

Dr. habil. Mira Malczyńska-Biały, Associate Professor UR

ORCID: 0000-0003-3083-800X

mimalczynska@ur.edu.pl

University of Rzeszów

Consumer protection in the European Union and unfair commercial practices

Keywords: *consumer; unfair commercial practices; Court of Justice of the European Union; European Union*

The article aims to analyse selected aspects of consumer protection within the European Union concerning unfair commercial practices. The considerations focus on providing examples of unfair market practices based on Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005. A synthesis of unfair market practices in the European Union has also been made. Selected case law of the Court of Justice of the European Union in this area has been presented. On the basis of the analysis, it has been found that when Member States do not apply EU law in the field of unfair commercial practices in an appropriate manner, the Court of Justice of the European Union interprets EU law. It also adjudicates legal disputes between EU governments and EU institutions, as well as cases of individuals, i.e. consumers, or consumer organizations who believe that their rights have been violated by EU institutions.

Co-financed by the Minister of Science under the Regional Excellence Initiative program, “Migrants from Ukraine in the Podkarpackie Voivodeship. Socio-economic implications.”

Introduction

Article 169 of the Treaty on the Functioning of the European Union (TFEU)¹ indicates that the Union aims to ensure, among other things, a high level of security and the economic interests of consumers. It also contributes to the protection of their economic interests. The article aims is to analyse unfair commercial practices in the European Union. The focus is on presenting the types of practices based on Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005. The selected case law of the Court of Justice of the European

Union in this area is presented. It takes into account the fact that the average consumer should be reasonably well informed, observant, and circumspect when making purchases.

In addressing the chosen research problem, important methods and techniques relevant to the field of social sciences were employed. The primary research method used in the article is the dogmatic analysis method. It was applied to the analysis of legal acts regulating the discussed issues. The article also uses the comparative method to compare specific legal and informational actions of the European Union aimed at counteracting unfair market practices.

The article critically examines the following research hypotheses: First, in order to ensure the effectiveness of counteracting unfair

¹ Consolidated version of the Treaty on the Functioning of the European Union (OJ EU C 326/49, 26/10/2012).

market practices in the European Union, a uniform interpretation of EU law applied by the appropriate judicial institutions is necessary. Second, unfair commercial practices may influence consumers' economic behavior and their purchasing decisions.

Assessment of these elements is made taking into account social, cultural, and linguistic factors, as well as the particular consumer group to which a given consumer belongs. This includes an identifiable group of consumers who are notably susceptible to the impact of a market practice or to the product to which the market practice relates, due to their specific characteristics, such as age or disability, either physical or mental.

The conclusion presents the influence of the Member States on the implementation of the legal provisions of the European Union in the field of unfair commercial practices. It also indicates selected case law of the Court of Justice of the European Union concerning these practices.

Consumers' right to safety is a fundamental aspect of their protection. In the EU, consumer safety can be examined from several perspectives: health, economic, informational, safety, or in terms of pursuing claims. The European Union ensures this at the international level through appropriate legal regulations and the actions of competent entities and institutions. By establishing such regulations as secondary law acts (directives), it requires Member States to adopt them at the national level.

Protection of the economic interests of the consumer is primarily related to ensuring the economic security of buyers of goods and services. Human economic security is defined as the level of income considered basic, i.e., ensuring survival, sustainable development, and personal dignity. Income management depends on the individual needs of the buyer. The income held determines the purchasing possibilities of the average consumer. Therefore, when entering into a consumer contract, the buyer should have full knowledge of its actual terms, including the financial ones. The economic security of

consumers is related, in particular, to the legal protection of their financial interests when entering into contracts. It depends on the elimination of unfair commercial practices used by entrepreneurs, aimed at persuading the consumer to make a financially unattractive purchase decision, which under normal conditions they would not make. It is also possible to pursue financial consumer claims resulting from the purchase of a product that is not in accordance with the contract.

I. Unfair commercial practices – definitional aspect

Unfair commercial practices used by entrepreneurs have a negative impact, in particular, on the economic security of consumers. The basic legal act regulating the issue in the European Union is the Directive of 11 May 2005.² Its overarching objective is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection. This is to be attained by approximating the laws, regulations, and administrative provisions of the Member States relating to unfair commercial practices and those which harm the economic interests of consumers (Art. 1). The Directive defines the concepts of a consumer and a trader. A consumer is meant by any natural person who, in commercial practices covered by this Directive, is acting for purposes unrelated to their trade, business, craft, or profession. A trader is any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to their trade, business, craft, or profession, and any person acting in the name or on behalf of a trader (Art. 2).

² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ EU L149/22, 11/06/2005).

When analysing the types of unfair practices, it should be noted that, as a rule, unfair commercial practices are prohibited in the European Union.

A commercial practice is unfair in two cases. First, it goes against the requirements of professional diligence. Second, it significantly distorts or is likely to significantly distort the economic behaviour regarding the product of a consumer, who encounters it or to whom the product is directed. It may also involve the average member of a specific consumer group if the practice aims at that group. Commercial practices are unfair if they are likely to significantly distort the economic behaviour of an identifiable group of consumers who are especially vulnerable to the practice or the product due to physical or mental disabilities, age, or gullibility, in a way that a trader could reasonably foresee (Art. 5). In particular, misleading or aggressive commercial practices are considered unfair.

Unfair and misleading commercial practices may take the form of an act or a failure to act, omission on behalf of the trader. A practice is considered misleading if it contains false information and is therefore untrue or, in any way, throughout all the circumstances of its presentation, misleads or is likely to mislead the average consumer. A practice is unfair even if the information is true in relation to one or more of the following elements and in any case causes or is likely to cause the consumer to take a transactional decision that would not have been taken otherwise. It misleads as to the existence or nature of the product, the main characteristics of the product, such as its availability, benefits and risks, workmanship, composition, accessories, after-sales services and the complaints procedure, the method and date of production or manufacture, delivery, suitability, use, quantity, specification, geographical or commercial origin, the expected results of its use or the results and essential characteristics of tests or checks carried out on the product. It deceives as to the trader's obligations, the motive for the commercial practice, and the nature of the sales process,

statements or symbols concerning direct or indirect sponsorship or authorisation granted to the trader or the product. It misleads regarding the price, the method of calculating it, or the existence of a special price advantage, a necessary service, part, replacement, or repair.

Moreover, it does so through providing unclear information about the type, characteristics, and rights of the entrepreneur or their representatives, such as their identity and assets, qualifications, status, permits, memberships or affiliations, and industrial and intellectual property rights or awards and distinctions, therefore the buyer may make a purchase decision that would not normally be made. An unfair practice misleads regarding the right to exchange goods or to request a refund.

A commercial practice is also considered misleading if, in a specific case, taking into account all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that would not have been made otherwise. It covers any type of introduction of a product to the market, including comparative advertising, which causes confusion between the products, trademarks, trade names, or other distinguishing marks of the trader and the competitor. In addition, it is connected with the trader's failure to comply with the obligations contained in the codes of conduct to which they have committed. Such an obligation is not based solely on the intention to implement it but is binding and verifiable. The abuse relies upon the fact that the traders indicate that they are bound by the code within their commercial practice (Art. 6).

A misleading omission is a commercial practice where, in a specific case, taking into account all its features and circumstances and the limitations of the medium, it omits essential information needed by the average consumer to make an informed transactional decision. It therefore causes or is likely to cause the average consumer to make a transactional decision that would not have been made otherwise. An omission is also considered misleading when the trader conceals information or provides it in an unclear, unintel-

ligible, ambiguous, or untimely manner. It also fails to disclose the commercial purpose of the practice if it is not clear from the context, where it causes or is likely to cause the average consumer to make a transactional decision that they would not have made otherwise. If the medium of communication used for a given commercial practice imposes limitations of space or time, those limitations and all measures taken by the trader to make the information available to consumers in another way will be taken into account when deciding whether any information has been omitted. If it is not apparent from the context, in the case of an invitation to purchase, information on the characteristics of the product is considered significant, to the extent that it is appropriate to both the medium and the product. Information on the address and identity of the trader and the price, including taxes, is also relevant. Furthermore, adding the arrangements for payment, delivery, or performance and the procedure for handling complaints, if they deviate from the requirements of professional diligence, as well as, in the case of products and transactions involving a right of withdrawal or cancellation, the existence of such a right. Finally, the information requirements laid down in the Community law concerning commercial communication, including advertising and marketing (Art. 7).

The second category of unfair commercial practices in the European Union is aggressive practices. A commercial practice is considered aggressive if, in a specific case, taking into account all its features and circumstances, through harassment, coercion, including the use of physical force, or undue influence, it significantly restricts or is likely to restrict the average consumer's freedom of choice or conduct concerning the product and thus causes or is likely to cause making a transactional decision that would not have been made otherwise. For this purpose, five circumstances of the practice are taken into account. Firstly, time, place, type, and persistence. Secondly, the use of threats or offensive expressions or methods of conduct. Third, the trader's use of a specific misfortune or circumstances so serious that they limit the

consumer's assessment ability, of which the trader is aware, to influence the consumer's decision about the product. Then, onerous or disproportionate non-contractual barriers that the trader uses to prevent the consumers from exercising their contractual rights, including the right to terminate the contract or to switch to another product or trader. The latter circumstance includes threats of taking unlawful action (Art. 8, 9).

2. Case law of the Court of Justice of the European Union in the context of unfair commercial practices

European Union law prohibits unfair, misleading, and aggressive commercial practices that can influence consumers' economic behaviour. The Court of Justice of the European Union interprets EU law to ensure that it is applied in the same way in all Member States. It also resolves legal disputes between EU governments and EU institutions. In certain situations, individuals, companies, or organisations can also bring cases before the Court if they believe their rights have been infringed by EU institutions.³

The Court has developed a wealth of case law in the field of unfair commercial practices. The first category of case law is related to misleading practices, so-called bundled offers. The second concerns unfair practices that are aggressive.

Bundling occurs when the sale of one product (non-leading product) is dependent on the purchase of another product (leader product), which also functions in trade as a separate product. This means that a buyer interested in product A is forced to buy product B as well, whereas product B is also sold on its own, without product A.⁴ Examples of rulings in this area include the following decisions. Member States cannot prohibit a seller from making any combined of-

³ A. B. Capik, *Trybunał Sprawiedliwości Unii Europejskiej*, Kraków 2013, pp. 14–16.

⁴ I. Małobęcki, *Sprzedaż wiązana i pakietowa jako potencjalne naruszenie europejskiego prawa konkurencji – ekonomiczna i prawna analiza problemu*, Warszawa 2013, pp. 8–10.

fers to a consumer (such as a petrol station offering free roadside assistance for three weeks for every tankful of at least 25 litres of fuel). Combined offers cannot be considered unfair commercial practices in all circumstances.⁵

The Court ruled that a bundled offer consisting of a computer equipped with pre-installed software does not constitute an unfair commercial practice. Furthermore, the failure to indicate the price of each of the pre-installed programs does not constitute a misleading commercial practice, because the price of individual programs does not constitute significant information for the consumer.⁶

Another category of Court rulings concerns aggressive commercial practices. In 2012, the Court banned aggressive commercial practices by companies that give the consumer the false impression of winning a certain prize, when in fact they have to pay to receive the so-called prize. This is the case, for example, with advertisements that make the consumer believe that they have won a cruise, when in fact, to receive the prize, they have to pay for insurance and an additional cabin fee, as well as cover food and drink costs and port fees during the cruise.⁷

Statutory health insurance funds may also be liable for unfair commercial practices. For example, a practice is misleading if a health insurance fund informs its members that joining another statutory health insurance fund will entail financial disadvantages for them.⁸

Finally, the cost of calling the after-sales service telephone number must not exceed the cost of a standard call; otherwise, it would constitute an unfair commercial practice.⁹

⁵ Judgment of the Court of Justice of the European Union of 23 April 2009, VTB-VAB and Galatea, C-261/07 and C-299/07.

⁶ Judgment of the Court of Justice of the European Union of 7 September 2016, Blanquart, C-310/15.

⁷ Judgment of the European Court of the European Union of 18 October 2012, Purely Creative, C-428/11.

⁸ Judgment of the European Court of the European Union of 3 October 2013, Centrale zur Beginning unlauterer Wettbewerbs, C-59/12.

⁹ Judgment of the European Court of the European Union of 2 March 2017, Centrale zur Beginning unlauterer Wettbewerbs Frankfurt am Main, C-568/15.

Conclusion

The European Union leaves it up to Member States to provide consumers with adequate and effective means to combat unfair commercial practices to comply with the provisions of Council Directive 2005/29. These include legal provisions under which persons or organisations recognised under national law as having a legitimate interest in combating unfair commercial practices, including competitors, have a number of rights. They can initiate legal proceedings concerning such unfair commercial practices. They can also challenge such unfair commercial practices before an administrative body competent to hear complaints or to initiate appropriate legal proceedings (Art. 11).

Member States shall allocate certain powers to courts or administrative authorities to deal with cases of unfair commercial practices in civil or administrative proceedings. This may include requesting the trader to provide evidence of the truth of his statements relating to the commercial practice if, taking into account the legitimate interests of the trader and other participants in the proceedings, such a request appears appropriate in the circumstances of the case. It may also be related to the recognition of allegations of facts as untrue if the evidence requested is not provided or if it is considered by the court or administrative authority to be insufficient (Art. 12).

Member States are required to establish penalties for breaches of national provisions adopted in the implementation of the Directive on unfair business-to-consumer commercial practices in the internal market. They are also required to take all necessary measures to ensure that they are enforced. These penalties must be effective, proportionate, and dissuasive (Art. 13).

If the Member States do not apply EU law on unfair commercial practices properly, the Court of Justice of the European Union interprets the EU law. It also adjudicates legal disputes between EU governments and EU institutions, as well as cases of individuals, i.e. consumers or

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consumer organizations, who believe that EU institutions have violated their rights.

Based on the analyses conducted in the article, the research hypotheses were positively verified. It was confirmed that, in order to ensure the effectiveness of counteracting unfair market practices in the European Union, a uniform interpretation of EU law by the Court of Justice of the European Union is necessary. Without such interpretation, there would be no effective control over abuses related to the sale of goods and services within the EU single market. Unfair commercial practices negatively influence consumers' economic behavior and purchasing decisions, which is why combating them at the EU level is so important.

Today, consumer protection against unfair commercial practices is primarily associated with ensuring greater transparency and safety during online shopping, as well as strengthening consumers' positions in the process of ecological transformation. The "Omnibus" Directive was intended to serve this purpose – aiming to reinforce and modernize consumer protection, counteract unfair business practices, and ensure greater transparency and safety in online transactions. From that point onward, sellers were required to display not only the current promotional price, but also the lowest price that was in effect during the 30 days preceding the discount. Furthermore, businesses must inform consumers if the price has been personalized through automated decision-making. Service providers must verify reviews published on their websites to ensure their authenticity. It is also prohibited to post fake product reviews. Businesses are required to provide a telephone number on their website through which consumers can contact them. Consumers must also be informed about the use of personal data and whether the seller qualifies as a business entity.¹⁰

¹⁰ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC,

Strengthening consumer rights in the context of ecological transformation and protection against unfair commercial practices was further supported by Directive (EU) 2024/825 of the European Parliament and the Council, which addresses the issue of "greenwashing." The directive introduces regulations prohibiting misleading environmental claims, ensuring greater transparency and credibility of product-related environmental information. Its goal is to enable consumers to make more informed and sustainable purchasing choices. Consumers are granted better access to information about product durability and repairability, which facilitates more sustainable decisions.¹¹

The directive emphasizes transparency and the verifiability of information provided to consumers so that they can base their decisions on reliable data. By providing better information and protecting against unfair practices, the directive supports sustainable consumption and contributes to ecological transformation. Additionally, the directive introduces definitions of key terms, such as "environmental claim," and expands the list of unfair commercial practices that are explicitly prohibited.

In conclusion, the sense of security of the EU consumer is influenced by many factors. These include, first and foremost, consumer awareness, knowledge of one's rights, and knowledge of how to pursue claims. There is no doubt that counteracting unfair commercial practices is of great importance in guaranteeing consumers the safe use of the European Union market for goods and services.

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 (O.J. L 328, 18.12.2019).

¹¹ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information (O.J. L, 2024/825, 6.3.2024).

Abstrakt**Ochrona konsumenta w Unii Europejskiej oraz nieuczciwe praktyki rynkowe**

Słowa kluczowe: konsument; nieuczciwe praktyki rynkowe; Trybunał Sprawiedliwości Unii Europejskiej; Unia Europejska

Artykuł ma na celu analizę wybranych aspektów ochrony konsumentów w Unii Europejskiej w zakresie uczciwych praktyk handlowych. Rozważania koncentrują się na ukazaniu przykładów nieuczciwych praktyk rynkowych na podstawie dyrektywy 2005/29/WE Parlamentu Europejskiego i Rady z 11 maja 2005 r. Dokonano również syntezy nieuczciwych praktyk rynkowych w Unii Europejskiej. Przedstawiono wybrane orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w tym zakresie. Na podstawie przeprowadzonej analizy stwierdzono, że gdy państwa członkowskie nie stosują w odpowiedni sposób prawa UE w zakresie nieuczciwych praktyk handlowych, Trybunał Sprawiedliwości Unii Europejskiej dokonuje wykładni prawa unijnego. Rozstrzyga też spory prawne między rządami krajów Unii a jej instytucjami, jak również sprawy osób fizycznych, tj. konsumentów, lub organizacji konsumenckich, które uważają, że ich prawa zostały naruszone przez instytucje UE.

Bibliography**Literature**

Brander H. E., Ulmer P., *Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission*, "Common Market Law Review", No. 28.

Capik A. B., *Trybunał Sprawiedliwości Unii Europejskiej*, Kraków 2013.

Howarth D., *Internal Policies: The Commission Defends the EU Consumer*, "The Autor(s) Journal Compilation" 2008, No. 46.

Małobęcki I., *Sprzedaż wiązana i pakietowa jako potencjalne naruszenie europejskiego prawa konkurencji – ekonomiczna i prawna analiza problemu*, Warszawa 2013.

Nieuczciwe praktyki rynkowe. Przewodnik, Warszawa 2009.

Human Development Report 1994, United Nations Development Programme (UNDP), New York–Oxford 1994.

Żak K., *Kodeks dobrych praktyk rynkowych jako narzędzie budowania relacji przedsiębiorstwa z interesariuszami*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2016, No. 263.

Legal Acts

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (O.J. EU L 171, 7.07.1999).

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (O.J. EU L 149/22, 11.6.2005). Consolidated version of the Treaty on the Functioning of the European Union (O.J. EU C 326/49, 26.10.2012). Directive (EU) 2019/2161 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 (O.J. L 328, 18.12.2019).

Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information (O.J. L 2024/825, 6.3.2024).

Case Law

Judgment of the Court of Justice of the European Union of 23 April 2009, VTB-VAB i Galatea, C-261/07 i C-299/07.

Judgment of the European Court of the European Union of 18 October 2012, Purely Creative, C-428/11.

Judgment of the European Court of the European Union of 3 October 2013, Zentrale zur Bekämpfung unlauteren Wettbewerbs, C-59/12.

Judgment of the Court of Justice of the European Union of 7 September 2016, Blanquart, C-310/15.

Judgment of the European Court of the European Union of 2 March 2017, Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main, C-568/15.