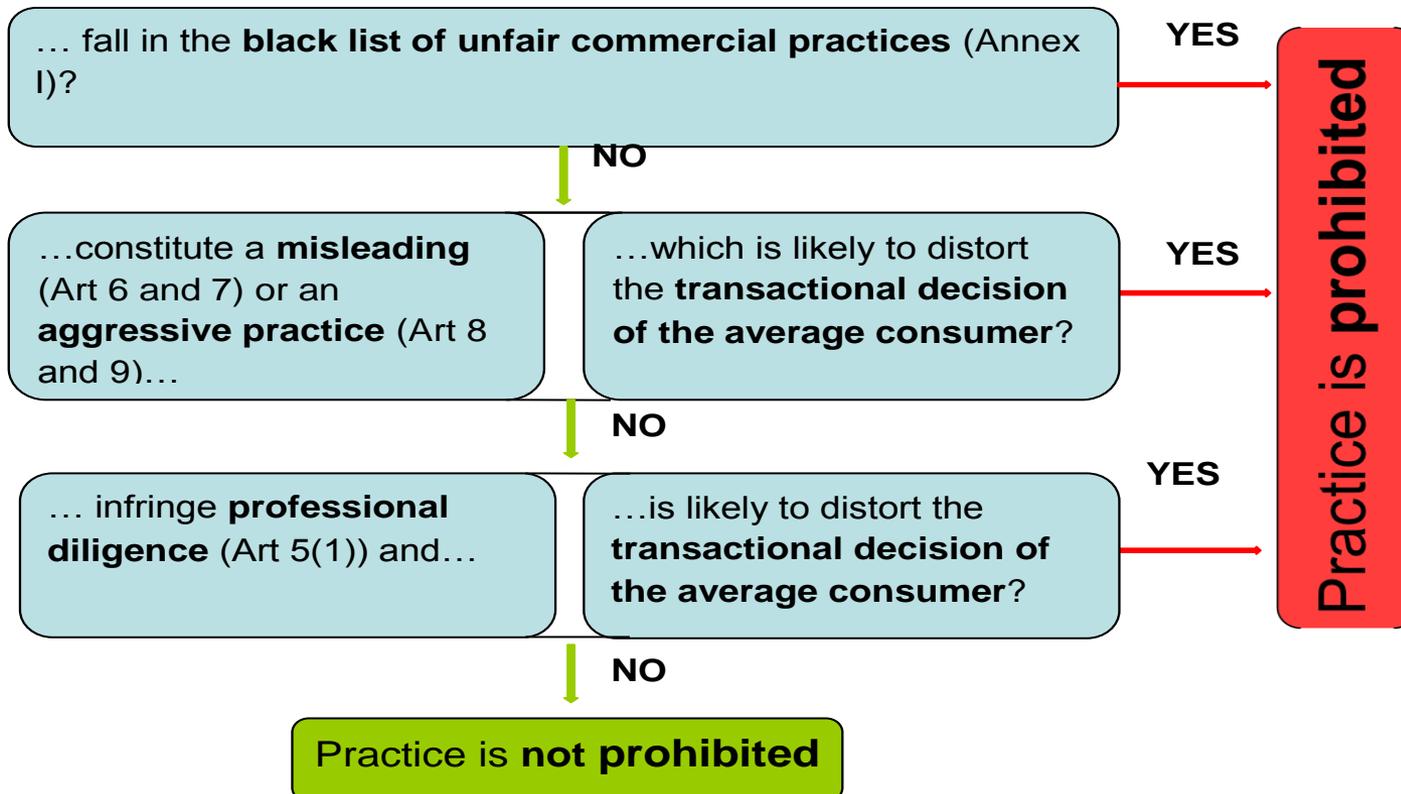
Recital 18: "[...] *[T]his Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.*

Regulatory technique

- Full harmonisation
- "Safety net" to sectorial consumer protection rules
- 3-step test for assessing whether a commercial practice is unfair
 - 1) Black-list** of 31 specific commercial practices which are prohibited per se (no case-by case assessment)
 - 2) Detailed rules on misleading and aggressive practices** – case-by-case assessment
 - 3) General clause** – case-by-case assessment

3-step test for assessing unfairness

Does the commercial practice:



The black-list in Annex I

➤ **Example: No 20 of ANNEX I**

"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."

➤ **Practical case:**

In a combined offer for a mobile phone with a subscription, a Swedish telecom operator marketed the price as "0 kr". However, when accepting this offer the monthly instalments for the subscription would be increased. A court agreed with the Consumer Ombudsman that this was contrary to No 20 of Annex I UCPD

Article 6: Misleading actions

- Article 6(1): Information provided to the consumer should be **truthful** and should not **deceive or be likely to deceive the consumer** in any way, including in the overall presentation, even if the information is factually correct.
- In order to be misleading, an action must be **likely** to cause the average consumer "to take a transactional decision **that he would not have taken otherwise**".

➤ **Practical case:**

Sale of a second-hand car. The seller had indicated the mileage as "162.120 on the counter, unconfirmed", although the real mileage was at least 180.200 km. This was found misleading by the Czech Commercial Inspectorate and subsequently by a Czech Court.

Article 7: Misleading omissions

- Article 7(1) establishes in general terms an obligation on traders to provide all **material information** that the average consumer needs to take an **informed transactional decision**.
- In order to be misleading, an omission of material information must be "**likely** to cause the average consumer to **take a transactional decision that he would not have taken otherwise**".
- Article 7(2): **Failing to identify the commercial intent** of a commercial practice is a misleading omission, when this failure is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

Article 7: Misleading omissions

➤ Practical case:

The Polish Office of Competition and Consumer Protection has acted against a trader offering life insurance products, without including material information in the advertising. The trader indicated that in the event of death of the person covered by the insurance, his relatives would obtain all insurance benefits. However, the trader omitted to inform consumers that in the event of death due to other reasons than an accident within the first 24 months of the contract, the relatives would only receive limited insurance benefits.

Aggressive practices – Art. 8-9

Article 8:

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.

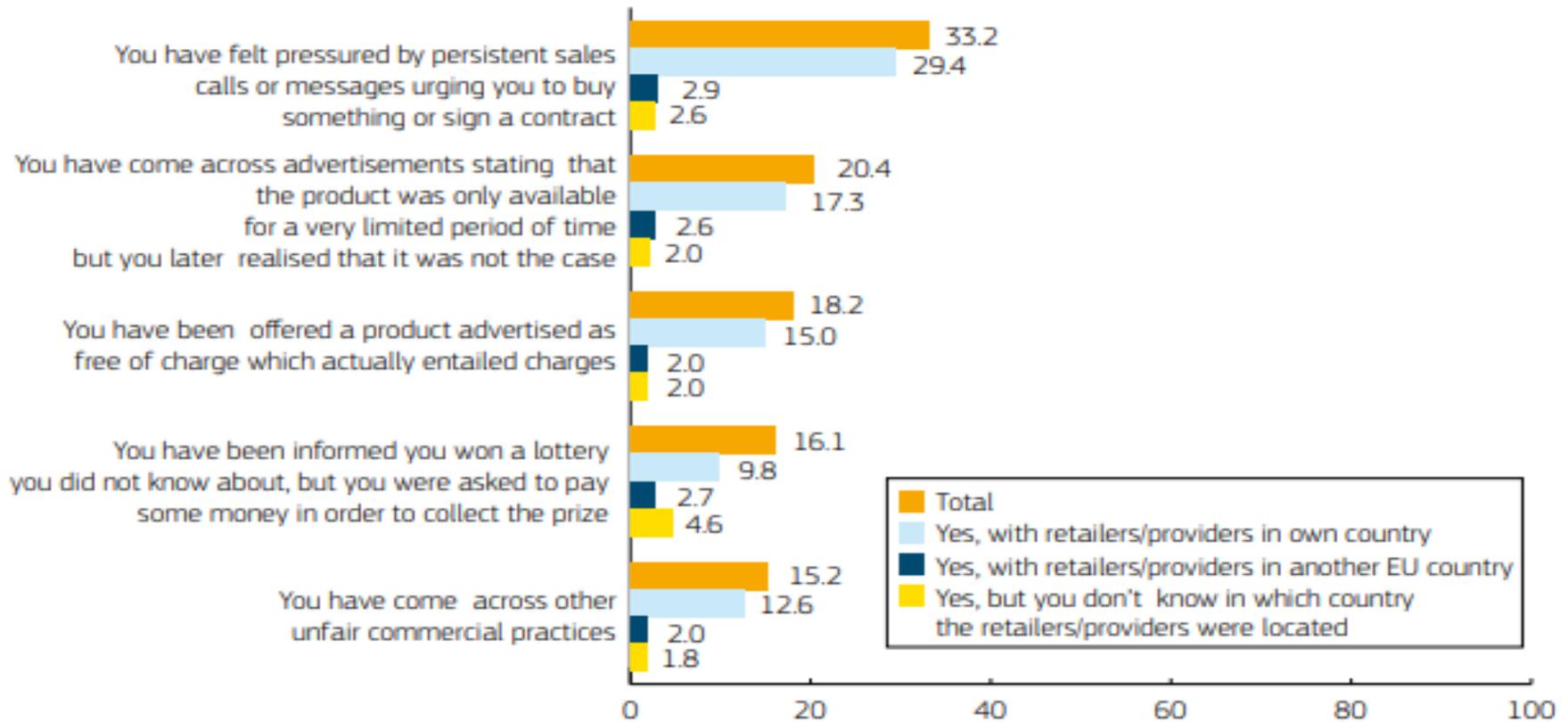
Practical case:

In a decision by the Latvian Consumer Protection Authority of 23 October 2012, which has been confirmed by Latvian courts, the use of pre-ticked-boxes by an airline was considered as unfair for being aggressive and not in compliance with professional diligence

Article 5: General clause

1. *Unfair commercial practices shall be prohibited.*
 2. A commercial practice shall be unfair if:
 - (a) *it **is contrary to the requirements of professional diligence,***
and
 - (b) *it materially distorts or **is likely to materially distort the economic behaviour** with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*
- [...]

Unfair Commercial Practices – EU consumers' experiences



Source: 2017 Consumer Conditions Scoreboard

Enforcement

- Enforcement at Member State level (no direct enforcement powers for the European Commission).
- However, there are EU-level instruments regulating the public and private enforcement of the UCPD in the Member States

Public enforcement

- Art. 11 et seq. UCPD: Minimum requirements for Member States' enforcement systems
- Consumer Protection Cooperation (CPC) Regulation 2006/2004/EC (to be replaced by revised CPC Regulation 2017/2394): coordination of Member States' public enforcement actions in cross-border cases

Private enforcement

Individual actions

- Availability currently not mandated by EU law; depends on Member States' autonomous procedural laws
- Availability of individual remedies for UCPD breach mandated under Proposal for "Omnibus Directive" under the "New Deal for Consumers" (COM[2018] 185 final)

Collective actions

- Qualified entities can request injunctive relief under Injunctions Directive 2009/22/EC
- Under proposal for "Representative Actions Directive" under 'New Deal for Consumers' (COM[2018] 184 final) qualified entities can request injunctive, declaratory and compensatory relief

The 2004 Consumer Protection Cooperation (CPC) Regulation

- A unique **cooperation framework** to protect collective economic interests of consumers when harmful practices concern 2 or more EU countries
- **A common toolbox:** minimum powers needed for enforcement cooperation in the cross-border context
- **A broad scope:** its Annex covers the consumer acquis and sectorial laws
- **Coordinated procedures** that enable the pooling of resources and more consistent enforcement approaches





European
Commission

Enforcement cooperation: What was achieved up to now?



Apple, Google
& Amazon
changed
marketing
of games
offering in-app
purchases

5 big car hire
companies =
65% of the EU
market,
pledged to
introduce fairer
conditions



5000 websites
checked via
sweeps since
2007

Hundreds of
days of
training,
exchange of
best practices,
workshops



The revised CPC Regulation 2017/2394

TODAY

Authorities can only act against on-going illegal practices

- Authorities will be able to sanction short-lived practices and prohibit their repetition

Some key consumer rights are not covered

- Extension of coverage to additional rights: geo-blocking, additional passenger rights, financial services

Authorities have limited powers to identify and deter online rogue traders

- Extension of powers to closing down websites with scams, obtaining full information on site owners and ensuring eventual consumer compensation

Widespread issues ("infringements") are not tackled in a coordinated manner

- New EU level procedure launched and coordinated by the Commission

Sharing of intelligence is limited

- Clearer alert procedure and concerned parties allowed to signal issues

The 2016 UCPCD Guidance

The UCPD Guidance

- Updated EC guidance on implementation/application of the UCPD adopted 25 May 2016 (available in all official languages)
- Specific chapter on application of UCPD in the digital economy

http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm

- Guidance aims to facilitate compliance and enforcement + increase legal certainty
- Explanations and practical examples on the UCPD (examples from the Court of Justice, national courts and administrations)