Better enforcement and modernisation Directive (EU) 2019/2161

1st Transposition Workshop

13 February 2020

Unit E2 "Consumer & Marketing Law"
DG Justice and Consumers
European Commission

Overview of the Directive

Directives amended by Directive (EU) 2019/2161



Unfair commercial practices directive (UCPD) 2005/29/EC: prohibits misleading and aggressive commercial practices towards the consumers, contains a "blacklist" of unfair practices



Consumer Rights Directive (CRD) 2011/83/EU: harmonises pre-contractual information obligations and the right of withdrawal in off-premises and distance contracts (in particular on-line)



Unfair Contract Terms Directive (UCTD) 93/13/EEC: prohibits unfair contractual terms that have not been individually negotiated, contains an "indicative list" of unfair contractual terms



Price Indication Directive (PID) 98/6/EC: requires to indicate the selling price and the unit price of goods (per kg, litre, etc.)

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Main provisions of Directive(EU) 2019/2161



Digital

- Online marketplaces
- Online search results
- Consumer reviews
- Ticket resale
- 'Free' digital services



Better enforcement

- Penalties
- Individual remedies



Other

- Dual quality
- Price reductions
- Derogations re.: doorstep sales and commercial excursions

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Dual quality - Introduction

Dual quality – main EU activities

- Amendment to Article 6 of the Unfair Commercial Practices Directive;
- Several projects of the Joint Research Centre (JRC):
  - Common testing methodology, April 2018;
  - EU-wide testing campaign of food products, results presented in June 2019;
  - Studies on the economic rationale of product differentiation and its impact on consumers' purchasing decisions (pending).

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Dual quality – new projects

- New European Parliament Pilot Project to support consumer organisations and strengthen their product testing capacities.
- New European Parliament Preparatory Action to extend the dual quality research to certain categories of non-foods and to examine the feasibility of creating a permanent observatory.

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Dual quality – legal issues

Dual quality – legal provision

✓ ***Art. 6(2)(c)*** *of UCPD &* ***recital 53*** *of 'Omnibus' Directive*

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

c) any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors.

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Points for Discussion: Scope

- Scope of the term "*marketing*" – applicability to various actors in the product supply chain
- Scope of the term "*goods*" – not defined in UCPD; the definition in the (new) Sales of Goods Directive (EU) 2019/771 applicable: tangible movable items + water, gas and electricity in limited volume or set quantity
- Meaning of "marketing as being *identical*" – refers to the perception by an average consumer
- Meaning of "*…identical to a good marketed in other Member States…*" - includes cases where the good is marketed as being identical to a good in just one other Member State

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Points for discussion: 'Significant' difference

- "significance" in the context of the UCPD = element of the case-by-case assessment of whether the practice is misleading and has negative impact on consumers, namely:
  - assessment whether the dual quality marketing practice has concealed a difference, which is 'significant' enough to lead the average consumer to a different transactional decision if the difference was made known to the consumer
- Transactional decision test in the application of the new provision –
  - any comparable Member States experience from the application of the UCPD in other areas, e.g. misleading environmental claims?

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Points for discussion: justified differences (I)

- Non-exhaustive indicative list of factors that can justify the differentiation of a good (mentioned in recital 53):
  - National legal requirements;
  - Availability/seasonality of ingredients;
  - Voluntary strategies for healthier food.
- Any other factors that could be relevant in your national context?
- Proving that the difference is justified (e.g. due to availability of raw materials) – Article 12 UCPD on substantiation of claims enables national courts/authorities to:
  - require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice, and
  - consider factual claims as inaccurate if no evidence/ insufficient evidence

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Points for discussion: justified differences (II)

- Information about justified differences – alternatives to information on label are preferable (recital 53):
  - What methods should/could traders use?

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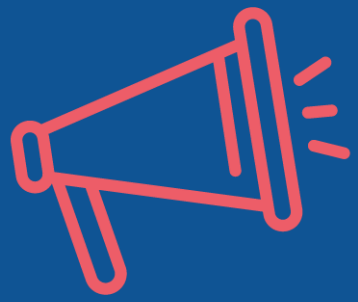
Review clause

✓ ***Art. 6** of 'Omnibus' Directive*

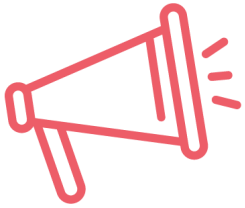
By 28 May 2024, the Commission shall submit a report on the application of this Directive to the European Parliament and to the Council. That report shall include in particular an assessment of the provisions of this Directive regarding:

(b) cases of goods marketed as identical but having significantly different composition or characteristics, including whether those cases should be subject to more stringent requirements, including prohibition in Annex I to Directive 2005/29/EC and whether more detailed provisions on information about the differentiation of goods are necessary.

That report shall be accompanied, where necessary, by a legislative proposal.



Price reduction announcements



✓ ***Art. 6a*** *Price Indication Directive*

1. Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.

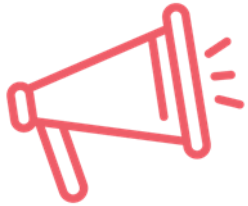
2. The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction.

3. Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly.

4. Where the product has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2.

5. Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction.

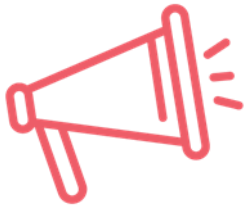
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Price Indication Directive

- ✓ Objective of the PID: better consumer information and price comparison by:
  - Indication of the selling price;
  - Indication of the unit price (price per unit of measurement).
- ✓ Limited scope: PID applies only to 'goods'; it does not apply to services (incl. digital services) and to digital content;
- PID applies to all distribution channels: face2face, online…
- PID applies also to any advertisements which mention the selling price of products covered by the Directive.

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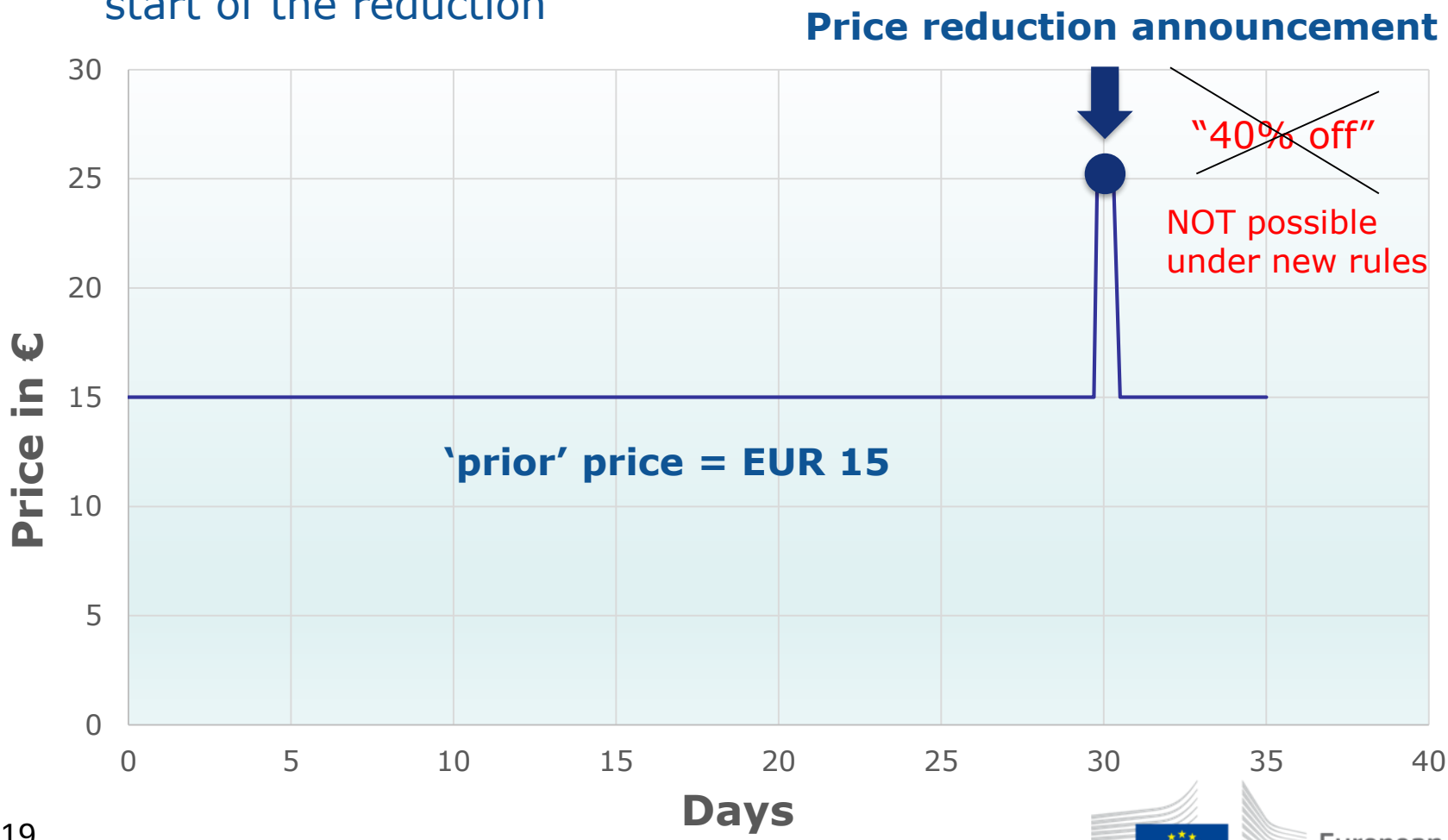


New Article 6a on price reductions

- Purpose: protect consumers against misleading price reduction claims using artificially inflated price as reference price.
- Does not affect the seller's freedom to vary the price (including immediately before the price reduction).
- Two requirements:
  - Information: Indicate the 'prior' price
  - Substantive: the "prior" price is the lowest price in the past 30 days
- "Price" = "selling price" used in other PID provisions (not "unit price")

General rule on price reductions

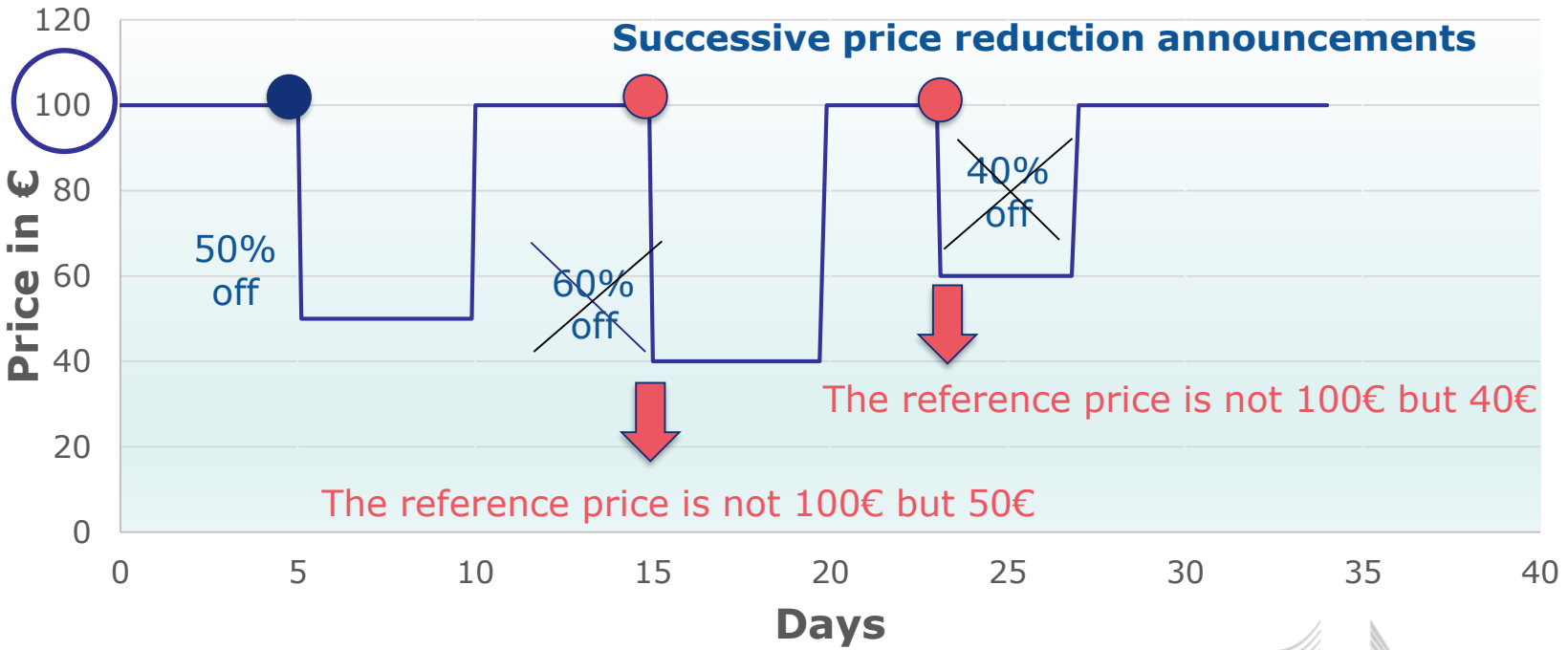
- Show the 'prior' price = the 'lowest' of, possibly, different prices applied in the past 30 days. To be identified once before the start of the reduction



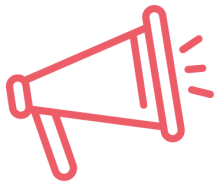
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‘Prior’ price in successive price reductions

- In case of successive price reduction campaigns, the ‘prior’ price can be the lowest reduced price within the previous sales campaign in the past 30 days



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Points for discussion (I)

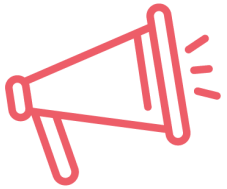
Duration of the price reduction

- The provision does not affect the duration of the price reduction campaigns
- Fairness of extended price reductions remains to be assessed on a case-by-case basis under UCPD.

Price comparisons

- The provision was not intended to address price comparisons, e.g. comparison of the price with: (1) the price for the same good charged by other traders, (2) a 'recommended' resale price (as defined) or (3) other reference price (as defined)
- Such price comparisons remain subject to UCPD

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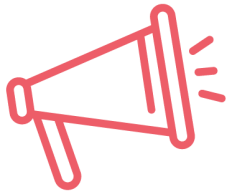


Points for discussion (II)

General advertising communications

- The provision does not apply to general communications (including in advertising material - leaflets, brochures, promotional e-mails) for all trader's goods or ranges/categories of traders' goods without indicating a specific (measureable) price reduction announcement
  - (e.g. "best/lowest prices", "promotion", "launching price" or "sales")
- What about general price reduction announcements indicating a measurable price reduction?
  - (e.g. "20% off on everything today" or "20% off on all Christmas decorations today")

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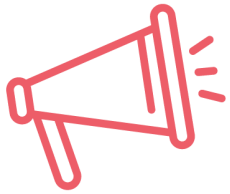


Points for discussion (III)

Conditional promotional offers

- The provision does not apply to offers whereby the purchase of a good entitles the consumer to an additional free good (e.g. “1+1 free/gratis”, “2 for the price of 1”)
- Similarly, it does not apply to conditional offers of an additional good at a discounted price (e.g. “2nd at 50% off”)
- Such conditional offers remain subject to UCPD

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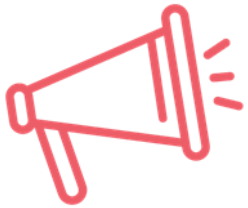


Points for discussion (IV)

Discount cards/ vouchers and loyalty programmes

- The provision does not apply to general discount cards/ vouchers which give consumers the right to a price discount to trader's all goods or ranges/categories of traders' goods;
- Similarly, it does not apply to loyalty programmes whereby consumers receive, upon purchase of a good or goods, benefits (credits) in respect of their future purchases of trader's all goods or ranges/categories of traders' goods

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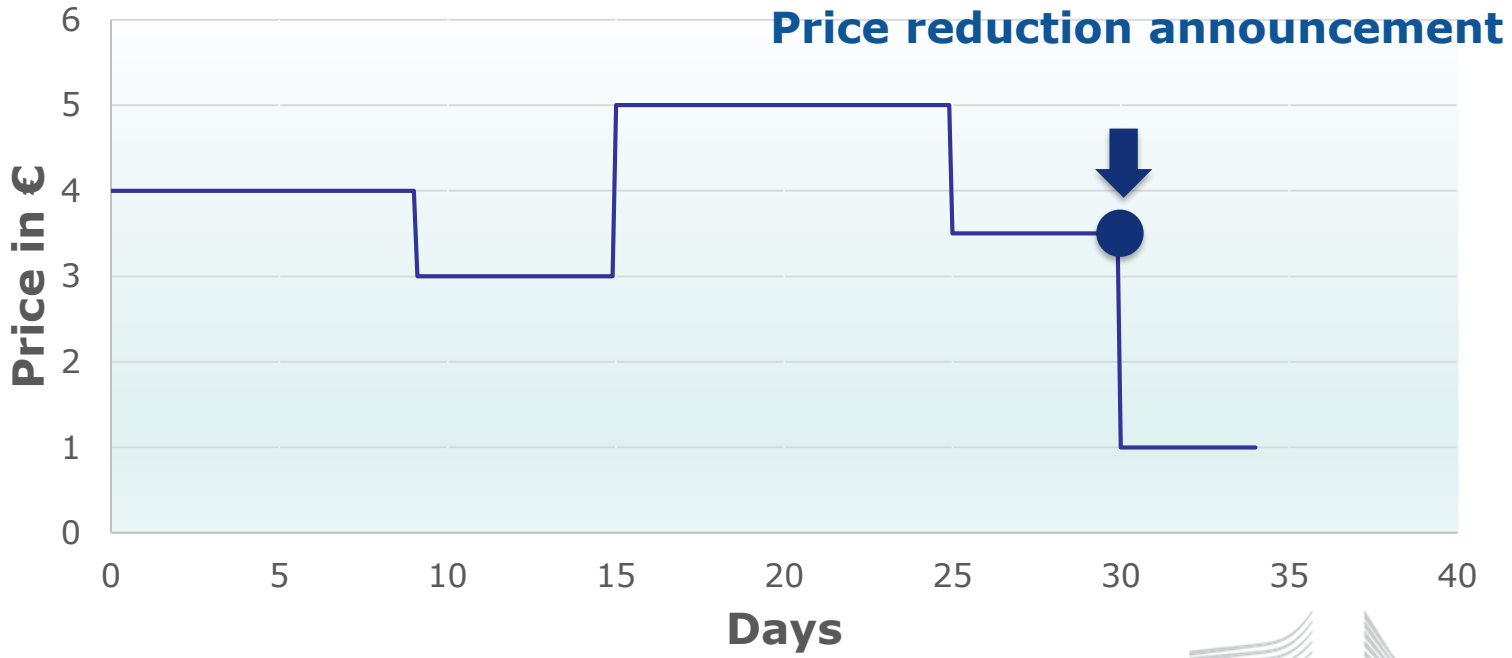
Regulatory choices (options)

- Three regulatory choices (options) available to Member States to provide for lighter rules regarding:
  - ✓ 'Perishable' goods
  - ✓ Progressive price reduction campaigns
  - ✓ Goods ('new arrivals') that the seller has been selling for less than 30 days

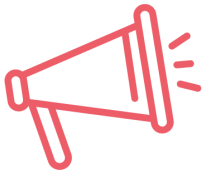
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Option 1 – perishable goods

- *"3. Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly."*
- Objective of the option – allow for a lighter regime because perishable goods may need to be discounted/sold out more often due to approaching expiration deadlines.



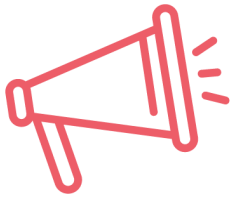
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Perishable goods – discussion points

- Goods "liable to deteriorate or expire rapidly" = CRD concept (goods exempted from the right of withdrawal under Art. 16(d)).
- Do Member States intend using this option?
- If so, what could be the possible "different rules" that Member States can adopt for this category of goods?
  i. Full exemption from the requirement to indicate the 'prior' price?
  ii. Allow using as 'prior price' the last price immediately before the reduction?
  iii. Other?

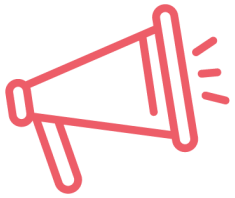
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Option 2 – 'new arrivals' goods

- *'4. Where the good has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2'*
- This option was meant to enable Member States to allow price reduction announcements also in respect of goods ('new arrivals') that the seller has been selling for less than 30 days before announcing the price reduction

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‘New arrivals’ goods – discussion points

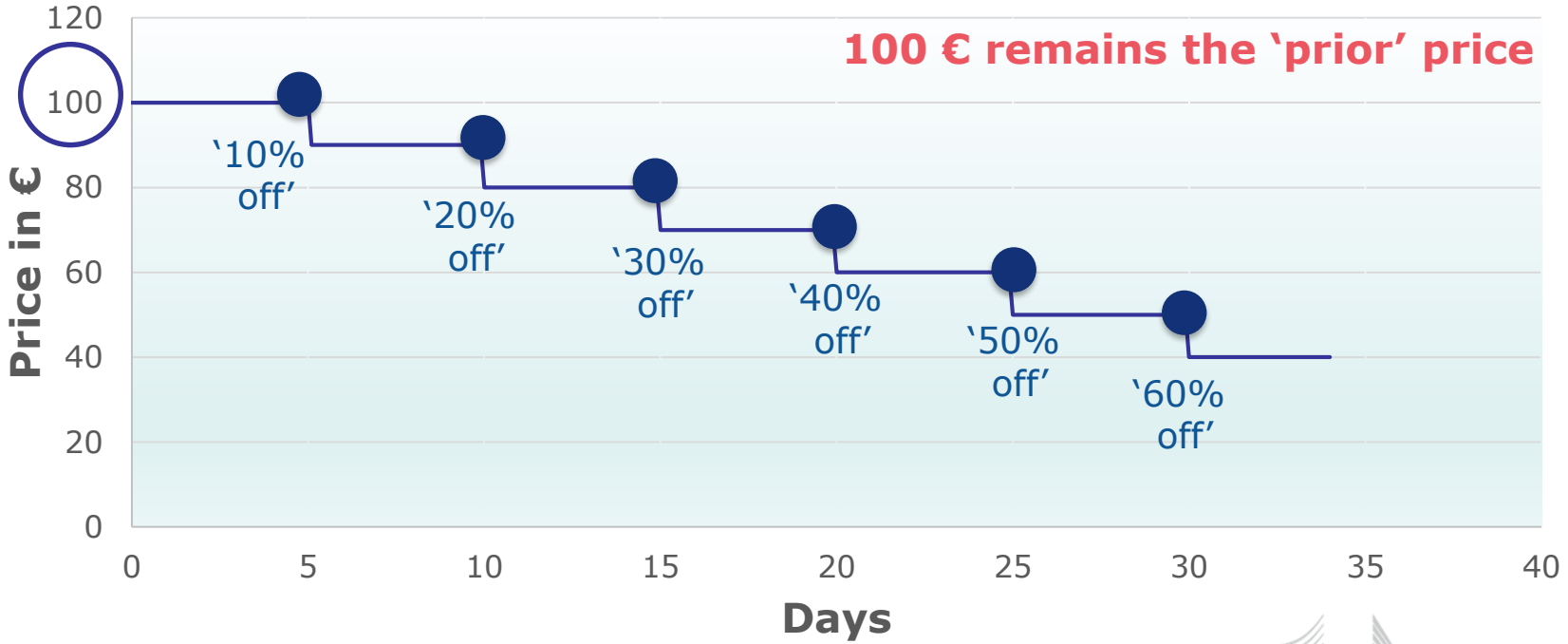
- Do Member States intend using this option?
- If so, what could be the “shorter period”:
  - Fixed period, eg. 20/10/5 days (i.e. the seller would have to sell the ‘new arrivals’ goods at full price for at least 20/10/5 days before announcing the price reduction)
  - Allowing the seller to choose a shorter period of time for establishing the ‘prior’ price, i.e. without fixing a specific period in law (fairness of such announcements to be assessed on case-by-case basis under UCPD)

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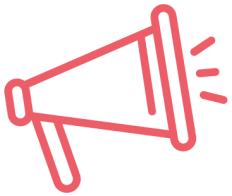
Option 3 – progressive price reduction

- '5. *Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction.'*

- Objective of the option: allow sellers to continue showing, as 'prior price', the **original** price before the first price reduction announcement when they progressively reduce the price during the campaign (i.e. without interruptions)



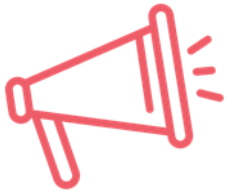
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Progressive price reductions – discussion points

- Do Member States intend to use this regulatory option?

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Relation to the new CRD rule on Personalised pricing

- *Art. 6(1) (ea) of CRD:* consumers should be informed if the price was personalised on the basis of automated decision-making.
- Information that price is personalised pursuant to CRD is not *per se* a price reduction announcement .
- But if the personalised price also involves price reduction announcement – both PID and CRD requirements applicable.
- What is the '*prior*' price in this case – the lowest personalised price for the given consumer in the past 30 days or the lowest price available to the general public?

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Penalties

Penalties

Articles in all the 4 amended directives:

UCTD	PID	UCPD	CRD
Art. 8b	Art. 8	Art. 13	Art. 24
Art. 1	Art. 2 (2)	Art. 3(6)	Art. 4(13)
‘Omnibus’ Directive			

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Penalties – general clause

- Similar Article on penalties in UCPD, CRD, UCTD and PID, with some differences.

- Whilst in UCPD, CRD and PID, the new Article builds on the existing general requirement to provide for penalties, the Article on penalties is a novelty for UCTD.

1st paragraph – general requirement to provide for penalties. No substantive change compared to the current UCPD, CRD and PID rule:

"1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."

Penalties - criteria

2nd paragraph – indicative non-exhaustive criteria – identical in all 4 directives (UCPD, CRD, UCTD, PID):

"2. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

a) the nature, gravity, scale and duration of the infringement;
b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
c) any previous infringements by the trader;
d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;
f) any other aggravating or mitigating factors applicable to the circumstances of the case".

Penalties – maximum fine (I)

- Rule on (minimum) harmonization of the maximum fine for a specific category of major cross-border infringements.
- Only UCPD, CRD and UCTD (not in PID)

3rd paragraph

"Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being **at least 4 % of the trader's annual turnover** in the Member State or Member States concerned."

Penalties – maximum fine (II)

- Alternative maximum fine when the turnover is not available

- Also only UCPD, CRD and UCTD

4th paragraph

"For cases where a fine is to be imposed in accordance with paragraph 3, but information on the trader's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be **at least EUR 2 million**."

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Penalties – transparency of national rules

- Final transparency paragraph – same in all 4 Directives – builds on the transparency requirement in current Article 24(2) of the CRD.

"Member States shall, by 28 November 2021, notify the Commission of the rules and measures referred to in paragraph 1 and shall notify it, without delay, of any subsequent amendment affecting them."

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Penalties – regulatory choices - UCTD

- General regulatory choice to apply penalties only to infringements of national "black lists" of unfair contract terms or to a continued use of unfair contract terms that have been found unfair by national courts or administrative bodies.

"2. Member States may restrict such penalties to situations where the contractual terms are expressly defined as unfair in all circumstances in national law or where a seller or supplier continues to use contractual terms that have been found to be unfair in a final decision taken in accordance with Article 7(2)."

Penalties – regulatory choices - UCPD

- Regulatory choice only regarding infringements subject to the new rule on the maximum fine (4 % of turnover or EUR 2 million).

- It allows Member States not to apply the harmonized fine to infringements breaching, for the first time, solely Article 5 of the UCPD (practices contrary to the requirements of professional diligence).

"3. […] without prejudice to that Regulation, Member States may, for national constitutional reasons, restrict the imposition of fines to:

(a) infringements of Articles 6, 7, 8, 9 and of Annex I to this Directive; and

(b) a trader's continued use of a commercial practice that has been found to be unfair by the competent national authority or court, when that commercial practice is not an infringement referred to in point (a)".

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Points for discussion (I)

- Relation to the CPC Regulation (EU) 2017/2394.
- Member States have discretion as regards the national procedures for the imposition of penalties/fines – as long as the possibility of imposing the penalties/fines is ensured.

Maximum amount of fines

- Member States can go beyond the 4% of turnover/EUR 2 million maximum fine – regarding both the amount and the reference turnover

- *"…at least 4% of the trader's annual turnover in the Member State or Member States concerned"*

- Trader's annual turnover

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Points for discussion (II)

- When taking enforcement measures in coordinated actions (Art 21 of Regulation (EU) 2017/2394), are Member States also obliged to provide for fines for the breaches of:

  - Article 27 of CRD - demanding consideration from the consumer in case of inertia selling prohibited by UCPD,
  - Article 21 of CRD - demanding to pay more than the 'basic rate' for post-contract telephone queries
  - CRD provisions (e.g. Article 6(6), Article 18(2), Article 22) that include specific remedies when trader breaches their requirements?

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AOB – next meetings – dates + provisional topics (to be discussed)

Next (2nd) Workshop: 3 April (Friday)

Topics – *Digital block:* search results ranking, marketplace transparency, consumer reviews, ticket resale; scope provisions (incl. 'Free' services), information requirements (incl. personalised prices), right of withdrawal (in relation to data handling and digital content/services)

3rd Workshop – May (tbc)

Topics: UCPD remedies*, options on doorstep selling & commercial excursions …*

4th Workshop – end June?

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