

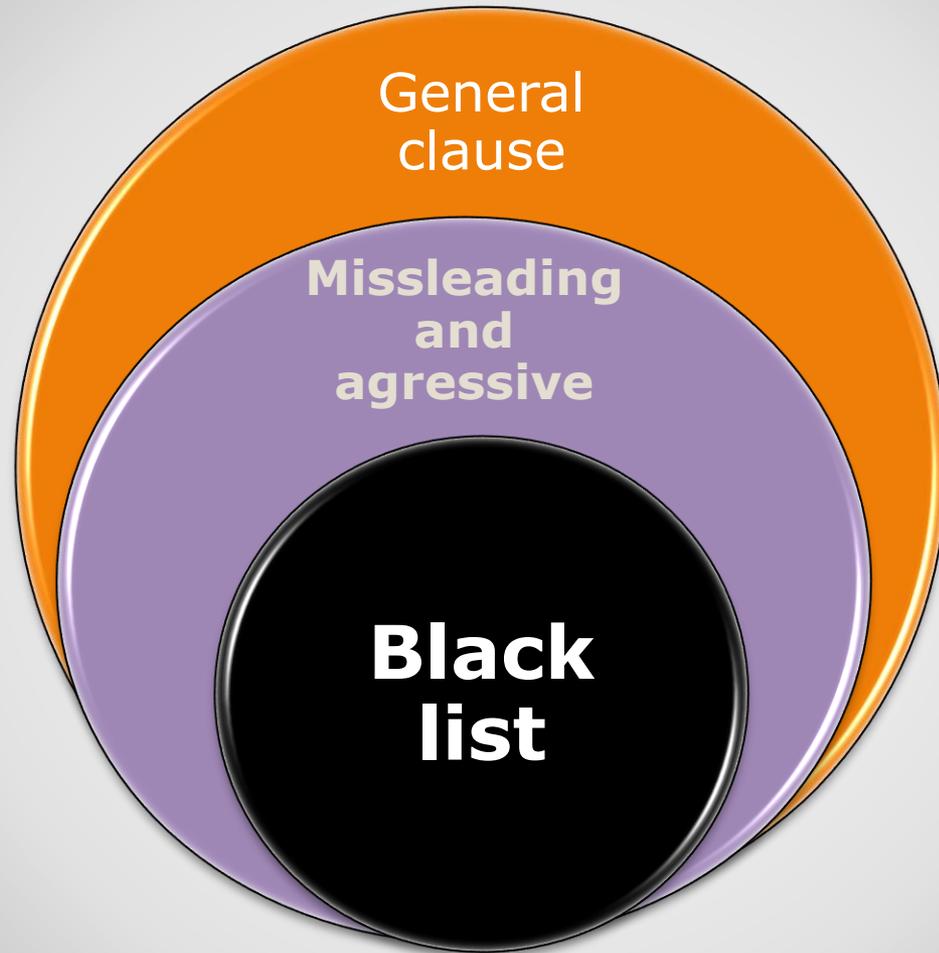
The UCP directive

- Types of regulations
 - Laws
 - general misleading prohibition
 - sector specific regulations
 - Self-regulation, i.e. Better Business Bureau (U.S.), ethical norms
 - Can the market cure the problems?
 - i.e. the role of brands, consumer reviews
- Tension:
 - Global companies – global campaigns – local/regional rules
 - Lack of co-operation between enforcers

Rules on misleading ads

- The role of a Preamble
- Substantial and procedural-institutional rules
- Full harmonization – the single market objective
- Scope
 - B2C (not B2B)
 - Special (stricter) rules in the financial, drugs, food sectors
 - Personal, territorial scope?

The structure of the UCPD



Three layers of the prohibition

- Who are the traders and consumers?
- What are commercial practices?
 - Invitation to purchase
- What are transactional decisions?
 - UCPD applies before, during or after a TD

Definitions

Who is the average consumer?



- Falsely claiming that a product is able to cure illnesses, dysfunction or malformations
- `Describing a product as `gratis`, `free`, 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
- `Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents to buy advertised products for them.

Black list examples

- Main characteristics: availability, risks, composition, after-sale assistance, delivery, quantity, origin, the results to be expected
- The price, existence of a specific price advantage
- Attributes of the trader, his qualification, awards
- Consumer`s rights: replacement, reimbursement, guarantees

Misleading actions, Art. 6

- Not including **material information**
 - invitation to purchase
 - information requirements established by EU law
- that the **average consumer** needs to take an **informed** transactional decision
- distorts or is likely to distort **transactional decision**
- taking account the limitations of the communication medium

Misleading omission

- Does the UCPD preclude national legislation banning sales with bonuses (the aim of which is to protect consumers)?
- A car trader ommits information about official fuel consumption and CO2 emissions which is regulated by a Directive - UCPD?
- An airline ticket sellers failing to break down the final price by components (e.g. air fare, taxes, airport charges, etc,) – UCPD?

Check your knowledge!

- Which of these is a transactional decision?
 - A decision to travel to a sales outlet or shop as a result of a commercial offer
 - A decision to buy two bottles of wine instead of buying just one
 - A decision to click through a website as a result of a commercial offer
 - A decision to withdraw from a service contract
- Which of the above are pre- and post-purchase decisions?

Check your knowledge!

- A telephone operator advertised on TV a mobile phone subscription by highlighting the specific price benefits, whilst the restrictions and conditions of the offer were only presented in small print which appeared on the screen for a very short time

Check your knowledge!

U.S. law on misleading advertising

- First Amendment: free speech
- Commercial speech
 - Commercial speaker, to consumers, commercial content
 - Less protection
- Protected speech regulated by the government
 - Informational function of advertising
 - Deceptive ads can be banned

Are laws regulating commercial speech constitutional?

Key statutes and rules

- FTC Act of 1914
 - creating the Federal Trade Commission (FTC) as an independent agency to keep the U.S. economy both *free* and *fair*
 - 1938 amendment: 15 U.S.C. Section 45
- Sector specific laws
 - i.e. dolphin-safe tuna labeling
- FTC *may issue* trade regulation rules
 - 1995 Telemarketing Sales Rule (TSR) prohibiting *deceptive* and *abusive* telemarketing acts
- *Industry guides, policy statements*: FTC interpretations of the laws it administers

Deceptive Acts or Practices

- FTC Act Sec. 5 prohibits unfair or deceptive acts or practices in commercial settings
- FTC Policy Statement on Deception requires the Commission to prove the activity is deceptive or unfair if it:
 - involves a *material* misrepresentation
 - omission, or practice
 - it is *likely to mislead* a consumer
 - who acts *reasonably* under the circumstances
- Actual deception is not required
- Need to substantiate both literal and implied claims

FTC Trade Regulation Rules

- FTC trade regulation rules have the force of law and FTC can proceed directly against those who engage in prohibited practices:
 - Civil penalty up to \$10,000 for each knowing violation of a rule
 - Court proceedings to obtain consumer remedies, such as damages, refund of money, return of property, or the reformation of contracts

FTC v. Kraft

- Even literally true statements can be misleading
 - Implied claims (milk equivalency) reasonably clear from advertisements
 - Kraft, Inc. advertised that *Kraft Singles* (process cheese food slices with at least 51% natural cheese) contained 5 oz. milk in each slice
 - True statement
 - FTC brought Sec. 5 suit for deceptive advertising against Kraft alleging that the milk equivalency claim was false and misleading because 30% of calcium in milk is lost through processing

- More than a trademark statute
 - 43(a)(1)(A)
- 43(a)(1)(B)
 - false or misleading statement of fact
 - material
 - in connection with advertising or promotion
 - actually deceives or has the tendency to deceive an appreciable number of consumers
 - likely to cause injury to the plaintiff
 - interstate commerce
- Plaintiff bears the burden of proof

The Lanham Act: competitors

- Since 2010
- Enforcing the misleading advertising prohibitions of sector specific acts
 - Consumer Financial Protection Act (CFPA), the Mortgage Acts and Practices (MAP), Truth in Lending Act (TILA)
 - i.e. Amerisave bait-and-switch mortgage plans

**Consumer Financial Protection
Bureau**

- Virtually every state has laws against false advertising
 - providing remedies to consumers and competitors
 - state attorney generals
- Uniform Deceptive Trade Practices Act
 - i.e. Illinois

State laws

- National Advertising Division (NAD)
 - Mission `to review national advertising for truthfulness and accuracy and foster public confidence in the credibility of advertising.`
 - i.e. Energizer vs. Duracell: `50% longer lasting`
- Better Business Bureaus (BBB): local
 - i.e. on lying letters

Self-regulation

Test Your Knowledge

- *True or False?*
 - The FTC has rulemaking and enforcement powers
 - Deceptive practices under FTC Sec. 5 must mislead a consumer resulting in a sale
 - Consumers have standing under the Lehman Act

Enforcement of misleading advertising rules

- Education vs. sanctions
- Ex-ante vs. ex-post?
- Self-regulation
- What sanctions?
 - Cease and desist order
 - Administrative/civil fines on corporations
 - Corrective statements
 - Disqualification
 - Other administrative sanctions
 - Jail sentence
 - Criminal fines on individuals
- Commitments
- Recovery of damage
- Which institutions?
 - Courts
 - Competition authority
 - Consumer protection authority
 - Specialized agency
 - Self-regulatory body

Effective enforcement

- No centralized law enforcement body
- The UCP directive does not harmonize
 - MSs can choose between the administrative or the judicial model
- The penalties should be
 - effective,
 - proportionate, and
 - dissuasive
- Regulation 2017/2394 on co-operation between national enforcers
- EU Court may help clarify the meaning of the law (preliminary rulings)

EU legislation

- Criminal sanctions exist on paper only
- Reality is administrative fines
- Statutory maximum: 10% of the previous annual turnover
- Fining guidelines
 - Starting amount is either the relevant marketing budget or % of the relevant turnover
 - Aggravating and mitigating factors
 - Multiplier for repeat infringements
- Fines are not excessive
 - Almost never reach 1 M €
 - HUF 100 M is often regarded as a level meriting attention by the board and the press
- Many commitment decisions

The Hungarian model: GVH

- **NAD: self-regulation**
 - Complying with its decision is optional (potential FTC reference)
 - Can be appealed to the National Advertising Review Board
- **Public enforcement**
 - FDA: warning letters
 - FTC
 - Administrative adjudication
 - administrative consent order or final decision (cease and desist, disclosure order, corrective advertising); may also seek consumer redress from the respondent in district court for consumer injury
 - Seek restitution on behalf of consumers by filing a civil action in federal court
 - The court may award both prohibitory and monetary equitable relief in one step
 - Criminal cases by state attorney generals
 - In some states, i.e. California
- **Private enforcement**
 - Actions under state unfair and deceptive acts
 - Some allow class actions
 - Lanham Act

U.S. procedures

- Money-back (checks)
 - The Nationwide Class: settlement fund of \$2,500,000; the California Class: \$550,000
 - Class Members can receive up to \$4 per jar of Nutella that they purchased during the time periods defined, up to five jars for a maximum award of \$20 per household
 - Class counsel`s fee: 3 M and .9M respectively
- Ferrero also agreed to modify the Nutella label, marketing statements, create new television ads, and change the Nutella website

Class actions: Nutella settlement