



The Impact of the Unfair Commercial Practices Directive (2005/29/EC) on Contract Law

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Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute

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Department of Law

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This Thesis has benefited from language correction

SUMMARY

This thesis examines the relationship between the law on unfair commercial practices and consumer contract law. The thesis develops the claim that Directive 2005/29/EC, on unfair commercial practices (UCPD) has had a strong impact on the content of consumer contract law, despite the declaration concerning the independence between both branches of law contained in Article 3(2) UCPD.

In order to substantiate this claim, the thesis examines the implications for consumer contract law of the main components of the regulatory regime laid down by the UCPD, namely, (1) the notion of average consumer, (2) the duty to trade fairly, (3) the duty of information and (4) the remedies.

By looking both at the theoretical underpinnings and at the actual operation of this regulatory regime, the thesis casts light on the way in which the UCPD has shaped consumer contract law. The thesis further shows that this is an ongoing phenomenon whose ramifications may be far-reaching, for it implies that the UCPD is powerfully fuelling the Europeanization of contract law.

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CHAPTER I - INTRODUCTION

The main hypothesis and problem of the thesis

Directive 2005/29/EC on unfair commercial practices¹ (“UCPD” or “Directive”) is the most powerful and complete instrument that the European Union (“EU” or “European Union”) has adopted, so far, in the area of consumer protection. Through its complex and effective mechanism for protection from all types of unfair commercial practices, the Directive provides an extensive and advanced mechanism for consumer protection. Its broad scope of application was confirmed by the case law of the Court of Justice of the European Union (“Court” or “ECJ”). The Court accordingly pointed out that the Directive’s rules apply to all kinds of commercial practices which in any manner may hinder economic interest of consumers.²

The maximum harmonisation character of the Directive further adds to its importance and effects. The principal objective of the UCPD is twofold: firstly, to set up a unified and coherent European legal framework for fair trading, through the abolishment of all obstacles for cross border trade among Member States; secondly, to secure a sufficiently high and common level of consumer protection throughout the European Union.³

What has remained unclear and ambiguous after the adoption of the Directive is the relationship between the law on unfair commercial practices, on the one side, and contract law, on the other side. This includes the existing body of European contract

¹ 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 (‘Unfair Commercial Practices Directive’), OJ L 149/22, 11.06.2005.

² Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2010] ECR I-00217; Case C-522/08 *Telekomunikacja Polska* [2010] ECR I-2079; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909.

³ Article 1 of the UCPD as confirmed by Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 51; Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 44.

law, i.e. the areas of contract law that have been subject to the ongoing process of Europeanisation, which is particularly noticeable in the area of consumer contract law, but also the national contract laws of the different Member States. The relationship between the law on unfair commercial practices and contract law has already attracted the attention from legal scholarship,⁴ from the case law of the ECJ⁵ and from high level officials responsible for consumer policy.⁶ However, the question has not been squarely addressed to date in a systematic and comprehensive manner. This is the gap that this thesis seeks to fill in.

Thus, the main purpose of the thesis is to clarify the relationship between the law on unfair commercial practices and contract law, which has rightly been described as “a legally tricky area”.⁷ Such a study is not only of a theoretical significance, but it is also a topic of high practical importance, since in practice the rules of these two areas of law will often apply to the same factual situations, hence the need to reflect on how they are correlated and how they affect each other.

The starting point of this thesis is the hypothesis that there is a connection and a dynamic interrelationship between the law on unfair commercial practices and contract law, despite the provision of the UCPD according to which its provisions are “without prejudice to contract law and, in particular, to the rules on the validity,

⁴ H Collins, ‘EC Regulation on Unfair commercial practices’ in H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 37; S Whittaker, ‘The Relationship of the Unfair Commercial Practices to European and National Contract Laws’ in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 141; J Stuyck, E Terryn and T Van Dyck, ‘Confidence through fairness? The new Directive on unfair business-to-consumer on commercial practices in the Internal Market’ (2006) 43 *Common Market Law Review* 107, 142; HW Micklitz, ‘Unfair Commercial Practices and European Private law’ in C Twigg-Flesner (ed) *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010), 231-232

⁵ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000

⁶ A speech by Viviane Reding, Vice-President of the European Commission and European Commissioner for Justice, Fundamental Rights and Citizenship at the European Consumer Summit 2013 in Brussels ‘Towards a more coherent enforcement of EU consumer rules’ (19 Mar 2013) http://europa.eu/rapid/press-release_SPEECH-13-237_en.htm

⁷ U Bernitz, ‘Scope, Ambitions and Relation to Unfair Competition Law’ in S Weatherill and U Bernitz U (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 44

formation or effect of a contract”.⁸ More precisely, this thesis will attempt to show that the law on unfair commercial practices has had a strong impact on consumer contract law.

Moreover, I presume that the UCPD is used as a powerful tool aimed at fostering and strengthening the process of Europeanisation of contract law. Herein, I understand Europeanisation of contract law as a phenomenon that includes: first, the development of common contract rules at the European level; secondly, the penetration of EU common rules into traditional national contract law concepts; and, finally, the very process of harmonization of the Member States’ national laws.⁹

The main research question

With the goal of clarifying and understanding the relationship between these two areas of law, the main research question addressed in this thesis is the following:

What is the impact of the law on unfair commercial practices as defined by Directive 2005/29/EC on unfair commercial practices on consumer contract law?

In order to provide an answer to this question, it is useful to break it down into several sub-questions:

What are the main points of interlink between the law on unfair commercial practices and contract law?

How do the two areas of law correlate through these main points of interlink?

What lies behind the interaction of these two areas, i.e. has their correlation been intentional despite the formal separation?

What are the effects and consequences of this interaction, in particular from the perspective of the Europeanisation of contract law?

⁸ See Article 3(2) of the UCPD

⁹ L Miller, *The Emergence of EU Contract Law: Exploring Europeanisation* (Oxford University Press 2011), 4-14

Is there any particular role of the innovative legal terminology for understanding their mutual relationship?

Is it possible to draw any far-reaching conclusions in relation to European private law on the basis of the examined interplay?

Structure of the thesis

In order to verify my main research hypothesis and to provide an answer to each of the research questions listed above, the thesis is divided into six chapters: introductory chapter, four main chapters and a concluding chapter, which are all further divided into sections. The six chapters include:

- 1) *Introduction*
- 2) *The average consumer*
- 3) *The duty to trade fairly*
- 4) *The duty of information*
- 5) *Remedies*
- 6) *Conclusions*

Each of the four main chapters of the thesis is dedicated to the analysis of one of four fundamental elements of the Directive. These four concepts are the four cross-points where the interlink and correlation between the law of unfair commercial practices and contract law is the most intense and relevant, as my research will show. They basically cover the entire system of protection of consumers provided by the UCPD. This is why, eventually, the examination of these four major interlink points between the law on unfair commercial practices and contract law will make it possible to draw conclusions and to clarify, at least to some extent, their complex mutual interlink.

The *average consumer* is, according to the Directive, the main benchmark for the assessment of the fairness of a commercial practice, followed by the standard of vulnerable consumer as a subsidiary benchmark. The average consumer also

represents a model of expected behaviour for the consumer that deserves to be protected by EU Consumer law. Despite the need for adoption of a related standard in relation to information and transparency requirements, such a standard did not exist in consumer contract law. In this Chapter of the thesis, I demonstrate that there is a noticeable tendency to consider that the standard of average consumer of the UCPD is also applicable in the context of consumer contract law.

The *duty to trade fairly* has been established by the Directive as a general obligation of all traders while acting at the market, i.e., one that applies to all their commercial practices whenever they may hinder consumers' economic interests. Such a common and general duty, which would always regulate a trader's behaviour, did not exist in consumer contract law. Due to its universal and broad character and the tight connection between a commercial practice and a contract, I argue in this Chapter that the duty to trade fairly now also applies and regulates all phases of any consumer contract.

The *duty of information* is for the first time established through the provisions on misleading omissions of the Directive as a universal pre-contractual duty of traders in EU consumer law. Duty of information, as the main regulatory instrument of EU consumer law, was previously regulated through a fragmented, partial and incoherent European legislation, dispersed in a dozen of directives, characterized by a phenomenon of 'information overload'. In this Chapter of the thesis, I demonstrate that the introduction of the universal duty of information by the UCPD, has resolved, to a certain extent, these shortcomings of contract law instruments. Moreover, I show that the Directive has also provided a European meaning to the notion of invitation to purchase, a *par excellence* contract law concept.

Remedies represents an area for which the UCPD provides very scarce rules, leaving the procedural part of the law of unfair commercial practices to be regulated primarily by the national laws of Member States. Accordingly, an individual consumer, a victim

of unfair commercial practice, has to rely on traditional contract law rules. What I show in this Chapter is the lack of capacity of the existing contract law concept to provide an adequate response to the breach of the rules of the Directive has led to their modification or adoption of new contract law remedies. In addition to this, I point out to the particularly dynamic relationship with the existing remedies developed by European contract law that may be used in certain cases as a convenient and easy means by an individual consumer for the purpose of remedying the breach of the UCPD. Contrary to this, the provisions of the UCPD provide an additional level of protection to consumer rights established through contract law instruments.

Setting of the scene: the background of the problem

Two branches of EU Consumer Law

The system of EU consumer law consists of two large subcategories: the law on unfair commercial practices and consumer contract law.¹⁰ For the purposes of this thesis, I understand the law on unfair commercial practices exclusively as the set of rules defined by the UCPD that regulate exclusively business-to-consumer relations. Equally, I understand consumer contract law as comprising “any laws which govern the relative rights, duties or liabilities of the parties to a consumer contract, whatever the formal classification as a matter of national law”.¹¹ In the thesis, I examine the relationship between these two areas of law as understood above, so that anything else is beyond its scope.

The UCPD represents the main source of the law on unfair commercial practices; it provides a complete and thorough regulation of fair trading in business-to-consumer relations.¹² Accordingly, there is a rather high level of harmonised rules on unfair commercial practices on the European level contained in one consistent piece of legislation. The UCPD materially affected national laws on unfair commercial

¹⁰ Commission ‘Follow-up Communication to the Green Paper on EU Consumer Protection’ COM (2002) 289 final, 14

¹¹ S Whittaker (n 4) 148

¹² T Wilhelmsson, ‘Scope of the Directive’ in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 49

practices, having replaced previously existing diverse national regimes with only one set of rules, based on the principle of maximum harmonisation.¹³ Therefore, the remaining, non-harmonised national provisions on unfair commercial practices, in particular those of substantive character, fall outside the scope of the thesis.¹⁴ Furthermore, it is true that the law on unfair commercial practices is also embodied in other pieces of legislation, but their significance is, in general, minor and therefore irrelevant for thesis.¹⁵

Contrary to highly harmonised law on unfair commercial practices, only a small part of contract law has been affected, so far, by the process of Europeanisation, whereas its significantly larger part is still contained in the national laws. The area of contract law affected by far the most by the process of Europeanisation is the field of consumer contract law.¹⁶ However, despite an increasing pace of Europeanisation, a significant part of consumer contract law is still regulated by the rules defined by national contract laws of Member States. Furthermore, unlike in the case of the rules on unfair commercial practices, the rules on European consumer contract law are rather fragmented and dispersed throughout several directives.¹⁷

¹³ Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee, COM (2013) 139 final, 4

¹⁴ Herein, I primarily think to fields of substantive law not covered by maximum harmonisation, as it is the case with financial services and immovable property, see Article 3(9) of the UCPD (n 1); procedural rules of national laws will be touched upon, since that is the area which was only partially regulated, so national provisions fill in the missing gaps, see Chapter V on Remedies of the thesis

¹⁵ e.g. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) OJ L 376/21 of 27.04.2006. OJ L 271/16, 09/10/2002

¹⁶ see S Weatherill, *EU Consumer law and Policy* (2nd edn Edward Elgar Publishing 2013), 188 et seq

¹⁷ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours OJ L 158/59 of 23.06.1990.; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 095/29 of 21.04.1993.; 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 OJ L 171/12 of 07.07.1999; Directive 2008/48 of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC OJ L 133/66 of 22.05.2008.; Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts OJ L 33/10 of 3.2.2009; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the

Europeanisation of the law unfair commercial practices

The commencement of the process of Europeanisation

Before the adoption of the UCPD in 2005, Member States showed a high level of divergences in their approaches to the law on unfair commercial practices.¹⁸ The existence of such diversities in regulatory regimes was considered as a material obstacle for the development of cross border trade within the European Union both for consumers and traders.¹⁹ Namely, consumers could not know what they should expect in case of cross border trade, whereas traders could not be certain what kind of behaviour towards consumers and, in particular, what type of marketing tactics were acceptable in other Member States.²⁰

This explains the convoluted history of the first attempts by the European Commission (“Commission” or “European Commission”) to harmonize the national laws on unfair commercial practices. The first attempts by the Commission, which were unsuccessful, date back to the seventh decade of the twentieth century.²¹ They are reflected in the book edited by Eugen Ulmer on comparative national laws on unfair commercial practices throughout Europe published in 1965.²²

In spite of the lack of existence of a unified European legislation, the Court developed in the seventies and eighties a body of European law on unfair commercial practices through its case law that primarily dealt with the interpretation of EU primary rules on

Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council OJ L304/64 of 22.11.2011.

¹⁸ S Grundmann, ‘EC Consumer and EC Competition Law’ in H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 220

¹⁹ Commission, ‘Green Paper on European Union Consumer Protection’ COM (2001) 531 final; Commission, ‘Explanatory Memorandum to the Proposal for a Directive on unfair commercial practices ‘ COM (2003) 356 final

²⁰ RW De Vrey, *Towards a European Unfair Competition Law. A Clash between Legal Families*, (Leiden 2006), 29

²¹ E Budaite and C van Dam, ‘Statutory Frameworks and General Rules on Unfair Commercial Practices’ in C Twigg-Flesner, D Parry, G Howells and A Nordhausen (eds) *The Yearbook of Consumer Law* (Ashgate 2008), 113

²² E Ulmer, *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG* (Köln 1965)

free movement of goods. The main question that the Court had to resolve was the assessment of whether the existence of a particular national rule on fair trading is justified on the ground that it provides protection to consumers or such a rule actually represents an obstacle for cross border trade in the context of the Internal Market, and thus should be abolished. In these cases, the ECJ continuously required from Member States to provide an advanced level of justification for their national measures which prohibited unfair commercial practices.²³ Eventually, in its decisions the Court had “a rather market oriented approach to consumer protection”, through giving priority to the objectives of free movement of goods over the national rules whose goal was protection of consumers.²⁴

Consequently, the role of the ECJ for building of the European system of the law on unfair commercial practices is very significant. Through its case law, the Court laid down the foundations of the European law on unfair commercial practices and developed certain common legal notions and standards throughout the European Union, such as the average consumer as expected standard of behaviour of a European consumer that was subsequently codified by the text of the UCPD.²⁵ After the adoption of the Directive, the importance of the Court has still remained, since the ECJ plays a crucially important role regarding the interpretation of the UCPD, clarifying thus its scope of application and the meaning of its provisions.²⁶

²³ see, inter alia, Case C-120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 00649; Case C-286/81 *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 04575; Case C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-00667; Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH* [1993] ECR I-02361; Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH* [1993] ECR I-02361; Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-03689; Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-01795; Case C-368/95, *Familiapress*, [1997] ECR I-3689.

²⁴ G Howells, ‘Introduction’ in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 19

²⁵ see Chapter II on Average consumer of this Thesis

²⁶ M. Koutsias and C Willett, ‘The Unfair Commercial Practices Directive in the UK’ (2012) 5 *Erasmus Law Review* 237, 251

Directive on 84/450/EEC on misleading advertising

Parallel to the development of the European law on unfair commercial practices through the jurisprudence of the ECJ, the Commission also started adopting certain sector-specific rules on unfair commercial practices,²⁷ followed by the adoption of a general legislative framework for advertising through Directive 84/450/EEC on misleading advertising (“Directive 84/450/EEC”).²⁸ However, Directive 84/450/EEC had limited effects since it represented “above all a compromise” made among all relevant stakeholders.²⁹ Namely, due to the lack of political support, it established only a very basic and narrow regulatory framework, on the basis of minimum harmonisation, limited only to misleading advertising and not to other forms of unfair practices.³⁰ However, Directive 84/450/EEC is still important since it introduced for the first time the universal idea of fairness on a common European level, through the establishment of a legal framework aimed at securing fair advertising practices.³¹

Directive 84/450/EC was subsequently modified and amended by Directive 97/55/EC on comparative advertising³², so that it spread fairness requirements also on comparative advertising.³³ Eventually, after the adoption of the UCPD, Directive 84/450/EEC and Directive 97/55/EC were unified into a single piece of legislation, namely, Directive 2006/114/EC on misleading and comparative advertising.³⁴ Today, Directive 2006/114/EC applies exclusively in business-to-business relations, as a legal instrument designed “to protect traders against misleading advertising and its unfair

²⁷ see, *inter alia*, Council Directive of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products OJ L 262/169 of 27.9.1976; Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer OJ L 33/01 of 08.02.1979.

²⁸ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising OJ L 250/17 of 19.09.1984.

²⁹ F Henning-Bodewig, ‘Secondary Unfair Competition Law’ in RM Hilty and F Henning-Bodewig, *Law against Unfair Competition: Towards a New Paradigm in Europe?* (Springer 2007), 113

³⁰ S. Weatherill (n 16) 217

³¹ Art 1 of Directive 84/450/EEC on misleading advertising

³² Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising OJ L 290/18 of 23.10.1997.

³³ C-159/09 *Lidl SNC v Vierzon Distribution SA* [2010] ECR I-11761

³⁴ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) OJ L 376/21 of 27.04.2006.

consequences and to lay down the conditions under which comparative advertising is permitted”.³⁵ However, as a consequence of the wide scope of application of the UCPD, which shall apply whenever consumer economic interests are hindered, its scope and practical importance is, in reality, very limited.

Furthermore, some of the common European rules on unfair commercial practices were also contained in the European directives on consumer contract law. For instance, this is the case with Directive 93/13/EEC on unfair contract terms, which prohibits continuous usage of unfair contract terms.³⁶ Similarly, Directive 97/7/EC on distance selling prohibited certain selling tactics in the case of distance contracts, for e.g. inertia selling.³⁷ However, all these rules were few, diversified and a general legal framework was still missing.

The adoption of Directive 2005/29/EC on unfair commercial practices

Eventually, the Commission started intensively working on the new Directive on unfair commercial practices at the turn of the twentieth century, together with strengthening its powers in the area of consumer protection.³⁸ This is when the Commission ordered a detailed study on the feasibility of introducing a general principle of fair trading in EU Law³⁹ and an equally detailed, comparative examination of the existing laws on unfair commercial practices in Member States.⁴⁰ These two projects were subsequently complemented with an additional report on the national laws on unfair commercial practices of ten new Member States that followed

³⁵ Case C-657/11 *Belgian Electronic Sorting Technology NV v Bert Peelaers and Visys NV* [2013] ECR I-0000, para 36

³⁶ Article 7(1) of Directive 93/13/ECC on unfair contract terms

³⁷ Article 9 of Directive 97/7/EC on distance selling contracts

³⁸ J Stuyck, ‘European Consumer Law after the Treaty of Amsterdam: Consumer policy in or beyond the Internal Market?’ (2000) 37 *Common Market Law Review* 367

³⁹ HW Micklitz et al., ‘V.I.E.W. Study on the feasibility of a general legislative framework on fair trading’ (2000) http://ec.europa.eu/dgs/health_consumer/library/surveys/sur21_vol1_en.pdf accessed 12 May 2014

⁴⁰ R Schulze and H Schulte-Nölke, ‘Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices’ (2003) http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf accessed 12 May 2014

their accession into the European Union in 2004.⁴¹ All these studies provided the essential foundations upon which the Commission subsequently developed the provisions that form the UCPD as it stands today.

These studies confirmed the existence of a high degree of diversity among national legislations in the area of the law on unfair commercial practices. To begin with, the goals of the different legislative regimes differed, since some of them were more focused on the protection of competitors, whereas others had a more consumer oriented protection in focus. Moreover, some countries did not at all recognize a general principle of fair trading in business-to-consumer relations. On the basis of their regulatory approach towards the law on unfair commercial practices, as analysed in these pre-UCPD studies, Member States could be divided into three groups:

- 1) Countries which did not recognize the existence of any kind of specific regulation in the area of unfair of commercial practices or a general principle of fair trading (e.g. Ireland, UK)
- 2) Countries where a general principle of fair trading was derived/developed from the general private law codifications, but where no separate law/rules on unfair commercial practices existed (e.g. the Netherlands, Italy, France)
- 3) Countries with a developed legal frameworks on unfair commercial practices, contained in separate pieces of legislation that established the principle of fair trading, aimed to protect both consumers and traders/competitors (e.g. Germany, Austria, Greece).

Simultaneously to the commissioning of the studies, the Commission published the Green Paper on European Union Consumer Protection (“Green Paper”) in 2001.⁴² The

⁴¹ C. Van Dam C et al., ‘An analysis of the existing national laws on unfair commercial practices between business and consumers in the new Member States with regard to the Directive on Unfair Commercial Practices’ (British Institute for International and Comparative Law 2006) [http://www.biiicl.org/files/882_general_report_unfair_commercial_practices_new_member_states\[with_dir_table_and_new_logo\].pdf](http://www.biiicl.org/files/882_general_report_unfair_commercial_practices_new_member_states[with_dir_table_and_new_logo].pdf) accessed 12 May 2014

Green Paper laid down the grounds for further evolution of a common European law on unfair commercial practices. It defined new priorities for the development of EU consumer law, particularly through the encouragement of cross border trade as a necessary pre-condition for the development of the Internal Market.⁴³ The publication of the Green Paper led to intense public discussions on the future on EU consumer policy where the main dilemma was related to the method of regulation of commercial practices. The question was whether the regulation of unfair commercial practices should be done through a ‘specific’ approach (i.e. through the adoption of a series of sector-specific directives), or through a rather ‘mixed’ approach (i.e. through the adoption of a framework directive).⁴⁴

Subsequently, in 2002, the Commission issued a Follow-up Communication to the Green Paper on EU Consumer Protection (“Follow-up Communication”) in which it announced its decision to develop a framework directive on unfair commercial practices.⁴⁵ Moreover, this document was the first in which a clear separation between the regulatory instruments on the law on unfair commercial practices and contract law was drawn. Accordingly, the Follow-up Communication established two separate tracks for the future development of these two laws on the European level.

Eventually, after a Follow-up Communication, the Proposal of the Directive on unfair commercial practice (“the Proposal”) was adopted in 2003.⁴⁶ In the Proposal, the Commission opted for a ‘mixed’ approach that combined both a general clause and more restrictive clauses on misleading and deceptive practices, as well as some of the concrete, most common examples on breaches of the rules in unfair commercial practices. Such a general idea of a general clause supported by less abstract clauses

⁴² Commission, ‘Green Paper on European Union Consumer Protection’ COM (2001) 531 final

⁴³ Ibid 9

⁴⁴ Ibid 10-12

⁴⁵ Commission ‘Follow-up Communication to the Green Paper on EU Consumer Protection’ COM (2002) 289 final

⁴⁶ Commission, ‘Proposal of the Directive on unfair commercial practice’ COM (2003) 356

and a number of concrete examples was also maintained in the final version of the Directive in May 2005.

The Regulatory Framework of the UCPD

The scope of application of the Directive

The Directive has brought radical changes to EU consumer law, representing “a much more aggressive approach towards harmonisation of national laws”, materially Europeanising the law on unfair commercial practices throughout the European Union.⁴⁷ In its Communication issued in 2013, the Commission expressed its satisfaction with the results achieved by the UCPD and pointed out that there are currently no plans for amending the text of the Directive.⁴⁸

With its maximum harmonisation character and horizontal effect approach, the adoption of the Directive marked a radical change to the previously prevailing sector-specific, piecemeal regulatory approach of EU consumer law, based on the principle of minimum harmonization. Despite the initial intention to include the widest possible set of commercial practices under the scope of the Directive, and due to the opposition of Member States, the Directive has eventually included only those commercial practices that affect the economic interest of consumers.⁴⁹ Consequently, those unfair commercial practices that only affect the economic interest of competitors have remained outside its scope.⁵⁰

⁴⁷ H Collins, ‘Harmonisation by example: European laws against Unfair Commercial Practices’ (2010) 73 *Modern Law Review* 89, 118

⁴⁸ Commission, ‘Communication on application of the Unfair Commercial Practices Directive’ COM (2013) 138 final, 9

⁴⁹ However, the Commission is now considering also of improving and spreading a regulatory regime for protection of competitor in business-to-business relations, see Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on ‘Protecting businesses against misleading practices and ensuring effective enforcement’, Review of Directive 2006/114/EC concerning misleading and comparative advertising COM(2012) 702 final

⁵⁰ Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909; Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000, para 30.

However, the Directive provides that, by protecting the consumer's economic interests from the widest possible set of unfair commercial practices, it also protects in an indirect manner the legitimate interests of competitors.⁵¹ Herein, it shall also be underlined that the Directive, through the introduction of its complete regulatory regime for securing of fair trading at the market in business-to-consumer relations, has also materially and doubtlessly contributed to the protection of fair play among traders themselves. Moreover, the scope of application of the directive was interpreted in the case law of the Court in a very broad manner, both *rationae personae* and *rationae materiae*.⁵² Accordingly, the Directive is applicable in all cases where the economic interest of consumers is hindered by the commercial practices of a trader. It is absolutely irrelevant whether such a practice also endangers the economic interest of competitors or some other kind of interest. Even if the consumers' economic interest is much less hindered than the economic interest of competitors, the rules of the UCPD shall apply.⁵³

Besides providing the same definition of trader as the one that had already existed in consumer contract law, the question that arose was whether the notion of trader also included public-law bodies entrusted with a task of general public importance. In particular, the question referred to the court was whether an advertising of a sickness insurance fund which was found to be misleading, is included in the scope of application of the provisions of the Directive, since it was a publicly owned and a non-profit body of a public importance. In its judgment in *BKK Mobil Oil*, the Court confirmed a wide notion of trader that shall also include public law bodies showing in such a manner a wide understanding of trader.⁵⁴

⁵¹ Recital 6 of the UCPD

⁵² Conformation of such a wide scope by the ECJ was rather expected, see T Wilhelmsson (n 12)

⁵³ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217; Case C-522/08 *Telekomunikacja Polska* [2010] ECR I-2079; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909.

⁵⁴ Case C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2013] ECR I-0000, para 38

However, in its judgement in *RLvS* the Court slightly narrowed the scope of application of the UCPD by emphasising that a trader may be responsible for breach of the rules of the Directive only if there is a direct connection between a trader and a commercial practice, indirect connection is not sufficient for the application of provisions of the UCPD.⁵⁵

Three-step mechanism for assessment of fairness

The Directive prohibits all kinds of commercial practices that are unfair.⁵⁶ With the purpose of verifying whether a commercial practice is unfair, the Directive has established a complex, three-step mechanism for the assessment of the fairness of commercial practices. In order to understand the relationship between the law on unfair commercial practices and contract law, it is necessary to explain the operation of the mechanism. The mechanism consists of three elements: a general fairness clause, three small general clauses aimed at the prohibition of misleading and advertising practices, and thirty-one exhaustively listed examples of practices which shall always be declared as unfair.

After the adoption of the Directive, what remained ambiguous was how the provided mechanism should be applied in practice, in particular whether there is any hierarchical order among the rules that the national courts shall follow. The Court provided the explanation on the mechanism of the Directive already in its first judgement on the UCPD, in *VTB-VAB*,⁵⁷ confirming it in its subsequent case law.⁵⁸

According to the interpretation of the Court, while assessing fairness of any commercial practice, a strict three-step procedure shall always be followed in an

⁵⁵ Case C-391/12 *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] ECR I-0000, para 44

⁵⁶ Article 5(1) of the UCPD (n 1)

⁵⁷ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 58

⁵⁸ Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 45; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 34, Order in Case C-288/10 *Wamo BVBA v JBC NV and Modemakers Fashion NV* [2011] ECR I-05835, para 37

exactly defined order. The first step to be taken is to verify whether a practice can be subsumed under any of the thirty-one practices enlisted in Annex I to the Directive which are always unfair, under any circumstances.⁵⁹ These are the only commercial practices, which according to the UCPD, can be declared unfair without requirement for a case-by-case assessment.⁶⁰ The exhaustive list is adopted in order to guarantee legal certainty as “an essential element for the sound functioning of the Internal Market”.⁶¹ In its case law, the ECJ stressed the importance of the requirement of legal certainty in the area of consumer protection.⁶² So far, the existence of a catalogue with concrete examples of the most common unfair commercial practices has turned out to be a very powerful instrument for the protection of consumers from unfair commercial practices.⁶³

The existence of such an exhaustive list also shows a liberal orientation of the Directive, which shows that with the exception of the enlisted thirty-one practices, all other commercial practices are presumed to be fair. Accordingly, Member States are allowed to subject only these thirty-one forms of commercial practices to absolute prohibition, since they are considered as the most harmful for the consumer, but all other commercial practices can be only prohibited after the fairness assessment has been performed.⁶⁴ This is in line with the maximum harmonisation character of the UCPD that does not entitle Member States to add any additional practice to the list which may only be modified by the revision of the Directive.⁶⁵

The second step, which follows if a commercial practice does not represent any of the enlisted practices in Annex I, is to check whether a practice is unfair on the basis of one of the three small general clauses on misleading actions, misleading omission and

⁵⁹ Article 5(5) of the UCPD

⁶⁰ Recital 17 of the UCPD

⁶¹ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 45

⁶² Case C-144/00 *Commission v Netherlands* [2001] ECR I-02921, para 21

⁶³ Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee, COM (2013) 139 final, 19

⁶⁴ Case C-515/12 *'4finance' UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* [2014] ECR I-0000, para 32

⁶⁵ Article 5(5) of the UCPD

aggressive practices, now applying a case-by-case method of assessment of fairness.⁶⁶ Eventually, if it turns out that the assessed practice does not represent an unfair commercial practice under the initial two steps, the general clause will apply as the last step and as a particular safety net directed to sanction any unfair commercial practice that managed to skip the prohibition.

The established pyramidal, hierarchical structure of the mechanism, or ‘a top-down’ approach as Advocate General in the Opinion in *CHS Tour* refers to it,⁶⁷ is strict. Accordingly, Member States are always obliged to follow it and they are prohibited from making any modifications. In practice, a significant part of the unfair commercial practices will be prohibited under some of the thirty-one explicitly listed commercial practices in Annex I to the Directive or on the basis of the assessment through small general clauses on misleading and aggressive advertising which are very broadly defined. Nevertheless, the general clause plays a crucially important role in the legal regime provided by the UCPD, by establishing and shaping a general duty to trade fairly.⁶⁸

Maximum harmonisation character of the Directive

Significance of maximum harmonisation

A powerful maximum harmonisation character of the Directive increases the effects that the law on unfair commercial practice has on contract law.⁶⁹ This is because maximum harmonisation requirement diminishes the strength of national law resistance and represents a more influential and vigorous instrument for penetration into the laws of Member States. The imposition of maximum harmonisation was justified through the necessity to diminish as much as possible all divergences among

⁶⁶ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 45; Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000, para 35; Case C-515/12 ‘*4finance*’ *UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* [2014] ECR I-0000, para 31.

⁶⁷ Opinion of Advocate General Wahl in Case C-435/11 *CHS Tour Services GmbH v Team4 Travel GmbH* [2013] ECR I-0000, para 29

⁶⁸ See Chapter III on Duty to trade fairly of the thesis

⁶⁹ Article 4 of the UCPD

the national legal systems which may represent obstacles for free movement of goods and cross border trade.⁷⁰ This is also in accordance with the goal of strengthening the internal market as one of the two main goals of the Directive.⁷¹

An exemption from the general requirement of maximum harmonisation exists in relation to financial services and immovable property as a consequence to their particularities and sensitivity.⁷² In these areas Member States, as reaffirmed by the ECJ, are free to establish a level of protection that is higher than the one prescribed by the Directive, as it is the case with prohibition of combined offers where at least one of the offered components is a financial service.⁷³

Reasons for maximum harmonisation

As a consequence of the maximum harmonisation requirement, Member States are imposed not only with the required bottom level of consumer protection, but also with its ceiling. This means that Member States are not only limited anymore with a proportionality requirement while regulating consumer protection, but with the legislation itself, being prohibited from providing a more advanced level of consumer protection than the one established by the Directive. A shift from minimum harmonisation to maximum harmonisation has been present in EU consumer policy during the last decade, and the UCPD represents one of the first examples of such a shift as it opened the door for a broader usage of maximum harmonisation in consumer contract law.⁷⁴ The Consumer Policy Strategy 2002-2006 initially set up the grounds for the shift to the maximum harmonisation as part of the new common

⁷⁰ Recital 5 of the UCPD (n 1); for a detailed discussion on maximum harmonisation character of the Directive, see HW Micklitz, 'Unfair Commercial practices and misleading advertising' in HW Micklitz, N Reich and P Rott, *Understanding EU Consumer Law* (Intersentia 2009), 78-80

⁷¹ Article 1 of the UCPD

⁷² Article 3(9) of the UCPD

⁷³ Case C-265/12 *Citroen Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen* [2013] ECR I-0000, para 28

⁷⁴ on the shift from minimum to maximum harmonization policy, see G Howells, 'European Consumer Law – The Minimal and Maximal Harmonisation Debate and Pro Independent Consumer Law Competence' in S Grundmann and J Stuyck, *An Academic Green Paper on European Contract Law* (Kluwer Law International 2002)

European strategy of consumer policy and the goal of achieving a high common level of consumer protection.⁷⁵

The adopted maximum harmonisation character also marked the beginning of new era of consumer contract law, to be based on maximum harmonisation requirement.⁷⁶ Subsequent to the adoption of the UCPD, the Commission passed several pieces of European legislation on consumer contract law: Directive 2008/48/EC on consumer credit, Directive 2008/122/EC on timeshare and Directive 2011/83/EU on consumer rights.⁷⁷ The shift from minimum to maximum harmonisation was exposed to serious criticisms, in particular in the area of consumer contract law.⁷⁸ Namely, from a perspective of desirability, traders seem to be in favour of maximum harmonisation since it facilitates cross-border trader, whereas consumer groups are opposing it, arguing it diminishes the level of consumer protection.⁷⁹ This is especially the case in Nordic countries where the development of EU consumer based on maximum harmonisation results not in improving but in diminishing the level of consumer protection, since these countries have to reduce their traditionally advanced requirements imposed by national laws.⁸⁰ The case *Ving Sverige*, referred to the ECJ by a Swedish court, shows well the existence of this tension between the higher, Nordic concept of consumer protection and the lower, European approach towards consumer protection.⁸¹

The proffered justification for the shift towards maximum harmonisation is that minimum harmonisation caused significant divergences which represent obstacles for

⁷⁵ Commission, 'Consumer Policy Strategy 2002-2006' COM (2002) 208 final, 15

⁷⁶ M. Faure, 'Towards a Maximum Harmonization of Consumer Contract Law' (2008) 15 Maastricht Journal of European and Comparative Law 433

⁷⁷ Directive 2008/48/EC on consumer credit, Directive 2008/122/EC on timeshare contracts and Directive 2011/83/EU on consumer rights (n 17)

⁷⁸ see HW Micklitz and N Reich, 'Cronica de una muerte anunciada, the Commission Proposal for a Directive on Consumer Rights' (2009) 46 Common Market Law Review 471

⁷⁹ I Ramsay, 'Regulation and the Constitution of the Single Market: The Contribution of Consumer Law' (2011) 50 Canadian Business Law Journal 322, 333

⁸⁰ J Bärlund, 'Current regulation of misleading marketing in Nordic countries' in P Letto-Vanamo and J Smit, *Coherence and Fragmentation in European Private Law* (Munich 2012), 97

⁸¹ *Konsumentombudsmannen (Ko) v Ving Sverige AB* Case C-122/10 [2011] ECR I-03903

cross border trade, and thus for the development of the Internal Market.⁸² This is because consumers seem to be more hesitant to perform any kind of cross border trade since they are afraid for their level of consumer protection, whereas traders are more reluctant to perform cross border trade activities due to the need to get familiar and to align their practices with the particularities of each legal system. In its Report on the application of the Directive, the Commission provides empirical evidence that the establishment of a unified European legal framework in the area of unfair commercial practices has resulted in the fact that consumers are now more open and ready to spend more in cross border transactions.⁸³ The shift from minimum to maximum harmonisation also proves that EU consumer policy is not only focused on the provision of a high level of consumer protection throughout the European Union, but also to the establishment of a unified and consistent system of European consumer law.

The notion of commercial practice

Meaning of commercial practice

The Directive is aimed at protecting consumers from any unfair commercial practice, so it is of utmost importance to understand the meaning of the European notion of a commercial practice. The UCPD itself defines a commercial practice very broadly, as “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”.⁸⁴ The definition shows that the UCPD is primarily focused on protecting consumers from unfair advertising and marketing, though its scope of protection clearly goes beyond these two categories.

In its case law, the Court identified some of the forms of commercial practices:

⁸² Commission, ‘Explanatory Memorandum to the Proposal for a Directive on unfair commercial practices’ COM (2003) 356 final, para 49

⁸³ Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee, COM (2013) 139 final, 20

⁸⁴ Art 2(d) of the UCPD

- Offering the chance for consumers to win a prize in games, puzzles or competitions and in such a manner persuading consumers to buy a certain product (for instance newspapers).⁸⁵
- Combined offers⁸⁶, including those kinds of combined offers where one of the offered components is a financial service⁸⁷
- Selling at a loss, as a means of persuading consumers to make a commercial transaction.⁸⁸
- Advertising practices such as the sale of goods to consumers on advantageous terms or advantageous prices form also commercial practices.⁸⁹
- The notion of advertising includes the use of a domain name and that of metatags in a website's metadata, but not the registration of a domain name.⁹⁰

Relationship between a commercial practice and a contract

The provisions of the Directive apply to commercial practices which occur not only before, but also during and after a commercial transaction in relation to any kind of goods or services.⁹¹ From a contract law perspective, this provision shows a wide scope of application of the Directive. The UCPD awards protection to consumers not only in the phase that anticipates the conclusion of a contract, but its rules will also apply in the process of contract conclusion itself and once a consumer contract has been stipulated.⁹² In such a manner, the Directive has provided a complete protection of the consumer in his contractual relationship with a trader.

⁸⁵ Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-03689, para 28

⁸⁶ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 50

⁸⁷ Case C-265/12 *Citroen Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen* [2013] ECR I-0000, para 19

⁸⁸ Case C-343/12 *Euronics Belgium CVBA v Kamera Express* [2013] ECR I-0000, para 22

⁸⁹ Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000, para 27

⁹⁰ Case C-343/12 *Euronics Belgium CVBA v Kamera Express* [2013] ECR I-0000, para 42

⁹¹ Order in Case C-433/11 *SKP k.s. v Kveta Polhosova* [2013] ECR I-0000, para 26

⁹² J Stuyck, E Terryn and T Van Dyck, 'Confidence through fairness? The new Directive on unfair business-to-consumer on commercial practices in the Internal Market' (2006) 43 *Common Market Law Review* 107, 142

The Green Paper on European Union Consumer Protection, which was published in 2001 and which established the grounds for development of a common European law on unfair commercial practices, gave some examples of what kind of practices should be included in the Directive.⁹³ These examples included commercial practices related to payment, the subject matter of the contract, price estimates, execution, performance, delivery, complaint-handling and post sale services.⁹⁴ The examination of the black list of Annex I shows that all these examples have been included in the text of the Directive. All these examples show well how tightly and disparately commercial practice and contract are in reality.

The fact that commercial practices are defined in a very broad manner is essential for understanding the relationship between the law on unfair commercial practices and contract law. Indeed, the meaning and scope of a commercial practice prove the tight connection in practice between a commercial practice and a contract in practice, granting legal protection offered by the Directive follows all phases of a consumer contract, periods of its formation, conclusion, execution and termination. As it will be examined and showed later in the thesis, as a consequence of such a tight connection in real life, the Directive affects contracts, through the adoption of relevant standards of behaviour to consumers,⁹⁵ but also of traders, applicable in all or some phases of the life of a contract, as it is the case with the duty to trade fairly⁹⁶ or duty of information,⁹⁷ as well as through development of contract law remedies.⁹⁸

Europeanisation of contract law

European v national contract law

Within the European Union, there are two main legislators operating and accordingly on the ground of original sources of the law of contract, a distinction is to be made

⁹³ Commission, 'Green Paper on European Union Consumer Protection' COM (2001) 531 final

⁹⁴ Ibid, 7

⁹⁵ See Chapter II on Average consumer of the thesis

⁹⁶ See Chapter III on Duty to trade fairly of the thesis

⁹⁷ See Chapter IV on Duty of information of the thesis

⁹⁸ See Chapter III on Remedies of the thesis

between European contract law and national contract laws.⁹⁹ In my thesis, I address the impact of the UCPD on both the European contract and the national contract law. I understand European contract law as set of contract law rules adopted on the European level in diverse legislative forms, in particular in the form of directives, as well as developed by the case of the ECJ, that accordingly shall apply in all Member States of the European Union. The body of European contract law, to a large extent, consists of the rules that are exclusively applicable to consumer contracts, as a particular type of contracts where one party is a consumer and the other is a trader.¹⁰⁰

National contract laws refer to the contract law rules contained, depending on the particularities of each legal system, in civil/contract codes/laws of the Member States and/or developed by the case law of the national courts that are applicable within the borders of a particular legal system. In the twenty-eight Member States of the European Union, broadly speaking, there are twenty-nine national contract law regimes: one in case of each Member State with the exception of the United Kingdom which has two – English and Scottish contract law.¹⁰¹

Fragmentary character of European contract law

In the fragmented law of contract, as it stands today, a majority of contract law rules have been developed on the national level, though an increasing tendency of Europeanisation of contract law can be observed.¹⁰² The area of contract law affected by the process of Europeanisation is still relatively small. It is well described as an archipelago of small islands in the wide seas of national laws.¹⁰³ Even in the most affected area of contract law, the consumer contract law, common European rules are

⁹⁹ R Schulze, 'European Private Law: Political Foundations and Challenges' in R Brownsword, HW Micklitz, L Niglia and S Weatherill (eds), *Foundations of European Private Law* (Hart, 2011), 294

¹⁰⁰ MW Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship or Justice?' in S Grundmann (ed), *Constitutional Values and European Contract Law* (Wolters Kluwer 2008), 243

¹⁰¹ Within a contract law regime of a Member States, differences among diverse part of the country are also possible, as it is the case, for instance, with Spain, see A Vaquer, *Contract Law in Spain* (Madrid 2013), but this is for the sake of examination performed in this thesis rather irrelevant.

¹⁰² J Smits, 'Coherence and Fragmentation in the Law of Contract' in P Letto-Vanamo, *Coherence and Fragmentation in European Private Law* (Sellier 2012), 18 et seq.

¹⁰³ H Collins, *The European civil code – the Way Forward* (Cambridge University Press 2008), 40

limited only to certain sectors or characteristics of a contractual relationship with universally applicable rules being very scarce.¹⁰⁴ The incoherency among these rules is present as the result of different periods and the necessity for constant compromising as a precondition for their adoption. General rules on consumer contracts, such as those on formation or execution of the contract, primarily originate from the national contract law sources.

Primarily through the provisions of the newly developed consumer contract law, as a particular set of rules within general contract law, EU law managed to slowly and without too many hiccups, penetrate further into national contract laws and to shape the non-harmonised areas of contract law. In that aspect, the ECJ has a particularly important role to play,¹⁰⁵ but this had also been done through the process of ‘spontaneous harmonization’¹⁰⁶ or through spill-over effects of the harmonised into non-harmonised rules.¹⁰⁷ However, this process of Europeanisation of contract law is only of partial, inconstant and incoherent character.

Codification of European private (contract) law?

For the adoption of any kind of general codification of the entire contract or private law into one piece of legislation that would be named, or at least resemble to a European Civil Code or a European Contract Code, there seems to be a lack of political will.¹⁰⁸ Such a resistance is also the result of the fact that in some of the Member States, contract law represents more than the mere law and simple regulation of the most important branch of private law. Contract law is a part of the national

¹⁰⁴ e.g. Directive 93/13/EEC on unfair contract terms (n 17)

¹⁰⁵ The ECJ has had a very prominent role in the development of European contract law, see J Stuyck, ‘The European Court of Justice as motor of Private Law’ in C. Twigg-Flesner (ed) *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010)

¹⁰⁶ MB Loos, ‘The Influence of European consumer law on general contract law and the need for spontaneous harmonization’ (2007) 15 *European Review of Private Law* 515

¹⁰⁷ A Johnston, ‘Spillovers from EU Law into National Law: (Un)intended Consequences for Private Law Relationship’, in D Leczykiewicz and S Weatherill, *The Involvement of EU Law in Private Law Relationships* (Hart 2013)

¹⁰⁸ HW Micklitz, ‘Failure or Ideological Preconceptions—Thoughts on Two Grand Projects: The European Constitution and the European Civil Code’ in K Tuori and S Sankari (eds), *The Many Constitutions of Europe* (Ashgate, 2010)

identities and pride contained in different codifications, some of which represent living legal monuments, which may explain why Member States are very reluctant to get rid of them.¹⁰⁹ For instance, France and Germany have often/frequently changed their governments and even their regimes since the adoption of their codes in 1804 and 1896, but their codes have survived as the living proof of the continuity of these nations. Furthermore, isolated by the British Channel from the rest of Europe, English contract law developed through the centuries in accordance with the needs and realities of English society, which valued flexibility and opposed any kind of big, general codification that might endanger its continuity and perfectionism, though still it was materially affected and modified as a consequence of the process of Europeanisation.¹¹⁰

Further to this, the impossibility of convergence of the different legal traditions has also been pointed out as yet another obstacle for the unification of contract law in Europe.¹¹¹ The same goes for the risk that such a unification could have a counter-effect and act as irritant in some of the national legal systems.¹¹² Concurrently, the existence of adequate constitutional grounds for the adoption of any kind of codification of contract law also seems to be missing. Namely, the main legal basis for the adoption of a common European contract law instruments is article 114 TFEU, whose main objective is the strengthening of the Internal Market, but which, despite the attempt to use in widest possible number of cases, has limited power as shown by the ECJ in its decision in the Tobacco Advertising case,¹¹³ which brought *a shadow of competence anxiety* into European harmonisation policy.¹¹⁴ Consequently, the

¹⁰⁹R. Michaels, 'Code vs. Code: Nationalist and Internationalist Images of the Code civil in the French Resistance to a European Codification' (2012) 8 *European Review of Contract Law* 277

¹¹⁰ see J Cartwright, *Contract Law – An introduction to the English Law of Contract for The Civil Lawyers* (2nd edn Hart 2013), in particular 68-70

¹¹¹ P Legrand, 'European Legal Systems are not converging' (1996) 45 *International and Comparative Law Quarterly* 52

¹¹² G Teubner, 'Legal Irritants: Good faith in British law or How unifying ends up in new divergences' (1998) 61 *Modern Law Review* 11

¹¹³ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419

¹¹⁴ S. Weatherill (n 16) 78

capacity of article 114 TFEU to represent an acceptable legal ground for a massive unification of European contract law is disputable.¹¹⁵

Projects on the Europeanisation on contract law

The Commission constantly points out to the existence of divergences amongst the contract law regimes of the different Member States as a material obstacle for the further development of the Internal Market. It has thus used it as the main argument in favour of the unification projects of contract law in the European Union.¹¹⁶ Under the veil of explanation that unification of contract law throughout the European Union is a necessary prerequisite for overcoming these obstacles and for strengthening of the Internal Market, the Commission has, as of the beginning of the twenty-first century, invested significant efforts directed towards the unification of contract law.

Since the year 2001 and the publication of the *Communication on European Contract Law*,¹¹⁷ the Commission noticeably increased its efforts for the Europeanisation of contract law.¹¹⁸ This Communication was followed by a more concrete *Action Plan on a More Coherent European Contract Law* adopted in 2003 and *European Contract Law and the revision of acquis: the way forward*.¹¹⁹

As a consequence of all these efforts and ambitious work, the Commission initiated and/or, directly or indirectly, supported several projects on European contract law, among which the most important outcomes are the published Principles of European

¹¹⁵ S Grundmann, 'Costs and benefits of an optional European Sales Law (CESL)' (2013) 50 *Common Market Law Review* 225, 230-231

¹¹⁶ Since the first initiatives of the European Parliament for unification of private law, this has been used the main argument for promotion of unification of contract law in Europe, see: Resolution of 26 May 1989 on action to bring into line the private law of the Member States [1989] OJ C158/400 and Resolution of 6 May 1994 on the harmonization of certain sectors of the private law of the Member States [1994] OJ C205/518

¹¹⁷ Communication from the Commission on European Contract Law, COM (2001) 398 final

¹¹⁸ Commission, 'A More Coherent European Contract Law – An Action Plan' COM (2003) 68 final

¹¹⁹ Commission, 'European Contract Law and the revision of acquis: the way forward' COM (2004)

Contract Law (“PECL”)¹²⁰ and the Draft Common Framework of Reference (“DCFR”).¹²¹ However, they never managed to become a European Contract Code or a European Civil, but have only remained outstanding examples of legal scholarship, used as important reference points in the debates on Europeanisation of contract law.¹²²

The Optional Instrument and its future

The latest proposal of this kind made by the Commission was the publication of the Proposal of The Optional Instrument on a Common European Sales Law (“The Optional Instrument”),¹²³ which is also justified on the basis of necessity to overcome currently existing differences in contract law among Member States as barriers for cross border trade.¹²⁴ The Optional Instrument, as it stands now, should represent an alternative, a free choice option to national law to be chosen by parties. It would not repeal or modify the existing national contract laws, but it would exist parallel to them, as an alternative legal regime for which consumers would be able to opt. Such a proposal is aimed at being a less intrusive policy option than the one which had also initially been presented by the Commission as an alternative solution and which envisaged full replacement of national laws.¹²⁵

However, it was pointed out that traders might profit from such an optional character of the proposed Optional Instrument and, as a consequence of consumer’s lack of information and knowledge, impose the application of the Optional Instrument on

¹²⁰ O Lando and H Beale (eds), ‘Principles of European Contract Law, Part I (1996) and Part II (1999); O Lando, E Clive, A Prum and R Zimmermann (eds), Principles of European Contract Law, Part III (2003) http://frontpage.cbs.dk/law/commission_on_european_contract_law/pecl_full_text.htm accessed 12 May 2014

¹²¹ C Von Bar et al., ‘Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)’ (Sellier 2008) http://ec.europa.eu/justice/policies/civil/docs/dcf_r_outline_edition_en.pdf accessed 12 May 2014

¹²² C Twigg-Flesner, *Europeanisation of Contract Law* (2nd edn Edward Elgar 2013), 175

¹²³ Commission, ‘Proposal of The Optional Instrument on a Common European Sales Law (“The Optional Instrument”)’ COM(2011) 635 final

¹²⁴ *Ibid.*, 2-4

¹²⁵ Commission, ‘Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses’ COM (2010) 348 final

consumers.¹²⁶ This is one of the reasons why consumer movement seems to be strongly against it claiming that it would diminish the existing level of consumer protection.¹²⁷

Surprisingly, the Optional Instrument does not incorporate in its text the rules on unfair commercial practices, contrary to the previously adopted approach in the DCFR.¹²⁸ Furthermore, the Optional Instrument seems to be absolutely ignoring the existence of the common European rules on unfair commercial practices introduced through the UCPD which would result in an ambiguous relationship between the UCPD and the Optional Instrument, in case the latter one gets adopted.

The destiny of The Optional Instrument is still unknown, same as the future of entire European contract law. While assessing European contract law a while ago, McKendrick pointed out that “[t]he future course of the harmonisation of European contract law is difficult, if not impossible to predict. The likelihood is that the calls for further harmonisation of national contract laws will increase in future years”.¹²⁹ Almost a decade later, these words still apply and explain well the current status of European Contract Law.

The case of Directive 2011/83/EU on consumer rights

In case of harmonisation of consumer contract law, it has been noticeable that Member States showed less hostility than in case of general contract law where consumer contract law has been significantly more affected by the process of Europeanisation than the other parts of contract law. However, the example of Directive 2011/83/EU on consumer rights shows well how Member States are also

¹²⁶ S Whittaker, ‘The Optional Instrument of European Contract Law and Freedom of Contract’ (2011) 7 *European Review of Contract Law* 371

¹²⁷ Beuc, ‘European Contract Law - Optional instrument for consumers to business contracts’ available at <http://www.beuc.org/publications/2011-00379-01-e.pdf> last accessed on 12 May 2014

¹²⁸ See article II.- 3:102 of the DCFR (n 107)

¹²⁹ E McKendrick, ‘Harmonisation of European Contract Law: The State We Are’ in S Vogenauer and S Weatherill (eds), *The Harmonisation of European Contract Law – Implications for European Private Laws, Business and Legal Practice* (Hart 2006), 28

reluctant to approve adoption of any kind of complex contract law instrument in the area of consumer law.¹³⁰ Namely, Directive 2011/83/EU on consumer rights shows hardly any resemblance to the much more ambitious Commission's Proposal for the adoption of a Directive on consumer rights published in October 2008, proving that any substantial reform of consumer contract law is hardly possible.¹³¹

Furthermore, initially the new Directive on consumer rights was intended to represent a kind of codification of the entire EU consumer law, imagined as an ambitious project aimed to include provisions of eight existing directives from consumer *acquis*.¹³² Eventually, it ended up repealing only two directives, Directive 85/577/EEC on doorstep selling contracts¹³³ and Directive 97/7/EC on distance selling contracts¹³⁴ and just slightly modifying and amending an additional two, Directive 99/44/EC on consumer sales¹³⁵ and Directive 93/13/EC on unfair contract terms.¹³⁶ The example of Directive 2011/83/EU shows well a rather limited potentially of Europeanisation of contract law, even in case of consumer contract law.

The role of article 3(2) UCPD

The lack of consensus and reluctance of the Member States towards any massive harmonisation of contract law, even in the area of consumer contract law, also explains why article 3(2) UCPD was introduced, explicitly stating that the Directive is “without prejudice to contract law and, in particular, to the rules on the validity,

¹³⁰ Directive 2011/83/EU on consumer rights

¹³¹ Commission, 'Proposal of the Directive on consumer rights' COM (2008) 614 final, for further information on the Proposal, see: G Howells and R Schulze, 'Overview of the Proposed Consumer Rights Directive' in G Howells and R Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009)

¹³² See: Commission, 'Communication to the European Parliament and the Council. A More Coherent European Contract Law – An Action Plan' COM (2003) 68 final. This plan eventually resulted in drafting of a detailed study on EU Consumer Law and its development and application both on the European and on the national levels, see H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium* (Sellier 2007)

¹³³ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31

¹³⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19

¹³⁵ Directive 99/44/EC on sale of consumer goods and associated guarantees

¹³⁶ Directive 93/13/EEC on unfair contract terms

formation or effect of a contract”. It was suggested that this provision should not be read in the sense that it prohibits any influence of the UCPD on contract law, but rather as pointing out that the Directive does not establish an obligation to make any kind of modifications of contract law.¹³⁷ In such a manner this provision expresses sensitivity to national legal traditions rather than intervening into national contract laws.¹³⁸ However, the impact in practice of this provision is described as being *far from clear*.¹³⁹

In spite of the fact that it is aimed to regulate exclusively the area of unfair commercial practices, Member States were aware of the possible impact of the Directive on contract law. Article 3(2) UCPD was inserted as a check point to prohibit any direct influence that the UCPD may have on the national contract law resulting in the artificial separation of the two set of rules. However, as it will be shown in the thesis, this provision only provides a limited safeguard since, by using different manners and using bypasses to avoid this check point, Directive 2005/29/EC has materially shaped and Europeanise consumer contract law.

¹³⁷ C Twigg-Flesner (n 122) 55

¹³⁸ S Weatherill (n 16) 246

¹³⁹ T Wilhelmsson (n 12) 72

CHAPTER II - THE AVERAGE CONSUMER

Introduction: Which consumer is protected by EU law?

The mechanism of legal protection from unfair commercial practices, as established by the UCPD, is not focused on providing protection to just *any consumer*, but rather only to *the average consumer*.¹⁴⁰ The average consumer is a market participant that shows an adequate level of carefulness and attentiveness while acting in the market representing “the economists’ idealistic paradigm of a rational consumer in an efficient marketplace”.¹⁴¹ This notion of the average consumer had been developed by the case law of the ECJ and it was eventually codified in the Directive.

The UCPD takes the average consumer as its main objective for protection and principal benchmark for assessment of fairness of trader’s commercial practice: a commercial practice will be unfair only if it is unfair in relation to an average consumer. This is why the standard of average consumer plays a key role in application of the provisions of the UCPD. Besides the average consumer as the principal standard, the Directive has also introduced a subsidiary standard of *vulnerable consumer* that will be used as a benchmark for assessing of fairness of commercial practice when a commercial practice hinders economic interests of consumer which are particularly vulnerable.¹⁴²

Contrary to the prescribed standard in the law on unfair commercial practices, European consumer contract law did not have a clearly defined standard of expected consumer’s behaviour despite the emerging necessity for its existence. The need for such a standard is particularly noticeable in case of two important areas of consumer contract law: in case of prescribed transparency requirements of contract terms and in case of established information duties. Namely, while assessing whether trader has

¹⁴⁰ See Articles 5 – 8 of the UCPD

¹⁴¹ R Incardona and C Poncibo, ‘The average consumer, the unfair commercial practices directive, and the cognitive revolution’ (2007) 30 Journal of Consumer Policy 21, 35

¹⁴² Article 5(3) and Recital 18 of the UCPD

duly fulfilled transparency requirements as established by the common European rules on unfair contracts terms¹⁴³ and pre-contractual information requirements,¹⁴⁴ the standard for consumer expected behaviour is needed in order to verify whether a trader has duly fulfilled his obligations.

What I argue in this chapter is that the standard of the average consumer as defined by the UCPD tends to fill up the missing related standard in the area of consumer contract law. This process is noticeable in relation to pre-contractual information requirements. On the one hand, the observed tendency may be described as a positive phenomenon which leads to a more consistent and coherent system of EU consumer law, praised by the arguments of legal certainty. On the other hand, the adoption of a universal standard of the average consumer has resulted in lowering of the general level of consumer protection in some of the Member States.

In case of transparency requirements of contract terms, the effects on the average consumer seem to be more limited as a consequence of the minimum harmonisation, characteristic of Directive 93/13/EEC on unfair contract terms. This Directive leaves more freedom to Member States to define applicable standards. However, in its recent judgement, in *Kásler*, the ECJ has also used, for the first time the standard of average consumer as a benchmark for the assessment of transparency requirement of contract term.¹⁴⁵ Moreover, I argue that for the reasons of legal certainty and consistency, the standard of the average consumer as defined by the UCPD should also be adopted in the area of unfair contract terms. I show that the adoption of such a standard would not be contrary to a present, very pro-consumer jurisprudence of the ECJ in this area.

¹⁴³ Article 5 of Directive 93/13/EEC on unfair contract terms

¹⁴⁴ Articles 3 and 4 of Directive 90/314/EEC on package travel; Article 5 of Directive 2008/48/EC on consumer credit; Articles 3 and 4 of Directive 2008/122/EC on timeshare; Articles 5 and 6 of Directive 2011/83/EU on consumer rights

¹⁴⁵ Case C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECR I-0000, para 74

Protected consumer under the UCPD

Two definitions of consumer

The Directive contains two definitions of a consumer whose function and purpose materially differ. One definition of consumer is aimed at explaining what kind of person is supposed to be understood as a subject that is provided protection under the legal regime established by the Directive, i.e. the scope of application of the Directive *rationae personae*, whereas the other definition is designed to clarify what is substantially meant under the notion of consumer as a benchmark of the UCPD for the assessment of commercial practice's fairness.

Consumer as the subject of protection

The first definition describes consumer as a natural person who *is acting outside his trade, business, craft or profession*.¹⁴⁶ Accordingly, the Directive points out that a consumer must always be a natural person, i.e. legal entities are not considered as consumers, though Member States may and sometimes do spread legal protection dedicated to consumers to certain legal entities, which are considered as economically weaker.¹⁴⁷ The Commission itself considers spreading 'consumer alike' protective measures to certain legal entities, in particular to small and medium enterprises in their relationship with big enterprises.¹⁴⁸

Natural persons, however, are not in all cases considered as consumers. The criterion for their recognition as consumers is established on the basis of activity of a person in

¹⁴⁶ Art 2(a) of the UCPD; the same definition is adopted in two recent legislative pieces dealing with consumer law, see: Art 2(1) of the new Directive 2011/83/EU on consumer rights and by Art 2(f) of the Proposal of The Common European Sales Law, Commission, 'Proposal of The Optional Instrument on a Common European Sales Law ("The Optional Instrument")' COM(2011) 635 final

¹⁴⁷ This right of Member States is explicitly recognized by Directive 2011/83/EU on consumer rights, see its Recital 13: *Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises*; the UCPD just points out that its scope is limited to protection of economic interests of consumers, whereas in case of other persons, the Commission is called to *carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition*. (Recital 8 of the UCPD)

¹⁴⁸ See Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM (2013) 37 final

each specific case. The Directive provides a definition which actually does not explain who is a consumer, but rather who is *not* to be considered as consumer. Such a definition is of help for the interpretation of the *materiae personae* scope of application of the provisions of the Directive, since its legal regime is applicable only for business practices which harm or are likely to harm the economic interests of consumers.

In respect to this definition, the Directive did not provide anything innovative, but rather confirmed a definition that already existed in other pieces of consumer legislation¹⁴⁹ and that was confirmed by the Court in its case law.¹⁵⁰ Since there has been a clear consistency between the law on unfair commercial practices and consumer contract law concerning this definition and since this definition does not help with understanding of the meaning of consumer as a legal standard of expected behaviour of consumer, further examination of this definition remains outside of the scope of the analysis of this thesis.

Consumer as a standard of expected behaviour

This Chapter is focused on the second definition of the consumer. This definition is aimed to explain what the substantive characteristics of a consumer as a legal standard are, establishing thus “an idealised image of how consumer behaves”.¹⁵¹ In that aspect, the Directive defines average consumer as “a consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the European Court of Justice”.¹⁵² This definition represents codification of the notion of average consumer as already developed by the ECJ in a legislative text for the reasons of coherency and legal

¹⁴⁹ Such a definition of consumer was adopted already in the first directive of consumer acquis aimed to protect economic interests of consumers, see Article 2 of Directive 85/577/EEC on contracts negotiated away from business premises

¹⁵⁰ Joined Cases C-541/99 and C-542/99 *Cape SNC v Idealservice SRL and Idealservice MN RE SAS and Omai SRL* [2001] ECR I-9049 para 17

¹⁵¹ G Howells, ‘The scope of European Consumer Law’ (2005) 1 *European Review of Contract Law* 360, 366

¹⁵² Recital 18 of the UCPD

certainty on the European level since it was identified that some of Member States were not applying such a test, but were still using their own, national standards.¹⁵³

This definition is contained in the Recitals of the Directive, though it was initially proposed as an integral part of the main text of the UCPD.¹⁵⁴ The Commission explained that the reason for which the definition was moved to recitals, from the main text of the Directive, concerned the prescription of a definition would protect further evolution of the standard of the average consumer through the jurisprudence of the ECJ.¹⁵⁵ However, the principal reason for its removal was the impossibility to make a consensus among all relevant stakeholders for the adoption of such a standard.

Nevertheless, despite being moved to the recitals of the Directive, already in one of its first judgments on the UCPD, *Ving Sverige*, the Court underlined the fundamental significance of such a definition of the consumer for application of the provisions of the UCPD in practice, confirming its status as the principal benchmark for assessment of fairness of a commercial practice.¹⁵⁶ Namely, the Directive prohibits all commercial practices of traders directed towards consumers which are unfair. In order to verify whether a commercial practice is unfair, the UCPD has established a complex three-step mechanism for assessment of commercial practice's fairness that national court must always follow in a strictly hierarchical order as emphasised by the ECJ.¹⁵⁷ The notion of average consumer plays a key role chiefly for the second step

¹⁵³ G Abbamonte, 'The UCPD and its general prohibition' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 25

¹⁵⁴ Commission, 'Proposal of the Directive on Unfair Commercial practices' COM (2003) 356 article 2(b)

¹⁵⁵ Commission, 'Communication to the European Parliament concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Regulation [Consumer Protection Cooperation] and directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC (the Unfair Commercial Practices Directive)' COM (2004) 753 final, 3

¹⁵⁶ see Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903, para 7 and para 22

¹⁵⁷ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 65; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2010] ECR I-00217, para 53; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 40.

and the three forms of small general clauses, as well as for the third step and the general fairness clause of the UCPD.¹⁵⁸

The average consumer between the two goals of the UCPD

European average consumer as a compromised solution

The standard of average consumer represents, as Weatherill describes it well, “an attempt to navigate a course between the rich diversity of actual consumer behaviour and the need for an operational benchmark”.¹⁵⁹ The question is why the Commission opted for such a rather advanced standard of expected behaviour of consumer when it had a chance to incorporate a more consumer friendly standard into the UCPD than the one developed by the ECJ. This would also have been in line with the shift brought by the UCPD from a prevailing negative, to prevailing positive harmonisation approach in the area of unfair commercial practices.¹⁶⁰

The expected standard of behaviour developed through the ECJ case law is higher than the standard which had been previously used in some Member States.¹⁶¹ In other words, expectations related to the presumed consumer behaviour on the market were higher than those initially assumed by national consumer polices. This is not surprising since the establishment of average consumer as unified European standard of expected consumer’s behaviour was not the product of European consumer policy, but rather a result of the tendency to abolish as much as possible all kind of barriers for cross border trade among Member States.¹⁶²

¹⁵⁸ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 53; Order in Case C-343/12 *Euronics Belgium CVBA v Kamera Express* [2013] ECR I-0000, para 26;

¹⁵⁹ S Weatherill, “Who is the “Average Consumer”” in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 135

¹⁶⁰ See T Wilhelmsson (n 12)

¹⁶¹ See, inter alia, Case C-120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 00649; Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR I-00131; *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* Case C-315/92 (1994) ECR I-00317; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I-01923; Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-04657

¹⁶² S Weatherill, *EU Consumer law and Policy* (2 nd edn Edward Elgar Publishing 2013), 57

Such a standard of average consumer as developed by the ECJ was maintained and codified by the Directive, despite the fact that the UCPD is now a common European piece of legislation, imagined to be a most powerful instrument for consumer protection. This approach can be explained by the fact that achievement of a high level of consumer protection is not the exclusive principal goal of the UCPD, but besides this objective, the Directive indicates another main purpose of its adoption, of nominally equal importance as the need to achieve high level of consumer protection: the requirements for improvement of functioning of the internal market.¹⁶³ As a consequence, the standard of the average consumer is the outcome of the conflict of these two main goals of the Directives which in their relation to the average consumer have opposite purposes: the objective of consumer protection urges for adoption of a more consumer-friendly standard, according to which an average consumer is seen, more realistically, as it was argued two decades ago by Collins as “a naïve and inexperienced consumer”.¹⁶⁴

Contrary to this, the interests of internal market advocate for adoption of a standard that would establish as least as possible regulatory obstacles for free movement of goods where acceptance of any higher standard would also result in more obstacles for cross border trade. This is why the average consumer, under such a meaning, was eventually approved as the general standard for assessment of commercial practice’s fairness.

A comparative example of understanding of average consumer

Interestingly, a comparative example from Canada, a country of comparable economic power and tradition of consumer protection as the European Union, shows a different understanding of the standard of the average consumer where this standard is equally used for the fairness assessment of commercial practice of trader. In its relatively recent judgement, in case *Richard v. Time Inc*, the Supreme Court of Canada clarified

¹⁶³ Art 1 of the UCPD; the legal basis for adoption of the Directive was not article 153 TEC (now Article 169 TFEU), but article 95 TEC (now Article 114 TFEU) whose objective is development of the Internal Market.

¹⁶⁴ See H Collins, ‘Good Faith in European Contract Law’ (1994) 14 Oxford Journal of Legal Studies 229, 248

the meaning of the average consumer.¹⁶⁵ The facts of this case included a consumer who received an advertisement in which it was falsely claimed that consumer has won the prize, while the true intention was to make consumer subscribe on a magazine under the guise of retrieving this prize.

In its judgment, the Supreme Court of Canada has identified that the assessment of fairness of the commercial practice should be performed on the basis of “the average consumer, who is credulous and inexperienced and takes no more than ordinary care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement”.¹⁶⁶ By this judgment, the Supreme Court has overruled the decision of the lower Court of Appeal which had defined the benchmark of the average consumer as possessing “an average level of intelligence, scepticism and curiosity”.¹⁶⁷ It can be noticed that the overruled standard of the lower court, the Court of Appeal, is much closer to the European understanding of the average consumer. However, the Supreme Court opted for a more pro-consumer oriented definition, same as the one which applied in case of pre-UCPD national laws in Germany or Scandinavian countries.¹⁶⁸

Three components of the definition of average consumer

The definition of average consumer is a very complex one, in reality consisting of three parts. Firstly: the average consumer is considered as a “reasonably well-informed, reasonably observant and circumspect” consumer, which explains what is the expected behaviour of a consumer. Secondly while assessing the fairness of advertising “social, cultural and linguistic factors” should be taken into account, which points to the three factors which must be taken into consideration while

¹⁶⁵ *Richard v. Time Inc.*, 2012 SCC 8

¹⁶⁶ *Ibid.*

¹⁶⁷ *Time inc. c. Richard*, 2009 QCCA 2378

¹⁶⁸ U Bernitz, ‘Scope, Ambitions and Relation to Unfair Competition Law’ in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 37

assessing whether the consumer behaved in expected manner. Third, the concept of the average consumer needs to have an autonomous meaning as interpreted by the ECJ, i.e. that there has to be a unified European understanding of average consumer.

All three of these parts have been developed by a different set of case law of the Court. This jurisprudence had some, though limited, impact on the national understandings of the average consumer before the adoption of the Directive.¹⁶⁹ In order to fully understand the meaning of the average consumer, it is essential to assess each of these three components separately.

The average consumer as a reasonably well-informed and reasonably observant and circumspect consumer

This part of the definition of average consumer establishes a presumption of how an average consumer is expected to behave in reality as a key player at the market. It is primarily based on the information paradigm, upon which the entire EU consumer law is founded.¹⁷⁰ The concept of well-informed and reasonably observant and circumspect consumer is founded on the hypothesis that consumer lack of information leads to an inefficient market, so that is considered to be the main argumentation of the economists justifying the need for the legal activism in the consumer markets and imposition of duty of information on traders.¹⁷¹ Consequently, EU consumer law protects only the consumer who puts some efforts and uses the disclosed information, and not those who ignore them.

On the basis of such an idea and approach towards consumer, the Court developed a set of consistent case law. The roots of the concept of “a reasonably well-informed

¹⁶⁹ R Schulze and H Schulte-Nölke, ‘Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices’ (2003) http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf accessed 12 May 2014, 24

¹⁷⁰ see Chapter IV on Duty of information of the thesis

¹⁷¹ S Grundmann, W Kerber W and S Weatherill, ‘Party autonomy and the role of information – an overview’ in S Grundmann, W Kerber and S Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market – an Overview* (Walter de Gruyter 2001), 7

and reasonably observant and circumspect consumer” can be traced back to the judgments of the Court in *Nissan*¹⁷² and *Mars*¹⁷³. Such a model of the consumer was eventually confirmed and expressed in currently existing wording in the decision of the Court in *Gut Springenheide*¹⁷⁴.

In *Nissan*, the Court had to decide on a preliminary reference made by French court whether an the advertising of imported and already registered cars as new should be considered to be misleading. The issue was that cars of the Nissan brand were imported from Belgium to France for resale by an importer other than the exclusive distributor of Nissan for France. In his advertising the importer was promoting the imported cars as both being new, and as cheaper than the same cars which were offered by the official French distributor. Despite being brand new, these cars had already been registered, though only for import purposes, and they were cheaper because they were equipped with fewer accessories than the same model of the cars, which was on sale in France by the official distributor. Hence, the question was whether a consumer could be misled by such an advertising practice.

In his Opinion, Advocate General in *Nissan* pointed out that the average consumer is prompted to “make a careful comparison of the prices on offer and to enquire of the seller sometimes very meticulously, about the accessories with which the vehicle is equipped”.¹⁷⁵ Continuing in the same vein, the Advocate General identified the average consumer as the only consumer who deserves to be protected by EU consumer law in accordance with the proverb: “vigilantibus, non dormientibus iura succurunt or the law comes to the assistance of those who are vigilant with their rights, and not those who sleep on their rights”.¹⁷⁶

¹⁷² Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR I-00131

¹⁷³ Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I-01923

¹⁷⁴ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-04657

¹⁷⁵ Opinion of Advocate General Tesauro in Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR I-00131, para 7

¹⁷⁶ *Ibid.*, para 8

The Court in its decision materially followed the Opinion of Advocate General and adjudicated that the disputed advertising is not to be considered as misleading. In its judgment the basic presumption of the Court was that consumers are neither misled by the advertisement nor by the fact that cars are cheaper due to containing fewer accessories. This is so since a majority of consumers inform themselves about these characteristics before buying a car, normally also comparing with other offers on the market. Consequently, the law will provide protection to the informed consumers who applies a certain level of effort in informing themselves while acting in the market. This means that as the objective for protection should only be based upon the fact that a consumer applies some effort to inform himself with relevant facts, and not to a lazy consumer who does not conduct any comparative research about the offers or hardly makes any effort in becoming informed.¹⁷⁷

In *Mars*, the Court developed the concept of the *reasonably circumspect* consumer as the benchmark of protection from misleading advertising. The question raised before the Court was whether a German national rule that imposed prohibition of the indication “+10%” on Mars ice cream bars and other products of the same producers represented an obstacle to free movement of goods. In this case, these ice cream bars, which first were lawfully produced, advertised and sold in France, were imported to Germany. The labels of these ice creams contained the sign “+10%” whose purpose was to show that standard product size was increased by ten percents. The disputed issue concerned whether such a sign should be permitted since it covered more than ten percent of the total surface of product wrapping. As a consequence, consumers were subject to being misled by thinking that either the sale price of the goods was the same as it was for the same product without the +10% label, or that the size and weight of the product was in any way significantly increased.

The Advocate General in his Opinion pointed to the standard of ‘normal care’ required for justification of the existence of an obstacle to freedom of movement of

¹⁷⁷ Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR I-00131, para 11

goods through the rule on advertising prohibition. He stated that it was not proven that the consumer who shows normal levels of care could be misled by the sign. In that aspect, the Advocate General followed the Commission's view that "... it must also be clear to a careful consumer that a certain amount of exaggeration is inherent in any promotion of a product".¹⁷⁸ In this Opinion, it is noticeable, as the Advocate General points out, that consumer protection should be granted only to a careful consumer. However, the Court did not follow this approach, but it has rather used the notion of *reasonably circumspect* consumer as a slightly more protective and objective formulation.

The Court concluded that a reasonably circumspect consumer is fully aware of the fact there is no connection between the size of the marketing sign and the real increase of the advertised product.¹⁷⁹ By this, the Court rejected the argumentation of the German government that "+10%" may cause "a non insignificant number of consumers" to believe that the increase of the offered product is bigger than it actually is.¹⁸⁰ Consequently, such an approach shows that the objective of protection is a reasonably circumspect consumer who is aware of the basic marketing tactics and does not fully trust traders.

Eventually, in *Gut Springenheide* the Court was obliged to provide answers to the direct question regarding the objective of EU consumer policy: whether that is the *casual consumer* or the *average consumer*.¹⁸¹ This was a conflict between the traditional German national concept of a casual consumer with the innovative European concept of average consumer as developed by the ECJ case law.

¹⁷⁸ Opinion of Advocate General Leger in Case C-470/93 *Verein Gegen Unwesen in Handel und Gewerbe Koln eV v. Mars GmbH* [1995] ECR I-1923, para 44

¹⁷⁹ Case C-470/93 *Verein Gegen Unwesen in Handel und Gewerbe Koln eV v. Mars GmbH* [1995] ECR I-1923, para 24

¹⁸⁰ *Ibid.*, para 22

¹⁸¹ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-04657, para 15

In this case, the dispute concerned the legality of the marketing of eggs in Germany under slogan ‘six grain – 10 fresh eggs’ supported by the provision of information that hens which produce these eggs are fed with particular six types of grain. The marketing slogan was also the name of the trademark. The description of the meaning of this name was put inside the product package. However, the issue was that the hen feed did not exclusively consist of these grains, and in fact included some other ingredients. Therefore, the question arose as to whether consumers are misled by such a form advertising of the eggs and by the inserted leaflet.

In his Opinion, the Advocate General indicated that in the case law, the Court always referred to an average, reasonably circumspect consumer as the benchmark of its consumer policy. In that aspect, Advocate General agreed with the definition given by the German Federal Administrative court, which referred the case, where the informed average consumer is defined as consumer “who takes in the information about the product on sale and hence the overall characterization of the products attentively”.¹⁸² Contrary to the average consumer, there is a casual consumer “who has regard to the information about the product on sale and the statements promoting sale only casually and uncritically, without checking more closely the message put over by the information”.¹⁸³ In other words, the casual consumer does not use or profit from the provided information and that is his problem. The law does not provide protection to a person who behaves so negligently, but only to persons who take care and use what they are offered, i.e. the information.

In its judgment, the Court followed the Opinion of Advocate General and underlined that the national courts, while deciding whether an advertising practice is misleading, as a benchmark should take the average consumer who is reasonably well-informed

¹⁸² Opinion of Advocate General in Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-04657, para 56

¹⁸³ *Ibid.*

and reasonably observant and circumspect.¹⁸⁴ Thus, this judgment represents the first decision of the Court in which such a wording for the explanation of the protected consumer in advertising was used.

Social, cultural and linguistic factors

The European Union is a multicultural and multi-linguistic society where the existences of differences among its citizens are recognized, protected, and moreover, supported and encouraged. One of the forms of these diversities is the diversity among consumers coming from different Member States. On the European level, consumers do not represent a homogenous group, since they differ among themselves due to various factors in relation to national specificities and, consequently, while acting at the market, they behave in different manners, so it may be highly disputed whether at all we can speak of ‘a European consumer’.¹⁸⁵ Empirical research on consumer behaviour differentiates depending on the culture to which certain consumer belongs, research has shown that, depending to the culture they belong to, consumers are going to react and respond in different ways to traders’ commercial practices.¹⁸⁶

Through the recognition of social, cultural and linguistic factors in interpretation of the meaning of the average consumer, the Directive acknowledges this diversity.¹⁸⁷ The formulation of these three factors enables subsuming of a wide range of different circumstances that affect the distinctiveness of a consumer.¹⁸⁸ The UCPD in particular recognized the differences among diverse consumer cultures in Europe by not addressing legal requirements related to taste and decency.¹⁸⁹

¹⁸⁴ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-04657, para 37

¹⁸⁵ see T Wilhelmsson, ‘The Average Consumer: a Legal Fiction?’ in T Wilhelmsson, E Paunio and A Pohjolaine (eds), *Private Law and the Many Cultures of Europe* (Kluwer Law International 2007)

¹⁸⁶ see M de Mooij, *Consumer Behavior and Culture* (2nd edn SAGE Publications 2011)

¹⁸⁷ In the initially Proposed version these three factors were omitted, but they were only added subsequently see Commission, ‘Proposal of the Directive on unfair commercial practice’ COM (2003) 356, section 35

¹⁸⁸ T Wilhelmsson, ‘Harmonizing Unfair Commercial Practices Law: Cultural and Social Dimensions’ (2006) 44 *Osgoode Hall Law Journal* 461

¹⁸⁹ Recital 7 of the UCPD

I argue that the case law of the Court shows that they are to be interpreted in a very restrictive manner, which significantly diminishes practical importance of these three factors. Their application can be justified only exceptionally. This is because these factors stand opposite to the goals of the establishment of the unified legal regime of fair-trading in the EU since the consequence of their application is that certain practice may be allowed in one, and prohibited in another Member States, representing thus again an obstacle for cross border trade.

Recognition of the potential usage of social, linguistic and cultural factors in interpreting particular commercial practice also represents the result of the case law of the Court. Initially, they were raised in the context of factors that were taken into consideration while deciding whether a trader's practice misleads the consumer and accordingly whether a national prohibition of such a practice, which represents the obstacle to free movement, can be justified. Again, same as in the case of the well-informed consumer, the ECJ developed these factors through interpretation of EU primary law. The Court developed these factors in its decisions in *Clinique*¹⁹⁰ as subsequently confirmed and explained in *Fratelli Graffione*¹⁹¹ and '*Lifting*'.¹⁹²

In *Clinique*, the dispute was related to the national ban which prohibited marketing of cosmetic products in Germany under the name 'Clinique'. The justification was based on the explanation that such a name is similar to German word for 'hospital' and thus, that it may mislead consumers about the characteristics of the advertised product. In its judgment, the Court pointed out that this prohibition is not permitted because the name 'Clinique' cannot mislead consumers since it is sold in shops which are exclusively dedicated to selling of cosmetic and not medical products. Thus, despite the fact that linguistically speaking such a practice could be misleading, the fact that it

¹⁹⁰ Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* (1994) ECR I-00317

¹⁹¹ Case C-313/94 *Fratelli Graffione Snc v Ditta Fransa* [1996] ECR I-06039

¹⁹² Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-00117

is sold in particular types of shops provided sufficient clarification for average consumer not to be misled.¹⁹³

The Court, however, did not mention ‘linguistic, social and cultural’ factors but these words were only stated in the Opinion of Advocate General. This phrase was mentioned in the context that these factors have to be taken into consideration by national courts while deciding whether certain advertising is misleading for consumer. Namely, depending on these factors, the same advertisement may be allowed in one member state and prohibited in the other member state since there it can mislead a consumer depending on their particular linguistic, social and cultural characteristics. However, what always should be considered in decision making, is the freedom of movement of goods on the one hand, with a particular value (health, etc...) that is protected by a disputed rule.¹⁹⁴ This means that the existence of a particular rule which prohibits advertising may be legally justified in one Member State, whereas it may be found unlawful in the other Member State on the basis of linguistic, social and cultural factors if it protects an interest that is considered to be more important, under mandatory condition of proportionality.

In *Fratelli Graffione SNC*, the dispute was whether prohibition of marketing of toilet paper and handkerchiefs under the trademark *Cotonelle* in Italy represented an obstacle to freedom of movement of goods since the trademark of this product could mislead consumers to think that the product contained cotton, when in reality it does not. Advocate General Jacobs in his Opinion agrees with the Advocate General Gulmann from the *Clinique* case that the fact of whether the advertising is misleading in one member state may depend on linguistic, social and cultural conditions. In that aspect, Advocate General Jacobs showed that the word ‘cotonelle’ causes “a speaker of English, French or Italian to believe that a product is made of cotton but it could

¹⁹³ Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* (1994) ECR I-00317, para 21

¹⁹⁴ Opinion of Advocate General Gulmann in Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* (1994) ECR I-00317, para 18

hardly have that effect on someone who understands only German or Spanish since the words for cotton in those languages are ‘Baumwolle’ and ‘algodon’ respectively”.¹⁹⁵ This may mean that such advertising practice would be misleading, for instance, in case of the average Italian consumer, and not in case of average German consumer.

The Court agreed with the observation of the Advocate General on the fact that due to linguistic, cultural and social differences, a trademark which is not misleading in one Member State can actually be misleading in the other one. However, a measure that protects the consumer in that Member State from being misled “must really be necessary for that purpose and proportionate to the objective pursued, which must not be capable of being achieved by measures which are less restrictive of intra-Community trade”.¹⁹⁶ Such a view of the Court shows that, besides its wide possible scope of application, these three factors are interpreted restrictively.

In accordance with such an approach as in *Fratelli Graffione SNC*, social, cultural and linguistic factors were principal factors used by the Court while weighing the arguments of consumer protection on the one side, with the freedom of movement of goods on the other side in its decision in *Lifting* case the.¹⁹⁷ In this case, the Court was faced with the question whether the name of a cosmetic product manufactured by Lancaster which contains the word ‘lifting’ is misleading for consumers. This is because consumers might be misled due to the word ‘lifting’ that the advertised cream contains in its name, it has the same effects as a surgical lifting of the wrinkles. The issue was whether the term ‘lifting’ is particularly misleading for German consumers due to linguistic reasons, and that as a result, the prohibition of this form of advertising would be justified in Germany.

¹⁹⁵ Opinion of Advocate General Jacobs in Case C-313/94 *Fratelli Graffione Snc v Ditta Fransa* [1996] ECR I-06039, para 10

¹⁹⁶ Case C-313/94 *Fratelli Graffione Snc v Ditta Fransa* [1996] ECR I-06039, para 23

¹⁹⁷ Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-00117, para 29

In his Opinion, the Advocate General pointed that this linguistic factor cannot be applied in this case since 'lifting' is an English word so it would rather mislead consumers of different Member States rather than a German consumer.¹⁹⁸ The Court followed the Opinion of the Advocate General and did not agree with the German justification for the prohibition of the advertising of products containing the word 'lifting' since it could not be considered as misleading for the average consumer.¹⁹⁹ Consequently, the Court did not accept German justification for existence of such a national measure based on language particularities.

The limited scope of application of the factors

Taking into consideration these three factors of the Directive while defining the notion of the consumer takes into account the European concept 'united in diversity' and respect of the multi-linguistic and multicultural nature of the European Union that also affects European private law.²⁰⁰ Moreover, these values have been explicitly recognized by the Charter of Fundamental Rights of the European Union.²⁰¹ This is why Wilhelmsson has advocated for a more practical usage of these factors.²⁰²

The Court showed that these three factors are to be interpreted in a very restrictive manner. The application of these rules might result in the fact that advertising of a certain product becomes prohibited in one of the states, whereas in the other ones, it is lawful. Hence, traders would not be able to advertise a particular product freely in the same manner. This is why this provision has to be interpreted restrictively, that these factors should be taken into consideration only when their impact has serious effects. Particular consideration should be paid to the maximum harmonization character of

¹⁹⁸ Opinion of Advocate General in Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-00117

¹⁹⁹ Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-00117, para 30

²⁰⁰ R Sefton-Green, 'Sense and Sensibilities: The DCFR and the Preservation of Cultural and Linguistic Plurality' (2008) 4 *European Review of Contract Law* 281

²⁰¹ 'The Union shall respect cultural, religious and linguistic diversity', Art 22 of the Charter of Fundamental Rights of the European Union

²⁰² T Wilhelmsson, 'Misleading Practices' in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 152

the Directive which diminishes even further the their possible scope of application in practice.

Remarkable is that the Court developed and mentioned these three factors in cases in which it did not find them applicable. Similarly, in a majority of the cases when these factors were raised in favour of justification of banning a particular practice, the Court rejected them. For instance, in Italy it is a cultural phenomenon that vinegar is made exclusively of grapes and never of apple, or that pasta can be made exclusively of durum wheat, but the Court did not accept this justification for a measure which prohibited the marketing and selling of vinegars based on apple²⁰³ or pasta made of other types of wheat.²⁰⁴ Similar cases exist with margarine in Belgium where consumer culture understood that margarine is always packed in cubes in order to distinguish it from butter which was packed in different manner. However, this could not justify the existence of national Belgium measure aimed to protect expectations of a Belgium consumer.²⁰⁵

The case law shows that actually the Court allows the application of the three factors only in cases when the health or personal integrity of consumer, with a higher value than only economic interests, are endangered and when such a risk is clearly proven. This was the approach of the Court in the interpretation of primary law by accepting the justification of national measures on the basis of the protection of health and safety. For instance, the import of muesli bars with added vitamins that were lawfully marketed and sold in Germany on the basis on the uncertainty of the effects of these vitamins.²⁰⁶

Similarly on the ground of public health, France was allowed to prohibit marketing and sale of Red Bull, a drink that is lawfully marketed and sold in most other Member

²⁰³ Case C-788/79 *Criminal proceedings against Herbert Gilli and Paul Andres* [1980] ECR 02071

²⁰⁴ Case C-407/85 *Drei Glocken GmbH and Gertraud Kritzingler v USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECR I-04233

²⁰⁵ Case C-261/81 *Walter Rau Lebensmittelwerke v De Smedt PvbA* [1982] ECR 03961

²⁰⁶ Case C-174/82 *Criminal proceedings against Sandoz BV* [1983] ECR 02445

States.²⁰⁷ The Court found both of these measures to be justified. However, since protection of these interests is beyond the scope of the Directive, the case law shows that it is hard to imagine that social, cultural and linguistic factors may apply in cases when economic interests of consumers are endangered.

A restrictive approach towards the application of these three factors narrows down the possibility of the influence of the national concepts on the understanding of the average consumer by the national courts. This is in accordance with the aim of the Directive to achieve a high level of harmonisation of fair trade laws in the Member States. In that sense, it is on the national courts to provide justification for the application of these factors. As a consequence, some of the national legal systems will not be able to maintain their pre-UCPD standards on the ground of social, cultural and linguistic characteristics of consumers. The idea seems to be that there should not be a Swedish or an English consumer, but that rather a concept European consumer needs to be established.

The autonomous interpretation of the average consumer

The third component of the definition of the average consumer is an understanding of its meaning ‘as interpreted by the European Court of Justice’. This is in line with the requirement that the notion of EU law, including European private law, may have only the European meaning, fully liberated from any influences of the national legal systems.²⁰⁸ Such an approach represents a mandatory prerequisite for the aimed unification and it is primarily derived from *Hoekstra*.²⁰⁹ In this case the Court underlined the principle of the autonomous interpretation of EU law by the ECJ and that only the Court is competent to provide an interpretation of the provision from EU law which have their own autonomous European meaning.

²⁰⁷ Case C-24/00 *Commission v France* [2004] ECR I-01277

²⁰⁸ G Dannemann, S Ferreri and M Graziadei, ‘Language and terminology’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010), 80

²⁰⁹ Case C-75/63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 00347

Since the Hoekstra case, case law has shown high levels of consistency regarding the application of the principle of autonomous interpretation of EU law. The further clarification was well explained in a more recent judgment of the Court in *Hadady* where the ECJ underlined that “it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question”.²¹⁰

In case of the rules on unfair commercial practices, the autonomous interpretation of the terms from the UCPD was confirmed by the Court in *Ving Sverige*. The entire legal framework for fair-trading needs to have its own European meaning. In this case the Court was asked whether a particular advertising of Swedish travel agency could be considered as an invitation to purchase in accordance with article 7(4) of the UCPD. The notion of the invitation to purchase from the Directive also exists in the national laws of member states and accordingly the advertisement which was the object of dispute can be considered as invitation to purchase in some of the national jurisdictions, whereas in some others it cannot. However, the Court pointed out that the terms from the Directive should be interpreted independently from the national legal traditions and gave the autonomous interpretation of this term on the basis of the text of the UCPD.²¹¹

Some other case law of the Court can be also considered as useful for understanding the notion of the average consumer. For instance, in *Lloyd*, the Court that the attention of consumer is not a constant, but rather a variable category that depends on the

²¹⁰ case C-168/08 *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)* [2009] ECR I-06871

²¹¹ Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903

category of goods and services.²¹² As a consequence, national courts have to assess consumer behaviour in the context of particular product that is the object of a commercial practice. This autonomous interpretation is of particular importance in the case of the UCPD since this Directive requires maximum harmonization, as it was pointed out by Advocate General Mengozzi so that all Member States could have a unified approach to the regulation of fair trading.²¹³

The case law of the Court provides numerous examples on what is in reality to be understood as the average consumer. However, the problem is that the ECJ cannot provide clarification on how in each of the thousands of possible factual situations, the average consumer might be imagined to behave. This opens the door for different understandings of the average consumer, in particular cases decided by the national courts. This is why it may easily happen that in different countries in case with the same facts, the behaviour of the average consumer may be understood in different manner.

The interpretation of the average consumer under the UCPD

In its case law on the interpretation of provisions of the UCPD, the ECJ also touched upon the question of the meaning of average consumer. These decisions are important since they facilitate the understanding of the meaning of the average consumer to the national courts in cases when they are supposed to assess fairness of a commercial practice. Accordingly, the Court confirmed the role of average consumer as a central figure of the Directive who is always to be taken as a benchmark in relation to which fairness of a commercial practice is to be assessed.²¹⁴ Moreover, certain clarifications of the meaning of the average consumer were provided, particularly by the Advocate Generals.

²¹² Case C-342/97 *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* [1999] ECR I-03819, para 26

²¹³ Advocate General Trstenjak in Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 24

²¹⁴ Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903, para 22

In *Mediaprint*, the Advocate General in her Opinion pointed out that the average consumer is a compromise, a balance, between the requirements for consumer protection, on the one hand, and encouragement for freedom of movement of goods, on the other hand, based on the fundamental principle of proportionality.²¹⁵ Therefore, while interpreting the concept of the average consumer, national courts should always be aware of the principle of proportionality while deciding on the average consumer.

Moreover, in contemporary society and free market economy, consumers need to be fully aware of the fact that usual advertising tactics do not include only marketing of product prices and quality, but also of certain supplementary benefits. Accordingly, the Advocate General pointed out that “it is therefore logical to leave it to such a reasonably well-informed and reasonably observant and circumspect consumer within the regulatory framework defined by Community law to decide whether to purchase a product on the basis of the advertised advantages or because of its quality or even its low price”.²¹⁶ Consequently, the Advocate General points out that the average consumer cannot be misled by a sale with bonuses, i.e. by the sale of newspapers that offers participation in a competition. The validity of such an argument was confirmed by the Court when deciding that such a commercial practice is not to be considered as unfair.²¹⁷

In her Opinion in *Plus*²¹⁸, the Advocate General agreed with the arguments raised by the Spanish government that the average consumer will not expect to spend 100 EUR in order to play a game of chance. Consequently, the fact that consumers are offered the possibility to participate in a lottery if they spend a certain amount of money cannot be considered as an unfair commercial practice. In this case, unlike in *Mediaprint*, the

²¹⁵ Advocate General Trstenjak in Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 102

²¹⁶ *Ibid.*, para 131

²¹⁷ Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 47

²¹⁸ Opinion of Advocate General Trstenjak in Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 103

Court did not assess this argument of the Advocate General since it just considered the maximum harmonization character of Directive which precluded explicit prohibition of any other commercial practice than the thirty-one exhaustively enlisted in Annex I of the Directive.²¹⁹

In *Lidl* the Court assessed permissibility of a comparative advertising from a perspective of an average consumer. One of the findings of the Court was that comparative advertising of food products with different characteristics exclusively on the basis of price differences could be misleading for the average consumer if this distinction among characteristics is not apparent from the advertisement.²²⁰ Furthermore, the Court pointed out to the national courts that the average consumer should be taken from the category of *all end consumers who purchase their basic consumables in a chain of stores*²²¹ from which the average consumer should be taken as the benchmark for the assessment whether a comparative advertisement is to be considered as misleading.

In *Ving Sverige*, a case referred from a Swedish Commercial Court, the ECJ was dealing, *inter alia*, with the question whether an advertising for a package travel of a Swedish tourist agency which contained only the initial price and partial material information can be subsumed under a form of unfair commercial practice. According to the views of Consumer Ombudsman, the main Swedish institution in charge of enforcement of consumer law, such an advertising practice of trader is to be considered as misleading since it omits to present certain material information and thus misleads an average consumer. Such a view of Consumer Ombudsman was fully in line with the traditionally advanced Swedish approach towards consumer protection.

²¹⁹ Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 54

²²⁰ *Ibid.*, para 56

²²¹ *Ibid.*, para 47

The ECJ disagreed with the approach of Swedish Consumer Ombudsman and pointed out that the disputed advertising practice is legal, i.e. that an average consumer cannot be misled by such a practice and thus it must not be prohibited.²²² Namely, according to the Court, for an advertisement directed towards an average consumer it is sufficient to provide only some of the material information in the advertisement itself whereas for the additional missing information it is enough to provide the consumer with a phone number or an address of a web page on which he can find the missing information and get informed. In other words, in case of an advertising practice as the one of *Ving Sverige*, an average consumer will not be fully pleased with the information provided, but he is expected to look for more information provided to him via other mediums.

In its judgement, the Court underlined the fundamental significance of a common European model of average the consumer, as a well-informed and reasonably observant and circumspect consumer, for the interpretations of the provisions of the Directive.²²³ As a consequence, only such a consumer can be used as a model throughout all Member States, precluding all previously existing national models of consumers even if, as it was the case of Sweden, national models of consumer guaranteed a higher level of consumer protection.

In *Perenicova*,²²⁴ the average consumer was taken as a benchmark while deciding whether false information on annual percentage rate in consumer credit agreement was misleading information in the context of the provisions on misleading action of the UCPD.²²⁵ Regarding behaviour in real life of an average consumer in his relation towards consumer credit, the Advocate General explained what is expected, i.e. that “an average consumer will normally obtain offers from a number of potential lenders and decide to take out a loan on the basis of a comparison of those offers, including

²²² Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903

²²³ *Ibid.*, para 22

²²⁴ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000

²²⁵ *Ibid.*, para 47

the costs likely to be incurred”.²²⁶ As a consequence, offering favourable credit conditions will, by rule, be the fundamental reason why a consumer would opt for a particular creditor. The Court concluded that the average consumer would be misled by the false provision of the interest rate, as it were the case. Hence, such a practice by traders is unfair and prohibited.

In *Purely Creative*, the Court pointed out that information regarding the cruise that was offered, as a prize, to consumers has to include information regarding the itinerary of the cruise, points of departure and arrival as well as forms of housing and meal plans which are offered. In a concrete case, these pieces of information were provided only partially and in small print. The Court pointed out that *clarity* and *comprehensibility* of disclosed information has to be assessed in such manner that they “enable the average consumer of the group concerned to take an informed decision”.²²⁷

The distinction between the average consumer and vulnerable consumer

Besides the definition of the average consumer as a general standard for assessment of fairness of a commercial practice, the Unfair Commercial Practices Directive provides two additional, supplementary benchmarks. The first one is the average consumer within a particular group of consumers,²²⁸ the second one is the vulnerable consumer.²²⁹

Average consumer of a particular group

The standard of the average consumer of a particular group of consumers applies when a commercial practice is *specifically aimed at a particular group of consumers*.²³⁰ Such a standard applies in case, for instance, of advertising of male

²²⁶ Opinion of Advocate General Trstenjak in Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 99

²²⁷ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 56

²²⁸ Art 5(2)(b) of the UCPD

²²⁹ Recital 18 and art 5(3) of the UCPD

²³⁰ Art 5(2)(b) of the UCPD

shave equipment which is directed exclusively to male population above certain age as a target group and behaviour of an average consumer of that group will be considered as a benchmark. In these kinds of cases, the national courts are obliged to record the reaction to the commercial practice of an average member of such a group while assessing the impact of such a practice.²³¹

It has to be underlined that the meaning of the average consumer within a particular group of consumers is the same as the meaning of the general average consumer. Only the context for the assessment of fairness will be changed. This is because the purpose of this supplementary benchmark is to provide a more realistic assessment of fairness of a commercial practice when it is directed to a particular group of consumers which are not particularly vulnerable, but which has certain particularities that have to be taken into account. Such a consumer is also considered as being reasonably well-informed and reasonably circumspect and observant. The point is to exclude from the assessment consumers who in this group is irrelevant since they are not affected by a particular practice, and thus must not be considered in the results.

The notion of vulnerable consumer

The standard of the vulnerable consumer applies in case of particular vulnerability of a consumer to a commercial practice as a consequence of particular characteristics of that consumer such as *mental or physical infirmity, age or credulity*.²³² Such a definition of the vulnerable consumer was criticized as being too narrow and arbitrary, thus neglecting to include some other legitimate causes of consumer's vulnerability including education, race and ethnicity.²³³ For instance, the ECJ itself has identified a low level of education as one of the causes of vulnerability to consumers, so it is surprising that these grounds were not taken into consideration.²³⁴

²³¹ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 53

²³² art 5(3) of the UCPD

²³³ J Stuyck, E Terryn and T Van Dyck, 'Confidence through fairness? The new Directive on unfair business-to-consumer on commercial practices in the internal market' (2006) 43 *Common Market Law Review* 107, 122

²³⁴ Case C-328/87 *Buet v Ministere Public* [1989] ECR 1235

In case of a commercial practice which is targeted towards such a group of consumers, fairness is to be assessed on the basis of the average member of the group to which such a vulnerable consumer belongs. For example, if the potentially misled consumers are children at early stages of the adolescence, an average child of that age group would be considered as the average consumer for purpose of fairness assessment.

Due to their vulnerability, the initial presumption is that vulnerable consumers are especially affected by an unfair commercial practice. This is why particular care needs to be paid to their protection unfair behaviour of traders. In accordance with this approach, a commercial practice may be considered as fair on the basis of two previous forms of the average consumer, but unfair if assessed on the basis of a vulnerable consumer.

The concept of vulnerable consumer is the outcome of the European Union's policy to pay special attention to those which are particularly weak.²³⁵ Moreover, this standard was established as a category aimed to remedy relatively high requirements for consumer protection established by the average consumer that was criticised as being particularly harmful for vulnerable group of consumers. This is because in case of some Member States, such as Germany or Scandinavian countries, the adoption of the average consumer as a central benchmark led to the diminishment of the level of consumer protection since their pre-UCPD central benchmark was much more similar to the vulnerable than to the average consumer.²³⁶ Hence, the vulnerable consumer attempt is to represent a corrector applicable in case of particularly weak consumers.

The concept of vulnerable consumer is in line with the case law of the ECJ that developed the general standard of average consumer. Namely, the vulnerable consumer is not vulnerable because they behave carelessly and does not use the disclosed information, rather due to some of its characteristics which he cannot

²³⁵ S Weatherill, *EU Consumer law and Policy* (2nd edn Edward Elgar Publishing 2013), 243-244

²³⁶ H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium* (Sellier 2007), 453 - 465

influence, such as their age or state of mind, which inhibits them from receiving and profiting from disclosed information. For instance, it cannot be expected that the imposition of the duty of information applied in the same manner to all consumers will be of the same benefit to a thirty-year old person in comparison to a ninety-year old consumer.

Examples of vulnerable consumers

As an exclusive concrete example of vulnerable consumers, the UCPD identifies children.²³⁷ With such an approach, the Directive became the second instrument of European consumer law to provide a particular care about children. The first instrument where children, as well as other vulnerable categories of consumers, were granted additional levels of protection from advertising was Directive 89/552/EEC on television without frontiers²³⁸ which was repealed by Directive 2010/13/EC on audiovisual media services²³⁹. The vulnerability of children to advertising practices was confirmed in *De Agostini*.²⁴⁰

In EU Consumer Law, the first document where children, i.e. minors, were attributed particular levels of protection was Directive 97/7/EC on distance selling where traders imposed obligation to take into consideration, while fulfilling their pre-contractual information duties from the directive, the principles established by the national laws of Member States protecting those who are unable to give their consent, where minors are mentioned as an example.²⁴¹ The Commission in its Guidelines on the UCPD also

²³⁷ Recital 18 of the UCPD

²³⁸ Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (1989) OJ L298/23

²³⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) (2010) OJ L 95/1

²⁴⁰ Joined Cases C-34/95, C-35/96 and C-36/95 *Konsumentombudsmannen v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843

²⁴¹ Article 4(2) of Directive 97/7/EC on distance selling

identifies teenagers as a group of vulnerable consumers for the same reason as children: “their lack of attention or reflection due to their immaturity”.²⁴²

Vulnerable consumer in action

The conditions posed by the Directive for the application of vulnerable consumer standard seem to be too strict which questions its effectiveness. Namely, a particular practice has, first, to be likely to materially distort economic behaviour *only* [*emphasis added* MD] of identifiable the group of vulnerable consumers, and, second, it has the distortion has to be performed in a manner which the trader could have reasonably be expected to foresee.²⁴³ The requirements of exclusiveness limits particularly the application of this standard. It means that a practice which endangers both the economic behaviour of the regular average consumers and vulnerable consumers will not be able to be assessed on the basis of a vulnerable consumer. This would be the case in spite of the fact that it materially distorts economic behaviour of vulnerable consumer so that it makes a commercial transaction he would have not otherwise made, if the regular average consumer is not affected by a particular practice.

Moreover, in practice it is very difficult to prove that certain commercial practices are directed towards vulnerable consumers since they reach all types of consumers, and not only the vulnerable who are their main targets.²⁴⁴ Consequently, such an approach may significantly narrow down potential application of the standard of vulnerable consumer. The requirement ‘reasonably expected to foresee’ gives an objective perspective to the interpretation of the vulnerable consumer.²⁴⁵

²⁴² Commission ‘Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices’ SEC (2009) 1666, 29-30

²⁴³ Commission ‘Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices’ SEC (2009) 1666

²⁴⁴ G Abbamonte, ‘The UCPD and its general prohibition’ in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 26

²⁴⁵ HW Micklitz, ‘The General Clause on Unfair Practices’ in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 116

The Court has not yet provided the interpretation of the characteristics of vulnerable consumers, particularly how widely they are supposed to be understood. However, all the terms, and particularly *credulity*, can be very widely interpreted to include all imaginable vulnerable consumers. Undoubtedly, vulnerability caused by lack of education or financial status can be easily subsumed under the cause of vulnerability due to credulity. In general, for their credulity vulnerable consumers are those “who may more readily believe certain claims”.²⁴⁶

One crucially important task for the competent authority in charge of assessing fairness of commercial practice is to discover on the basis of which of the three types of consumers yardsticks it will perform its task. The potential problem for the national court is the question of deciding how to decide whether a commercial practice is directed towards a group of vulnerable consumers or to general public, who actually represents vulnerable consumers and what level of influence a practice should have on a group, i.e. what it is just partially dedicated to vulnerable consumers.

Vulnerable consumer in services of general economic interest

The definition of the vulnerable consumer derived from the UCPD is not to be confused with the notion of vulnerable consumer for the purpose of services of general economic interest (“the SGEI”). The European Commission defined the SGEI as services “which the public authorities class as being of general interest and subject to specific public service obligations”.²⁴⁷ The access to the SGEI is a fundamental right of all consumers.²⁴⁸

These two notions have, to a certain extent, different meanings and purposes. Under the SGEI, vulnerability is particularly addressed to the economic aspects of consumers, their financial situation, due to which they need special rights related to

²⁴⁶ Commission, ‘Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices of 3 December 2009’ SEC (2009) 1666, 30

²⁴⁷ Commission, ‘Communication on “Services of general interest in Europe’ COM (2000) 580

²⁴⁸ Article 36 of the Charter of Fundamental Rights of the European Union

the admission to the services of general economic interests and protection from disconnection. This is the case, for instance, with limitations on the rights of providers of heating to cut the heating system during winter from a consumer who receives a very low monthly income.

Contrary to this, according to the UCPD, vulnerability is caused predominantly by non-economic factors. Vulnerable consumers under the SGEI definition are characterized as consumers who are particularly vulnerable due to their hard economic situation or some other characteristic and thus enjoy an additional level of protection.²⁴⁹ For instance, vulnerable consumers are those consumers with extremely low personal income or consumers who live in remote areas of a country. Of course, this does not mean that these two categories will not often coincide in reality.

²⁴⁹ M. Bartl, 'The Affordability of Energy: How Much Protection for the Vulnerable Consumers?' (2010) 33 *Journal of Consumer Policy* 225

Protected consumer under consumer contract law

Lack of clear standard of protected consumer

European consumer contract law is focused on the explanation of *who* shall be understood to be a ‘consumer’ in the context of clarification of the scope of application *rationae personae* of consumer law, i.e. which subjects are protected by the consumer law regime.²⁵⁰ Such a definition of consumer fully corresponds to one of two definitions of consumers of the UCPD, where consumer is defined as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”.²⁵¹

Accordingly, the case law of the ECJ examined this definition of consumer in the context of the scope of application of consumer law, providing eventually a rather narrow interpretation.²⁵² A question of particular importance was the application of consumer law in case of so-called ‘mixed purpose’ contracts where consumer was acting both within and outside his trade, business, craft or profession.²⁵³ Directive 2011/83/EU on consumer rights is aimed to provide final clarification of this ambiguousness, pointing out that in case of these types of contracts, it has to be verified which activity “is predominant in the overall context of the contract”.²⁵⁴

However, unlike the UCPD, European legislation in the area of consumer contract does not provide a definition of a common European standard of expected behaviour of consumer, but such a definition of consumer is missing. Surprisingly few pieces of legal scholarship have addressed this issue, and even those are limited to the

²⁵⁰ As the latest example, see Directive 2011/83/EU on consumer rights, article 2(1), where consumer is defined as *any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.*

²⁵¹ Article 2(a) of the UCPD

²⁵² Case C-361/89 *Criminal proceedings against Patrice di Pinto* [1991] ECR I-1189; Case C-269/95 *Francesco Benincasa v Dentalkit Srl.* [1997] ECR I-3767

²⁵³ Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-439

²⁵⁴ Directive 2011/83/EC on consumer rights Recital 17: *The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.*

observation that such a unified European standard is missing despite the need for its existence.²⁵⁵ The necessity for existence of a common European definition of consumer has certainly increased together with the shift of European consumer policy from minimum to maximum harmonisation which requires a more unified consumer policy among Member States.

The need for a standard of consumer

Information and transparency requirements

The standard of consumer in consumer contract law is to be used as a model of behaviour on the basis of which the national court would have to verify whether a trader has duly fulfilled his obligations. In particular, the standard of consumer is of utmost importance for two areas of consumer contract law: unfair contract terms and pre-contractual information requirements.

First, for the assessment of fulfilment of the requirements of transparency and fairness of contract terms, primarily in the context of Directive 93/13/EEC on unfair contract terms and whether a contract and its terms have been drafted in plain, intelligible language, this standard is used as a benchmark for assessment of whether these criteria of contract term have been fulfilled or not.²⁵⁶ Second, for the verification of fulfilment of trader's obligation to disclose to consumer all relevant information in plain, intelligible language imposed by all European directives in the area of consumer contract law, the standard is again used as a yardstick to verify whether these pre-contractual duties have been correctly fulfilled.²⁵⁷

²⁵⁵ H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds) (n 236) 247; P Nebbia, *Unfair Contract Terms in European Law* (Hart 2007), 139-141; A Nordhausen Scholes, 'Information Requirements' in Howells G and Schulze R (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), 221

²⁵⁶ Articles 4 and 5 of Directive 93/13/EEC on unfair contract terms

²⁵⁷ See, for example, Articles 5 and 6 of Directive 2011/83/EU on consumer rights; Articles 3 and 4 of Directive 2008/122/EC on timeshare; Articles 4, 5 and 6 of Directive 2008/48/EU on consumer credit

Why has the meaning of consumer as a standard been missing?

Bearing in mind the importance and the role that transparency requirements and duty of information have in the system of EU consumer law,²⁵⁸ the fact that the meaning of the consumer as a standard was not provided is surprising. The fact that such a standard has been missing resulted in a heterogeneous understanding of applicable standard among national legal systems of Member States. Such a phenomenon was explicitly noted in the EU Consumer Law Compendium, a Study ordered for the European Commission on the Consumer Acquis and its implementation in Member States, focused on eight European directives.²⁵⁹ The authors of the Study underlined the significance of this phenomenon, but did not go further into details, only pointing out that the detailed exposition of this fact is beyond the scope of the performed study.²⁶⁰

Equally, the drafters of the Draft Common Frame of Reference, as an academic project that also covered all areas of consumer contract law, noted that Directive 93/13/EEC on unfair contract terms does not either provide the answer to the question of what kind of consumer should be the reference model for the assessment of transparency, or whether that is the average consumer.²⁶¹ However, again, in the proposed provision on transparency requirement of a contract term, the DGFR did not provide a standard in comparison to which it has to be assessed.²⁶²

Concurrently the actual Commission's Proposal on a Common European Sales Law, the so-called Optional Instrument or the CESL, has also failed to provide a standard of expected behaviour of the consumer in the context of transparency and information requirements despite the fact that the Optional Instrument has particularly further

²⁵⁸Case C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-00667, para 18; Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECR I-0000, para 51

²⁵⁹ H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium* (Sellier 2007), 247

²⁶⁰ *Ibid.*

²⁶¹ Von Bar C et al., 'Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)' (Sellier 2008) http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf accessed 12 May 2014, Note 1(1) to Article II.-9:402, 631

²⁶² *Ibid.*, Article II.-9:402, p.29: A person who supplies terms which have not been individually negotiated has a duty to ensure that they are drafted and communicated in plain, intelligible language

developed these duties.²⁶³ The Optional Instrument also does not provide particular protection for vulnerable consumers, who are simply ignored in the text of the Proposal, equalizing this category of consumers with a general category. As a result, the UCPD would certainly provide a higher level of consumer protection to vulnerable consumers than the proposed Optional Instrument.

The lack of provision of unified European standards does not seem to be a negligent, but rather an intentional omission. The reason why the benchmark was not defined is due to the fear of some Member States that the model of the average consumer as developed by the Court's interpretation of the EU primary law would be introduced as the most probable option.²⁶⁴ In that sense, the inability to provide a unified standard may mean that EU law implicitly recognized the divergences among the national legal systems. This approach was definitely legitimate and legal, being in line with minimum harmonization approach enabling thus national legal system to maintain their national standards if they are in accordance with the minimum criterion.

The relevance of the shift towards maximum harmonisation

The meaning of consumer as a standard in consumer contract law is relevant both for traders and for consumers. It provides traders with a guideline as to what manner they are obliged to behave in and how to fulfill the duties they are legally imposed with, while consumers are made aware of the level of provided protection they are entitled to.²⁶⁵ The necessity for having a unified meaning of the consumer in EU consumer contract law has become particularly important after the shift from minimum harmonisation to maximum harmonisation approach in consumer contract law.

²⁶³ Commission, 'Proposal of The Optional Instrument on a Common European Sales Law ("The Optional Instrument")' COM(2011) 635 final, see in particular its Articles 13-20 and 80-83

²⁶⁴ G Howells, 'European Consumer Law – The Minimal and Maximal Harmonisation Debate and Pro Independent Consumer Law Competence' in S Grundmann and J Stuyck (eds), *An Academic Green Paper on European Contract Law* (Kluwer Law International 2002), 75

²⁶⁵ V Mak, 'Policy choices in European consumer law' (2011) 7 *European Review of Contract Law* 257, 266

Previously, a general rule was that European legislation would provide a minimum level of protection, whereas national legal systems were allowed to adopt any additional rules on consumer protection, if they respect the imposed minimum standard.²⁶⁶ This meant that the national legal systems were free to adopt the standard of consumers applicable for assessment of transparency and information requirements in accordance with their own consumer policies having respected the minimum criteria established by EU law.

However, during the last decade several of the major EU directives on consumer contract law were repealed or modified by the new directives requiring maximum harmonisation.²⁶⁷ It is no longer legal for Member States to have diverse standard for defining the consumer from the unified European standard. Consequently, the shift from minimum towards maximum harmonisation also results in a significant increase of the need for the adoption of one, unified European meaning of consumer as a benchmark.

Today, the majority of pre-contractual information requirements imposed by EU Consumer Law are contained in directives requiring maximum harmonisation. Their examination may show that there is a tendency of adopting a standard equal to the one of the average consumer as defined by the UCPD. In case of Directive 93/13/EEC on unfair contract terms, despite the intention to modify it in accordance with a maximum harmonisation principle, such an attempt has failed.²⁶⁸ However, the reasons of legal certainty still urge for adoption of a standard related to the one of the UCPD.²⁶⁹

²⁶⁶ Case C-484/08 *Caja de ahorros y monte de piedad de Madrid v Asociación de usuarios de servicios bancarios (Ausbanc)* [2010] ECR I-4785, para 28

²⁶⁷ See Directive 2008/48/EC on consumer credit; Directive 2008/122/EC on timeshare; Directive 2011/83/EU on consumer rights

²⁶⁸ Commission, 'Proposal of the Directive on consumer rights' COM (2008) 614 final

²⁶⁹ V Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal of Consumer Rights Directive' (2011) 19 *European Review of Private Law* 25

This is in particular the case after the judgment of the Court in *Perenicova* in which proved a tight connection between the unfair commercial practices and unfair contract terms, pointing out that the usage of unfair contract terms would typically represent an unfair commercial practice.²⁷⁰ Accordingly, the usage of the unfair contract term will typically represent a form of unfair commercial practice. The adoption of such a standard would also be in line with a current very pro-consumer jurisprudence of the ECJ and with the entire EU consumer law and policy since they deal with different aspects of fairness of contract terms, so one does not exclude the other.

EU primary law and the notion of consumer

Consumer Protection under EU primary law

A detailed analysis of EU primary law related to consumer protection is beyond the scope of this paper.²⁷¹ Instead I will examine EU primary law in order to verify whether its examination contributes to understanding of the meaning of consumer in EU consumer contract law. EU primary law does not, namely, provide a direct answer to this question, but understanding of EU consumer law and policy based on the analyzed constitutional foundations can be of help for getting a clearer picture of what is the objective of protection of consumer contract law.

The previous section of this Chapter showed that the concept of the average consumer was primarily developed by the interpretation of the Court of EU primary law, in particular of article 34 TFEU (*ex* article 28 TEC). The questions raised before the Court concerned whether national measures on commercial practices of Member States whose objective was consumer protection, but which were found to establish obstacle to free movement of goods, could be justified in accordance with the principles set up by the Court in its judgment in *Cassis de Dijon*.²⁷² The Court's

²⁷⁰ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 41

²⁷¹ For a detailed analysis of EU primary law in the context of consumer protection, see: S Weatherill, 'Recent Developments in the law governing the free movement of goods in the EC's internal market' (2006) 2 *European Review of Contract Law* 90; N Reich, 'Economic Law, Consumer interests and EU integration' in HW Micklitz, N Reich and P Rott, *Understanding EU Consumer Law* (Intersentia 2009), 3-60

²⁷² Case C-120/78 *Rewe Central AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 669

prevailing approach was that disputed national measures represent obstacles to free movement of goods since they are not in line with the principle of proportionality and thus they should be abolished, defining a very high level of expected behaviour by the consumer.²⁷³ As a standard of the assessment for justification of the national measures, the Court took the average consumer as a benchmark in the form in which it was later codified in the UCPD.

Two-fold approach of the ECJ

Contrary to the noticeable restrictive approach towards the national rules on consumer protection, the Court in the interpretation of EU secondary legislation on consumer contracts had a rather consistent pro-consumer approach. On this basis of these two distinctive approaches, Unberath and Johnston pointed out the inconsistency of the objective of protection of the Court depending on whether the decision is based on primary or secondary law.²⁷⁴

The explanation for such a diversification of the approach can be found in the analysis of the objectives of the Court's interpretation. Namely, the aim of interpretation of the primary law was in the context of free movement of goods where national rules on consumer protection rules represented obstacles. Consequently, the Court goal, at least nominally, was to find a benchmark which would enable the functioning of the Internal Market, but again which would respect particularities of national legal systems. The recognition of usually lower standards of the definition of consumer could have been easily used as the justification for preservation of the national measures and this is why the Court came up with the average consumer which combined the reasonably well-informed, the reasonably circumspect and the observant component, with the social, linguistic and cultural factor which have to be taken into consideration.²⁷⁵

²⁷³ See V Mak, 'The 'Average Consumer' of EU Law in Domestic and European Relationship' in D Leczykiewicz and S Weatherill, *The Involvement of EU Law in Private Law Relationships* (Hart 2013), 333

²⁷⁴ H Unberath and A Johnston, 'The Double-Headed Approach of the ECJ concerning Consumer Protection' (2007) 44 *Common Market Law Review* 1237

²⁷⁵ D Kraft, 'Advertising Restrictions and the Free movement of Goods – the Case Law of the ECJ' (2007) 18

Contrary to such an approach in the interpretation of EU primary law, in the context of consumer protection, the Court's had a more pro-consumer approach while deciding on the basis of EU secondary law on consumer protection. Namely, in the last three decades, a dozen European directives were passed that have regulated certain types of consumer contracts, such as off-premises, distance or timeshare contracts, or particular aspects of the content of consumer contract itself as it is the case with the rules on unfair contract terms making thus shift from negative into positive harmonisation. This is because the tension between the incentive to strengthen the internal market on one hand, and the requirements for strengthening of consumer protection on the other hand are less present if a particular area of law has already been unified.

Until recently, the prevailing method of regulation has been based on minimum harmonization which has allowed Member States to maintain or adopt measures which provide a higher level of consumer protection. Accordingly, the countries which adopted stricter measures justified them through the minimum harmonization character of the directives as was the case in *Buet*.²⁷⁶ It is questionable whether such a measure by a French national would have been justified by the Court if it had not had its roots in EU secondary legislation.

Previous to the UCPD, the average consumer was the outcome of negative harmonisation and the conflict between the internal market and national rules on consumer protection. Currently, such a standard was maintained in the secondary legislation as a compromise to the conflict between requirements of the internal market and European consumer policy. This is why in the area of unfair commercial practices, there is no more differentiation between the approach on the basis of primary and secondary law. Such an approach seems to be also now prevailing in the

European Business Law Review 517, 523

²⁷⁶ See Case C-328/87 *Buet v Ministere Public* [1989] ECR 1235

area of secondary law on consumer contract law. This is certainly the case at least in the standard of the protected consumer, there is the same tension as in case of the UCPD between the interest of consumer protection and the interest of the internal market, noticeable through the examination of the constitutional basis of secondary legislation.

The constitutional basis of consumer protection

Consumer protection is guaranteed and highlighted by the EU Charter of Fundamental Rights which represents an integral part of the Treaty.²⁷⁷ Besides this, the TFEU itself contains two articles which are exclusively dedicated to consumer protection: Article 12 TFEU²⁷⁸ and Article 169 TFEU.²⁷⁹ It is noticeable that the objective of both of these articles is to ensure common European policy of provision of high level of consumer protection. The interpretation of Article 169 shows that there are two legal bases for the adoption of the consumer protection measures on the European level.

First, there is article 114 TFEU whose purpose is the establishment and functioning of the Internal Market and removing all of the possible obstacles. Second, article 169 TFEU itself provides basis for the adoption of the measures for consumer protection. In practice, the absolutely prevailing legal basis for the adoption of consumer protection measures is article 114 TFEU (ex article 95 TEC).²⁸⁰ From a consumer protection perspective, the problem with article 114 TFEU is that the interests of

²⁷⁷ Article 38 of the Charter of Fundamental Rights of the European Union: Union policies shall ensure a high level of consumer protection.

²⁷⁸ Article 12 TFEU states that while defining and implementing the Union policies and activities, the consumer protection requirements should be considered.

²⁷⁹ 1. *In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*

2. *The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:*

(a) measures adopted pursuant to Article 114 TFEU in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).*

4. *Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.*

²⁸⁰ This legal ground represents the basis for the adoption of CRD 2011/83/EU as well as the Proposal of the Optional Instrument

consumer protection are sometimes conflicting with the interests of the strengthening of the Internal Market.²⁸¹

However, article 169 TFEU has been rarely used as the legal basis for a consumer protection directive and its effects in practice are minor. Directive 98/6/EC on price indication represents one of few directives on consumer protection adopted on basis of article 169 TFEU (ex Article 153 TEC). It seems to be rather supplementing the consumer protection policies of Member States. Furthermore, maximum harmonization character on the basis of this provision is explicitly prohibited,²⁸² so in currently prevailing maximum harmonization approach, it is questionable whether in the future this provision will have any role to play.

It looks clear that article 114 TFEU will remain the dominant ground and probably the only basis for development of consumer policy. This means that the entire EU Consumer Law, and not only the law on unfair commercial practices, has always to be interpreted in a manner that it is mandatory to take into consideration the interest of the internal market as defined by article 114 TFEU together with the interest of achieving high level of consumer protection.

In the context of constitutional basis of EU Consumer Law, Willett suggests that as a benchmark for assessment of fairness in commercial practice and for verification of transparency of contract terms should materially differ under the explanation that these two areas have different objectives and regulate different areas. On the one hand, the objective of the rules on unfair contract terms is the provision of high level of consumer protection, whereas, on the other hand, the goal of the UCPD is to satisfy both the aim of achievement of high level of consumer protection and the aim of the strengthening of the internal market.²⁸³

²⁸¹ As it is, for instance, the case with average consumer

²⁸² Article 169(4) TFEU

²⁸³ C Willett, *Fairness in Consumer Contracts* (Ashgate 2007), 212

This argument can hardly be accepted. Namely, Directive 93/13/EEC, as well as the majority of the European directives in the area of consumer protection, is based on the same legal basis as the UCPD, article 114 TFEU. Accordingly, this article also imports requirement of strengthening of the internal market into the core of the directives, as their principal policy objective, besides achievement of high levels of consumer protection, and consequently in the standards to be derived from these directives. This characteristic of article 114 TFEU is confirmed by the ECJ.²⁸⁴

Consumer Policy Strategies

The Commission's Consumer Policy Strategies are adopted for the period of several years and they identify the directions of the future development of EU consumer law and policy. The analysis of these strategies can also show the approach of the Commission towards the meaning of consumer. The examination of the Strategies adopted for the period of the last ten years proves the general tendency of the Commission to open a new chapter in the area of consumer protection and to modify in certain directions the founding European consumer policy established by Preliminary Programme of the European Community for consumer protection and information policy, adopted in April 1975 by the European Council.²⁸⁵ In general, a tendency of development of a 'less friendly consumer' approach can be noticed where EU Consumer Law is increasingly losing its "social protective outlook".²⁸⁶

In the context of understanding the meaning of consumer in consumer contract law, certain parts of the strategies are relevant. One of the main objectives of the Strategy 2002 - 2006 was the establishment of a high level of consumer protection.²⁸⁷ Such an approach was followed by Strategy 2007–2013. One of the ideas on the basis of which

²⁸⁴ Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I)* [2000] ECR I-08419; Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* [2006] ECR I-11573

²⁸⁵ Preliminary Programme of the European Community for consumer protection and information policy OJ C 92, 25.4.1975, 2-16

²⁸⁶ HW Micklitz, 'Introduction' in HW Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011), 32

²⁸⁷ Commission, 'Consumer Policy Strategy 2002-2006' COM (2002) 208 final, 30

this Strategy was developed is that consumers have become more empowered in comparison to the earlier periods when they were more ignorant about their rights and system of consumer protection. Consequently, the greater empowerment of consumers has also led to greater responsibilities for them to manage their own affairs.²⁸⁸

Furthermore, the Strategy 2007 – 2013 underlined the tight connection and interaction between internal market and consumer policy.²⁸⁹ One of the main goals was to empower consumers. Empowered consumers are defined as those who need real choices, accurate information, market transparency and the confidence that comes from effective protection and solid rights.²⁹⁰

The Consumer Programme 2014-2020 underlines the importance and the role of an empowered consumer as the centre of the Single Market.²⁹¹ This is why empowerment of the consumer is identified as one of the General objectives of the Programme.²⁹² The Programme also underlines the specific needs of vulnerable consumer “in order to take into account their specific needs and strengthen their capabilities”²⁹³ In such a manner, the Programme underlines the significance of particular protection of the vulnerable consumer, a concept that is not yet applied in case of unfair contract terms in the lack of a universally prescribed standard.

The analysis of the texts of previous, current and future Strategies show the shift of consumer policy in the European Union. The main objective of protection is the empowered consumer who is an educated consumer, who profits from disclosed information and who is aware of his rights. Applied on consumer contract law, this leads to the conclusion that the empowered consumer will also be the objective of protection. This concept seems to be very similar to the average consumer, as a

²⁸⁸ Commission, ‘Consumer Policy Strategy 2007-2013’ COM (2007) 99 final, 3

²⁸⁹ Ibid, 4

²⁹⁰ Ibid, 5

²⁹¹ Regulation (EU) No 254/2014 of the European Parliament and of the Council on a multiannual consumer programme for the years 2014-20 and repealing Decision No1926/2006/EC

²⁹² Ibid., Article 2

²⁹³ Ibid, Recital 8 and Annex I of the Regulation, Objective II

consumer who is an active participant of the market and who cares and fights for his own interest.

EU primary law and understanding of consumer

All in all, it can be concluded that today in case of both parts of the once bifurcated EU consumer law, the fair-trading law, and consumer contract law, there exists secondary legislation which has introduced unified European rules in these two areas. Consequently, since secondary legislation exists in both cases, there is no need for existence of different standards, one to be applied in case of primary law and the other in case of secondary legislation.

Moreover, both of the regulatory instruments were, though with few exceptions, adopted on the grounds of the same constitutional basis, article 114 TFEU, understanding that interest for high level of consumer protection was combined with sometimes confronting interest of the development of internal market. Therefore, in case of both regulations there is a need for a standard of the consumer that would include both these interests. Similarly, the European strategies on consumer protection as lighthouses of common European consumer policy, take the informed consumer who is an active market player, looks for information and compares offers as the objective for the future development of European consumer policy.

The final conclusions to be drawn here is that today there is no reason why, as it was the case previous to the adoption of the UCPD, EU primary law would require the adoption of different standards of consumer in contract law and in unfair commercial practices. Quite the contrary, the constitutional basis under which directives of consumer contract law were adopted urge for the adoption of the meaning of consumer which is equal to the one of the UCPD.

EU secondary law and the standard of consumer

Transparency and benchmark consumer

Common European consumer policy is based on a paradigm of the informed consumer as an idealised rational actor at the market. The disclosure of information is of essential importance for the consumer since his rational decision making process depends on it. The mandatory information requirements as defined by EU law do not require only simple provision of information to the consumer, but also the manner in which the information will be provided to the consumer, so that they can process and profit from it.

Besides sector specific consumer contract directives which all require provision of information in a transparent manner, Directive 93/13/EEC imposes a high level of transparency requirement regarding contract terms. The transparency requirement stands next to the information requirements as provided by other EU directives since the purpose of both is to ensure that the consumer makes a well-informed decision.²⁹⁴

The transparency requirement is also guaranteed by Directive 2005/29/EC on unfair commercial practices whose rules provide an additional layer of protection to consumers from non-transparent contract terms.²⁹⁵ Accordingly, provisions of information in unclear, unintelligible, ambiguous or untimely manners represents what is called a *misleading omission*.²⁹⁶ The tight connection between Directive 93/13/EEC and the UCPD was confirmed by the Court in *Pereničová*, where the Court pointed out that the usage of unfair contract terms represents a form of unfair commercial practice.²⁹⁷

²⁹⁴ See further on transparency and information requirements in EU consumer law in: G Howells, A Jansen and R Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate 2004)

²⁹⁵ S Orlando, 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice' (2011) 7 *European Review of Contract Law* 25, 33-34

²⁹⁶ Art 7(2) of the UCPD

²⁹⁷ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000

Directive 93/13/EEC on contract terms imposes strict requirements of full transparency of contract terms on traders. In all cases when the consumer is provided with the terms of the contract in writing, these terms have to be drafted in plain, intelligible language.²⁹⁸ The assessment of fairness of the main subject matter of the contract and the stipulated price and remuneration are left out of the scope of the application of the directive with the exception of transparency obligation. Therefore, the so called ‘core terms’ of a contract will be considered as unfair if they are not provided in plain intelligible language.²⁹⁹ Consequently, the transparency represents the minimum level of regulation that the European Union provides for core terms.³⁰⁰ This is why in practice these rules play an important role.

The requirement of ‘plain, intelligible language’ is a standard that should be assessed on a case-by-case basis. Its purpose is, as it was identified in the *Commission v. Spain* by Advocate General Geelhoed that the terms contained in general conditions have to be “completely plain and intelligible to the consumer. Their meaning must not depend on which of a number of possible divergent interpretations is placed on them”.³⁰¹ Besides this form of protection, Directive adds another layer of protection stating that in case of any doubts about the meaning of the term, the one that is most favourable for consumer will prevail.³⁰²

ECJ case law on unfair contract terms

On the basis of Directive 93/13/EEC on unfair contract terms, the Court has developed a fruitful judicial practice which is often described as manifesting a very pro-consumer oriented approach. However, none of the case law has provided clarification of what kind of consumer is understood as a benchmark for the assessment of fulfillment of transparency requirement, though the average consumer

²⁹⁸ Article 5 of Directive 93/13/EEC on unfair contract terms

²⁹⁹ Article 7(2) of Directive 93/13/EEC on unfair contract terms

³⁰⁰ HW Micklitz, ‘Reforming European Unfair Terms Legislation in Consumer Contracts’ (2010) 6 ERCL 347, 366

³⁰¹ Case C-70/03 *Commission v Spain* [2004] ECR I-07999, para 14

³⁰² Art 5 of Directive 93/13/EEC on unfair contract terms

as defined by the ECJ and codified in the UCPD was identified as the most probable solution to be adopted.³⁰³ In spite of a lack of such a clear standard, I will now examine the existing case law in this area in order to verify whether any general conclusion useful for the subject examined here can be drawn. In particular, the purpose is to discern whether such a case law advocates against average consumer as defined by the UCPD to be also applied to consumer contract law.

The judicial practice consists of two groups of cases: those resulting from the infringements surrounding lack of proper transposition of the directive by Member States and those decisions surrounding the basis of preliminary references made by national courts with the purpose of receiving interpretation of some provision of the directive. The first group of cases would include the judgments of the Court in relation to the infringement procedures that the Commission initiated on the basis that Directive 93/13/EEC had not been properly implemented, whereas the second group would include the decisions made as the answers to the preliminary references made by the national courts. A certain level of inconsistency in approach may be noticed in these two sets of cases.

In the first group of cases, the issue was whether a particular manner in which these countries transposed the provisions is suitable and whether it fulfills the objective posed by the directive. In all of these cases, the Court underlined that the individuals have to be made fully aware of their rights and this is the reason why proper implementation matters.³⁰⁴ In its judgment in *Commission v. Spain* the Court pointed out that legislative action is not necessarily demanded to transpose provision of a European directive but that it is extremely important for the national law to be “sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts”.³⁰⁵

³⁰³ C Twigg-Flesner, *The Europeanisation of Contract Law* (2nd edn Routledge 2013), 98

³⁰⁴ Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, para 17, and Case C-478/99 *Commission v Sweden* [2002] ECR I-4147, para 18

³⁰⁵ Case C-70/03 *Commission v Spain* [2004] ECR I-07999, para 15

Consequently, the conclusions to be drawn from these decisions show that if the directive is properly implemented, consumers will be made fully aware of their rights and will be able to profit from them.

Contrary to such a view of the Court in the case law on infringement of Directive 93/13/ECC, in its case law on the interpretation of the provisions of this directive, the Court approached the consumer as being absolutely ignorant about their rights despite of proper transposition of the directive. A series of cases were pending before the Court in which it was assessed what kind of obligation Directive 93/13/EEC establishes to the national courts regarding the assessment of unfair contract terms. In *Oceano*, the first case of this kind, the Court defined consumer as a weaker party in a contractual relationship with trader “as regards both his bargaining power and his level of knowledge”.³⁰⁶

As a consequence of his economic weakness, consumer has no sufficient financial resources to initiate a litigation. The problem with the lack of financial capacities is solvable through the access to free legal aid, but what remains unsolvable is the fact that the consumer is not aware of their rights. This is why the ECJ confirmed the existence of the right of the national court to assess the fairness of contract term on its own motion. In *Cofidis*, the Court reaffirmed the right of the national courts to ascertain the illegality of an unfair term even in cases when the consumer does not raise the issue of fairness themselves, within the time limit defined by the national law. In other words, EU Law requires positive actions of the national courts as a necessary prerequisite for effective protection of the consumer since the consumer is unaware of their rights or faces difficulties with enforcing them.³⁰⁷

³⁰⁶ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocio Murciano Quintero e.a.* [2000] ECR I-04941, para 25; Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, para 25; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579, para 29

³⁰⁷ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocio Murciano Quintero e.a.* [2000] ECR I-04941, para 26, C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875, para 33

In a subsequent case law, the Court transformed this right into a duty of the national courts to assess the fairness of a contract term “compensating in this way for the imbalance which exists between the consumer and the seller or supplier”.³⁰⁸ The Court essentially based its rulings on the ground that Community-law consumer protection rules constitute rules of public policy in the context of national legal system.³⁰⁹ As a consequence, the national courts are obliged to assess the fairness of a contractual term, unless consumers oppose to such a motion.³¹⁰ Moreover, in its decision in *Invitel*, the Court identified that the decision of the national court on unfairness of a contract term has *erga omnes* effects on all consumer contracts that contains it irrespectively of the fact whether a consumer party to it has initiated a legal action or not.³¹¹

Again, in its decision in *RWE*, a case which dealt with a question of fairness of a standard contract term that allowed the trader to modify the gas prices without stating the reasons for that was found to be unfair, the Court highlighted consumer’s need to be protected from stipulation of unfair terms in consumer terms. Accordingly, the Court pointed out that a standard contract term in consumer contract must always meet “the requirements of good faith, balance and transparency”.³¹² However, a provision which allows trader to modify its prices in case of which the consumer was not informed about the grounds for these modifications before the conclusion of a contract will represent a form of unfair contract term, despite the existence of possibility for the consumer to terminate the contract in case of price alteration.³¹³

In these cases the Court displays a very pro-consumer approach as a means to provide protection to the consumer as the weaker party. However, all of the case law dealt with procedural implications of the directive and questioning procedural autonomy of

³⁰⁸ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421

³⁰⁹ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira* [2009] ECR I-9579, para 52

³¹⁰ Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Gyórfi* [2009] ECR I-04713

³¹¹ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000

³¹² Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECR I-0000, para 47

³¹³ *Ibid*, para 51

the Member States. The purpose was to align the procedures established by national laws in accordance with the requirements set up by the principles of equality and efficiency. In other words, this pro-consumer approach of the ECJ in its case law was not the result of the interpretation of the directive regarding what is understood as its breach, but rather of the procedural consequences of the breach of the directive. In that aspect, the interest of the Internal market fully coincide with the interests of the protection of the consumer since the goal of both is to sanction unfair behaviour on the market.

On the other hand, the question of the consumer as a benchmark is substantial in nature and has nothing to do with procedural autonomy of Member states, the latter being the main issue in these cases. It was possible to see that in the case of the definition of its meaning, the interest of consumer protection and internal market are conflictive. Defining consumer as a passive, uninterested player at the market would in accordance with the interest of consumer protection, but against the requirement of the internal market.

On the other hand, defining the consumer as an extremely intelligent and active player would also be contrary to the interests of consumer protection, but would encourage the actions of the trader. Consequently, it can be concluded that the pro-consumer oriented approach of the ECJ in relation to unfair contract terms cannot be regarded as contrary to the acceptance of the average consumer as a benchmark for the assessment of the Directive 93/13/EEC in the context of fulfillment of transparency requirements. Moreover, the introduction of the average consumer in consumer contract law contributes to a “balancing of the interest of the two parties” which the Court has emphasized as one of the objectives of consumer law.³¹⁴

³¹⁴ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECR I-0000, para 53

The significance of the ECJ decision in Kásler

In its recent judgement in *Kásler*, the ECJ explicitly used the standard of average consumer, as a reasonably well informed and reasonably observant and circumspect consumer, requiring from the national court to use it as a benchmark for the verification whether a contract term has been drafted in plain, intelligible manner.³¹⁵ This was the first case that the Court applied the benchmark of average consumer as defined by the UCPD to be used a standard applicable also in case of the unfair contract terms. Accordingly, it may be concluded that the average consumer has also become the applicable standard in case of unfair contract terms.

The concept of Consumer and Information Requirements

The duty of information represents the most important instrument for consumer protection provided by EU consumer law.³¹⁶ The imposition of duty of information as a regulatory tool for protection of consumer that is the weaker party in contractual relationship, has been noticeable since the very beginning of the development of the European consumer policy.³¹⁷ Today, the number of required information duties has multiplied so much that the phenomenon is pejoratively called the ‘information jungle’.³¹⁸ In accordance with such a policy, all of the European directives contain a developed set of information duties particular for a type of contractual relationship they regulate. The duty of information represents one of the tightest connection points between the UCPD and contract law since breach of information duty will represent a form of misleading omission. Their relationship and consequences thus arising are analyzed in a separate chapter of this thesis.

³¹⁵ Case C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECR I-0000, para 74

³¹⁶ For a detailed analysis on the duty of information in the UCPD and EU consumer contract law, see Chapter IV of this thesis

³¹⁷ Preliminary Programme of the European Community for consumer protection and information policy OJ C 92, 25.4.1975, 2-16

³¹⁸ HW Micklitz and N Reich, ‘The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)”: Too broad or not broad enough?’ EUI Working Papers Law 2012/04

However, in this area what remained unclear is also the meaning of the standard for verifying whether a trader had fulfilled his information duties. As in the case of transparency requirement imposed by Directive 93/13/EEC, neither the secondary law nor the Court have explained on the basis of what standard the fulfilment of the trader's obligation needs to be assessed. What is possible to conclude on the basis of the case law on consumer contract directives is that there is a recognized separation between the regular consumer and a more vulnerable consumer who deserves additional care by the system of consumer protection. Accordingly, I want to assess the case law of the Court in relation to information duties in order to see how the average consumer fits into the concepts developed by the judicial practice, as it was done in instance of case law on the ground of provisions on transparency of Directive 93/13/EEC.

The Court came closest to explaining the standard of protected the consumer in the *Cofinoga*, case dealing with the interpretation of the old Directive 87/102/EEC on consumer credit. In this case referred by a French court, which dealt with the obligation of provision of information requirements in a consumer credit contract, the Court underlined that in case of renewal of consumer credit agreement, a trader is not obliged to present to the consumer all required pieces of information established by Directive 87/102/EEC.³¹⁹

The judgment of the Court directly opposed and precluded French approach where renewal of a consumer credit contract was treated in the same manner as the conclusion of a new agreement and, thus, the trader was obliged to provide all relevant information to the consumer.³²⁰ As a consequence, the consumer now must be observant and circumspect as well as aware that in case of the renewal of a consumer credit contract, they will not be provided with the information on the basis of which they will decide whether or not he will renew the contract. The consumer has

³¹⁹ Case C-264/02 *Cofinoga Merignac SA v Sylvain Sachithanathan* [2004] ECR I-02157, para 39

³²⁰ *Ibid*, para 29

to, himself, seek for all relevant information. Opposite to this, an uninformed, lazy consumer will not be protected.

In spite of the fact that the old Directive 87/102/EEC was based on minimum harmonization, the Court explained that the French approach was contrary to the objectives of the directive, in particular to the goal of the strengthening the internal market, confirming in that manner its previous decision in *Berliner*. In its judgment in *Berliner*, the Court underlined that consumer credit Directive should always be interpreted in accordance with both of its objectives.³²¹

The legal basis for adoption of the directive on consumer credit has been Article 95 TEC (now Article 114 TFEU) which was the same as in the case of the UCPD, aiming both at the strengthening of the internal market and at achievement of high level of consumer protection.³²² By analogy, this means that most other consumer protection directives also should be approached in the same standard, including the standard of protected consumer which has also to incorporate the requirements of the internal market. This is exactly in line with the manner in which the concept of the average consumer is defined by the UCPD.

The general notion of average the consumer is mentioned in several cases of the Court related to contract law, but their meaning is ambiguous. For instance, Advocate General in his Opinion in *Criminal Proceedings against Patrice Di Pinto*, one of the first cases dealing the with interpretation of Directive 85/577/EEC on doorstep selling, has pointed out that “the directive is obviously intended to protect the average consumer”.³²³ However, it has remained unclear what was the meaning of the average consumer to which Advocate General referred to in his Opinion.

³²¹ Case C-208/98 *Berliner Kindl Brauerei AG v Andreas Siepert* [2000] ECR I-1741, para 20

³²² *Ibid*, para 25

³²³ Case C-361/89 *Criminal proceedings against Patrice di Pinto* [1991] ECR I-1189, para 23

Similarly, the notion of average consumer is mentioned in the Opinion of Advocate General in *Ilsinger*, the case dealing with the question of applicable jurisdiction over a consumer contract. In this case, Advocate General pointed out that in “determining whether a prize notification addressed to a consumer constitutes an offer, it is not possible...to provide a general answer. It will be necessary to determine in each specific case how an average consumer understood the vendor’s prize notification, and whether it is possible to consider from the consumer’s standpoint that the vendor has by its prize notification made him an offer. The national court must actually carry out that assessment of the facts. In proceedings for a preliminary ruling, which are based on a clear separation of functions between the national courts and the Court, any assessment of the facts in the case is a matter for the national court”.³²⁴ Again, the clarification of what was meant under average consumer was not provided.

Vulnerable consumer in contract law

The case law on consumer contract law seems to have recognized the category of vulnerable consumers as a category of consumers who due to their vulnerability deserve more care and attention than the general category of consumers before this was recognized by secondary legislation. In *Buet*, as one of the first cases where the Court assessed the provisions of Directive 85/577/EEC on contracts concluded away from business premises, the particular vulnerability of consumers with lower level of education in case of promotion of education materials was pointed out. Such a view was explained through the potential negative effects that uninformed purchases might have on buyers.

In *Buet*, the Court pointed to consumers with the lower level educations as particularly vulnerable to the sale of the inadequate language learning materials, as it was the case, where the purchase of this kind of materials would not only cause financial loss to consumer but would have long-term negative effects for consumers regarding their

³²⁴ Opinion of Advocate General in Case C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] ECR I-03961, para 60

employment prospectus.³²⁵ Hence, the Court considered the French measure of total prohibition of selling of this kind of education equipment as being in accordance with article 30 TEU. Such a decision was adopted despite the existence of the right of contract termination by the consumer as provided by Directive 85/577/EEC which consumers could use to remedy its decision. However, vulnerable the consumer in *Buet* represents an exception in case of which right of rescission could be considered as not providing sufficient tool for protection.³²⁶

In *Openbaar Minsiterie*, an assessment on the justification of the Belgian law concerning the authorization for sale of periodicals as obstacles to free movement, the concept of the vulnerable consumer is mentioned in the Opinion of Advocate General Leger. In his Opinion, Advocate General identified that periodicals, and the subscription to such periodicals, would include all categories of consumers. Therefore, since these periodicals do not exclusively target vulnerable consumers, so the subsidiary standard of vulnerable consumer cannot be applied.³²⁷

The used concept of vulnerable consumer is very similar to vulnerable consumer as defined by Directive 2005/29/EC.³²⁸ Through adoption of this implicit regime for vulnerable consumers in case of information requirements, the conclusion can be made that with the exceptional cases of vulnerable consumer, the standard on the basis of which it will be assessed whether the information has been duly disclosed will be the standard of average consumer who is reasonably well informed and reasonably circumspect and observant consumer.

³²⁵ Case C-328/87 *Buet v Ministere Public* [1989] ECR 1235, para 13

³²⁶ P Nebbia, *Unfair Contract Terms in European Law* (Hart 2007), 141

³²⁷ Opinion of Advocate General in Case C-20/03, *Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong*[2005] ECR I-4133, para 76-77

³²⁸ Art 5(3) of the UPCD

The analysis of post-UCPD secondary law on consumer protection

Directive 2008/48/EC on consumer credit

Eventually, all of the recently adopted directives in the area of consumer contract law can show that the average consumer is to be taken as the applicable standard. Namely, all of post-UCPD consumer contract law directives refer to the UCPD in certain manner, particularly in the context of required pre-contractual information duties. Accordingly, the new Directive 2008/48/EC on credit agreements points out that consumer has to be protected from unfair commercial practices of creditors, particularly those dealing with the information duties of the creditor *in line with* [emphasized by M.D.] the UCPD.³²⁹ If consumer is provided with protection ‘in line’ with the UCPD, by analogy it also means that the fulfillment of information duties needs to be assessed on the basis of the same standard of the average consumer as the principal benchmark and the vulnerable consumer as a residual benchmark applied in cases when consumer is particularly vulnerable.

Directive 2008/122/EC on timeshare contract

Similar wording was also taken in the new Directive 2008/122/EC on timeshare contracts. Directive 2008/122/EC refers to the UCPD by stating that one of the objectives of the new directive is to further develop the legal framework of protection of consumers in timeshare, particularly by further developing the information requirements of traders and manner in which these information duties will be provided.³³⁰ Again, if Directive 2008/122/EC refers to the UCPD as the model for the improvement of the set of information duties, it also means that it refers to the standard of the average consumer as the one to be applied.

Directive 2011/83/EU on consumer rights

Eventually, the standard of the average consumer seems to be fully recognized by the new Directive 2011/83/EU on consumer rights (‘the CRD’ or ‘the Directive 2011/83/EU’). The directive does not mention anywhere an average consumer or

³²⁹ Recital 18 of Directive 2008/48/EC on consumer credit

³³⁰ Recital 9 of Directive 2008/122/EC on timeshare contracts

generally applicable standard for assessment of developed information duties under any other name. However, despite the fact that a generally applicable standard is not explicitly defined, the CRD provides the definition of a subsidiary standard, formally and substantially identical to the subsidiary standard of vulnerable consumer defined by the UCPD. According to the directive, the standard of ‘vulnerable consumer’ is to be applied in case of consumers who are particularly vulnerable due to “their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee”.³³¹ Such a provision did not exist in the Proposal of the Directive on consumer rights of 8 October 2008, and it was identified as a particularly weak point of the Proposal.³³²

It is noticeable that Directive 2011/83/EU adopts absolutely the same wording as the one from the definition of vulnerable consumer in the UCPD. The objective for the existence of this category of consumers, as the CRD points it, is that the concept of the vulnerable consumer is applicable in case pre-contractual information requirements provided by the Directive as defined by articles 5 and 6 of the Directive 2011/83/EU.³³³ This means that, as the exception to the general rule (which is not defined), a vulnerable consumer will represent a benchmark for the assessment whether trader has fulfilled his information duties in cases when he is vulnerable due to some of the enlisted causes.

In the area of the consumer contract law the idea of vulnerability of certain types of consumers who deserve an additional level of protection is not a radical innovation. It was recognized by the ECJ in *Buet*, but also by Directive 97/7/EC which requires that a provision of pre-contractual information while concluding a distance contract must be provided in accordance with, *inter alia*, “the principles governing the protection of

³³¹ Recital 34 of Directive 2011/83/EU on consumer rights

³³² HW Micklitz and N Reich, ‘Cronica de una muerte anunciada, the Commission Proposal for a Directive on Consumer Rights’ (2009) 46 Common Market Law Review 471

³³³ Article 5 provides generally applicable information duties for consumer contracts, whereas Article 6 accommodates them to the specificities of distance and off-premises contracts

those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors”.³³⁴

Through recognition of the vulnerable consumer as a subsidiary reference point for assessment of fulfillment of information requirements in contract law that is worded in the same manner as the vulnerable consumer in the UCPD, the Directive also implicitly accepted the average consumer of the UCPD as the general benchmark. Hypothetically speaking, it is questionable what would be the consequence in practice if a lower standard of consumer than the average consumer of the UCPD were accepted in consumer contract law. In such a case, the trader would be liable for the unfair commercial practice of a misleading omission since they did not provide information to the consumer who was neither reasonably well-informed, nor reasonably well circumspect and observant. This is because the UCPD explicitly mentions that all information requirements from consumer contract directives are considered as material, and thus their breach is a form of misleading omission. The other option is that, irrespectively of one provision or the other, the courts always assess whether the information is provided, first on the basis of the average consumer for the need of the UCPD and second on the basis of some other reference mark for in the context of consumer contract law. As a consequence, this would result in legal incoherence and uncertainty.

Therefore, it is not surprising to notice that some of the English speaking Member States in their national legislation used the term ‘average consumer’ in the context of consumer contract law as a standard. For instance, the Irish National Consumer Agency as a statutory body established by the Irish government in charge of enforcing consumer rights, uses in its guide to the unfair contract terms the word ‘average’ in defining the consumer as a benchmark for assessment of transparency requirement: “[t]he question will most likely be decided from the perspective of the typical or average consumer. The fact that a term used would be intelligible to a lawyer does

³³⁴ Art 4(2) of Directive 97/7/EC on distance contracts

not suffice if it is not intelligible to an average consumer and could therefore be reviewable under the regulations”.³³⁵ Similarly, the UK Financial Services Authority, as regulatory body in the United Kingdom in charge of financial services, in its Guidelines on unfair contract terms in consumer contracts uses the average consumer as a standard for verification whether contract term has been provided on intelligible and plain language.³³⁶

Conclusion of the Chapter

This chapter examined the average consumer which is the principal objective of protection provided by the Directive. It was initially developed through the case law of the ECJ and codified for the first time in EU Consumer Law through the provisions the UCPD. The notion of average consumer is of utmost importance for assessment of fairness of a commercial practice since it designates what is the expected behaviour and reaction of a consumer to a commercial practice. Therefore, it is to be used as the benchmark for fairness assessment. A standard of vulnerable consumer is to be used as a subsidiary benchmark which has to be used when a commercial practice is targeted to a particularly vulnerable group of consumers.

Contrary to the benchmark of average consumer, a prescribed European standard of expected behaviour of consumer was missing in consumer contract law. This standard is of very high practical importance since it has to be used for verification of correct fulfillment of all transparency and information requirements imposed by diverse directives on consumer contract law. Eventually, a tendency of adoption of a unified standard of consumer equal to the one average consumer of the UCPD is particularly noticeable in the newly adopted legislation on consumer contract law in relation to the imposed pre-contractual duty of information and transparency requirements of contract terms.

³³⁵ Irish National Consumer Agency, ‘Unfair Terms in Consumer Contracts’ available at <http://www.consumerhelp.ie/index.jsp?a=1200&n=101&p=100>, 8, last accessed 5 June 2014

³³⁶ UK Financial Services Authority, ‘Unfair contract terms: improving standards in consumer contracts of January 2012’ para 3.35, available at http://www.fsa.gov.uk/static/pubs/guidance/fg12_02.pdf, accessed on 12 May 2014

CHAPTER III – DUTY TO TRADE FAIRLY

Introduction: General Duty to Trade Fairly in EU Consumer Law

The UCPD has introduced, for the first time, what I call, a general, pan-European duty to trade fairly in business-to-consumer relations. The universal duty to trade fairly is secured by the system of protection based on a three-step mechanism for assessment of fairness of a commercial practice that provides a complete protection of the consumer from any kind of trader's unfair behaviour. In this three-step hierarchy of the applicable provisions of the Directive, the last, third step defined by a general fairness clause is of particular importance. Namely, the UCPD has established a general fairness clause providing thus the most abstract rule for assessment of fairness of a commercial practice.³³⁷

The importance of the general clause comes from the fact that it, firstly, establishes the most abstract rule of fairness, applicable in widest possible situations, contributing materially in such a manner to the widest possible general character of a universal duty to trade fairly, and, second, through its cumulative double criteria, it explains best a substantive meaning of the duty to trade fairly and how traders shall behave at the market in their relationship with consumers.

Contrary to the example of the law on unfair commercial practices, in European consumer contract law there is no universal duty which would correlate to the duty to trade fairly introduced by the UCPD and which would thus be applied to all types and all phases (formation, conclusion and execution) of a consumer contract. Good faith mentioned by Directive 93/13/EEC on unfair contract terms has only limited effects, in particular being applicable only on non-individually negotiated contract terms.³³⁸ The lack of such a general principle is primarily the result of strong opposition of Member States to the introduction of any kind of duty similar to the principle of good

³³⁷ Article 5 of the UCPD

³³⁸ M Ebers, 'Unfair Contract Terms Directive (93/13)' in Schulte-Nolke H, Twigg-Flesner C and Ebers M (eds), *EC Consumer Law Compendium* (Sellier 2007), 341-438

faith in contract law on the European level. This is a consequence of the diversity of approaches of national legal systems towards, first, recognition of existence of such a duty, and, second, the content and requirements of that duty.

What I argue in this Chapter of the thesis is that the duty to trade fairly as defined by the UCPD has also become a universal duty applicable in consumer contract law. As a consequence of a broad definition of the notion of commercial practice and its tightest connection with contract, the duty to trade fairly applies not only before, but also during and after a commercial transaction.³³⁹ Consequently, this means that the duty to trade fairly regulates behaviour of trader towards consumers in all phases of their contractual relationship, establishing thus also a general fairness requirement in consumer contract law. In other words, the duty to trade fairly has become a general obligation that also applies to consumer contract law, but only as a duty of the trader due to the unequal relationship between consumer and trader.

Duty to trade fairly under Directive 2005/29/EC

The definition of general clause

According to the Directive, any commercial practice that is unfair shall be prohibited.³⁴⁰ In order to verify whether a practice is unfair, the Directive envisages a three-step mechanism for assessment of fairness of a commercial practice that national authorities shall follow.³⁴¹ The first step is to verify whether a practice can be subsumed under any of thirty-one exhaustively enlisted concrete examples of commercial practices which are always unfair.³⁴² The second step is to assess a practice through one of three more abstract “small general clauses” which prohibit

³³⁹ Article 3(1) of the UCPD

³⁴⁰ Article 5(1) of the UCPD

³⁴¹ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 65; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 53; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 40

³⁴² Article 5(5) and Annex I of the UCPD

misleading and aggressive practices.³⁴³ Eventually, the last, third step is a general fairness clause which provides the most abstract and general mechanism for assessment of commercial practice's fairness that managed to skip the previous two steps.³⁴⁴

According to the third step, a commercial practice is unfair when two conditions are cumulatively fulfilled. The first condition is that a commercial practice is contrary to the requirements of professional diligence. The second condition requires that such a commercial practice materially distorts or is likely to materially distort economic behaviour of an average consumer. In such a manner, the Directive defines a general fairness requirement of trader in a negative manner, as a duty not to trade unfairly. Traders are not directly obliged to trade in a fair manner, but they are prohibited from acting unfairly. Although the initial intention was to formulate the general clause in a positive manner, primarily as a result of the UK's strong opposition, the final version of the duty is formulated in a negative form.³⁴⁵

The explanation for the shift in approach is found, as Collins explains it well, in "the traditional British liberal perspective on the state that what is not prohibited is therefore permitted, thereby avoiding the appearance of the imposition on business of a vague positive duty to behave in ways dictated by the government".³⁴⁶ Moreover, negative formulation is considered as being encouraging for trader's commercial freedom, as it was argued by Advocate General Trstenjak. It is in accordance with the principle *in dubio pro libertate* which shall be always applicable in case of the UCPD application.³⁴⁷

³⁴³ Articles 5(4), 6, 7, 8 and 9 of the UCPD

³⁴⁴ Article 5(2) of the UCPD

³⁴⁵ Commission, 'Green Paper on European Union Consumer Protection' COM (2001) 531 final

³⁴⁶ H Collins, 'Harmonisation by example: European laws against Unfair Commercial Practices' (2010) 73 *Modern Law Review* 89, 96

³⁴⁷ Opinion of Advocate General Trstenjak in Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 81

The UCPD provides that a commercial practice will be unfair if it is contrary to the requirement of professional diligence, as an expected and required standard of fair behaviour of traders. Moreover, for a practice to be declared unfair, the particular commercial practice of a trader must affect or must be likely to affect economic behaviour of consumer, as a necessary requirements of consequences that a behaviour of trader needs to have on consumer in order to be prohibited. I will examine both of these conditions later in details in this Chapter of the thesis since, besides providing condition for application of this provision, they explain best what shall be the substantive meaning of the duty to trade fairly.

The purpose of the general clause and its functions

A general fairness clause provided by the Directive has four main functions which proves well its character of a general duty to trade fairly. These functions include the roles of the general clause as a safety net, its adaptability to the changes of trader's behaviour, but also to the changes of a consumer's behaviour and a general fairness clause also show a clear policy determination of EU consumer law.

Safety net

The general fairness clause is to be used as a safety net aimed at prohibition of any commercial practice that is unfair, but which manages to skip prohibition on the grounds of the first two steps for assessment of fairness. Although it is true that in practice most of the unfair commercial practices can either be subsumed under one of thirty-one exhaustively listed practices of Annex I or be declared as unfair through assessment based on one of small general clauses, some commercial practices which are unfair that may avoid them.³⁴⁸

³⁴⁸ In her Opinion in *Perenicova*, Advocate General argued first that the commercial practice in question is unfair under one of the small general clauses, but to be on the safe side, she also showed, alternatively, that the practice is unfair also on the basis of the general clause criteria, see: Opinion of Advocate General Trstenjak in Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 104-107

Accordingly, with its general and flexible formulation general fairness clause secures a full horizontal application of the duty to trade fairly, securing thus the most complete protection of consumers from any unfair commercial practice of traders. In such a manner, the duty to trade fairly fills in the gaps which remained unregulated by other, sector specific EU rules.³⁴⁹

Adaptability to changes of trader's behaviour

In the case of other areas of EU consumer law, as a consequence of its generally present piecemeal approach, it was possible to notice diverse methods and techniques that traders used in the past in order to avoid the application of the provisions of a particular directive. For instance, this was the case with old Directive 94/47/EC on timeshare when traders started using a new product called 'holiday clubs' whose scope fall out of the legal regime established by the directive in order to avoid application of its provisions. Similarly, in case Directive 85/577/EEC on doorstep selling, a new irregular method of approaching the consumer was surmised as the 'response' of traders to the passing of the directive which successfully succeeded in avoiding the application of the provisions of the directive related to illegal aggressive practices.³⁵⁰

In that aspect, the purpose of a general clause is to remedy all possible avoidance of the application of consumer law by covering *in abstracto* all imaginable cases of unfair behaviour of traders and to provide a complete protection. In such a manner, the general clause overcomes constant risk typical for sector specific legislation of not being capable to adapt quickly to market developments. Moreover, this also shows that the Directive is *future-proof*³⁵¹ since it is capable to cover all innovative practices traders may develop in the future that may be against economic interest of the

³⁴⁹ Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee, COM (2013) 139 final, 2

³⁵⁰ H Collins, 'EC Regulation on Unfair commercial practices' in H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 25-26

³⁵¹ G Abbamonte, 'The UCPD and its general prohibition' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 20

consumer, but which are not sanctioned by the provisions of the UCPD or some other piece of consumer legislation.

Society and trade are now developing in such a more quickly than ever before and the trade techniques adapt much faster to these changes than the applicable legislative framework. The general clause of duty to trade fairly has that flexibility to be capable of covering all imaginable, but also currently unimaginable situations that can potentially happen in the future, a flexibility that none of the other pieces of European legislation on consumer law possesses. In other words, this shows the Directive's ability to adapt automatically to the evolution of the market, as it is described.³⁵²

Adaptability to changes of consumer's behaviour

Importantly, not only trader's behaviour and commercial techniques change during the time, but this happens with consumer behaviour which is also a relative and fluctuating category.³⁵³ Consequently, consumers become less susceptible to being hurt by one set of practices, and more by other types of practices. Finding and verifying how consumers really behave and react to a commercial practice in reality shall be a crucially important criteria for application of the general fairness clause.³⁵⁴ In that respect, the general clause with its flexibility represents a great instrument with high potentiality in order to accommodate the duty to trade fairly to the reality at any moment and to adapt the mechanism of protection in accordance with real consumer's behaviour.

Consequently, national courts shall profit from such an adaptability of character of the general clause that can follow change of consumer behaviour in practice since a commercial practice is unfair only if affects or is likely to affect the consumer's

³⁵² G Anagnostaras, 'The Unfair Commercial Practices Directive in context: From legal disparity to legal complexity?' (2010) 47 Common Market Law Review 147, 152

³⁵³ M Solomon, G Bamossy, S Askegaard and MK Hogg, *Consumer behaviour: A European perspective* (4th edn Pearson Education 2010), see, in particular Chapters 5 and 6, where it is shown in what manner consumer's preferences, as well as attitude and reaction towards particular commercial tactics change over the time.

³⁵⁴ J Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practises Directive' (2011) 34 Journal of Consumer Policy 377, 391

economic behaviour.³⁵⁵ This means that a commercial practice which is contrary to the requirements of professional diligence is not automatically deemed unfair under general fairness clause, but it is mandatory required that it has certain affects on consumer's behaviour.

Policy determination

The general clause is not only a provision of a binding legal nature, but also a provision which shows a clear policy determination and explains the philosophical basis of the Directive.³⁵⁶ As a policy measure of EU Consumer Law, its objective is to underline that only fair trade, at least in case of business-to-consumer relations is allowed and encouraged, whereas the unfair behaviour is unacceptable and thus shall be strictly prohibited and sanctioned.

Such an approach is in accordance with EU Charter of the Fundamental Rights which recognizes the freedom to conduct business in accordance with European law and national practices.³⁵⁷ The general duty to trade fairly represents the other side of the guaranteed freedom: in order to be free to conduct business, the trader is obliged to trade fairly. Furthermore, the general clause represents the emanation of the requirement posed by EU Charter that all European policies have to ensure high level of consumer protection.³⁵⁸ Accordingly, it has introduced a common European duty to trade fairly which applies to a widest possible forms of trader's behaviour in his relation towards a consumer.

Two limbs of the general clause

The general clause of the Directive is defined in the following manner:

A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence, and

³⁵⁵ Article 5(2)(b) of the UCPD

³⁵⁶ G Abbamonte, 'The Unfair Commercial Practices Directive: An example of the new European Consumer Protection Approach' (2006) 12 Columbia Journal of European Law 695, 696

³⁵⁷ Article 16 of the Charter of Fundamental Rights of the European Union

³⁵⁸ Article 38 of the Charter of Fundamental Rights of the European Union

*(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.*³⁵⁹

Cumulative fulfillment of the two limbs is required for a practice to be considered as unfair.³⁶⁰ Accordingly, if one of the two conditions is missing, a practice cannot be declared unfair. The first condition is related to the breach of the required standard of behaviour of a trader. It will be fulfilled if a trader has not behaved in a required manner as defined by the UCPD. The second condition is related to the consequences of such unfair behaviour of the trader towards the consumer and it is accordingly fulfilled if a commercial practice has effects on the decision making process of consumer.

The general clause is always applied bearing in mind reaction and behaviour of an average consumer, as a reasonably well-informed and reasonably circumspect and observant consumer, who is taken as the principal benchmark under the Directive.³⁶¹ The wording used in the general clause reveals the complexity and ambiguousness of its provisions, in particular due to the combination of innovative and traditional legal vocabulary used in a new context whose meaning and mutual correlation does not seem to be sufficiently clear.

³⁵⁹ Article 5(2) of the UCPD

³⁶⁰ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 54; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 32; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2010] ECR I-00217, para 43; Case C-435/11 *CHS Tour Services GmbH v Team4 Travel GmbH* [2013] ECR I-0000, para 36; Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e delle Mercato* [2013] ECR I-0000, para 28.

³⁶¹ See Chapter II on Average consumer of the thesis

The requirements of professional diligence

The meaning of professional diligence

Professional diligence defines required a standard of behaviour by the trader while acting on the market. The standard requires an advanced level of care in comparison to an ordinary person or a non-professional.³⁶² This is accordance with the case law of the ECJ in the area of consumer contract law where the Court confirmed a requirement of particularly attentive care from traders in their interaction with consumers. This is because the consumer is always a weaker party ‘as regards both his bargaining power and his level of knowledge’ in comparison to a trader.³⁶³

Since professional diligence is an innovative legal notion in EU consumer law, the Directive also provides its definition. It is defined as a “standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity”.³⁶⁴ The definition shows that professional diligence shall be understood in a broader manner than the concept of subjective good faith since professional diligence also requires from trader to possess relevant competence and expertise in addition to the requirement of honesty.³⁶⁵

Accordingly, it is pointed out that professional diligence requires for traders “to undertake further activities beyond those that they are normally required to carry out in fulfilling a duty of good faith”.³⁶⁶ Moreover, in line with its scope of application, the Directive narrows down the definition to the required standard of behaviour *towards consumers*, whereas regulation of trader’s behaviour towards competitors is

³⁶² G Abbamonte (n 351) 22

³⁶³ See, *inter alia*, Case C-618/10 *Banco Español de Crédito SA and Joaquín Calderón Camino* [2012] ECR I-0000, para 39; Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000, para 44; Case C-280/13 *Barclays Bank SA v Sara Sánchez García and Alejandro Chacón Barrera* [2014] ECR I-0000, para 32.

³⁶⁴ Article 2(1)(h) of the UCPD

³⁶⁵ G Abbamonte (n 351) 22

³⁶⁶ C Alvisi, ‘The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Practices’ in G Bongiovanni, G Sartor and C Valentini, *Reasonableness and Law* (Springer 2009), 284

provided by other pieces of legislation and thus it is irrelevant for definition of professional diligence in the context of the UCPD.³⁶⁷

Initially, the Commission planned to define ‘professional diligence’ as “a measure of special skill and care exercised by a trader commensurate with the requirements of normal market practice towards consumers in his field of activity in the internal market”.³⁶⁸ Such a proposal was criticized by the European Parliament as being difficult to understand, as well as for allowing traders to base their defense on the fact that a practice was ‘normal’ for a particular sector. Furthermore, it was suggested that a good faith component should be added to the definition of professional diligence in line with the already existing concept of good faith established by Directive 93/13/EEC on unfair contract terms. The European Parliament attempted to upgrade the significance of good faith by the additional amendment proposed adding the criterion of good faith to the first limb, i.e. that a practice has to be contrary both to professional diligence and good faith.³⁶⁹ These arguments of the European Parliament were partially followed as the final version of the adopted text the Directive may show.

In defining the components of the duty to trade fairly, the Commission was aware of its tight liaison between the general duty of good faith and the necessity to show this connection. However, professional diligence and good faith, in particular those existing in national contract laws, are not the provision of the equal meaning.³⁷⁰ Eventually, good faith requirement was incorporated in the text as a part of the definition that provides some explanation to the meaning of professional diligence through rather familiar concept.

³⁶⁷ On the European level, the regulation of commercial practices in B2B relations is primarily provided by Directive 2006/114/EC on misleading and comparative advertising whose capacity and effects are significantly less important than the capacity of the UCPD.

³⁶⁸ Commission, ‘Proposal of the Directive on unfair commercial practice’ COM (2003) 356, section 22

³⁶⁹ See Report of the Committee on Legal Affairs and the Internal Market on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) COM(2003) 356 – C5-0288/2003 – 2003/0134(COD)

³⁷⁰ See on that Section of this Chapter

Equally, instead of opting for the unclear concept of the ‘normal market practice’, the final version adopted the adjective ‘honest’ as a requirement of the quality of a trader’s market practices, following partially in that manner the general prohibition of unfair commercial practices provided by article 10bis of Paris Convention for the Protection of Industrial Property.³⁷¹ The Paris Convention itself represents the oldest international agreement that has ever contained a provision, article 10bis, which is aimed to secure effective protection from unfair commercial practices.³⁷² All EU Member States are signatories of Paris Convention.³⁷³ Consequently, the idea was that the final wording of professional diligence encompasses in its text the notions of good faith and honest market practice which were already established in the legal systems of majority of Member States.³⁷⁴

The interpretation of the professional diligence by the ECJ

In its case law on the UCPD, the Court, provided some clarification of the definition of professional diligence. However, since professional diligence represents a standard, it is not possible to have a detailed and precise meaning of this definition, but the test is rather to be performed on a case-by-case basis. Accordingly, the existing case law of the ECJ is of help to understand what the European meaning of professional diligence shall be.

In *Plus*, the main subjects were business activities of a retail company in Germany whose promotional strategy was based on the invitation of consumers, through the

³⁷¹ Paris Convention for the Protection of Industrial Property of 1883, 21 UST 1583, 828 UNTS 305, see Article 10bis(2): *Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition*

³⁷² PV Norton, *The Effect of Article 10bis of the Paris Convention on American Unfair Competition Law* (1999) 68 Fordham Law Review 225, 239

³⁷³ http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2, accessed on 12 May 2014

³⁷⁴ Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee on the application of 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 (‘Unfair Commercial Practices Directive’) COM (2013) 139 final, 12

advertisements, to buy in their shops in order to collect bonus points. Those who collected a certain prescribed number of points were given the chance to participate in a lottery and to win prizes. Such a practice by the trader was prohibited on the basis of a provision of German national law on unfair competition.

The Court concluded that maximum harmonisation character of the Directive precludes such a provision of German law.³⁷⁵ In this case, only the Advocate General addressed the question of professional diligence.³⁷⁶ The Court did not follow the Opinion of Advocate General since it did not perform a substantial analysis of the Directive, but rather focused exclusively on the scope of the application of the directive and the question of whether the UCPD precludes German law on prohibition of a form of commercial practice.³⁷⁷

While examining whether a disputed practice could represent an unfair commercial practice under the general clause, the Advocate General identified that the practice in case, i.e. participation of consumers in a competition which is made conditional on the purchase of a product, can represent a form of breach of professional diligence.³⁷⁸ Advocate General explained her views on the ground that “the use of games of chance in advertising is very likely to arouse the human pleasure in gambling”. As a consequence, the games of chance “can arouse the attention of prospective customers and direct them to certain ends by means of the chosen advertising strategy”.³⁷⁹

Prior to reaching such a conclusion, the Advocate General referred to the Court’s case law on gambling and underlined the problematic moral component of games of

³⁷⁵ Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217

³⁷⁶ Opinion of Advocate General in Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 89-94

³⁷⁷ Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217

³⁷⁸ Opinion of Advocate General in Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 94

³⁷⁹ Opinion of Advocate General in Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 93

chance and that prohibition can be justified on the grounds of public policy. In spite of such an approach, Advocate General did not even attempt to assess this particular practice through the criteria of taste and decency as exceptions to the application of Directive's regime. The explanation for this approach can be found in the fact that subjected commercial practice, besides its problematic moral justification, also impaired consumer's economic interests by influencing him to buy the advertised products. This means that taste and decency in the context of the UCPD should be interpreted restrictively and that they do not fall under the Directive only in cases when consumer's economic interest is not hindered.

In *Mediaprint*, the Court provided clarification of the requirement of professional diligence. The question was whether possibility to take part in a lottery connected with the purchase of newspapers constituting an unfair commercial practice. On the basis of the fact that it is not contrary to the criterion of professional diligence, the Court simply stated that such a practice is allowed.³⁸⁰ However, the Court did not provide any assessment of the subjected practice under professional diligence which would be of help to understanding how this notion works in practice. Neither did Advocate General, whose Opinion the Court followed, offered any explanation while stating that a discussed practice does not represent a failure to fulfill the requirement of professional diligence.³⁸¹ Advocate General only pointed out that it is for the national court to examine in detail whether a trader's practice is against the requirements of professional diligence.³⁸²

What seems particularly confusing is the inconsistency between the Opinions of the same Advocate General in *Plus* and *Mediaprint*, the two cases which were assessed a few months apart from each other. In both cases, the question was permissibility of sales promotions through possibility of the consumer to participate in a game of

³⁸⁰ Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 46

³⁸¹ Opinion of Advocate General in Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 110 and para 134

³⁸² *Ibid*, para 133

chance in case he purchases the advertised products. However, in the first one, such behaviour of traders was considered as contrary to the requirement of professional diligence, whereas in the second, it was in accordance with this requirement. The explanation for diverse approaches in these two cases seems to be lacking in order to avoid any possible misinterpretations by the national courts.

In *Perenicova*, the Court identified a false statement of annual percentage rate of charge in consumer credit contract by trader as a form of misleading action under article 6(1) of the UCPD.³⁸³ Alternatively to the assessment through the provisions of one of the small general clauses, the Advocate General performed the fairness test under the general clause which also came up with the conclusion that the practice in case was unfair.³⁸⁴ In her Opinion, the Advocate General pointed out that there was a breach of professional diligence requirement “since a trader must be expected to undertake his commercial activities in accordance with the relevant legislation and to demonstrate particular care in his dealings with a consumer, especially as the latter is dependent on the trader’s expertise”.³⁸⁵

The Advocate General considered the provisions of the old Directive 87/102/EEC on consumer credit establishing the rules on interest rate were considered as *relevant legislation*. Consequently, provision of false information on interest rate would be considered as contrary to the requirements of professional diligence. However, the Court having respected the three step procedure on fairness assessment and having found that the disputed practice was a form of misleading action, on the basis of which breach of professional diligence is undeniably presupposed, did not have the need to proceed with the assessment of a practice under the general clause and verify whether the traders acted in accordance with the requirement of professional diligence.

³⁸³ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-00000, para 47

³⁸⁴ Opinion of Advocate General in Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 107

³⁸⁵ *Ibid* , para 106

In *CHS Tour*, the ECJ clarified that for the assessment of fairness of a commercial practice under the three small general clauses on misleading and aggressive practices, it is not required to also prove that trader has acted contrarily to the requirements of professional diligence.³⁸⁶ In other words, it is sufficient to prove that a particular fact can be subsumed under one of the three small general clauses and if that is the case, the presumption is that such a behaviour will always automatically represent a breach of requirements of professional diligence. In such a manner, it is possible to conclude that any illegitimate manner in which a trader prohibits a consumer to make an informed and free choice is also contrary to the requirements of professional diligence.

Requirements of good faith and honest market practice

Practical significance of good faith and honest market practice

The examination of case law of the ECJ on the interpretation of professional diligence showed that the currently existing practice is not of particular usefulness to the national courts for understanding the autonomous concept of professional diligence. The Court provided hardly any universal guidance, but rather pointed out that professional diligence should be decided on a case-by-case basis. Similarly, in its documents that were issued after the adoption of the Directive, the Commission aimed to clarify ambiguousness and the other as the implementation and application report of the provisions of the Directive also touches upon the question of professional diligence inadequately and superficially.³⁸⁷ As a consequence, the lack of clear

³⁸⁶ Case C-435/11 *CHS Tour Services GmbH v Team4 Travel GmbH* [2013] ECR I-0000, para 48

³⁸⁷ In the Guidance, there is surprisingly not a single word aimed to explain what professional diligence is, see: Commission 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices' SEC (2009) 1666; in the Report on Application of the UCPD just mentions very briefly the interpretation of professional diligence by the ECJ and assess its transposition in national legal systems of Member States, see Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee on the application of 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 ('Unfair Commercial Practices Directive') COM (2013) 139 final, 8 and 12

European meaning of professional diligence seriously endangers the achievement of full harmonisation envisaged by the Directive.³⁸⁸

For the correct understanding of professional diligence under the UCPD, the notions of honest market practice and good faith may be of great usage. Namely, the Directive identifies that professional diligence is a standard equivalent to the duties of good faith and honest market practice.³⁸⁹ However, again, neither the UCPD itself, nor the ECJ have provided what shall be meant under these two notions. The only clarification that the UCPD provides for interpretation of these two notions is that applicable honest practices and good faith are those existing in traders' field of activity. It means that the two standards will be assessed from the perspective of particular industry sector to which the trader belongs. Limitation to particular industry sector is, as I will show later, particularly relevant when it comes to honest market practice since this requires taking into consideration private regulation that exists for the industry sector to which traders belongs.

However, certain bordering and related areas of the law on unfair commercial practices may be of help clarify the meanings of good faith and honest practice under the UCPD. To start with, for understanding of good faith under its European meaning, case law of the ECJ developed in relation to the rules on unfair contract terms under the UTD is of great benefit. Such a European concept of good faith is examined in detail in the sections of the second part of this chapter where applicability of the duty to trade fairly on contractual relationship between trader and consumer is explained. Herein, I will focus on the examination of the requirement of honest market practice.

In the context of understanding of the UCPD, honest market practice shall be approached from two perspectives: EU trademark law and private regulation. First, a very similar concept, named as 'honest practices', had already existed in a bordering

³⁸⁸ HW Micklitz (n 245) 99

³⁸⁹ Article 2(1)(h) of the UCPD

branch of EU law, the law on trademark, where it represents a *sui generis* form of required behaviour in case of usage of trademark by a third party. Second, the requirement of acting in accordance with honest market practice emphasised and upgrade the standard of trader's behaviour towards consumer at the market set by diverse forms of private regulation, in particular through code of conducts. Consequently, a breach of any code of conduct will also typically represent a breach of requirements of honest market practice and thus of a duty to trade fairly.³⁹⁰

The approach of EU Trademark Law towards honest market practice

The first perspective towards examination shall be from the position of Trademark law. Namely, the case law of the ECJ on the UCPD has not, so far, provided clarification what should be understood under honest market practice. However, the notion of honest market practice as defined by the UCPD materially resembles to the concept of 'honest practices in industrial and commercial matters' as defined and developed by EU Trademark law. In EU trademark law, from the concept of honest practices, the Court subsequently developed a rich jurisprudence.

One of the major outcomes of this intensive judicial activity on honest practices in industrial and commercial matters is the establishment of a general duty to act fairly in trademark law.³⁹¹ Due to the immediate obvious similarities between the duty to act fairly and the duty to trade fairly, as well as the tight connection between trademark and advertising laws, it is useful to examine what the Court understood under honest practices in its case law.

The notion of honest practices was initially contained in Directive 89/104/EEC on trademark where it is mentioned twice in the context of the limitation of the right of trademark proprietor to prohibit a third party of using the trademark in certain

³⁹⁰ C Twigg-Flesner et al., 'An Analysis of the Application and Scope of the Unfair Commercial Practices Directive - Report for the Department of Trade and Industry' (2005) <http://www.berr.gov.uk/files/file32095.pdf> accessed 12 May 2014, 15

³⁹¹ Case C-558/08 *Portakabin Ltd and Portakabin BV v Primakabin BV* [2010] ECR I-06963, para 67

cases.³⁹² The limitation is conditioned by the requirement to a third party to use the trademark “in accordance with honest practices in industrial or commercial matters”.³⁹³ However, neither does the Directive on trademark provide the exact meaning of this standard. The reason for this is well explained by Advocate General Jacobs who points out that for honest market practice “[b]y its very nature, such a concept must allow of a certain flexibility. Its detailed contours may vary from time to time and according to circumstances, and will be determined in part by various rules of law which may themselves change, as well as by changing perceptions of what is acceptable, however, there is a large and clear shared core concept of what constitutes honest conduct in trade, which may be applied by the courts without great difficulty and without any excessive danger of diverging interpretations”.³⁹⁴

These words applied on the concept of honest market practice as prescribed by the UCPD may show that this clause guarantees the flexibility of the general fairness clause necessary for its function as a safety net and enabling its adaptability to the changes of consumer’s and trader’s behaviour, without the need to amend or modify the text of the Directive.

Even after the repealing of directive with the new Directive 2008/95/EC on trademark, the requirements of honest practices in industrial and commercial matters remained untouched and unchanged.³⁹⁵ This is important since majority of relevant case law on honest practices of the Court is based on the old directive, but their legitimacy after the adoption of the new directive is not questioned since the applicable wording remained the same, showing also that there was no particular need for changing and clarification of this wording or concept.

³⁹² First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1

³⁹³ Art 6(1) and Art 15 (2) of Directive 89/104/EEC

³⁹⁴ Opinion of Advocate General Jacobs in Case C-2/00 *Hölterhoff v Freiesleben* [2002] ECR I-4187

³⁹⁵ Art 6(1) and Art 15 (2) of Directive 2008/95/ EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (Codified version) [2008] OJ L299/25

The case law of the Court in this area is very fruitful. Consequently, these decisions can be of great help for understanding the meaning of the honest practice concept of the UCPD. It should not be forgotten in spite of the fact that they represent different branches of law, in reality there is a tight connection between commercial practices, in particular advertising and marketing, and trademark as confirmed by the ECJ.³⁹⁶ This is best explained by quotation saying: “A trademark is nothing without advertising and advertising is nothing without a trademark, in any event when consumer goods are concerned.”³⁹⁷

Honest market practice in the ECJ case law

In the case law of the ECJ in the area of trademark, honest practices were mentioned in several cases in the context of permissibility of the commercial practice that used a particular trademark. In one of the landmark cases in this area, *BMW*, the question was whether the owner of garage who sells second hand and repairs BMW model cars is allowed to use the trademark of the company BMW while advertising the services of his garage. In this case, the Court explained that the honest practice requires a third party not to make “the impression that there is a commercial connection between the other undertaking and the trade mark proprietor, and in particular that the reseller's business is affiliated to the trade mark proprietor's distribution network or that there is a special relationship between the two undertakings”.³⁹⁸ Consequently, third party is allowed to use trademark if it uses it in manner that does not mislead consumers.

In *Gillette*, the usage of Gillette trademark in Finland by LA-LABS Gillette's competitor in the area of disposable razor blades the Court was directly and explicitly asked to provide the meaning of honest practice. In this case, the Court enlisted some of concrete examples of dishonest practices applicable in all cases.³⁹⁹ Furthermore, the

³⁹⁶ Case C-112/99 *Toshiba Europe GmbH v Katun Germany GmbH* [2001] ECR I-07945

³⁹⁷ T Cohen Jehoram, CJ Van Nispen and T Huydecoper *European Trademark Law* (Kluwer Law International 2010), 13

³⁹⁸ Case C-63/97 *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik* [1999] ECR I-905, para 64

³⁹⁹ Case C-228/03 *The Gillette Company and Gillette Group Finland Oy v LA-Laboratories Ltd Oy* [2005] ECR I-02337, para 49

Court pointed out to some forms of dishonest practices specific for the pending case. For instance, dishonest practice will be when a third party discredits or denigrates the trademark it is using⁴⁰⁰ or it presents its product “as an imitation or replica of the product bearing the trade mark of which it is not the owner”.⁴⁰¹

In *Portakabin*, the Court had to answer the question whether advertiser’s choice of a keyword for an Internet referencing service identical or similar to a registered trademark of another trader without his prior consent for advertising products identical to those for which the trademark has been registered, can be considered as a form of honest practice and, consequently, represent an exception to the general prohibition of the usage of a registered trademark. The answer of the Court was negative.⁴⁰² The ECJ explained that this particular commercial practice does not represent a form of honest practice since it “does not enable average internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or from an undertaking economically linked to it or, on the contrary, originate from a third party”.⁴⁰³

The question of honest practices was also touched by the Court directly in the context of advertising on the basis of Directive 84/450/EEC on misleading advertising. In *Toshiba*, one of the disputed issues was whether the indication of the product numbers of a trader by its competitor in its advertising practices can be considered taking the unfair advantage as defined by Directive 84/450/EEC on misleading advertising. The Court rules that such an advertising will be unfair only in case if the persons to whom the advertisement is directed to “associate the reputation of the manufacturer’s products with the products of the competing supplier”.⁴⁰⁴

⁴⁰⁰ Ibid, para 44

⁴⁰¹ Ibid, para 45

⁴⁰² Case C-558/08 *Portakabin Ltd and Portakabin BV v Primakabin BV* [2010] ECR I-06963, para 71

⁴⁰³ Ibid, para 54

⁴⁰⁴ Case C-112/99 *Toshiba Europe GmbH v Katun Germany GmbH* [2001] ECR I-07945, para 60

Similarly, in *Siemens v VIPA* the raised question before the ECJ was whether a trader is taking an unfair advantage if it uses in its advertising practices the competitor's distinguishing mark that can be recognized by a specialist public. The answer of the Court was that by simply using a competitor's distinguishing mark the trader does not take an unfair advantage, and consequently that such a commercial practice shall be permitted.⁴⁰⁵

From the requirement to act in accordance with honest practice, the Court derived a general duty to act fairly⁴⁰⁶, established in relation to the legitimate interests of the trademark proprietor. The duty to trade fairly was confirmed in *Brunnen* where the Court indicated using of a geographic origin that is potentially aurally confusing with a registered trademark of a competitor is allowed if a trader uses it in accordance with the honest practice which "constitutes in substance the expression of a duty to act fairly".⁴⁰⁷ The Court left to the national Court to decide whether such a practice is unfair by assessing all characteristics of advertising and, in particular, the shape and label of a bottle.⁴⁰⁸

The examined case law proves the tight relationship between the concept of honest practices as the foundation of the duty to act fairly from Directive 2008/95/EC on trademark and the honest market practices as the source of the duty to trade fairly. Both of these concepts are primarily used in the context of advertising and marketing. Moreover, it must not be neglected that both of these directives also use the average consumer, equally defined as a reasonably well-informed, reasonably circumspect and observant consumer, as the principal benchmark of the directives.⁴⁰⁹ This is why for a proper understanding of the European meaning of the honest market practices, the case law example of the ECJ interpreting the provisions on honest practice in

⁴⁰⁵ Case C-59/05 *Siemens AG v VIPA Gesellschaft für Visualisierung und Prozeßautomatisierung mbH* [2006] ECR I-02147, para 27

⁴⁰⁶ Case C-558/08 *Portakabin Ltd and Portakabin BV v Primakabin BV* [2010] ECR I-06963, para 67

⁴⁰⁷ Case C-100/02 *Gerolsteiner Brunnen GmbH v Putsch GmbH* [2004] ECR I-691, para 24

⁴⁰⁸ *Ibid*, para 26

⁴⁰⁹ Case C-252/07 *Intel Corporation Inc. v CPM United Kingdom Ltd* [2008] ECR, I-8823; Case C-408/01, *Adidas – Salomon and Adidas Benelux v Fitnessworld Trading Ltd* [2003] ECR I-12537.

trademark can be of great help. The examined case law enables the overview of some concrete examples of the meaning of honest practices.

In spite of the fact that in these cases the questions raised before the Court concerned two traders, the decisions are applicable and relevant for understanding the concept of the duty to trade fairly as defined by the UCPD. This is because the analyzed commercial practices could also hinder economic interest of consumers. For instance, in case a consumer decides to buy a car in a shop with a BMW signs, and not in another shop, thinking that there exists a commercial connection between a garage and the car company.

The existence of such a tight connection between the two areas of law is explicitly recognized by the UCPD in the provisions on misleading actions. Accordingly, “any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor” will be considered as a misleading action.⁴¹⁰ The previous cases were considered from the perspective of a trader, a trademark proprietor, yet from a consumer perspective they would have represented a kind of unfair commercial practice.

Empowerment of private regulation through honest market practice

The second perspective of honest market practice shall be from the position of private regulation. Namely, the clause on honest practice has also been incorporated into the system of protection provided by the Directive fairness requirements established through diverse pieces of private regulation. This in accordance with the increasing role that private regulation plays in the system of EU Law, described as “a growing phenomenon”.⁴¹¹ In case of the UCPD, a rising and important role of private

⁴¹⁰ Article 6(2)(a) of the UCPD

⁴¹¹ M Mataija, *Private regulation, competition and free movement* (PhD Dissertation European University Institute 2013 unpublished), 7

regulation for securing fair trade in business-to-consumer relations is particularly present.⁴¹²

Before the adoption of the Directive, the role, relevance and content of code of conducts in the national systems of protection from unfair commercial practices, differ significantly.⁴¹³ Consequently, one of the policy goals of the UCPD is to encourage traders of different business sectors to adopt codes of conduct that would regulate their honest practices.⁴¹⁴ In such a manner, through the adoption of pan-European codes of conducts in diverse market sectors, a final goal is to harmonize the standards of trading throughout the European Union.⁴¹⁵

The UCPD explicitly indicates that requirements imposed by code of conducts are to be taken into consideration while verifying whether a trader behaved in accordance with the principle of professional diligence.⁴¹⁶ Such an approach already existed in Nordic countries where guidelines of fair conduct were drafted by Consumer Protection Agencies together with the representatives of particular industry sectors and have been traditionally used by the courts while assessing whether a trader behaved in a fair manner.⁴¹⁷ Similarly, in the UK and Ireland there private regulation was a part of governmental strategy for securing fair marketing standards.⁴¹⁸ A significant advantage of private regulation is that, being a soft law, its modification can be done in an easier and faster manner, than legislative changes, which thus enables private regulation to adapt better and more quickly to market changes and

⁴¹² F Cafaggi, 'Private Regulation in European Private Law', in AS Hartkamp, MW Hesselink, EH Hondius, C Mak, CE Du Perron (eds), *Towards a European Civil Code* (4th edn Kluwer Law International 2011), 119-123

⁴¹³ A Bakardjieva Engelbrekt, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation* (PhD Dissertation Stockholm University 2003 unpublished), 609

⁴¹⁴ Article 10 of the UCPD

⁴¹⁵ H Collins, 'EC Regulation on Unfair commercial practices' in H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 12

⁴¹⁶ Recital 20 of the UCPD

⁴¹⁷ A Bakardjieva Engelbrekt, 'EU and Marketing Practices Law in the Nordic Countries - Consequences of a Directive on Unfair Business-to-Consumer Commercial Practices' (2005) <http://www.norden.org/en/publications/publikationer/2005-424> accessed 12 May 2014, 26

⁴¹⁸ HW Micklitz, 'A General Framework Directive on Fair Trading' in H Collins (ed), *The Forthcoming Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 77

developments.⁴¹⁹ Again, this shows that flexibility of the general fairness clause is secured as a necessary prerequisite for its role as a safety net and possibility to adapt to all future changes of consumer's and trader's behaviour at the market.

Different forms of private regulation contain rules relevant for requirements of honest market practice. They can be sector specific applicable for certain industries or general codes applicable for all or particular forms and means of advertising practices. This is why the UCPD itself delimits the requirement of honest market practice to a particular industry sector. The example for sector specific regulation is the Guiding principles for advertising and marketing communication to children made by the International Council of Toy Industries (ICTI).⁴²⁰ Accordingly, it applies exclusively in the case of advertising in the toy industry. It is recognized by Toy Industries of Europe whose member cover around 80% of the total European toy sale.⁴²¹ This Guide defines some of the principles how a trader in this sector should behave. For instance, one of the rules states: "Premiums should be used and presented responsibly. There should be no sales pressure".⁴²² Consequently, if an allegedly unfair commercial practice was performed by a trader belonging to this industry group, the ICTI Guiding Principles will also be taken into consideration in order to verify whether that member acted in accordance with requirements of professional diligence. The example of a universal code for any kind of advertising practices is the main source of private regulation in advertising is the Code of Advertising and Marketing Communication Practice of the International Chamber of Commerce (ICC).⁴²³ The Code requires the Best Practices Marketing as the necessary basics for performing any kind of advertising activities. At the very beginning, the ICC Code indicates honesty as a fundamental requirement for any marketing communication. Besides being

⁴¹⁹ G Abbamonte (n 351) 29

⁴²⁰ Guiding principles for advertising and marketing communication to children, <http://www.toy-icti.org/info/communications-to-children.html>, accessed on 12 May 2014

⁴²¹ <http://www.tietoy.org/toy-sector-in-europe/commercial-communications/>, accessed on 12 May 2014

⁴²² Ibid

⁴²³ ICC Code of Advertising and Marketing Communication Practice, http://www.codescentre.com/images/downloads/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf; it was revised for the last time in 2011, accessed on 12 May 2014

honest, all advertising practices have to be legal, decent and truthful.⁴²⁴The requirements of honesty are defined in a manner that advertising practice must not “abuse the trust of consumers or exploit their lack of experience or knowledge”.⁴²⁵

In case of alleged unfair commercial practices, all applicable codes shall be examined in order to verify whether trader acted in accordance with the provisions of the relevant codes. Private regulation through conducts can offer consumers a better and higher level of protection since it establishes minimum standards in accordance with which traders should behave. Accordingly, in order to protect consumer from misuse of their trust into code of conducts, the UCPD, as one of thirty-one commercial practices that shall be always deemed unfair, enlists trader’s false claim that he is signatory to a code.⁴²⁶

The traders are motivated to be part of such a code since it provides them additional guarantee that their competitors will behave fairly and that the interaction at the market will be just, from which both traders and consumers will profit. Moreover, from a perspective of cross-border trade, in contemporary Europe the codes usually overpass the national borders which ensures a supranational unified level of protection. In that context, the Proposal of the UCPD recognized the capacity of private regulation help in providing a convergent interpretation of professional diligence.⁴²⁷

On the other hand, the problem is that traders may base their defense on the honest practice in particular industry sector which was agreed by traders in their own

⁴²⁴ Article 1 of ICC Code: *All marketing communications should be legal, decent, honest and truthful. All marketing communications should be prepared with a due sense of social and professional responsibility and should conform to the principles of fair competition, as generally accepted in business. No communication should be such as to impair public confidence in marketing.*

⁴²⁵ Article 3 of the ICC Code

⁴²⁶ Article 5(5) and point 1 of Annex I of the UCPD

⁴²⁷ Commission, ‘Explanatory Memorandum to the Proposal for a Directive on unfair commercial practices ‘ COM (2003) 356 final, 16

interest.⁴²⁸ This is because it happens that the codes are sometimes established not for the sake of general or consumer interests, but rather in the interest for the involved industry sector.⁴²⁹ Consequently, national courts should be careful while applying them and approach them from a consumer perspective, in order to guarantee protection from unfair behaviour of traders.

This is why by requirement of cumulative fulfillment of good faith and honest market practices criteria, the Directive secures that the interest of consumer does not get prevailed by the interest of traders as expressed in a code of conduct. In other words, criterion of good faith is used as a certain form of a control check that disables exemption from unfair clause in cases when a commercial practice of trader is in line with honest practice, in particular when defined by a soft law instrument, but it is contrary to the requirements of good faith. In such kind of cases a commercial practice shall be considered as being contrary to professional diligence.

The scope of application of the duty to trade fairly

The exemption of the taste and decency from the duty to trade fairly

The duty to trade fairly, as defined by the Directive is aimed to protect exclusively the economic interests of consumers. Protection of any other non-consumer interest falls outside its scope as pointed out by the Court in its decision in *Pelckmans*, where the ECJ concluded that the provisions of the UCPD do not preclude rules of national laws that prohibits trader from keeping their shops open seven days a week, since such a provision is only aimed at protecting interests of workers and employees working in these shops, and not the interests of consumer.⁴³⁰ However, even in case of consumer's interests, the duty to trade fairly is strictly limited to the protection of

⁴²⁸ G Howells, 'The UCPD – A Missed Opportunity?' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 108

⁴²⁹ J Stuyck, E Terryn and T Van Dyck, 'Confidence through fairness? The new Directive on unfair business-to-consumer on commercial practices in the internal market' (2006) 43 *Common Market Law Review* 107, 137

⁴³⁰ Case C-559/11 *Pelckmans Turnhout NV v Walter Van Gestel Balen NV, Walter Van Gestel NV, Walter Van Gestel Schoten NV, Walter Van Gestel Lifestyle NV* [2012] ECR I-0000

economic interests of consumer, whereas all other forms of non-economic interests are not covered.

This is particularly true with the taste and decency whose protection also falls outside of the scope of the Directive.⁴³¹ Accordingly, Member States are allowed to maintain or adopt any national rules on unfair commercial practices whose goal is protection of taste and decency such as those dealing with “the protection of human dignity, the prevention of sexual, racial and religious discrimination, or the depiction of nudity, violence, anti-social behaviour”.⁴³² However, the fact that these values fall outside of the scope of the UCPD does not impede their necessity to represent justified measures for cross border trade and free movement of goods and services. This is well noticeable in the decision of the ECJ in *Omega* where a national prohibition of commercial practices aimed at providing protection to human dignity was considered as a justified obstacle for free movement of services.⁴³³

Some traders are worldly well-known for their ‘shock advertising’ approaches, as it is the case with fashion companies Benetton or Calvin Klein, whose advertising practices may sometimes be found offensive for certain groups of consumers, such as religious groups or women. The national courts of Member States have incoherent case law regarding permission of these kinds of advertisements: some of them find as part of advertising tactics within the limits of ethical and moral borders, whereas others prohibit them depending on the national approaches concepts of taste and decency.⁴³⁴ Through exclusion of the taste and decency from its scope, the Directive recognizes this diversity of approaches represents acknowledging this diversity of

⁴³¹ Recital 7 of the UCPD

⁴³² as two concrete examples, the Commission indicates first, national prohibitions or stricter rules regulating the marketing of violent online videogames and, second, national rules prohibiting advertisements for toys with a military theme directed at children, see: Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices of 3 December 2009, SEC (2009) 1666, available at http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf, para 1.6. at p. 13

⁴³³ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609, para 40

⁴³⁴ See a dozen of this kind of decisions of national courts of Member States are presented and examined in: HW Micklitz, J Stuyck J and E Terryn (eds), *Cases, Materials and Text on Consumer Law* (Hart 2010), 75 - 95

cultural, social, moral and ethical approaches of Member States towards permission or prohibition of certain commercial practices.⁴³⁵

Limited scope of application of taste and decency

The importance of the values that these practices aim to protect, advocate for a very a broad understanding of the notions of taste and decency all kinds of interests and values of non-economic character, including ethical.⁴³⁶ This is why Member States should not be limited by maximum harmonisation character of the UCPD to protect all of their own non-economic interests and values in accordance with the particularities of national legal systems and society. However, too wide application of taste and decency would diminish the potential scope of the application of the Directive.⁴³⁷ In that context, an important question which rises in practice is how restrictively in practice the Court will interpret these exemptions in cases when a commercial practice concerns both the moral and cultural values of consumer and his economic interests since the line between these two areas is blurred in reality.⁴³⁸

On the grounds of existing case law on the interpretation of the scope of application of the Directive made by the Court, it may be noticed that a seemingly wide nominal regulatory freedom of Member States in the area of unfair commercial practices that concern taste and decency is actually very limited in reality. The Court was very clear when it pointed out that the UCPD shall preclude not only the national provisions aimed exclusively to protect economic interests of consumer, but also those that besides protection of economic interests of consumer are designed to pursue other objectives.⁴³⁹

⁴³⁵ Commission, 'Extended Impact Assessment on the Directive on unfair Commercial Practices' SEC (2003) 724, 7-8; as the example is taken a prohibited advertising in Finland of a fast food chain directed at children that would most probably be considered as permitted in other Member States.

⁴³⁶ J Stuyck, E Terryn and T Van Dyck (n 429) 123

⁴³⁷ B Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Hart 2011), 266

⁴³⁸ T Wilhelmsson, 'Harmonizing Unfair Commercial Practices Law: Cultural and Social Dimensions' (2006) 44 *Osgoode Hall Law Journal* 461, 480

⁴³⁹ Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 41

Accordingly, the provision of the Directive shall apply whenever economic interests of consumers may be hindered.⁴⁴⁰ The ECJ has left to the national courts the obligation to verify whether a particular provision is aimed to pursue protection of economic interests of consumers and thus to come with a conclusion of whether it falls under the scope of the Directive.⁴⁴¹ As a consequence, the common European duty to trade fairly seems not be limited by the requirements of taste and decency since it will apply in case where a commercial practice, in particular an advertising practice, may hinder economic interests of consumers.

The exemption of health and safety

Besides exemption of the national rules on unfair commercial practices which are aimed to protect taste and decency, the Directive indicates that it is without prejudices regarding national bans on unfair commercial practices established on the basis that they protect health and safety.⁴⁴² The necessary condition to be fulfilled is that they represent a justified measure in accordance with the EU law on free movement.⁴⁴³ In certain cases of protection of health and safety, common European rules are provided. This is for instance the case with advertising of pharmaceuticals, food or tobacco or product safety where the EU Law has established a detailed and sophisticated instruments whose main purpose is to protect health and safety of consumers.

⁴⁴⁰ Ibid, para 21

⁴⁴¹ Order in Case C-288/10 *Wamo BVBA v JBC NV and Modemakers Fashion NV* [2011] ECR I-05835, para 28; Case C-391/12 *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] ECR I-0000, para 35

⁴⁴² Art 3(3) of the UCPD; well explained in Recital 9 of the Directive: The Member States will thus be able to retain or introduce restrictions and prohibitions of commercial practices on grounds of the protection of the health and safety of consumers in their territory wherever the trader is based, for example in relation to food or tobacco products, see Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 [2011] OJ L304/1; Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L152/16

⁴⁴³ U Bernitz, 'Scope, Ambitions and Relation to Unfair Competition Law' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 44

This means that on the grounds of health and safety, irrespectively whether on the basis of the EU or national laws, Member States may prohibit certain commercial practices which endanger health and safety of consumers without the need to assess them through the general fairness clause. Such a ban will not be considered as breach of the provision of the Directive, in particular its maximum harmonisation character. The explanation of the reasons why these interests are excluded are the same, since, as it has already been pointed out, the purpose of the Directive is the prohibition of exclusively economic and not any other interest of the consumer.

However, this does not mean that commercial practices on alcohol, tobacco products and similar products that particularly may endanger health and safety of consumers are exempted from the general fairness assessment. It may be the case that on the grounds of health and safety they remain permitted, but that due to unfair behaviour of a trader, they endanger consumer's economic interest. In these cases, when there is a suspicion that consumer economic interests might also be harmed, the general test of fairness will be performed. This is confirmed by the Directive since one of the thirty-one exhaustively listed practices states is a case of "[f]alsely claiming that a product is able to cure illnesses, dysfunction or malformations" which shows well that economic component of such a practice is protected by the UCPD.⁴⁴⁴ On the other hand, the other component of a practice, the one that is related to potential harm to health of consumer is regulated by another piece of legislation.

Material distortion of consumer's economic behaviour

Capacity for material distortion

The second component of the general clause is related to the required effects of a commercial practice on consumers for a practice to be considered as unfair. In the case of a lack of a sufficiently clear and precise European concepts of professional

⁴⁴⁴ Prohibited practice no 17 of Annex I of the UCPD

diligence, the second component represents a fundamentally important element for the assessment of fairness of a commercial practice.⁴⁴⁵

According to the text of the second limb of a general clause, a commercial practice will be unfair if “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”.⁴⁴⁶ Fulfillment of this condition is also required for application of the three small general clauses.⁴⁴⁷ Whereas the requirements of professional diligence are focused on behaviors of traders, the second condition requires an examination of the effects of a commercial practice on consumer to which commercial practice applies.⁴⁴⁸

The wording of this provision shows that a mere, abstract possibility to affect consumer’s behaviour is a sufficient pre-condition for a practice to be considered unfair. What is required is just the existence of the ability of a particular commercial practice to materially distort economic behaviour of an average consumer.⁴⁴⁹ Consequently, such a provision also functions pre-emptively since it is not required that negative consequences of a commercial practice has occurred in reality. There is no need for a real damage to the consumer.⁴⁵⁰ Such a broadly applicable formulation provides an additional layer of protection for consumer.

The UCPD further explains what is meant under the condition of material distortion of consumer economic behaviour defining it as “using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken

⁴⁴⁵ HW Micklitz (n 388) 102

⁴⁴⁶ Art 5(2)(b) of the UCPD

⁴⁴⁷ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e delle Mercato* [2013] ECR I-0000, para 33

⁴⁴⁸ Case C-435/11 *CHS Tour Services GmbH v Team4 Travel GmbH* [2013] ECR I-0000, para 43

⁴⁴⁹ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e delle Mercato* [2013] ECR I-0000, para 31

⁴⁵⁰ G. Abbamonte, ‘The UCPD and its general prohibition’ in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart 2007), 23

otherwise”.⁴⁵¹ The objective of this provision is to secure consumer’s freedom of choice through protection of the decision making process of consumers from the illegal influence of traders. The trader must not use his unfair tactics in order to influence the consumer’s mind. This does not mean that the Directive requires trader is prohibited to use commercial tactics with purpose of affecting consumer decision-making process.

Such a provision would be absurd since this is the purpose of all commercial communications. This is why traders invest an enormous amount of resources into advertising. In line with the importance of advertising, the Directive on the one hand explicitly encourages fair advertising, whereas on the other hand it secures that consumers are not treated unfairly by traders in order not to have “their freedom of choice impaired”.⁴⁵² Accordingly, what shall be prohibited is only unfair behaviour of trader which affects consumer’s mind. This rule also indirectly protects other competitors, securing a general fair trade at the market since the competition at the market is not allowed to be endangered by traders who act against the rules.

The additional requirement for distortion to be *material* is to be understood in the context of the proportionality principle, as a safeguard for too broad an application of the Directive which may negatively affect the trade and competitiveness at the Internal market without proper counter effects for consumers.⁴⁵³ Consequently, this provision exempts any kind of regular and acceptable advertising tactics such as overstatement or pufferies or any kind of practices that do not distort consumer. This is particularly important in relation to the permissibility of so called ‘puffery’ advertising which sometimes is very unrealistic, including a statement such as ‘the most comfortable shoes in the World’.⁴⁵⁴ In general, these kinds of practices should be

⁴⁵¹ Art 2(e) of the UCPD

⁴⁵² Commission, ‘Extended Impact Assessment on the Directive on unfair Commercial Practices’ SEC (2003) 724, 9

⁴⁵³ Recital 18 of the UCPD

⁴⁵⁴ in that aspect, see article 5(3) of the UCPD, which identifies that as unfair shall not be deemed *legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally*

allowed since average consumers will be able to understand that as part of advertising tactics and will not take their meaning literally. In these kinds of cases, what shall be assessed is whether the claim has a prevailing subjective character, or if it may be verified on the grounds of objective criteria.

That said, advertising a pie as ‘the most tasty pie in Florence’ will typically not represent a form of unfair practice since it is not possible to objectively verify it. In addition, an average consumer would be aware of this, so such a practice cannot have illegitimate impact. However, advertising of the same pie as ‘The cheapest pie in Florence’ might more easily be seen as an unfair practice if that is not true since this is an objectively verifiable category and thus it may have an impact of the average consumer’s economic decision. The level of *materiality* of distortion must always be assessed on a case by case basis as it was pointed out by the Advocate General in *Plus*.⁴⁵⁵ However, in practice it may be difficult sometimes to distinguish between alternation of a product from the distortion.⁴⁵⁶ For instance, insisting behaviour of a car trader to buy car because it is a great offer or model. The level of distortion must be significant in the sense that it represents the main, or at least one of the main causes that influence consumers to make certain transactional decisions.

The ability and effects of a commercial practice are always to be assessed on the ground of the average consumer, as a reasonably well-informed and reasonably observant and circumspect consumer, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice with a vulnerable consumer to be applied as a subsidiary benchmark.⁴⁵⁷

⁴⁵⁵ Opinion of Advocate General in Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 102

⁴⁵⁶ J Stuyck, E Terryn and T Van Dyck (n 429) 126

⁴⁵⁷ Recital 18 and Article 5(2) and 5(3) of the UCPD, see Chapter II of this Thesis

The meaning of transactional decision

The Directive provides also the definition of transactional decision as a fundamental element of the material distortion condition. Transactional decision is defined as “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”.⁴⁵⁸ This definition enables a very broad interpretation of this provision which would include any kind of possible decision to be made by consumer.⁴⁵⁹

Accordingly, the requirement of *any decision* may be also related to the negative decision of the consumer, and when they decide *not* to do something. Further to this, the ECJ provided an even broader definition pointing out that transactional decisions shall be always understood in a very broad manner, as referring not only to a decision to acquire or not to acquire a particular product, but also to a decision which is directly related to the decision to acquire or not to acquire a particular product as it is the case with the decision to enter or not to enter a shop.⁴⁶⁰

The approach of the ECJ towards material distortion

The Court had a chance to assess the question of material distortion several times. In *Plus*, the Court did not address the question of fulfillment of criteria defined by the two limbs. Only Advocate General touched upon this question. She pointed out on the necessity of an overall assessment of all circumstances in each particular case.⁴⁶¹ Her analysis showed that to the average consumer it would be clear that they would not need to spend at least 100 EUR in order to join a game of chance at which he can

⁴⁵⁸ Art 2(k) of the UCPD

⁴⁵⁹ Commission ‘Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices’ SEC (2009) 1666, 22

⁴⁶⁰ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e delle Mercato* [2013] ECR I-0000, para 36

⁴⁶¹ Opinion of Advocate General in Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2010] ECR I-00217, para 98

freely participate for a significantly less amount. Consequently, the second limb of the general clause is not fulfilled since “the consumer is free to decide whether to take part in the promotion or to purchase from a competitor”.⁴⁶²

In *Mediaprint*, the Court considered that a possibility to participate in a lottery could represent one of the factors that would impair the consumer’s decision related to the purchase of newspapers.⁴⁶³ By this decision, the Court left it to the national courts to decide whether a practice is capable of materially distorting consumer behaviour by indicating that a possibility to participate in the lottery may represent one of the factors national courts should take into consideration while conducting the fairness assessments.

In *Ving Sverige*, one of the raised questions was whether mentioning of only some of the main products’ characteristics in the advertising enables consumers to make the transactional decision. The Court left this issue to the national courts to be assessed on a case-by-case basis.⁴⁶⁴ In *Perenicova*, the Court pointed out that indication of false information of the annual percentage rate of charge is also likely to influence the consumer’s economic behaviour.⁴⁶⁵ This is well explained by Advocate General: “In a true-to-life situation, after all, it can be assumed that an average consumer will normally obtain offers from a number of potential lenders and decide to take out a loan on the basis of a comparison of those offers, including the costs likely to be incurred. In other words, comparatively favourable credit conditions usually have a decisive influence on the opinion formed by the consumer”.⁴⁶⁶

In *Trento Sviluppo*, the case in which it was found that a trader provided false information regarding the availability of lap tops offered at a discounted price during a

⁴⁶² Ibid, para 103

⁴⁶³ Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 44-45

⁴⁶⁴ Case C-122/10 *Konsumentombudsmannen (Ko) v Ving Sverige AB* [2011] ECR I-03903, para 58

⁴⁶⁵ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000

⁴⁶⁶ Opinion of Advocate General Trstenjak in Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 99

period of time, the question raised before the ECJ was whether consumers act that anticipate his purchase of the offered product represent transactional decision as defined by the UCPD. In particular the question was whether consumer's trip to the shop or the mere fact he entered the shop may be regarded as constituting transactional decisions. The judgment of the Court is of fundamental importance since its answer was affirmative confirming thus a very broad interpretation of transactional decision.⁴⁶⁷ Such a wide interpretation of the transactional decision shows a high level of powerfulness of the duty to trade fairly that imposes a general fairness requirement in a widest possible number of situations.

⁴⁶⁷ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e delle Mercato* [2013] ECR I-0000, para 36

Duty to trade fairly in consumer contract law

The impact of the duty to trade fairly on contract law

Previous sections of this Chapter examined and explain the meaning and the scope of the duty to trade fairly of traders in business-to-consumer relations which was brought by the UCPD. Accordingly, duty to trade fairly clause secures prohibition of any kind of commercial practice of trader that is unfair. Herein, in the second part of the Chapter, I will focus on the impact that the examined duty to trade fairly has on consumer contract law and contractual relationship between trader and consumer. Herein, I argue that due to tight and inseparable connection between a commercial practice and a contract, the establishment of the duty to trade fairly by the UCPD has also led to the introduction of a general duty that applies to all phases and aspects of a contractual relationship between a trader and a consumer. However, the application of this duty is limited exclusively to trader, as a contractual party, in the attempt to equalize more the unequal contractual positions of consumer and trader.

Through the introduction of general duty to trade fairly, a universally expected standard of expected behaviour of trader has been introduced for the first time into European consumer contract law. Due to its horizontal nature, the duty to trade fairly overcomes a prevalingly piecemeal and sector specific European approach towards contract law and applies to all forms and all phases of consumer contract, imposing general requirement of behaviour to trader in their relations towards consumers, with potential spill-over effects on the entire contract law. This is primarily the outcome of extremely broad formulations and flexibility of the general fairness clause that covers a widest possible set of pre-contractual and post-contractual practices.⁴⁶⁸

⁴⁶⁸ C Willett, "General Clauses on Fairness and the Promotion of Values Important in Services of General Interest" 2008 Yearbook of Consumer Law 67-106, 102

Commercial practices and contract

Tight connection between unfair commercial practices and contract

Commercial practices are tightly connected to contracts. Namely, the Directive defines a commercial practice as 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.⁴⁶⁹ Such a definition includes a widest possible behaviour of traders in relation to a product.⁴⁷⁰ A product is defined extremely broadly to include all types of goods and services, including immovable property, rights and obligations.⁴⁷¹

The only two mandatory conditions are that the practice is commercial, i.e. that it originates from a trader and that it is directly connected with the promotion, sale or supply of a trader's products to consumer.⁴⁷² In case when any of these two conditions is missing, the duty to trade fairly as defined by the UCPD will not apply, as it was pointed out by the ECJ in its decision in *RLvS*. Accordingly, a newspaper publisher cannot be found liable for engagement in an unfair commercial practice for an advertisement of another trader that was published in the newspapers issued since that advertisement does not originate from newspaper publisher.⁴⁷³

Moreover, the UCPD explicitly points out that the Directive shall apply "to commercial practices taking place before, during and after a commercial transaction".⁴⁷⁴ Equally, a commercial decision includes any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retaining or disposing of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from

⁴⁶⁹ Article 2(1)(d) of the UCPD

⁴⁷⁰ Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 40

⁴⁷¹ Article 2(1)(c) UCPD

⁴⁷² Case C-391/12 *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] ECR I-0000, para 17; Order in Case C-288/10 *Wamo BVBA v JBC NV and Modemakers Fashion NV* [2011] ECR I-05835, para 30

⁴⁷³ *Ibid*, para 47

⁴⁷⁴ Article 3(1) of the UCPD

acting.⁴⁷⁵ Such broad definition shows that the system of consumer protection provided by the UCPD will cover the entire contractual relationship between trader and consumer, all of its aspects, from a pre-contractual phase until the moment when all of trader's obligations in relation to a contract have been fully and duly executed.

For instance, the main goal of advertising practices, as the most common types of commercial practices, is certainly to have an impact on targeted categories of consumers by causing them to make certain economic decisions and to enter into certain contractual relationships, i.e. to acquire certain goods or to use certain services. In other words, the conclusion of a consumer contract will typically represent the result of a commercial practice.⁴⁷⁶ This is why traders compete and fight on the markets in order to attract as many consumers as possible and where commercial tactics play an essentially important role.

It is true that the duty to trade fairly is undoubtedly focused on protection of consumer in the pre-contractual phase, before a conclusion of a consumer contract. In that aspect, it is possible to notice that among national legal systems of Member States there are particularly present differences in their approaches towards the pre-contractual phase of contracts.⁴⁷⁷ In that sense, the imposition of the pan-European duty to trade fairly leads to a more unified regulatory approach of the pre-contractual phase of a consumer contract among twenty-eight Member States and contributes to the encouragement of cross-border trade since consumers are keener to shop cross border if the legal regimes are more similar.

The scope of application of the duty to trade fairly overcomes the border's of a pre-contractual phase of a contract, since commercial practices also include trader's

⁴⁷⁵ Article 2(1)(k) of the UCPD

⁴⁷⁶ S Weatherill and U Bernitz, 'Introduction' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), Hart publishing, 2007, 9

⁴⁷⁷ For an overview of diverse comparative European approaches to pre-contractual phase, see J Cartwright and MW Hesselink, *Precontractual liability in European Private Law* (Cambridge University Press 2011)

behaviour during and after formation of a contract.⁴⁷⁸ Accordingly, as emphasized by the Commission “[t]he trader will consequently need to ensure that commercial practices after sale meet the same fairness standards as commercial practices before sale”.⁴⁷⁹ For instance, the duty to trade fairly secures execution of certain consumer’s rights once a contract has been concluded. This is the case with consumer’s right to withdraw from certain consumer contracts without providing any justification within a limited period of time as established by EU consumer law.⁴⁸⁰ Equally, the provisions of the Directive secure that the consumer will be provided with promised after-sales services in the language he understands.⁴⁸¹ In such a manner, the notion of commercial practice, as defined by the UCPD, fully and completely covers the entire life of a consumer contract.

Law of unfair commercial practices as a regulatory part contract law

The law of unfair commercial practices is described as a regulatory element of contract law, contrary to its traditional private autonomy element on the basis of which the contract law has been developing for centuries. As a consequence, there is a substantive tension between the ‘policing’ and ‘contractual’ normative positions within a legal system.⁴⁸² However, it seems that there are still many obstacles, or “ideological wars” to implement and understand this regulatory part as a contract law component in spite of the close connection between the two parts.⁴⁸³ The clash between innovative, regulatory and the traditional, private autonomy approach towards contract law is hardly anywhere noticeable as it may be observed in case of EU Consumer law.

⁴⁷⁸ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e dele Mercato*, ECR I-0000, para 37

⁴⁷⁹ Commission, ‘Proposal of the Directive on unfair commercial practice’ COM (2003) 356, 13

⁴⁸⁰ Article 5(5) and point 27 of Annex I of the UCPD

⁴⁸¹ Article 5(5) and point 8 of Annex I of the UCPD

⁴⁸² S Whittaker, *Form and Substance in the Reception of EC Directives into English Contract Law*, (2008) 4 *European Review of Contract Law* 389

⁴⁸³ S Grundmann, ‘On the Unity of Private Law from a Formal to a Substance-Based Concept of Private law’ (2010) 18 *European Review of Private Law* 1055, 1076

While drafting the unified European rules on unfair commercial practices, the Commission also observed the diversity among national contract laws as a significant obstacle for development of the internal market. However, besides the general opposition of Member States against any unification of contract law, the Commission pointed out that “attempting to tackle both in one project would have it unmanageable, given the extent of consumer contract law and the knock-on to other contract law issues”.⁴⁸⁴ Eventually, only the law on unfair commercial practices was harmonized, whereas the area of consumer contract law has remained regulated in a piecemeal and incoherent approach, but has again become affected by a general duty to trade fairly.

In order to fully understand the impact of the duty to trade fairly on contract law, it is necessary to examine the concept of the duty of good faith both in national and in European contract laws. The reason for this is that, first, the UCPD makes an explicit connection of the duty to trade fairly with the notion of good faith so meaning of good faith shall be clarified for understanding of the meaning of the duty to trade fairly, and, second, to understand mutual correlation between these two duties in the context of their application in practice with contractual relationships between consumer and trader.

Good faith and national legal traditions of Member States

Acceptance of general principle of good faith

Good faith is an old concept of contract law, whose roots date back to the ancient Roman law and famous concept of *bona fides* which imposed certain general standards of behaviour on the parties while negotiating, concluding and executing contracts.⁴⁸⁵ The fact that the majority of European contract laws are based on the foundations laid down by Roman law also resulted that the concept of good faith has been widely accepted in national legal systems of the majority of Member States as

⁴⁸⁴ Commission, ‘Extended Impact Assessment on the Directive on unfair Commercial Practices’ SEC (2003) 724, 25

⁴⁸⁵ R Zimmermann *The Law of Obligations: Roman Foundations of the Civil law traditions* (Clarendon 1996)

one of the ruling principles of their national legal systems, though in more or less different formulations, power and roles.⁴⁸⁶

However, among the legal systems that have recognised a general principle of good faith in contract law, the formulation and wording of this principle differ.⁴⁸⁷ Moreover, national courts among diverse Member States also have an inconsistent jurisprudence when it comes to the interpretation of the meaning of good faith and its scope of application in practice.⁴⁸⁸ Consequently, from the perspective of national contract laws, it is hardly possible to talk about a unified approach towards the principle of good faith and its substantial meaning and scope of application even in those countries that have adopted it as a general rule.

Rejection of general principle of good faith

Contrary to the recognition of the duty of good faith as a general principle, some legal traditions have a rather hostile attitude towards recognition of good faith as a general principle and its introduction with such a capacity into their national legal systems.⁴⁸⁹ This is noticeable in case of English law which has been, to start with, very reluctant towards the adoption of any kind of general clauses as providing rather unclear and uncertain rules.⁴⁹⁰ The presence of such a reluctance is particularly noticeable in the case with the general clause on good faith.⁴⁹¹ *Teubner* famously explaining the approach towards good faith an English law considering it as an infecting virus:

⁴⁸⁶ For a detailed analysis, see R Zimmermann and S Whittaker *Good Faith in European Contract Law* (Cambridge University Press 2000)

⁴⁸⁷ Compare, e.g. article 1337 of the Italian Civil Code, article 1134 of the French Civil Code and article 242 of the German Civil Code

⁴⁸⁸ H Beale, 'General Clauses and Specific Rules in the Principles of European Contract Law: The 'Good Faith' Clause' in S Grundman and D Mazeaud (eds), *General Clauses and Standards in European Contract Law* (Kluwer Law International 2006), 205-218

⁴⁸⁹ D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999), 258

⁴⁹⁰ L Miller, 'After the unfair contract terms directive: Recent European Directives and English law' (2007) 3 *European Review of Contract Law* 88, 105

⁴⁹¹ *Walford v Miles* [1992] AC 128 at 138

‘British courts have energetically rejected this doctrine on several occasions treating it like a contagious disease of alien origin’⁴⁹²

The concept of good faith is tightly connected to the core of the national legal traditions and the related particularities which explains the hostile attitude of certain of Member States towards the provision of a universally applicable principle of good faith.⁴⁹³ Brownsword explains diverse approaches towards general principle of good faith on the basis of diverse ruling values in societies from which a particular legal system has evolved. Accordingly, there are two possible ethics upon which the law of contract can be based: individualism and cooperativism.⁴⁹⁴ The lack of general principle of good faith is the consequence of prevailing individualist ethics.

Good faith in European contract law

The presence of good faith in European legislation

The principle of good faith has a long history of being present in European private law, for almost three decades. The first directive that contained a good faith requirement was Directive 86/653/EEC on commercial agency that required both parties to act in accordance with the principle of good faith.⁴⁹⁵

In the area of EU consumer law, good faith was already an established notion even before the adoption of the UCPD. Namely, more than twenty years ago, good faith was incorporated in the text Directive 93/13/EEC on unfair contract terms as part of the general test aimed to be used for assessment of fairness of a contract term in a contractual relationship between trader and consumer. Accordingly, “[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the

⁴⁹² G Teubner, ‘Legal Irritants: Good faith in British Law or How Unifying Law Ends up in new Divergences’ (1998) 61 MLR 11

⁴⁹³ K Zweigert and H Kötz *An Introduction to Comparative Law* (Weir T tr 3rd edn Oxford University Press 1998)

⁴⁹⁴ R Brownsword *Contract Law: Themes for the Twenty-First Century* (Butterworths 2000), 30

⁴⁹⁵ Articles 3 and 4 of Directive 86/653/EEC on commercial agency

parties' rights and obligations arising under the contract, to the detriment of the consumer”.⁴⁹⁶

It is noticeable that there are two principal parts of the general test: first, stipulation of a contract term contrary to the requirements of good faith and, second, causation of significant imbalance, in such a manner, between the rights and obligation of the parties that is detrimental to the consumer.⁴⁹⁷

Initially, good faith would be used as a separate criterion for fairness assessment of a contract terms, but in the end it was incorporated in the general criterion. This was the consequence of the opposition of some of the Member States, such as the United Kingdom and Scandinavian countries not willing to accept good faith as a separate clause having been considered as the attempt to adopt good faith as a general European legal standard.⁴⁹⁸

Besides Directive 93/13/EEC on unfair contract terms, the concept of good faith is also mentioned in some subsequent European directives, though its practical role and significance is much less significant than in case of unfair contract terms. The old Directive 97/7/EC on distance selling indicated good faith in the context of the demanded manner in which trader is supposed to disclose required pieces of information to the consumer.⁴⁹⁹ Interestingly, Directive 2011/83/EU on consumer rights that fully repealed Directive 97/7/EC does not mention a good faith clause. Directive 2002/65/EC on distance marketing of financial services also uses the term

⁴⁹⁶ Article 3(1) of Directive 93/13/EEC on unfair contract terms

⁴⁹⁷ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-03403, para 19; Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Gyórfi* [2009] ECR I-04713, para 37 Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000, para 67

⁴⁹⁸ M Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems' (1995) 3 *European Review of Private Law* 273, 277

⁴⁹⁹ Article 4(2) of Directive 97/7/EC

good faith in the context of a required manner of provision of pre-contractual information by trader in case a distance contract.⁵⁰⁰

All of the old and currently pending projects on the unification of contract law in Europe also adopted good faith as one of the main principles of contract law. Accordingly, the principle of good faith and fair dealing was proposed as one of the pillars of the system of contracts proposed by the Principles of European Contract Law.⁵⁰¹ Equally, the Draft Common Framework of Reference also emphasised the principle of good faith and fair dealing,⁵⁰² though with a partially limited effects and applicability.⁵⁰³ The same approach towards the role of good faith has been taken by the latest project of this kind, the currently proposed Optional Instrument according to which *[e]ach party has a duty to act in accordance with good faith and fair dealing*.⁵⁰⁴

The initial lack of European meaning of good faith under the UTD

Immediately after the adoption of the Directive 93/13/EEC, it was pointed out that the meaning of good faith as a European concept brought by this directive is *mysterious*.⁵⁰⁵ For instance, the Directive on unfair contract terms has brought a general concept of good faith into Irish contract law, at least when it concerns consumer contracts, but its meaning remained unclear to the Irish courts.⁵⁰⁶ Surprisingly, in spite of such a long presence of a good faith principle in EU consumer law and the necessity to interpret it, it has taken the ECJ a period of roughly two decades to explain the common European meaning of good faith. As a consequence of such lack of judicial activity of the ECJ, the meaning of good faith as provided by Directive 93/13/EEC remained unclear for years.⁵⁰⁷

⁵⁰⁰ Article 3(2) of Directive 2002/65/EC on distance marketing of financial services

⁵⁰¹ Article 1:201(1) of the PECL: *Each party must act in accordance with good faith and fair dealing*

⁵⁰² The most noticeable in Article I.-1:103 of the DCFR

⁵⁰³ M Mekki, 'Good faith and fair dealing in the DCFR' (2008) 4 *European Review of Contract Law* 338, 371

⁵⁰⁴ Art 2(1) of the proposed Optional Instrument

⁵⁰⁵ H Collins, 'Good faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229, 249

⁵⁰⁶ Paul Anthony McDermott, 'The Europeanisation of Contract Law' in Mary Catherine Lucey and Cathrina Keville (eds), *Irish Perspectives on EC Law* (Dublin: Round Hall), 177.

⁵⁰⁷ C Twigg-Flesner, *The Europeanisation of Contract Law*, (2nd edn Routledge 2013) 93

The House of Lords twice had a chance, even an obligation, to ask the ECJ for preliminary reference on the meaning of good faith, but has never done it.⁵⁰⁸ However, even in case when a preliminary reference was indeed made by *Bundesgerichtshof*, the highest German civil court, on fairness of a specific contract term under the provision of the UTD, the ECJ despite having the opportunity to address this question, declined to provide an answer whether that particular contract term is unfair saying that this is the task of the national court, maintaining in such a manner opacity surrounding the European meaning of good faith.⁵⁰⁹

Eventually, only some fifteen years after its adoption, since 2008, is it possible to observe an immense increase of the number of preliminary references made to the ECJ on the grounds of the UTD and thus an ever developing case law in this area.⁵¹⁰ Besides relevance on unfair contract terms in the context of global and European financial crisis that began in the same period as the increase of the numbers of referred cases, such a booming of judicial activism of the ECJ may be explained as a compensation for the impossibility of the Commission to amend and develop the rules on the unfair contract terms.⁵¹¹

Namely, the Commission's attempt to materially reform and unify into one piece of legislation a majority of consumer protection rules contained in eight different directives, including the UTD, failed.⁵¹² The result of this attempt is rather disappointing since what was eventually adopted is Directive 2011/83/EU that only

⁵⁰⁸ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52; *Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6.

⁵⁰⁹ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-03403

⁵¹⁰ For an overview of that case-law of the ECJ on the UTD, see B Kas and HW Micklitz, 'Overview of cases before the CJEU on European Consumer Contract Law (2008-2013) – Part I' (2014) 10 *European Review of Contract Law* 1

⁵¹¹ HW Micklitz HW and N Reich, 'The Court and the Rosebud alias Sleeping Beauty' (2014) 51 *Common Market Law Review* 771, 776

⁵¹² Green Paper on the Review of the Consumer Acquis COM (2006) 744 final

insignificantly modified the rules on unfair contract terms.⁵¹³ Consequently, with the lack of legislative means, the intense Europeanization of national laws in this area had to be performed through the judicial activity of the ECJ. However, what particularly limits the potentiality of effects of this jurisprudence is a partial and minimum harmonisation carried out by the UTD.⁵¹⁴

The ultimate clarification of good faith by the ECJ

The rise of the judicial activism of the ECJ in the area of unfair contract was also followed by the increased willingness of the Court to provide more direct answers on fairness of contract terms in concrete cases, overriding thus its initial reluctance to do so expressed in its judgment in *Freiburger Kommunalbauten*. The subsequent case law was prevalingly not focused on the assessment of fairness of contract terms *per se*, but rather on establishment and development of *ex officio* obligation of the national courts of verification of fairness of contract terms, affecting thus significantly procedural autonomy of Member States.⁵¹⁵

In line with such a focal point of the ECJ, it is true that the Court in these judgments did not directly decide itself whether a contract term is fair or not, leaving that to be decided by the national courts following in that sense its previous ruling in *Freiburger Kommunalbauten*. Importantly, however, contrary to its approach in *Freiburger Kommunalbauten*, the Court in its decisions provided clear guidance to the national courts on how to perform assessment of fairness of particular terms and on the basis of which it can be easily understood whether, in view of the Court, a specific term or terms that were the subject of a particular referred case shall be deemed unfair.⁵¹⁶

⁵¹³ See Article 32 of Directive 2011/83/EU

⁵¹⁴ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 34

⁵¹⁵ V Trstenjak, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU' (2013) 21 *European Review of Private Law* 451

⁵¹⁶ See, e.g. Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* (2010) ECR I-10847; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000

In accordance with its booming and fruitful jurisprudence in the area of unfair contract terms, the ECJ eventually provided clarification on what shall be understood under the notion of good faith under the UTD. This is why the Court's judgment in *Aziz* is of particular importance where the ECJ finally explained the meaning of good faith under the UTD. In its judgment, the ECJ has pointed out that while assessing fairness of a contract term, the national court shall understand 'contrary to the requirement of good faith', as a condition for a term to be declared unfair, as "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations".⁵¹⁷ In other words, if the consumer would have not agreed, that is proof that a particular term is contrary to the requirement of good faith and if the requirement of significant imbalance has been fulfilled, such a term shall be considered as unfair.

The same approach towards the meaning of the notion of good faith was confirmed in subsequent judgments of the ECJ in *Banco de Valencia*⁵¹⁸ and *Katalin*⁵¹⁹ where the Court again pointed out to the criterion of what trader could have reasonably assumed from the consumer while negotiating and agreeing on a particular contract term as a criterion for assessment of fairness. Interestingly, the Court here idealizes the image of consumers that the national courts shall take into consideration identifying that consumer as a person who knows what term is good for him and which is not good, and it is only the fact that such a term was not individually negotiated that caused consumer to accept that term.

Besides explaining the meaning of good faith, the Court in *Aziz* also elaborated the ambiguous meaning of significant imbalance as the second essential component of

⁵¹⁷ Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000, para 69

⁵¹⁸ Joined Cases C-537/12 and C-116/13 *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo and Wilmar Edgar Cun Pérez (C-537/12) Banco de Valencia SA v Joaquín Valldeperas Tortosa and María Ángeles Miret Jaume (C-116/13)* [2013] ECR I-0000, para 66

⁵¹⁹ Case C-342/13 *Katalin Sebestyén v Zsolt Csaba Kóvári, OTP Bank, OTP Faktoring Követeléskezelő Zrt and Raiffeisen Bank Zrt* [2014] ECR I-0000, para 28

general fairness test under the UTD, providing guidance in that aspect to the national courts. Accordingly, while assessing the existence of significant imbalance, “it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force”.⁵²⁰

In summation, under the interpretation of the Court in *Aziz*, a contract term will be unfair if, firstly, in case it had not be stipulated, the consumer would be in the more favourable situation and, second, if traders could have expected that consumers would not have agreed on this contract term if it had been negotiable. These two conditions must be fulfilled cumulatively.⁵²¹

The meaning of good faith under the UCPD

The role of good faith

Having analysed good faith and its meaning under the UTD, I return to the concept of good faith as used in relation to the trader’s requirement professional diligence under the UCPD and how this relates to consumer contracts. As pointed out above, the UCPD does not provide the meaning of good faith, though a *general principle of good faith* is mentioned as one of the two components of the notion of professional diligence.⁵²² The related question is why the legislator at all used this notion in spite of the existence of such a divergence of the approaches of the Member States towards good faith and, at the time, in the lack of a unified European interpretation of this term.

⁵²⁰ Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000, para 68

⁵²¹ *Ibid*, para 67

⁵²² Article 2(1)(c) of the UCPD

The answer should be based on the fact that both the concepts of professional diligence and an honest market are innovative legal concepts whose meaning and purpose is not clear. The reason for using innovative legal terminology in the European private law is to avoid utilization of legal terms that have established legal meanings in the national legal systems.⁵²³ Contrary to the innovative legal terminology, a general idea of good faith is universally recognized, so the purpose of usage of this term is to provide the clarification of the provided term in a known legal language.

Two types of good faith in European Private Law

An important emphasis has to be made here. Good faith as understood in EU consumer law is not equal by its meaning to good faith used in general contract law. In general contract law a starting presumption is that contractual parties are equal, whereas in case of consumer contract law as approached by EU Law, the basic and initial hypothesis on which it has been founded is that there is an inequality of contractual parties.⁵²⁴

This is why, for instance, the proposed Optional Instrument spells out while explaining the principle of good faith and fair dealing that the concrete requirements imposed by general duty of good faith shall depend on the relative level of expertise of the parties and shall thus be substantially different depending whether it applies on a contract between two traders or on a consumer contract where one party is a consumer and the other is a trader.⁵²⁵ Accordingly, the proposed Optional Instrument acknowledges this differentiation.

⁵²³ S Vogenauer, 'Drafting and Interpretation of a European Contract Law Instrument' in G Dannemann and S Vogenauer, *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013), 16.

⁵²⁴ See, *inter alia*, Case C-618/10 *Banco Español de Crédito SA and Joaquín Calderón Camino* [2012] ECR I-0000, para 39; Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000, para 44; Case C-280/13 *Barclays Bank SA v Sara Sánchez García and Alejandro Chacón Barrera* [2014] ECR I-0000, para 32.

⁵²⁵ Recital 31 of the proposed Optional Instrument

Consequently, in European private law it is possible to observe two forms of good faith with different meanings: one is in the area of consumer law and the other one is used in these few remaining, non-consumer, areas of private law which have been Europeanised through common European pieces of legislation, as it is the case with commercial agency.⁵²⁶ In line with such a differentiation, it is possible to observe that in the case of the former category, good faith is imposed by EU legislation only for one party, the trader, leaving the consumer without a related general obligation of good faith, whereas in case of the latter category, good faith is a universally applicable principle for both contractual parties.⁵²⁷

Since the UCPD applies exclusively in business-to-consumer relations, its understanding and application of good faith unquestionably shall be looked for in the first category. In that sense, there same concepts of good faith are used both in the UCPD and in the UTD, which means that clarification of good faith made under the provisions of the UTD contributes to understanding of good faith under the UCPD. Namely, these two directives have the same objectives since they are both aimed at securing fulfillment requirements for fairness in EU consumer law.⁵²⁸

Moreover, a good faith clause should, being a flexible standard, guarantee a huge level of adaptability to the Directive and capability to cover a wide spectrum of commercial practices. This is in accordance with the general objective of the Directive drafted in such a manner to be able to cover all imaginable commercial practices and the design of the legal clause that can easily adapt to include any kind of innovative commercial practices which may arise in the future.

⁵²⁶ Directive 86/653/EEC on commercial agency

⁵²⁷ Article 3 and 4 of Directive 86/653/EEC on commercial agency

⁵²⁸ C Willett, *Fairness in Consumer Contracts* (Ashgate 2007)

The horizontal effects of the duty to trade fairly on consumer contracts

Coverage of all consumer contracts

As identified at the beginning of this thesis, EU consumer law general division is to be made on its two substantial parts: the law on unfair commercial practices as regulated by the UCPD and consumer contract law developed by a set of sector specific directives. On the one hand, the legal regime of fair trading shows a high level of harmonization particularly due to a detailed regulation of the Directive strengthened by the maximum harmonization component. On the other hand, primarily due to a constant opposition of the Member States and the lack of a proper and secure legal basis, EU consumer contract law is characterized by a piecemeal and incoherent approach.

At different times of their adoption, circumstances that followed, methods of drafting and diverse political factors resulted in occurrence of material incoherence among different directives on consumer contract law. For instance, a highly ambitious project of the general reformation of consumer contract law which initially aimed to revise eight directives into one coherent piece of legislation, was firstly diminished to cover four directives⁵²⁹, to the end that the final version which was adopted in October 2011 repealed fully only two directives, amended and modifies to a limited extent a third directive, making some minor changes to the fourth.⁵³⁰

The duty to trade fairly covers the situations where adequate contractual remedies are not provided, but also when they are available as a supplementary means of protection.⁵³¹ In that sense, Keirsblick's argumentation that contractual remedies are sufficient and that unfair commercial practices should cover exclusively the pre-contractual phase to the conclusion of contract seem too restrictive.⁵³² Moreover, it is not necessary condition that consumer has concluded a contract. It is only required

⁵²⁹ see Commission, 'Proposal of the Directive on consumer rights' COM (2008) 614 final

⁵³⁰ see Directive 2011/83/EU on consumer rights

⁵³¹ G Abbamonte, 'The UCPD and its general prohibition' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 44

⁵³² B Keirsbilck (n 437) 261

that consumer spends unnecessarily some time or do some unnecessary actions as a consequence of the unfair commercial practices.⁵³³ Due to this wide interpretation, consumers are awarded with an additional and complete level of protection during any type of their contractual relationship with a trader.

It has already been pointed out that consumers do not even need to conclude a contract to be protected, since the Directive protects them *ex ante* from any potential negative consequences of conclusion of a contract. For instance, in case of doorstep selling contracts, the consumer has the right to, according to Directive 2011/83/EU, rescind the contract within 14 days, that he may have concluded just in order to get rid of an aggressive trader who has entered into his house. However, the Directive *a priori* prohibits such a practices and thus spares consumer all the efforts and time he or she would need to spend in order to terminate such a contract.

In addition to this, the duty to trade imports fairly means new sanctions applicable also in case of consumer contracts. For instance, the rules on unfair commercial practices protects the consumer from unlawful unilateral rescission of contract that he concluded with a gym than the regular contractual remedies he would have the right to in any case. The additional sanction of public law for such unlawful behaviour will provide better protection for consumers. As a consequence, traders will be less willing to terminate the contract.

In spite of its name, Directive 93/13/EEC on unfair contract terms did not bring in the general obligation of fairness. Rather, it brought in a selective obligation in relation exclusively to particular forms of contract terms, those that were not negotiated.⁵³⁴ Contrary to the limited approach of the Directive 93/13/EEC on unfair contract terms, the requirement of fairness brought by the UCPD applies to all kinds of consumer contracts and the periods before, during and after conclusion of a consumer contract.

⁵³³ Commission 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices' SEC (2009) 1666, 24

⁵³⁴ H Collins (n 505) 253

The role of duty to trade fairly in the proposed Optional Instrument

The proposed Optional Instrument has kept the same formal borderline between fair trading law on the one hand, and the classical contract law on the other hand.⁵³⁵ Nevertheless, the duty to trade fairly will continue to play a significant role when (and if) this Optional Instrument gets adopted. This is because the provisions of the UCPD as transposed in the national legal systems will continue to apply irrespectively of choosing or rejecting the Optional Instrument as the applicable legal regime.

However, since the Optional Instrument is without legal consequences over the UCPD, its provisions will apply in any case. In that sense, consumers will be guaranteed a fair behaviour of traders and a constant level of consumer protection which would manage to diminish, though partially, the negative consequences that the adoption of the Optional Instrument might have over general level of consumer protection.

The significance of the judgment in *Perenicova*

The law on unfair commercial practices vs unfair contract terms

The judgment in *Perenicova* was the first case in which the ECJ had a chance to assess the relationship between the UCPD and contract law, in particular in the area of unfair contract terms. This case is relevant from a perspective of the duty to trade fairly, since it has show the impact of general duty to trade fairly on fairness of a contract term, which had not previously been clear.⁵³⁶ The judgment in *Perenicova* is particularly significant since it clarifies the scope of the impact, at least to a certain extent. It also touches upon the effects of the duty to trade fairly on another European consumer contract law instrument, the old Directive 87/102/EEC on consumer credit.

⁵³⁵ See Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions – A Common European Sales to Facilitate Cross-border transactions in the Single Market' COM (2011) 636 final.

⁵³⁶ S Orlando, 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice' (2011) 7 European Review of Contract Law 25

In *Perenicova*, a dispute arose over a consumer credit agreement whose several terms were challenged by consumers as being unfair. Especially problematic was the stipulated interest rate which was higher than the amount which had been initially presented to the consumer before conclusion of the contract. As a consequence, one of the two main questions raised in this preliminary reference made by the Slovakian court was whether a provision of false information of the annual percentage rate of a charge in consumer credit contract represented a form of unfair commercial practice. Furthermore, if the answer to this question was positive, the Court was asked whether this also automatically lead to the unfairness of the contract which represents the result of such an unfair practice.

In its judgment, the Court stated that provision of untrue information of the annual percentage rate is to be considered as a form of misleading action, in accordance with article 6 of the UCPD in relation to the price provision.⁵³⁷ However, the unfairness of such a practice does not cause directly that the unfairness of contract term concluded as a consequence of such a practice, but it represents one of criteria that the national courts should take into consideration while assessing the fairness of a contract term as provided by the UTD.⁵³⁸ The explanation of the Court was primarily based on the fact that article 3(2) of the UCPD indicating that the provisions of the Directive are without prejudice to contract law, so the fact that a contract was concluded as a consequence of unfair commercial practice cannot have any kind of direct effect on the validity of a contract.

Eventually, two main consequences of the judgment are that, first, stipulation of an unfair contract term shall be considered a form of unfair commercial practice (misleading) action, and, second, that the breach of the duty to trade fairly does not

⁵³⁷ it is possible to notice that some of the Governments in their written observations, considered this practice as being not a form of misleading actions, but a misleading omission (see Opinion of Advocate General in Case C-453/10, *Jana Perenicová and Vladislav Perenic v. SOS finance spol. s r. o.*, [2012] ECR I-0000, para 32-33) which shows very well how tight in practice is the connection between the misleading actions and misleading omissions.

⁵³⁸ Case C-453/10, *Jana Perenicová and Vladislav Perenic v. SOS financ spol. s r. o.*, [2012] ECR I-0000, para 43

have any *direct* effect on the validity of a contract, but it represents one of the factors that may be considered while deciding in that respect. The crucially important question is what is the impact of this decision on the national legal systems. Previously to the judgment, the Member States diverge regarding their approaches towards effects of breaches on the duty to trade fairly on contract law.

The differences regarding contract law consequences among Member States were regarded as one of the most problematic issues in the application of the Directive.⁵³⁹ In some of the Member States, the breach of unfair commercial practices had direct effects on the validity of contract, causing contract concluded under the unfair practice to become null and void. On the other hand, in other Member States, the breach of the duty to trade fairly had no direct effects on life of a contract. What is now problematic is whether, due to the confirmed strict maximum harmonization character of the Directive, national legal systems are allowed to keep these provisions or they have to modify them in accordance with the judgment in *Perenciova*. The Commission, in its submission to the Court, considered that national laws which provide direct contract law consequences of the breach of the duty to trade fairly are to be considered as contrary to EU law.⁵⁴⁰

Still, the Court in *Perenicova* through allowing the national courts to take into consideration the breach of the duty to trade fairly as one of the factors to be considered, left the door open to the national courts to apply their national rules and annul contracts if so is required by their national rules. All in all, the final result of the decision was that the duty to trade fairly has indirect effects on contractual relationships between traders and consumers.

⁵³⁹ S Whittaker, 'Relationship with European and National Contract Laws' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 151-154

⁵⁴⁰ Opinion of Advocate General in Case C-453/10, *Jana Perenicová and Vladislav Perenic v. SOS financ spol. s r. o.*, [2012] ECR I-0000, para 41

The meaning of the duty to trade fairly in consumer contract law

The duty to trade fairly, as applied on consumer contract law, has a different nature, as well as a diverse meaning, than a general duty of good faith which exists in the national contract laws of Member States. While the duty of good faith in general contract law applies to all parties of a contractual relationship, the duty to trade fairly is exclusively a duty imposed on one party in a consumer contractual relationship, a trader, with the aim to equalize the existing imbalance between contractual parties. In other words, this imbalance between the parties represent the reason why the duty to trade fairly shall apply in accordance with a general scope of application of particular consumer law regime on a contractual relationship.⁵⁴¹

In that sense, the duty to trade fairly is focused exclusively on the trader, securing in particular consumer's free and informed choice and breach of this duty leads to diverse public law or private law sanctions. Contrary to this, a consumer, being understood as a significantly weaker party is not imposed with a related duty. His only general obligation under EU consumer law is collect and profit from information presented to him by traders and to act in a reasonably observant and circumspect manner, i.e. to act as average consumer.

In the case when a consumer does not act as an average consumer who be expected to, the only 'sanction' is that he is not protected by the duty to trade fairly. In other words, the duty to trade fairly in contractual relationships between traders and consumers is not assessed only from a perspective of trader and whether he acted in or contrary to the requirement of professional diligence and thus to the requirement of good faith and honest market practice, but it has also to be assessed in relation to the effects of particular behaviour of trader on an average consumer. In accordance with the approach of the ECJ on good faith under the UCPD, the duty to trade fairly should require the trader to be aware of what reactions they may expect of consumer.

⁵⁴¹ Case C-508/12 *Walter Vapenik v Josef Thurner* [2013] ECR I-0000, para 33-34

Such a duty to trade off fairly, under its procedural meaning, shall be understood in the context of inequality between trader and consumer and the obligation of fairness that is particularly imposed on traders so that he does not misuse his power. The substantial meaning of duty to trade fairly would refer to the required standard of behaviour of trader's behaviour towards consumers, i.e. whether his commercial practices are fair in order to support consumer confidence.⁵⁴²

For understanding of the duty to trade fairly in the context of contract law, a potentially useful aid that national courts may have are thirty-one concrete examples of unfair practices that are listed in the Annex I. This list includes practices which are always considered unfair without the need to assess them under one of the three small general clauses or the general fairness clause.⁵⁴³ These practices are very useful for getting a general idea of what exactly is understood as a general obligation to trade fairly since some practices are closely related to contract law. This is for instance the case with “[c]reating the impression that the consumer cannot leave the premises until a contract is formed or the case of [p]resenting rights given to consumers in law as a distinctive feature of the trader's offer”.⁵⁴⁴

Besides having an impact on consumer contract law, it is highly likely to imagine that duty to trade fairly will have, at least to some extent, effects also on contractual relationship between traders. This is particularly the case with contractual relationship between two traders of unequal bargaining powers, i.e. the relationship between small or medium enterprises with big enterprises where again there is a fear that big enterprises may misuse their better initial bargaining positions.⁵⁴⁵

⁵⁴² Recital 13 of the UCPD

⁵⁴³ Article 5(5) of the UCPD

⁵⁴⁴ points 24 and 10 of Annex I of the UCPD

⁵⁴⁵ MW Hesselink, 'SMEs in European Contract Law, Background note for the European Parliament on the position of small and medium sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer acquis', July 2007, CSECL Working Paper No. 2007/03

Besides a possible legislative action on the European level in this area, the duty to trade fairly may be spread, and in line with the lack of European legislation in the area also modified, through process of spontaneous harmonisation⁵⁴⁶ or as a result of spillover effects.⁵⁴⁷ In accordance with such potential effects of the duty to trade fairly, for instance, Miller pointed out that, as a consequence of introduction of general duty to trade fairly, “English commercial law is likely to be tainted with more cooperative values”.⁵⁴⁸

Conclusion

This chapter of the thesis examined, what I call, a general duty to trade fairly brought by the Directive as a universally applicable standard of required behaviour of traders that is always required in the relationship towards consumers. The duty to trade fairly is particularly defined by the general fairness clause which, due to its universal character, has the potentiality to include a widest possible forms of trader’s commercial practices directed towards consumer. The two-limbs of the general clause explain well the substantive meaning of the concept of the duty to trade fairly.

Accordingly, commercial practice has to be, first, contrary to the requirement of professional diligence, and, second, capable of materially distorting economic behaviour of an average consumer. The requirement of professional diligence is further explained through the notions of honest market practice and good faith whose explanation is necessary for understanding of the requirement of professional diligence and thus of the duty to trade fairly.

⁵⁴⁶ MB Loos, ‘The Influence of European consumer law on general contract law and the need for spontaneous harmonization’ (2007) 15 *European Review of Private Law* 515

⁵⁴⁷ A Johnston, ‘Spillovers from EU Law into National Law: (Un)intended Consequences for Private Law Relationship’, in D Leczykiewicz and S Weatherill, *The Involvement of EU Law in Private Law Relationships* (Hart 2013)

⁵⁴⁸ L Miller, ‘After the unfair contract terms directive: Recent European Directives and English law’ (2007) 3 *European Review of Contract Law* 88, 110

In addition to this, what I argued in this chapter of the thesis is that the duty to trade fairly as defined by the UCPD has also become a universally applicable duty in consumer contract law. As a result of an extremely tight connection between a commercial practices and a contract, followed by a wide horizontal scope of its application, the duty to trade fairly also represents the first universally applicable duty of a trader which regulates all phases and forms of contractual relationships between trader and consumer.

CHAPTER IV – DUTY OF INFORMATION

Introduction: A universal European duty of information

One of the most fundamental novelties that the UCPD has brought is the introduction of a general duty of information in the entire EU consumer law. Through its provision on misleading omissions, as one of the three small general clauses for the assessment of fairness of commercial practice, a universal duty of information is imposed on traders.⁵⁴⁹ This duty now applies to all sets of commercial communications between a trader and a consumer. According to the UCPD, traders need to present to consumer all relevant pieces of information they may need to make an informed choice in an adequate and understandable manner. Moreover, the obligation of trader increases in case a commercial communication of trader represents an invitation to purchase since the consumer is in such situation closer to making an economic decision, so he should be additionally protected.

Generally speaking, in EU Consumer Law, the duty of information has traditionally been considered as the most important regulatory instrument for consumer protection and has been thus incorporated in all directives on consumer contract law.⁵⁵⁰ The imposition of pre-contractual information requirements became the main regulatory tool for correction of the inequality in contractual relationships between trader and consumer particularly noticeable once it comes to possession of relevant information.

However, until adoption of the UCPD, no general pre-contractual duty of information existed on the European level since each of the directives established particular sets of pre-contractual information duties applicable only for a specific form of consumer contract characterized by mutual incoherence and inconsistency. Moreover, pre-UCPD information requirements were exposed to criticism of remaining without

⁵⁴⁹ Article 7 of the UCPD

⁵⁵⁰ See T Wilhelmsson and C Twigg-Flesner, 'Pre-contractual Information Duties in the Acquis Communautaire', (2006) 2 European Review of Contract Law 441

expected effects in practice since they are drafted in a manner which does not correspond to the real consumer expectations and behaviour in practice.

What I argue in this Chapter of the thesis is that the UCPD through its introduction of a general pre-contractual duty of information applicable to all types of consumer contracts has remedied, to a certain extent, previously present incoherence and information overload as defined by consumer contract directives. Moreover, I want to point out that general obligation of information disclosure of the UCPD is drafted in such a manner that it takes into consideration real trader's and consumer's behaviour in practice, so that it requires from trader to present the information which are really relevant to consumer and in an appropriate manner.

Equally, the UCPD has established two levels of information requirements depending on the potential impact of a commercial practice on consumer. In case when a commercial communication is an invitation to purchase, the consumer is closer to concluding a contract, so that is the time when he needs more information. Consequently, through provision of a unified definition of invitation to purchase, the Court affected the previously existing national concepts of the invitation to purchase, at least when it concerns consumer contracts.

An important remark has to be made here. In this Chapter and in my thesis in general unless otherwise specified, I refer to the duty of information exclusively as a *pre-contractual duty of information*, i.e. the duty of information that is to be performed before conclusion of a contract since that is the one relevant in the context of misleading omissions, whereas I do not address the question of the *contractual duty of information*, i.e. the duty of information once a contract has been duly concluded.⁵⁵¹ Consequently, in the further text, the duty of information without the adjective 'pre-contractual' will be used under the meaning of pre-contractual duty of information.

⁵⁵¹ A Nordhausen Scholes, 'Information Requirements' in Howells G and Schulze R (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), 217.

Duty of information under the UCPD

Three small general clauses of the Directive

The purpose of small general clauses

The Directive establishes a hierarchical, three-step mechanism for assessment of commercial practice's fairness of trader that national authorities have always strictly to followed while assessing whether a practice is to deemed unfair. The first step requires verification whether a practice of trader can be subsumed under one of thirty-one exhaustively listed practices of Annex I of the Directive. The second step of assessment of commercial practice requires verification through one of the three so-called 'small general clauses'. Eventually, the third step is verification whether a practice is unfair through a general fairness clause.⁵⁵²

The role of the second step and small general clauses is to prohibit three frequent forms of unfair commercial practices: misleading actions, misleading omissions and aggressive practices. All three small general clause use the average consumer as the main benchmark in comparison to which a legality of practice is to be assessed.⁵⁵³ First two clauses on misleading practices are used to secure the *content* of the commercial practice, i.e. that trader provides consumers with pieces of information are truthful and non-decisive as well as complete and in a transparent manner. The main objective of provisions on misleading actions and misleading omissions is to enable consumer to make a fully informed, and thus efficient choice while acting on the market.⁵⁵⁴

⁵⁵² Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 52; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 41; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909, para 27.

⁵⁵³ See Chapter II of this Thesis on Average Consumer

⁵⁵⁴ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e delle Mercato* [2013] ECR I-0000, para 31

The third small clause on aggressive practices is focused on protection of consumer from any kind of illegal *behaviour* of trader that causes or is likely to cause an average consumer to take a transactional decision he would have not otherwise taken.⁵⁵⁵ Its main objective is to protect consumers from trader's behaviour which is too much hard-hitting and unpleasant or considered as having illegitimate impact on the consumer, prohibiting a wide set of illegal behaviour of traders, and in such a manner securing that consumer can make a free choice without any inappropriate influence of traders.⁵⁵⁶

Distinction between misleading actions and misleading omissions

Both the provisions on misleading actions and the provisions on misleading omissions of the UCPD are adopted with the same purpose, as means to secure *an informed and thus efficient choice* of consumer through assurance that the consumer receives, both true necessary information he may need to make such an informed choice.⁵⁵⁷ The former is performed through the rules on misleading actions, whereas the latter is regulated by the provisions on misleading omissions. Through protection of his informed choice, the provisions on misleading actions and misleading omissions saves his economic interests.⁵⁵⁸ This is fully in line with EU consumer policy which is based on the presumption of a well-informed consumer as a necessary prerequisite for a functional and efficient market on the ground of which the entire EU consumer law has been built, with the duty of information being used as the principal regulatory tool for securing that the consumer is provided with all information.⁵⁵⁹

The provisions on misleading actions and misleading omissions do not tend to affect legitimate advertising and marketing tactics “such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect

⁵⁵⁵ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 37

⁵⁵⁶ See G Howells, ‘Aggressive Practices’ in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006)

⁵⁵⁷ Recital 14 of the UCPD

⁵⁵⁸ Case C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2013] ECR I-0000

⁵⁵⁹ S Weatherill, *EU Consumer law and Policy* (2nd edn Edward Elgar Publishing 2013), 92

consumers' perceptions of products and influence their behaviour under the condition that they do not weaken consumer possibility to make an informed choice".⁵⁶⁰ The legality of such advertising tactics is certainly always to be decided on a case-by-case basis, bearing in mind the reaction of an average consumer.

Despite having the same principal objective of protection, i.e. consumer's informed choice, the provisions on misleading actions and misleading omissions differ considerably from a perspective of their development and recognition by national contract laws. This fact is an essential for understanding of the impact and correlation between these two provisions with contract law. Namely, what is called misleading actions under the UCPD has traditionally been regulated for centuries by all national contract laws, though in different forms, through sanctioning for provision of false information by an active behaviour of a party before conclusion of a contract.

Contrary to this uniform approach towards provisions of untrue information, national contract laws had divergent approaches towards a pure failure of one of the parties to provide information before conclusions of contracts, understood under the UCPD as a misleading omission, typically not finding it illegal.⁵⁶¹ Consequently, the rules on misleading omissions are a much more innovative category in the context of traditional contract law approach, than those on misleading actions, which also imply diverse contract law effects of their transposition on the national legal systems. Eventually, the directive has brought a general duty of information throughout the European Union for the first time. This is why the examination of the rules on misleading omissions deserves much more attention than analysis of the remaining two small general clauses.

⁵⁶⁰ Recital 6 of the UCPD

⁵⁶¹ R Sefton-Green, *Mistake, Fraud and Duties to Inform* (Cambridge University Press 2005)

Introduction of the general duty of information

Duty of information before the UCPD

The duty of information in the area of unfair commercial practices also existed in EU Law before the adoption of the UCPD. However, it was never imposed as a general duty, applicable to all commercial practices, but limited to specific sectors. Already in the eight decade of the twentieth century, certain harmonised rules on information duties were imposed on the European level as requirements for advertising of cosmetic products⁵⁶², followed by the common European rules on foodstuffs advertising.⁵⁶³ Directive 84/450/EC on misleading advertising and Directive 97/55/EC on comparative advertising contained some rules on information requirements. These were of limited scope, however, in accordance with the narrow purview of these two directives.

In its case law, the ECJ also emphasized the significance of information in commercial practices since its earliest judgements. In the famous case of *Cassis de Dijon*, where the Court pointed out that a disputed German rule which prohibited advertising of French blackcurrant liquor in Germany was contrary to the Treaty since the same goal of protection of consumers can be performed through introduction of the obligation to inform on alcohol content and the country of origin of the product. Accordingly, the ECJ considered that these information requirements were considered to be capable of achieving same protective effects as German rules on prohibition, but they would be less restrictive since advertising of the liqueur would be allowed, followed by provision of all relevant information.⁵⁶⁴

⁵⁶² Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products [1976] OJ L262/169

⁵⁶³ Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer [1979] OJ L33/01

⁵⁶⁴ Case 120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 00649, para 13

Equally, the Court underlined the significance and potentiality of the information in the *Petillant De Raisin* case. This case dealt with the marketing of a French drink *Petillant De Raisin* which is traditionally packed in a specific kind of bottle, but whose advertisement in that kind of bottles was not allowed in Germany due to German fear that that type of bottle might mislead consumers.⁵⁶⁵ Consequently, it was pointed out by the ECJ that total prohibition of advertising shall be substituted with obligation to provide information which will thus protect consumers.

A similar approach was taken in the case relating to the prohibition by the national law in Italy of advertising of cheese with insufficient fat content while assessing its justification on the basis of fair trade and consumer protection. Namely, the Court held that it would be sufficient for Italian authorities to impose mandatory disclosure requirement on “the actual fat content of cheeses to enable consumers to make their choice in full knowledge of the facts”.⁵⁶⁶ All this early pieces of legislation and case law shows that the idea of the significance of the duty of information was also present in EU Law before the UCPD, though it was never defined as a general principle of the law on unfair commercial practices. Likewise, irrespectively of these EU rules which certainly have affected the harmonised, sector specific areas, some national laws of Member States also recognized the duty of information, though the approach was rather non-equalized and heterogonous.

Indirect manner of introduction

In an indirect and nuanced manner, the Directive has introduced a universal duty of information in EU consumer law. The duty is defined in a negative form, as the obligation of traders not to omit to, and disclose, all relevant information to consumer. In that sense, the trader is not explicitly and directly required to present all material information, but that is done indirectly: his failure to present material information to

⁵⁶⁵ Case 179/85 *Commission v Federal Republic of Germany* [1986] ECR 3879 , para 13

⁵⁶⁶ Case C-210/89 *Commission v Italy*[1990] ECR I-03697, para 17

consumers will constitute a form of unfair commercial practice for which he needs be sanctioned.

Initially, the text of the Directive was supposed to contain an explicit and positive duty to inform consumers.⁵⁶⁷ The introduction of a general duty of information was identified as an essential tool for securing fair communication and all forms of commercial relations between a trader and a consumer.⁵⁶⁸ However, such a direct wording had to be modified as a consequence of lack of consent of relevant stakeholders. This is because, on the one hand, the advertisers had found such a provision to be too costly and burdensome, whereas, on the other hand, such an explicit provision was understood as too extreme by some of the Member States due to the divergences that existed among national contract laws of Member States in relation to the recognition of duty of information as well as a concern of possible impact that this duty may have on the national legal system.⁵⁶⁹

Consequently, the solution on how to achieve the same results, but to avoid the resistance and to reach a political compromise, was eventually found in linguistic formulation through the usage of the innovative notion of misleading omissions. Besides misleading omissions, such original terminology used in the text of the UCPD includes the notions *invitation to purchase* or the previously examined concept of *professional diligence*. The notion of misleading omission represents a perfect example of the powerfulness that the usage of innovative legal terminology has obtained as a means of Europeanization of private law.

First of all, by using the terminology of *misleading provisions*, the Directive managed to overcome concerns of Member States that the Directive interferes with their legal

⁵⁶⁷ See Commission 'Follow-up Communication to the Green Paper on EU Consumer Protection' COM (2002) 289 final. para 2.2.

⁵⁶⁸ HW Micklitz, 'A General Framework Directive on Fair Trading' in Collins H (ed), *The Forthcoming Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 70

⁵⁶⁹ G Howells, HW Micklitz and T Wilhelmsson, 'Towards a better understanding of unfair commercial practices' (2009) 51 *International Journal of Law and Management* 69, 70 et seq

traditions and that would impose a general duty of information since the notion itself sounds very neutral. Second, the creation of a new European legal terminology is part of process of making an original system of European private law to whose legal terminology “a special European meaning should be attributed, thereby reducing the risk that they might be interpreted as synonymous with concept in national legal systems”.⁵⁷⁰ Consequently, in case of misleading omissions, the idea is to diminish the impact of the traditional approaches of the national courts towards the duty of information in any form, irrespectively whether it is positive or negative, while interpreting and applying this provision.

Eventually, and despite its inventive name, the provision on misleading omissions reached the objective they were drafted for. During the adoption process of the Directive, the capacity of the provisions on misleading omissions to constitute a solid ground for imposition of the general duty to information was questioned exactly as a result of its ambiguity and innovative terminology and unpredictable future interpretation and application.⁵⁷¹ However, the Court is there to say and explain what the Commission did not dare to. Consequently, already in one of its first decisions on the UCPD, *Ving Sverige*, the ECJ has confirmed the immense impact of the provision on misleading omissions as a pan-European duty of information, pointing out that all commercial practices are subject to the information requirements imposed by this provision.⁵⁷²

The meaning and conditions for misleading omissions

The Directive provides a definition of misleading omissions in the following manner:

A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information

⁵⁷⁰ H Collins, ‘Harmonisation by example: European laws against Unfair Commercial Practices’ (2010) 73 *Modern Law Review* 89

⁵⁷¹ M Radaideh, *Fair trading in EC Law: Information and consumer choice in the internal market* (Europa Law Publishing 2005), 271

⁵⁷² Case C-122/10 *Konsumentombudsmannen (Ko) v Ving Sverige AB* [2011] ECR I-03903, para 24

that the average consumer needs, according to the context, 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.

It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, 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.⁵⁷³

The first paragraph of the definition explains what is the content of a general duty of information of a trader in their relationship towards consumers. For the assessment of the fulfillment of this duty of trader, the definition identifies four fundamental elements that the national courts have always to take into consideration. First, the fulfillment of information requirements needs always to be assessed in relation to the average consumer as the main benchmark. Second, the obligation to provide information relates only to the provision of *material* information, i.e. those which are relevant for consumers to make an informed choice.

Third, required information has to be of such quality that in case of trader's failure to provide information, such an omission would be likely to cause a consumer to take a transactional decision he would have not otherwise take, i.e. it relates to the effects of the failure to provide information. Fourth, all circumstances, followed by the entire context of an unfair commercial practice, as well all relevant features together with

⁵⁷³ Articles 7(1) and 7(2) of the UCPD

any limitation of mediums on which information is to be provided, have to be taken into consideration.

The second paragraph of the definition clarifies the manner in which a trader has to provide material information. Consequently, the duty of information requires what is called *a meaningful transparency*, i.e. a provision of information in such a manner that enables the consumer to really profit from it.⁵⁷⁴ Contrary to this, provision of form in an unintelligible, ambiguous or any other manner which does not enable consumers to understand disclosed information is equalized with the case when a trader has not disclosed all information.⁵⁷⁵

Moreover, the second paragraph of the definition also establishes a general obligation of identification of commercial intent in each of trader's commercial practices unless this is obvious from the context. Consumers must not get misled about the nature of certain advertisements in order to have a proper and objective understanding of the advertising message that, for instance, it does not represent a broadcasting of a neutral scientific study, but part of selling tactics of a particular company. The purpose of this provision is very similar to the point provided by Audiovisual Media Services Directive that requires that viewers have to be informed about sponsorship a programme in cases when audio-visual media services or programmes that are sponsored.⁵⁷⁶

Two practices among the thirty-one explicitly enlisted practices of the UCPD practices which are always unfair also secures that the consumer does not get misled by a lack of provisions of the nature of an advertising practice. The fact that failure to

⁵⁷⁴ WH Van Boom, 'Price intransparency, Consumer Decision Making and European Consumer Law' (2011) 34 Journal of Consumer Policy 359, 373

⁵⁷⁵ Compare with Directive 93/13/EEC on unfair contract terms, articles 4(2) and 5, which also requires contract terms to be offered in plain, intelligible language

⁵⁷⁶ Article 10(1)c of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (2010) OJ L95/1

provide commercial intent of a will equally considered as a form of misleading omission just secures that such a sensitive issue will be adequately taken care of in all cases through a provision of a more general clause.⁵⁷⁷ In its decision in *RLvS*, the Court clarified that such identification of commercial intent is only the obligation of trader from which originates a commercial practice. In accordance with such a view of the ECJ, a provider of audio-visual media services cannot be found to be engaged in an unfair commercial practice under the UCPD in case identification of commercial intent was omitted to be included since a commercial practice does not directly originate from him, but from another trader.⁵⁷⁸

In the following part, I will focus on the examination of fundamental elements of the provision on misleading omissions, with the exception of the average consumer which is the subject of a separate Chapter of this thesis. Moreover, I will also address the manners in which, according the UCPD, the information is required to be provided.

Materiality of information

Criterion of materiality

Traders are not obliged to disclose to consumer all possible and available information they have, but only *material* information. The notion of material information is a standard which understands what information is necessary for consumers to make an informed choice. Traders' failure to provide material information is likely to cause the consumer to take a transactional decision he would have not otherwise taken if that information had been provided.

What is understood under 'material information', as well as the fact of whether a trader presented material information to the consumer, is something that needs to be

⁵⁷⁷ Article 5(5) and points 11 and 22 of Annex I of the UCPD: *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). This is without prejudice to Council Directive 89/552/EEC; 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.*

⁵⁷⁸ Case C-391/12 *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] ECR I-0000, para 41

verified by the national courts in each particular case, on a case-by-case basis.⁵⁷⁹ For instance, an information that would typically not be considered as material is the failure of travel agent as traders to inform the consumer that the hotel in his package travel has been upgraded from a three star to a five star hotel at the same location for the same price. Such an information would not, by rule, have impact on the consumer who concluded that contract. In other words, consumer would have concluded the contract in any case. However, in case of an opposite occurrence of facts, when traders failed to inform the consumer that his hotel was downgraded from a five star, to a three star would typically be considered as a material information, capable of affecting consumer's choice.

In discovering what information the consumer really needs, behavioural studies are certainly of help for understanding what these most important pieces of information has to include. The area of information duties was identified as part of consumer law where the Economics approach shall be particularly applied since such an approach secures an efficient usage of information.⁵⁸⁰ The wording and flexible formulation of the UCPD on misleading omissions itself enables taking into consideration finding and application of behavioural studies. However, the national courts are certainly limited with the standard of the average consumer, as a normative concept, that defines how the consumer is expected to behave the market. The average consumer is also the one who deserves the protection and who profits from the information. It is for the consumer that the duty of information has been imposed, so his behaviour shall be taken as a model.⁵⁸¹

Empirical studies in behavioural economics, cognitive psychology and theory of marketing have shown the existence of bounded rationality of human behaviour. In accordance with their lack of rational behaviour, people are found to be imperfect

⁵⁷⁹ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 55 and 56

⁵⁸⁰ M Schillig, 'The Contribution of Law and Economics as a Method of Legal Reasoning in European Private Law' (2009) 17 *European Review of Private Law* 853

⁵⁸¹ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-04657

information processors.⁵⁸² This is why there is a constant advocacy for applying more behavioural economics in European consumer policy and while interpreting and applying consumer law in practice.⁵⁸³ According to the behavioural economics, proper framing of disclosure techniques is of fundamental importance for information to have an effect and that consumer may profit from it. Accordingly, information requirements shall be always designed and interpreted in accordance with real needs of consumers.⁵⁸⁴

Moreover, instead on the basis of their rationality, it was empirically proven, that consumers rather rely on their emotions in their decision-making processes.⁵⁸⁵ This factor has to be taken into consideration while deciding whether an information is material. Furthermore, several other factors were identified to be more important for consumers when making certain transactional decision that mere disclosure of certain information and this is why they should certainly be taken into consideration while deciding on materiality of the information. These factors include life style, culture, peer press, emotions, social class, context in which product is presented, level of involvement.⁵⁸⁶

From a European perspective, among the enlisted factors, culture seems to be particularly important. Namely, the entire situation with assessment of consumer behaviour and designing of an adequate legal mechanism becomes even more complex in case of the European Union due to its highly present multicultural character. This is so because consumer behaviour differentiates depending on the culture to which any certain consumer belongs. So depending on the culture they

⁵⁸² R Selten, 'What is bound rationality' in Selten R and Gigerenzer G (eds), *Bounded Rationality: The adaptive toolbox* (MIT Press 2001), 15

⁵⁸³ see 34 Journal of Consumer Policy, no 3, Special Issue on Behavioural Economics, Consumer Policy and Consumer Law (2011)

⁵⁸⁴ I Ramsay, *Consumer Law and Policy: text and materials on regulating consumer markets* (3rd edn Hart 2012), 101

⁵⁸⁵ AK Shah and DM Oppenheimer, 'Heuristics made easy: An Effort-Reduction framework' (2008) 134 Psychological Bulletin 207, 210

⁵⁸⁶ CV Jansson-Boyd, *Consumer Psychology* (Open University Press 2010), 131

belong to, consumers will react in different manner and consequently they may consider different information as representing material.⁵⁸⁷

Such a complexity is emanated through part of the definition of the average consumer as the main benchmark where it is pointed out that social, cultural and linguistic factors shall be taken into consideration while deciding on fairness of a commercial practice, though this exception may have a limited effect as a consequence of the maximum harmonisation character of the UCPD.⁵⁸⁸ These factors were identified as playing a potentially important role for the assessment of fulfillment of the duty of information.⁵⁸⁹

Obligation de résultat instead of obligation de moyens

In accordance with the outcomes of the studies in behavioural sciences on deficiencies in the duty of information, it should be very thoroughly researched what kinds of information are to be considered as material. Otherwise, the imposition of too much information will result in an increase of trader's costs and consumer being incapable of profiting from disclosed information. Information disclosure produces costs which will be eventually passed to consumers and in that sense, Stuyck points out, "a "high level" of protection does not necessarily mean the "highest" level of consumer welfare".⁵⁹⁰ The criterion of materiality enables flexibility in that aspect and possibility to choose which information is really relevant for the consumer and from which they can really profit. In such a manner it remedies a highly disputable tendency of increasing the number of information to be disclosed to consumers in European law.⁵⁹¹

⁵⁸⁷ M de Mooij, *Consumer Behavior and Culture* (2nd edn SAGE Publications 2011)

⁵⁸⁸ See Section of Chapter II on Average Consumer of this thesis

⁵⁸⁹ T Wilhelmsson, 'Misleading Practices' in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 152

⁵⁹⁰ J Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer policy in or beyond the Internal Market?' 37 *Common Market Law Review* (2000) 367, 392

⁵⁹¹ A Nordhausen Scholes, 'Information Requirements' in G Howells and R Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), 93

Moreover, previously existing duty of information of directives on consumer contract law was considered as a failure and incapable of protecting consumer's consent.⁵⁹² This is why such a general formulation of the provisions on misleading omission of the UCPD is good as it enables taking into consideration real needs of consumer. Certain consumers know, namely, what information they need and they look for it. However, some consumers do not know what information they need to make an informed choice and it is exactly in accordance with the needs of these consumers that duty of information and what information considered as material, should be 'tailored'.⁵⁹³

In such a manner, with its flexible wording, the UCPD leaves place for assessment and taking into consideration of real behaviour of consumer in practice. Such a view is confirmed by the ECJ who in its case law provided guidance to national courts on how to identify whether an information is material. In *Purely Creative*, the question referred to the ECJ by an English court was related to the interpretation of one of thirty-one exhaustively listed practices in Annex I of the Directive.⁵⁹⁴ The question was whether even the existence of a minimal cost, that the consumer needs to bear in order to obtain a much more valuable prize, shall be considered as a form of unfair commercial practice. The Court adopted a very pro-consumer oriented judgement in which it pointed out that such a practice of traders would be an unfair commercial practice, even if the cost that consumers shall bear is minor in comparison to the prize.⁵⁹⁵

From a perspective of the duty of information, this judgement is relevant since, in it, the Court clarified the method that the national courts shall use the fulfilment of the duty of information. Accordingly, the national court shall check the following criteria:

⁵⁹² O Bar-Gill and O Ben-Shahar, 'Regulatory techniques in consumer protection: A critique of the European Consumer Contract Law' (2013) 50 Common Market Law Review 109, 110

⁵⁹³ DG Baird, 'Precontractual disclosure duties under the Common European Sales Law' (2013) 50 Common Market Law Review 297, 308

⁵⁹⁴ Practice 31 of Annex I of the UCPD

⁵⁹⁵ Case C-428/11, *Purely Creative et al. v Office of Fair Trading*, ECR I-0000, para 57

“the availability of the information and how it is presented, the legibility and clarity of the wording and whether it can be understood by the public targeted by the practice”.⁵⁹⁶ Equally, it is for the national courts to establish whether the information supplied is sufficiently clear and comprehensive for the public targeted by the practice to enable the average consumer of the group concerned to take an informed decision.⁵⁹⁷

Moreover, in the same case, the Court acknowledged the relevance of taking arguments of cognitive psychology while assessing fulfillment of the duty of information, as well as the fact that the consumer does not behave in a rational manner: “the psychological effect caused by the announcement of the winning of a prize, in order to induce the consumer to make a choice which is not always rational, such as calling a premium rate telephone number to ask for information about the nature of the prize, traveling at great expense to collect an item of low-value crockery or paying the delivery costs of a book which he already has”.⁵⁹⁸

Duty of information shall be understood as, what sometimes is referred to in private law as an *obligation du résultat*, and not as an *obligation de moyens*. In other words, the regulatory mechanism shall be focused not only on the fact that trader present information and thus fulfills their obligation, but it shall rather secure that the consumer is presented information in such a manner that he or she really profits from it.

Two cases of materiality under the Directive

Besides a rather abstract criterion for verification of *materiality* of information to be disclosed to consumer, the Directive itself provides two cases when an information has to always be considered as material. This means that in case of alleged breach of

⁵⁹⁶ Ibid, para 55

⁵⁹⁷ Ibid, para 56

⁵⁹⁸ Ibid, para 38

the duty of information, the court or other competent bodies will not need to assess their quality of being material bearing for the consumer's behaviour and their impact on consumer's choice, but they will be automatically considered as material.

The first case is when a commercial communication is an invitation to purchase. In these cases, five groups of information exhaustively listed in the UCPD, will always be considered as material.⁵⁹⁹ This list of information is defined by the Directive because in cases of such types of commercial communications consumers are much more likely to enter into a contract, i.e. they need less time or effort and consequently they are more affected by commercial practice.⁶⁰⁰ In addition to classifying the information requirements in two categories depending on consumer's need for information, the first case of materiality is important from a perspective of contract law since the UCPD has introduced through it, a common European understanding of the invitation of purchase, as it will be explained later.⁶⁰¹

The second case includes all information duties established through dozens of diverse directives in the area of consumer law. This information also will always be considered as material without necessity to be assessed on case a by case basis, bearing in mind their effects on consumer economic behaviour. A list of these information requirements is provided in Annex II of the Directive.⁶⁰² Importantly, unlike Annex I which contains an exhaustive list of thirty-one practices which are always unfair, i.e. Member States may not establish any additional practice besides these, the list of Annex II is just an *exempli causa* list and it only identifies some of the European legislation in the area (some which of which has already seen changes by new directives).⁶⁰³

⁵⁹⁹ Article 7(4) UCPD

⁶⁰⁰ A Nordhausen, 'Information Requirements in the E-Commerce Directive and the Proposed Directive on Unfair Commercial Practices' in Howells G, Jansen A and Schulze R (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate 2004), 100

⁶⁰¹ See Section of this Chapter

⁶⁰² Article 7(5) of the UCPD

⁶⁰³ Recital 15 of the UCPD

Through the imposition of a higher standard of the duty of information in case of invitation to purchase, the Directive has highlighted the importance of the pre-contractual phase that precedes the conclusion of a consumer contract, making in that manner a tight interaction between unfair commercial practices and contract law. It is notable that the differentiation between the two levels of information requirements depending on the moment where information is to be provided is not radically innovative, since some of the directives makes the distinction between the sets of information which are to be provided during advertising and the sets information which are mandatory to be disclosed before conclusion of a consumer contract. This was the case with the contracts on package travel⁶⁰⁴ or consumer credit.⁶⁰⁵

The introduction of the invitation to purchase now enables better understanding of the borderline between pre-contractual phases and when which of these two sets of information duties from contract law directives will have to be disclosed. Accordingly, if a commercial communication is an invitation to purchase, that this will require disclosure of pre-contractual information and if it is not, then those aimed at advertising. Moreover, since this differentiation existed only in cases of certain types of consumer contracts, now it applies to all consumer contracts.

This second case has two main purposes. First, it codifies into one piece of legislation for the first time all information duties dispersed in diverse directives, in particular those in contract law. Second, the rules on information requirements as defined by directives on consumer contract law are typically not followed by provisions of any sanctions. Sometimes they were simply transposed in national legal systems of Member States, but due to lack of European rules on sanctions, they were left without any remedy, or at least functional remedy. Through the establishment of their permanent quality of material information, the UCPD secures that all of information requirements from directives on consumer contract law will be sanctioned though

⁶⁰⁴ Articles 3 and 4 of Directive 90/314/EEC on package travel

⁶⁰⁵ Articles 4 and 5 of Directive 2008/48/EC on consumer credit

sanctions which are provided in national legal systems in cases of unfair commercial practices. All legal systems of Member States have developed sanctions for breach of the rules of the UCPD and in particular on misleading omissions as one of Directive's fundamental components.

It has to be noted that the qualification of materiality applies only to those information duties which are established by European legislation. In other words, additional pieces of information that were developed in the national legal systems in line with directives which require only minimum and not a maximum harmonisation do not automatically fall under this category. Consequently, in case of failure to provide any of these information requirements, material character of this information is not presumed, but it will have to be proven. In such a manner coherence of the provisions of the Directive and its unified application, all Member States secured by requirements of maximum harmonisation shall be maintained.

Transactional decision

Likelihood of taking a transactional decision

The requirement of materiality of information is in tight connection with the requirement of likelihood of taking a transactional decision. Namely, material information will be only that information which causes or is likely to cause an average consumer to take a transactional decision in relation to products that he or she would have not otherwise made. As confirmed by the Court, the assessment of effects a failure to provide information is an essential condition for applying the rules on misleading practices. In its judgement in *Trento Sviluppo*, the ECJ answered the question referred by an Italian court on whether for a commercial practice is to be considered as misleading it is sufficient that it simply contains false information or that it is likely to deceive an average or, in addition to this condition, it is also

necessary that such a practice influences consumer to take a transactional decision he would have not otherwise taken.⁶⁰⁶

In its answer, the Court pointed out that the likelihood of causing the consumer to take a transactional decision he would have not otherwise taken a necessary condition for a practice to be considered as misleading.⁶⁰⁷ This is explained through the fact that the UCPD objective is to provide a general prohibition of all unfair commercial practices that distort economic behaviour of the consumer. In other words, the assessment of fairness of commercial practice by the national court must be done through a pure examination of traders' commercial practice, but it has to be executed in the light of its potential influence on economic behaviour of the consumer.

Despite the fact that this judgment dealt with misleading actions, this rule shall also *mutatis mutandis* apply to the provisions on misleading omission since they are two forms of misleading practices.⁶⁰⁸ Moreover, the objective of both is the protection of informed choices of the consumer.⁶⁰⁹ Accordingly, a mere failure to provide material information is not enough for the existence of misleading omissions, but such a failure has to be likely to cause an average consumer to take a transactional decision where he or she would not have otherwise.

Lack of obligation to verify the breach of professional diligence requirements

Conditions for application of the small general clauses, including the rules on misleading omissions, are less demanding than those applicable for general clause of fairness. The Court pointed out that exclusively conditions which are explicitly mentioned in these articles apply and that no other conditions exist. Consequently, misleading and aggressive practices are prohibited if, in accordance to their nature and

⁶⁰⁶ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e dele Mercato*, ECR I-0000

⁶⁰⁷ *Ibid*, para 33

⁶⁰⁸ Recital 14 of the UCPD

⁶⁰⁹ Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorita Garante della Concorenza e dele Mercato*, ECR I-0000, para 31

the entire factual situation they are likely to take a transactional decision that he would have not otherwise taken.⁶¹⁰

Namely, for application of any of three ‘small general clauses’ it is not required to be proven, unlike in the case of the general clause and its first limb, that trader has acted against the requirements of professional diligence as pointed out by the Court.⁶¹¹ Namely, in *CHS Tour Services* the question raised on whether trader’s breach of professional diligence requirements is a necessary pre-condition of prohibiting a commercial practice on the grounds that it represents a misleading practice.

The Court was clear that this is not required and pointed out that such an interpretation is in accordance with the requirements of effectiveness for application of the provisions of the Directive.⁶¹² This is because in case of the examination on the basis of the small general clauses the breach of professional diligence is indisputably pre-supposed and, as a consequence, the trader cannot base his defense on the fact that they behaved in accordance with the requirements of professional diligence. Provision of false information, deliberately omitting to disclose information or coercing consumers with purpose of influencing them to make a commercial transaction that they would have not otherwise performed *per definitionem* show that a trader has acted contrarily to professional diligence.

Equally, for the application of provisions on misleading omissions it is absolutely irrelevant whether traders who failed to provide information are a public or private body, or its performances tasks of public or private interest. This does not make any

⁶¹⁰ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949, para 55; Case C-435/11 *CHS Tour Services GmbH v Team4 Travel GmbH* [2013] ECR I-0000, para 41

⁶¹¹ Case C-435/11 *CHS Tour Services GmbH v Team4 Travel GmbH* [2013] ECR I-0000, para 45

⁶¹² *Ibid*, para 46

difference as it was pointed out by the ECJ in its judgment where an involved trader was a German public health insurance fund.⁶¹³

The context of in which information is provided

The significance of the context and limitation of the medium

The UCPD establishes a clear obligation that while assessing fulfillment of the duty of information, “factual context, taking account of all its features and circumstances and the limitations of the communication medium” of commercial practice have all to be taken into consideration.⁶¹⁴ The Directive continues that “[w]here the medium used to communicate the commercial practice imposes limitations of space or time, these limitations 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 information has been omitted”.⁶¹⁵ The limitation of medium for information is a category that always needs to be verified empirically, on a case by case basis.⁶¹⁶

The level of imposed information duties on traders depends on whether his commercial communication is considered as an invitation to purchase. The Court confirmed in *Ving Sverige* that the invitation to purchase is a particular form of advertising which demands stricter information requirements.⁶¹⁷ The Directive enlists five sets of information duties that have to be presented to consumers when a commercial communication is an invitation to purchase. These pieces of information include the main characteristics of the product, the address and the identity of a trader, the total price of a product with all applicable taxes and dues, all other relevant details about the product, such as delivery or complaint policy if they are contrary to the

⁶¹³ Case C-59/12 *BKK Mobil Oil Korperschaft des öffentlichen Rechts v Centrale zur Bekämpfung unlauteren Wettbewerbs eV* [2013] ECR I-0000, para 37

⁶¹⁴ Article 7(1) of the UCPD

⁶¹⁵ Article 7(3) of the UCPD

⁶¹⁶ C Willett, ‘Fairness and Consumer Decision Making Under the Unfair Commercial Practices Directive’ (2010) 33 *Journal of Consumer Policy* 247, 258

⁶¹⁷ Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903, para 28

requirements of professional diligence and the existence and details on the right of cancellation and withdrawal.⁶¹⁸

The means of provision of information

In *Ving Sverige*, the ECJ offered some guidance on the requests regarding how the information shall be provided and when it shall be considered that a trader has duly fulfilled his duty of information. The judgment in *Ving Sverige* is the first decision in which the Court interpreted the provisions of the Directive on misleading omissions. The dispute was raised in relation to the content of an advertisement of Swedish travel agency, published in Swedish daily newspapers.

In its publicity, Ving Sverige was promoting its package travel to New York City. The advertisement contained the information on starting price of the travel arrangement ('from SEK 7 820'). What the advertised price would include, followed by starting price of any extra night in a hotel. Furthermore, the disclaimer was provided on a limited period of time and number of places to which the advertisement was applicable. The Internet web address and the telephone number of the travel agency were provided at the bottom of the advertisement.

The Swedish ombudsman for consumer protection ('Konsumentombudsmannen') considered the advertisement as being contrary to the Swedish Law through which Sweden transposed the provisions of the Unfair Commercial Practices Directive into its national legal system. Accordingly Konsumentombudsmannen commenced the process before the Swedish commercial court (*Marknadsdolstolen*) on the basis that Ving Sverige's advertisements represented an invitation to purchase and as such it represented a misleading omission since the information on the main characteristics of the advertised product were not provided. *Marknadsdolstolen* referred to the Court for the clarification of the notions provided by the Directive.

⁶¹⁸ Article 7(4) of the UCPD

In its judgment, the Court left it to the national courts to decide whether a consumer can take a transactional decision on the basis of an entry-level price. In their assessments, national courts used the nature and characteristics of the advertised product and the commercial medium of communication used.⁶¹⁹ Through such reasoning the Court took into consideration real consumer behaviour.

However, the ECJ pointed out that if the consumer has been provided only with the entry price supported by the additional information which would direct him to the mediums where he can check all other relevant information, such an advertising cannot be considered as a form of misleading omission. Moreover, from a perspective of a trader, it would be absolutely impossible to get advertised in cases when his product is offered in various versions and under different prices if he was obliged to disclose all information. Such an obligation would seriously breach one of the two objectives of the Directive on strengthening of the Internal Market.

In its judgment, the ECJ pointed out that a verbal or visual reference may enable the consumer to form an opinion on the nature and characteristics of the product for the purpose of taking a transactional decision, and that includes a situation where such a reference designates a product which is offered in many versions.⁶²⁰ The Court refers to the possibility envisaged by the Directive that price and/or other costs of the product cannot reasonably be calculated in advance.⁶²¹ The extent of the information relating to the price will be established on the basis of the nature and characteristics of the product, but also on the basis of the medium of communication used for the invitation and having regard to additional information possibly provided by the trader⁶²²

⁶¹⁹ Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903, para 41

⁶²⁰ *Ibid*, para 46

⁶²¹ *Ibid*, para 63

⁶²² *Ibid*, para 68

Through this reasoning, the Court again protected advertising practice as a necessary element of trade, taking into consideration real behaviour of a consumer. On the other hand, consumers are not less protected with such an approach, similarly as in the case of the entry price, since they can check all of the product options on the website, through phone or other mediums of communication if it is duly provided in the commercial communication.

It should be underlined that the competent court should take care of all circumstances and features of the advertisement and particularly of the communication medium through which the information is supposed to be provided. The competent court shall pay attention to the fact where the advertisement is being presented, so the same criteria cannot be applied if, for instance, an advertisement takes just a small part of a page of newspapers in comparison to an advertisement taking exclusively two pages, as it was pointed in the Opinion of Advocate General in *Ving Sverige*.⁶²³ It is absolutely logical that the standard of information requirements in these two cases should differ and this provision makes such a different approach lawful.

Such a view of the Court is in line with urging that behavioural economics and neuroscience shall be taken into consideration while implementing the provisions of the UCPD.⁶²⁴ The European Commission itself has suggested taking into consideration behavioural economics while interpreting and applying the provisions of the Directive.⁶²⁵ In *Purely Creative*, the ECJ pointed out that it is on the national courts to establish whether the information supplied is sufficiently clear and comprehensible for the public targeted by the practice to enable the average consumer of the group concerned to take an informed decision.⁶²⁶ In this case, consumers were

⁶²³ Opinion of Advocate General in Case C-122/10 *Konsumentombudsmannen (Ko) v Ving Sverige AB* [2011] ECR I-03903, para 30

⁶²⁴ J Trszakowski 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive' (2011) 34 *Journal of Consumer Policy* 377

⁶²⁵ Commission 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices' SEC (2009) 1666, 32.

⁶²⁶ Case C-428/11, *Purely Creative et al. v Office of Fair Trading* [2012] ECR I-0000, para 56

informed that they won a prize, but they were not informed that acquiring of the prize brings costs to the consumer despite the fact that these costs were minor.

The rules regulating the duty of information request not only that an information gets presented, but also that it needs to be disclosed in a particular manner. Otherwise, the legal consequences would be the same as if the information was not disclosed at all. The point of this provision is that an addressee of advertisement, primarily the consumer has to be provided with the information in such a way that he can profit from it. Namely, as it was well noted, traders are skilled in manipulating the presentation of information.⁶²⁷

This is why the UCPD provides that as misleading omission will be considered an information that is presented in unclear, unintelligible, ambiguous or untimely manner, or if with the information the commercial purpose of ad was not mentioned, under the condition that it causes or is likely to cause consumer to take a transactional decision he would not have taken otherwise. In that manner, through obligation to provide information in clear and intelligible manner, a connection is made between the UCPD and Directive 93/13/EEC on unfair contract terms

⁶²⁷ JD Hanson and DA Kysar, 'Taking Behavioralism Seriously: some evidence of market manipulation' (1999) 112 Harvard Law Review 1420

Duty of information in consumer contract law

The paradigm of informed consumer

The core of the entire European consumer policy, since its very beginning in the eighth decade of the twentieth century, has been based on protection of the informed choice of consumers in line with their right to information.⁶²⁸ In its judgment in *GB-INNO-BM*, the Court recognized the fundamental character of this right of the consumer under EU Law.⁶²⁹ Equally, today the TFEU emphasizes the significance of the consumer's right to information on whose promotion the European Union shall invest further efforts.⁶³⁰ In order to secure the consumer's right of information, EU Consumer Law has introduced the duty of information as the main regulatory tool. From a regulatory point of view, the imposition of information requirements represents a less radical form of intervention than what would represent an introduction of substantive mandatory law.⁶³¹

The duty of information has been established and extensively developed through diverse legislative pieces on consumer contract law. The consumer has continuously been approached and described as a weaker party in his relationship with the traders who tend to profit from the consumer's weakness while concluding contracts.⁶³² That weakness and inequality between trader and consumer is particularly noticeable when it comes to possession of information, so the imposition of information obligation corresponds "to balancing of the interests of the two parties", as the Court identified in

⁶²⁸ Preliminary Programme of the European Community for consumer protection and information policy OJ C 92, 25.4.1975, 2-16

⁶²⁹ Case C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-00667, para 18

⁶³⁰ Article 169(1) TFEU: In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests.

⁶³¹ S Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269

⁶³² MW Hesselink, 'European Contract Law: a Matter of Consumer Protection, Citizenship, or Justice?' Centre for the Study of European Contract Law Working Paper Series No. 2006/04; B Lurger, 'The 'Social' side of Contract Law and the New Principle of Regard and Fairness' in AS Hartkamp, MW Hesselink, EH Hondius, C Mak, CE Du Perron (eds), *Towards a European Civil Code* (4th edn Kluwer Law International 2011)

its judgement in *RWE*.⁶³³ The national contract laws had diverse approaches towards the duty of information, though similarities are obviously presented in these areas of consumer contract law for which common European rules were provided.

Consumer's necessity for information is tightly connected with the promotion of European concept of *confident consumer*.⁶³⁴ Basically speaking, the confident consumer is the one who is not afraid to act on the market, who knows his rights and thus is much more keen on making economic decisions on the market and concluding contracts with traders and this is why he needs information.⁶³⁵ Accordingly, the duty of information has been imposed, as a means of securing that the consumer will get the necessary information.

It is possible to speak about two main rationales for introduction of the duty of information. The first one is moral argumentation based on the arguments of social justice, pointing out to the existing inequality and different starting position in trade relations between the consumer and trader. The second is based on argumentation in findings on the economics of information. Consequently, the justification is that consumer needs information in order to be capable of making rational choices. Otherwise, if he does not have the information, no rational choice can be made which results in failure of the entire market where consumers are essentially important players. However, it has been pointed out that the duty of information is actually the result not only of one of these rationales, but also that it shall be observed as the outcome of both of them.⁶³⁶

⁶³³ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECR I-0000, para 53

⁶³⁴ Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision No 1926/2006/EC [2014] OJ L84/42

⁶³⁵ C Twigg-Flesner, 'Innovation and EU Consumer Law,' (2005) 28 *Journal of Consumer Policy* 409, 410

⁶³⁶ H Kötz, 'Precontractual Duties of disclosure: A comparative and Economic Perspective' (2000) 9 *European Journal of Law and Economics* 5, 9

Two rationales of duty of information

Argumentation on the ground of moral and justice

The reasons of moral and justice are pointed out as the grounds for full transparency of information between two parties which are willing to stipulate a contract.⁶³⁷ In that sense, one of the most famous ancient Romans, Cicero, was among the first to discuss the duty of information from a moral perspective. Cicero examined what is supposed to be considered as moral in two hypothetical cases.

The first one is when on the island of Rhodes there is famine and one merchant arrives from Alexandria with the food, but it is only he who knows that behind him a few other ships with the food will arrive. The moral question is whether he should inform people of those ships coming or he should simply reject to disclose that information and sell the food at a higher price. The second one is the case of the sale of a house that has some defects (for example being unsanitary and thus substandard to the requirements of normal life), with which only the seller is familiar. Should the seller disclose those facts. Cicero argues that the arguments of morality require the disclosure of the facts in both the hypothetical cases.⁶³⁸

Consequently, it has been considered that the general duty of information is derived from the moral obligation to talk to and inform the other party about everything which a just consciousness would require to be disclosed. Further to this, requirements of justice provide that each of the parties shall disclose to the other party all relevant information for the conclusion of the contract and to protect the weaker party in a contractual relation. In this sense, the contract law is to foster those moral standards by imposing the duty of information as the instrument to protect the weaker party from the exploitative and abusive behaviour of the other party.⁶³⁹ This is in close relation to the concept of cooperation between the parties, especially when one of

⁶³⁷ M Fabre Magnan, *De l'obligation d'information dans les contrats. Essai d'une théorie*, (LGDJ 1992), 117

⁶³⁸ Cicero, *De Officiis*, available in English at: http://www.stoics.com/cicero_book.html;

⁶³⁹ D Kimel, *From Promise to Contract* (Hart 2003), 117-135

them is materially weaker, as it is the case with the consumer. In that sense, the duty of information is to be used as one of the instrument of contractual justice.⁶⁴⁰

The imposition of the duty of information is also in line with the a specific concept of justice that the European Union has developed which, *inter alia*, requires protection of a weaker party, in particular a consumer in his relationship to significantly more powerful traders. That is the concept of social justice.⁶⁴¹ In the context of the duty of information, the idea of social of justice is based on the concept of solidarity tightly linked to the idea of fairness which requires the protection of a weaker party in a contractual relationship, i.e. consumer, who is considered as neither possessing necessary information, nor of being able to acquire them.⁶⁴²

Argumentation on the ground of information economics

Besides moral argumentation, the imposition of the duty of information has also been explained on the grounds of economics, in particular the findings of the information economics. Namely, it was argued that the informational failure leads to an inefficient market, so that is considered to be the main argumentation of economists used to explain why there is a need for the legal activism in consumer markets.⁶⁴³ The duty of information is there to resolve that information asymmetry, since perfect information is one of the necessary pre-requisites for a perfect and efficient market.⁶⁴⁴ As a consequence of lack of information, the consumer cannot make an informed, and thus a rational, economic decision which results in market failure.

⁶⁴⁰ B Jaluzot, *La bonne foi dans les contrats* (Daloz 2001), 404

⁶⁴¹ HW Micklitz, 'Introduction' in HW Micklitz, *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011)

⁶⁴² F Nicola and U Mattei, 'A Social Dimension in European Private Law? The Call for Setting a Progressive Agenda' (2006) 41 *New England Law Review* 1

⁶⁴³ See: S Grundmann, W Kerber and S Weatherill, 'Party autonomy and the role of information – an overview' in S Grundmann, W Kerber and S Weatherill (eds) *Party Autonomy and the Role of Information in the Internal Market – an Overview* (Walter de Gruyter 2001), 7; S. Becher, 'Asymmetric Information in Consumer Contracts: The Challenge that is Yet to be Met' (2008) 45 *American Business Law Journal* 723, 53

⁶⁴⁴ A Hatzis, 'Civil Contract Law and Economic Reasoning: an Unlikely Pair' in S Grundmann and M Scahuer (eds), *The Architecture of European Codes and Contract Law*, (Kluwer Law International 2006), 166

However, state intervention at the market is a subsidiary mechanism of the protection of the market and it is only justified in cases when private mechanisms would fail.⁶⁴⁵ Consequently, the justification for the intervention on the market and imposition of mandatory disclosure rules is based on the fact that without such an imposition on the market there are informational deficiencies of consumers who generate inefficient choices that eventually lead to the market failure.⁶⁴⁶

This was famously explained by Akerlof in his example about the used car market. In this example, the car market was taken as a model to show how an important prerequisite for an efficient market is the fact that the consumer possesses all relevant information before making his economic decision. Namely, at the market of second-hand cars, the good and the bad cars cannot be easily differentiated and they look much the same. The bad cars will be cheaper and that fact will cause the buyers to buy the bad cars because they are cheaper and they look very similar to good cars, so the consumer cannot distinguish their quality, but only the car price.

Consequently, a buyer will buy a bad car because it is cheaper. This would lead to the fact that the dishonest traders will chase away the honest traders from the market who will not have any more incentive to participate in that market. Therefore, the cost of dishonesty does not include only the amount for which the buyer is cheated, but also the loss incurred from driving legitimate business out of existence.⁶⁴⁷

⁶⁴⁵ F. Rischkowsky and T. Döring, 'Consumer Policy in a Market Economy: Considerations from the Perspective of the Economics of Information, the New Institutional Economics as well as Behavioural Economics' (2008) 31 *Journal of Consumer Policy* 285, 290

⁶⁴⁶ S Weatherill, 'Justifying Limits to Party Autonomy in the Internal market' in S Grundmann, W Kerber and S Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market – an Overview* (Walter de Gruyter 2001), 180;

⁶⁴⁷ G Akerlof, 'The Market for 'lemons': Quality uncertainty and the Market Mechanism' (1970) 84 *The Quarterly Journal of Economics* 488

Duty of information in national contract laws

Means of causing fraud

The principle of prohibition of provisions of false information through active behaviour by one party to the other during the contract formation dates back to the ancient laws.⁶⁴⁸ In national contract laws, it is emanated principally through contract law rules on consent defects, and in particular through provisions on fraud. They are named in different manners depending on a legal system (dol, misrepresentation, dolo...), but they all are aimed to provide remedy in case of provision of false information and thus they represent functional equivalents.⁶⁴⁹

Moreover, a general principle is that on the grounds of fraud, the provision of false information which caused an innocent party to stipulate a contract or particular contract provision shall be sanctioned. Such a contract or contract term is typically considered as void or voidable and the innocent party also has the right to compensation for suffered damages.⁶⁵⁰ However, national contract laws have diverse approaches when it comes to legal consequences of failure of one party to provide information to other parties before the conclusion of a contract.

Traditional principle of Caveat Emptor

A general principle of *caveat emptor*,⁶⁵¹ developed in ancient Roman Law, remained applicable for many centuries in the majority of national legal systems of Member States. This notion applied to *Emptio-Venditio* contracts, i.e. the fact that in sale-purchase contracts the buyer was the one who was expected to take care of potential defects of the object of contract, and that a seller was not obliged to disclose them to a buyer.⁶⁵²

⁶⁴⁸ RC Van Caenegem, *An historical introduction to private law* (Cambridge University Press 2003), 180-181

⁶⁴⁹ M Michaels, 'Functional Method' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 342

⁶⁵⁰ J Cartwright, 'Defects of Consent in Contract Law' in AS Hartkamp, MW Hesselink, EH Hondius, C Mak, CE Du Perron (eds), *Towards a European Civil Code* (4th edn Kluwer Law International 2011)

⁶⁵¹ 'Let the buyer be aware'

⁶⁵² PS Atiyah, *The Rise and Fall of freedom of contract* (Clarendon 1985), 178

However, in the ancient Roman Law, in certain cases seller was obliged to disclose information regarding the defects of the object, otherwise buyers could use *actio empti* against seller in cases where the seller fraudulently did not disclose certain defects of the object⁶⁵³. In the later stage of the development of Roman Law, *aediles curules* widened this protection by adding a new system of remedies for certain market transactions, predominantly sale of slaves and livestock.⁶⁵⁴

Changes in national contract laws

National contract laws also did not traditionally recognize a failure to provide relevant information as one of the grounds for rescission of a contract. Traditionally, exclusively active behaviour was considered as capable of causing fraud, while this was not the case with passive behaviour.⁶⁵⁵ Initially, such provisions on fraud were interpreted in a narrow sense; so passive behaviour was considered as incapable of causing fraud. Nineteen-century codifications of private law provided that fraud could be caused only with active behaviour.

The primary reason for such an approach was based on the fact that for the existence of fraud, the consent of one of the parties is required to be defected as the consequence of behaviour of the other party, and in case of passive behaviour it is hardly possible to show that it was the silence that was the cause of the consent defect, so in that case fraud is missing its mandatory element, so it cannot exist. Eventually, during the second half of the twentieth century, certain changes to this approach may be noticed. For instance, in 1954, in its decision (and confirmed in another later decision in 1958⁶⁵⁶), the French Supreme Court, *Cour de Cassation*, accepted the claim on the ground of dol caused by passive behaviour of the other party, concluding

⁶⁵³ R Zimmermann, *The Law of Obligations* (Clarendon 1996), 308-309

⁶⁵⁴ *Ibid.*, pp. 311-318

⁶⁵⁵ See article 1116 of the French Civil Code; Article 1269 of the Spanish Civil Code, article 1439 of the Italian Civil Code; contrary to this, other European private law codifications contain explicit provisions that fraud can be also caused by passive behaviour, see: article 253 of Portuguese Civil Code.

⁶⁵⁶ Cass. 1^{re} civ. 19 mai 1958, Bull. civ. I, n°251

that fraud can also be caused by passive behaviour, by the so-called *la réticence dolosive*, or fraudulent non-disclosure.

Similar views were also adopted, again in the second half of the twentieth century, in the other civil law systems where this question was disputed, such as it was the case with Spanish or Italian law.⁶⁵⁷ In all of them, duty of information developed through broadening of the contract law notion of fraud by imposition of the duty not to fraudulently omit any material information while concluding the contract. Equally, for example, a new codification at the time of Slovenian and Croatian law of the obligations in 1978 (at the time both of these countries were part of one state, Yugoslavia) also explicitly recognised the possibility that fraud may be caused by passive behaviour of one contractual party.⁶⁵⁸

The reluctance to accept the duty of information

Contrary to the approach of the majority of European legal systems, the English law has been very reluctant towards recognition of the duty of information. In England, the courts were faced with the same question as in French law: whether misrepresentation can be caused by passive behaviour. The answer to this question is radically different than to the one given in some of the civil law legal system. English law is very strong on its general position that misrepresentation can be caused exclusively by active behaviour, and not by passive behaviour – or silence.⁶⁵⁹ This is because the simple omission of a party in the form of *mere silence* is not considered as a representation since it does not represent the statement of fact and, therefore, it is not

⁶⁵⁷ R Sefton-Green, *Mistake, Fraud and duties to inform* (Cambridge University Press 2005)

⁶⁵⁸ Yugoslav Law of Obligations (Sluzbeni list SFRJ br. 29/78, 39/85, 45/89 i 57/89), article 65: *Fraud is causing mistake to the other party or keeping in mistake the already mistaken party, with the intention to make it conclude the contract*

⁶⁵⁹ *Fox v Mackreth* (1788) 2 Cox Eq Cas 320 at 320-321, per Lord Thurlow; *Arkwright v Newbold* (1881) 17 Ch D 301 at 318: where it was held that *No mere silence will ground the action of deceit*; *Smith v Hughes* (1867) L.R. 6 Q.B. 597 at 607 (Blackburn J.): *[T]here is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.* *Turner v Green* [1895] 2 Ch 205; *Bradford Third Equitable Benefit Building Society v Bolders* [1941] 2 All ER 205 at 211: *Mere silence, however morally wrong, will not support an action of deceit.*

a conduct, and the English law attaches liability responsibility exclusively to a conduct.⁶⁶⁰

The refusal to make any changes in that aspect is explained by English lawyers that an imposition of a duty of information would be unjust since the information should be regarded as the property of the subject who possesses it, so making him share that information would not be “so different than forcing it to give away physical assets”.⁶⁶¹ This is in line with general English reluctance to recognition of any kind of general principle in contract law.⁶⁶²

Misleading omissions in the context of national contract laws

The relevance of the rules of national contract laws from the perspective of misleading omission lies in its innovative approach. Namely, from the perspective of legality of particular behaviour, the provision of misleading actions by the UCPD does not represent anything radically and revolutionarily innovative, but rather a reformulation on a harmonised European level of what shall be understood as fraudulent behaviour of a trader and provision of untrue information in business-to-consumer relations. Moreover, in such a manner, the Directive establishes grounds for provision of a supplementary layer of protection, through the introduction of additional, primarily public law, sanctions besides the regularly existing private law sanctions.

Accordingly, the interaction of the provisions on misleading actions with contract law is primarily focused to *interpretation*, i.e. that interpretation and application of the provisions on misleading provisions may influence and may be influenced by the national concept of consent defects, and in particular those on fraud.⁶⁶³ Equally, the

⁶⁶⁰ See J Cartwright (n 650)

⁶⁶¹ S Smith, *Atiyah's Introduction to the Law of Contract* (6 th edn Oxford University Press 2006), 245

⁶⁶² S Whittaker, 'Theory and Practice of the 'General Clause' in English Law: General Norms and the Structuring of Judicial Discretion' in S Grundmann and D Mazeaud (eds), *General Clauses and Standards in European Contract Law* (Kluwer Law International 2006), 57-76

⁶⁶³ See S Whittaker, 'The Relationship of the Unfair Commercial Practices to European and National Contract Laws' in Weatherill S and Bernitz U (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007)

rules on aggressive practices of the UCPD have provided a common European meaning to aggressive practices of trader whereas behaviour equivalent to what is understood under aggressive behaviour has also traditionally been sanctioned through national contract law rules on duress.

Both the rules on aggressive practices and on the duress have the same objective: to secure freedom of choice of contractual parties, in particular when it comes to making the decision whether or not to enter into a particular contract and the content of that contract. To sum up with, neither the concept brought by the rules on misleading actions nor the one brought by the provisions on aggressive practices represent something radically new and innovative from the perspective of contract law, but rather a reformulation of the existing models.

This is why the provision on misleading omission brought by the UCPD is so fundamentally important: for the first time a general pre-contractual duty of information has been brought, applicable to all types of consumer contract, which, to some extent, remedied the previously existing incoherence and partiality character of regulation of the duty of information as contained in directives on consumer contracts. Also the imposition of universal duty of information in consumer contract law may have a spill over effect on general contract law,⁶⁶⁴ or even get directly introduced at least in case of certain business-to-business contracts. Moreover, the provisions on misleading omissions have also affected some 'hard core' contract law notions through producing a common European notion on invitation to purchase which is a *par excellence* contract law concept.

⁶⁶⁴ A Johnston, 'Spillovers from EU Law into National Law: (Un)intended Consequences for Private Law Relationship', in D Leczykiewicz and S Weatherill, *The Involvement of EU Law in Private Law Relationships* (Hart 2013)

As a consequence of the UCPD, the duty of information now exists for all types of consumer contracts, both those on sales as well as those on services.⁶⁶⁵ The provision from failure to provide information through the rules on misleading omissions seem to be even more protective than the legal systems which have traditionally recognized a duty of disclosure.⁶⁶⁶

Duty of information in European contract law

Duty of information in consumer contract law

Starting from the first directive in the area of consumer contract law, Directive 85/577/EEC on doorstep selling, and in all subsequent directives in this area, the duty of information takes a central place in defined regulatory mechanism for protection of consumer and its glory still lasts, even more it is enhanced form.⁶⁶⁷ The main objective of information duties was to equalize the unequal pre-contractual positions of consumer and traders.⁶⁶⁸ The imposition of the duty of information in contractual relationships both restricts and protects freedom of contract.⁶⁶⁹ It restricts freedom of contract in such a manner that it imposes an obligation on trader, where it protects it in a sense that it helps the consumer to make a fully informed choice.

Consumer contracts are understood as contracts where on one side there is a trader which is an economically stronger party and, more importantly, whose main purpose of conclusion of consumer contract is acquiring of profit, whereas on the other side there is the consumer, or economically weaker party, whose main purpose of entering contract is not profit, but fulfilling of its necessary life needs. The existence of such an

⁶⁶⁵ HW Micklitz, 'Unfair Commercial Practices and European Private law' in C. Twigg-Flesner (ed) *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010), 235

⁶⁶⁶ H Collins, 'Harmonisation by example: European laws against Unfair Commercial Practices' (2010) 73 *Modern Law Review* 89, 104

⁶⁶⁷ C Poncibo, 'The Consumer Rights Directive and the proposal for a regulation on a Common European Sales Law (CESL): Do they promote consumer confidence?' Istituto Universitario di Studi Europei, Working Papers Series 2013-1/10-COLSI, 16

⁶⁶⁸ S Weatherill (n 646) 180

⁶⁶⁹ R Schulze, 'Precontractual duties and Conclusion of Contract in European Law' (2005) 6 *European Review of Private Law* 841, 846

unequal positions of contractual parties and different interests due to which they decide to enter into contracts was underlined by the ECJ in its case law.⁶⁷⁰

This is why all consumer contracts have to be transparent and all necessary information must be disclosed to the consumer because only through that way he will be able to understand whether they really want to conclude that contract or not. It is true that in such a manner party autonomy of the trader is limited, but it should not be neglected that party autonomy does not lead automatically to a fair and just contract and sometimes certain legal measures, such as the duty of information, are needed in order to protect potential abuse of party autonomy by a trader.⁶⁷¹

Accordingly, in order to secure that consumer the directives provided set of information requirements applicable for certain types of consumer contracts, such as doorstep selling,⁶⁷² consumer credit,⁶⁷³ package travel,⁶⁷⁴ timeshare⁶⁷⁵ or distance selling.⁶⁷⁶ Besides imposing information duties, these directives also require traders to provide this information in clear and comprehensive manner. In addition to these specific types of consumer contracts, transparency and legibility of contract terms is secured by a horizontal Directive 93/13/EEC, though with limited effects since the application of its provisions is limited exclusively to contract terms which were not individually negotiated.⁶⁷⁷

In the context of contract terms, the ECJ pointed out that it is essential to explicitly inform consumers about essential elements of the contract, such as the existence of the

⁶⁷⁰ See: Case C-481/99 *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945; Case C-350/03 *Elisabeth Schulte, Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR I-09215

⁶⁷¹ M Träger, 'Party autonomy and Social Justice in Member States and EC Regulation: A survey of Theory and Practice' in H Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008), 58

⁶⁷² ex Directive 85/577/EEC, now Directive 2011/83/EU

⁶⁷³ ex Directive 87/102/EEC, now Directive 2008/48/EC

⁶⁷⁴ Directive 90/314/EEC on package travel

⁶⁷⁵ ex Directive 94/47/EC, now Directive 2008/122/EC

⁶⁷⁶ ex Directive 97/7/EC, now Directive 2011/83/EU

⁶⁷⁷ Directive 93/13/EEC

consumer's right to termination and all important price related information, whereas provision of this information is not accepted.⁶⁷⁸ In its judgment in *RWE*, the ECJ has underlined the significance of information in the context of fairness of contract terms by pointing out that “[i]nformation, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier”.⁶⁷⁹

Fragmentation of information requirements

A rather piecemeal character of regulation of information requirements in the directives on consumer contract law is focused exclusively to certain specific types of consumer contracts followed by lack of general consumer contract legislation on the European level. This has resulted in the fact that no general and unified duty of information applicable to all types of consumer contracts was established. This is why the information requirements were underlined only in the areas where there was relevant European legislation, as it is the case for instance with distance selling or package travel contracts.⁶⁸⁰

Moreover, as a consequence of piecemeal regulatory approach of EU consumer law towards the duty of information, different time periods that directives on consumer contract law were adopted and diverse compromises that were supposed to be made as necessary prerequisites for their adoption, the content of the duty of information was characterized by high levels of mutual divergence. Consequently, European directives on consumer contract law were not coherent on the imposed information duties which all resulted in a significant fragmentation of these rules.⁶⁸¹

⁶⁷⁸ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECR I-0000, para 50

⁶⁷⁹ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000, para 29; Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECR I-0000, para 44

⁶⁸⁰ C Twigg-Flesner and K Steennsgaard, ‘Pre-contractual duties’ in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013), 238

⁶⁸¹ The UK Department for Business Enterprise & Regulatory Reform (BERR) has considered fragmentation as one of the biggest problems of the Consumer law, which besides complexity of legislation, leads to significant additional costs of the traders since they need to get familiar with different set of rules on different pieces of

The occurrence of the fragmentation phenomenon has resulted in the fact that different pieces of European secondary legislation in this area provides different information requirements and the required manner in which these pieces of information are to be disclosed.⁶⁸² Further to this, in case of certain contracts, traders may be subjected to more than one set of information rules,⁶⁸³ e.g. timeshare contract concluded at distance'.⁶⁸⁴ As its final outcome, fragmentation of the rules on information requirements resulted in legal uncertainty.

The phenomenon of information overload

Besides for its fragmentation, the rules on information duties as defined in consumer contract legislation were also criticized for overloading consumers with information. The criticism of the duty of information from the quantitative perspective is primarily based on the regulatory design of the duty of information as it stands now in the European consumer law requires presentation of too many information, so that the consumer simply cannot process all of them and, eventually, profit from them.⁶⁸⁵ Empirical studies in neuroscience have shown that cognitive limitation of people unable them to process information in cases when they are overloaded with it.⁶⁸⁶ It was pointed out that the more information is presented to the consumer, the less capable he or she is to process all this information.⁶⁸⁷

It has been pointed out that the attention of EU consumer policy makers is predominantly concentrated on mere imposition information requirements and that the

legislation. These cost are estimated to be around £65m per year. See: BERR, 'Consumer Law Review: Call for evidence' available at <http://www.bis.gov.uk/files/file45196.pdf>, 9

⁶⁸² R Schulze, 'Precontractual duties and Conclusion of Contract in European Law' (2005) 6 *European Review of Private Law* 841, 849

⁶⁸³ C Twigg Flesner, 'Information duties' in H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium* (Sellier 2007), 493

⁶⁸⁴ Case C-423/97 *Travel Vac SL v Manuel Jose Antelm Sanchis* [1999] ECR I-02915

⁶⁸⁵ H Rösler, 'Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law' (2010) 18 *European Review of Private Law* 729, 737-738

⁶⁸⁶ See: T Klingberg, *The overflowing brain: Information overload and the limits of working memory* (Oxford University Press 2009)

⁶⁸⁷ T Paredes, 'Blinded by the Light: Information Overload and its Consequences for Securities Regulation' (2003) 81 *Washington University Law Quarterly* 417

effects of information on consumers in practice are insufficiently assessed.⁶⁸⁸ Consequently, the problem is that consumers among all that information are incapable of making distinction which information they actually need the most to make a rational decision. Moreover, presentation of huge amount of information may end up with the result those pieces of disclosed information looks so complex and exhaustive that a consumer decides not to use or process any of the disclosed information. In such a case, information requirement would just represent an additional cost for traders, eventually transferred to the consumer, from which the consumer is not going to benefit.

A Nobel Prize winner in economics, Herbert Simon, was among the first scholars, four decades ago, to notice such a phenomenon of negative effects of overload of information on the basis that ‘a wealth of information creates poverty of attention’. Subsequently, numerous empirical studies by economics, psychologists, neuroscientists and sociologists have been performed showing that overload of information produces negative effects on the side of consumers.⁶⁸⁹

An empirical study, which was performed in the United States several years ago, demonstrated the presence of a tendency of declining usage of information from food nutritional labels, very important for health, by consumers. As one of the most probable explanations was pointed that products started also containing too much information which now included, for instance, organic certificate or welfare issues, to which consumers have started paying attention, consequently ignoring information from nutrition labels.⁶⁹⁰ This is why it is essentially important to bear in mind real behaviour of consumers in practice while defining and assessing fulfillment of information requirements.

⁶⁸⁸G Howells, The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 Journal of Law and Society 349–370, 363

⁶⁸⁹ BK Lee and WN Lee , ‘The effect of Information Overload on Consumer Choice Quality in an on-line Environment’ (2004) 21 Psychology & Marketing 159

⁶⁹⁰ ‘The Decline in Consumer Use of Food Nutrition Labels, 1995-2006’ Economic Research Report 63, Economic Research Service, U.S. Department of Agriculture, (2008) <http://www.ers.usda.gov/publications/err-economic-research-report/err63.aspx#.U3UFoByXGKI> accessed 12 May 2014, 20

An additional example is the case of Terms and Conditions, which are often so exhaustive that a consumer almost never reads any of them. In other words, in such an ocean of information consumers do not pay attention to any of the presented information, so that the final effect is the same as if a trader had not disclosed any of the information at all. This was well noted by Ben-Shahar who pointed out that “[r]eal people don’t read standard form contracts. Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract”.⁶⁹¹

This phenomenon has also been noticed by the Commission which pointed out “[a] large amount of information may distract consumers from focusing on the most important aspects, and cause them to make decisions with less reflection, rather than more”.⁶⁹² However, no related proposal on how to overcome this phenomenon was mentioned.

Following this, in the European Union the problem with overload of information is closely linked with the issue of fragmentation of the common European regulation of information requirements.⁶⁹³ Namely, the horizontal fragmentation of these rules has led to the fact that different pieces of European secondary legislation in this area provide different information requirements and the required manner in which those information are to be disclosed.⁶⁹⁴ Through adapting information requirements to each medium in which an information is to be presented the Directive controls and

⁶⁹¹ O Ben-Shahar, ‘The Myth of the ‘Opportunity to Read’ in Contract Law’ (2009) 1 *European Review of Contract Law* 2

⁶⁹² Commission staff working document on knowledge-enhancing aspects of consumer empowerment 2012 - 2014 SWD(2012) 235 final, 9

⁶⁹³ The UK Department for Business Enterprise & Regulatory Reform (BERR) has considered fragmentation as one of the biggest problems of the Consumer law, which besides complexity of legislation, leads to significant additional costs of the traders since they need to get familiar with different set of rules on different pieces of legislation. These cost are estimated to be around £65m per year. See: BERR, *Consumer Law Review: Call for evidence*, [1.12] at p. 9, available at <http://www.bis.gov.uk/files/file45196.pdf>

⁶⁹⁴ C Twigg-Flesner (n 683) 493

manages information overload of consumers, contributing to consumer's profit of the presented information.⁶⁹⁵

Information requirements in contract law after the UCPD

The significance of the provisions on misleading omissions

The transposition of a dozen of European directives on consumer contract law in the national legal systems of Member States brought a certain level of harmonization of the approaches towards the duty of information at least when it concerns consumer contract law. However, such a duty was still, all until the adoption of the UCPD, provided in fragmentary, partial and incoherent manner through sector specific directives, based primarily on vertical approach and being rather prescriptive than principle based. The problem with such a fragmented approach is that it is not capable of “fully meeting the requirements of today's rapidly evolving society and markets”.⁶⁹⁶

In that aspect, the provisions on misleading omissions are of fundamental importance since they have brought, for the first time, a general duty of information, always applicable and adaptable to all kinds of business-to-consumer relationships that subsequently opened a door for introduction of such a general duty through a contract law instrument, i.e. Directive 2011/83/EU on consumer rights (“Directive 2011/83/EU”).⁶⁹⁷ Namely, Directive 2011/83/EU is the first European contract law instrument that brought a general pre-contractual duty of information that applies to all consumer contracts which represents one of few general duties introduced by EU contract law.⁶⁹⁸

⁶⁹⁵ F Henning-Bodewig, ‘Directive 2005/29/EC’ in O. Castendyk, Dommering EJ and Scheuer A, *European Media Law* (Kluwer Law International 2008), 1074

⁶⁹⁶ B Keirsbilck, ‘The Limits of Consumer Law in Europe’ in E Claes, W Devroe and B Keirsbilck (eds) *Facing The Limits of The Law* (Springer 2009), 75

⁶⁹⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64

⁶⁹⁸ Article 5 of Directive 2011/83/EU on consumer rights

However, information duties defined by Directive 2011/83/EU, especially those applicable in case of distance selling,⁶⁹⁹ are very numerous, up to twenty in total, which is all confusing for a consumer.⁷⁰⁰ An excellent and actual example in European consumer law could be found in the new European Directive 2011/83/EU on consumer rights addition to this, in the case of distance and off-premises contracts these requirements increase so, besides these nine general sets, traders are obliged to provide a supplementary set of information. Accordingly, a problem of information overload was identified in Directive 2011/83/EU and it was particularly noted that imposition of such an amount of information is not in line with the current development of technology and devices on which information needs to be presented.⁷⁰¹

The Optional Instruments has also adopted a general duty of information in business-to-consumer contracts.⁷⁰² However, both in the case of information requirements in Directive 2011/83/EU and in the case of the Optional Instrument the distinction between two levels of information requirements on the ground of invitation to purchase seems to be ignored. Moreover, through their exhaustive enlistment of all information duties to be disclosed, the consumer is again faced with information overload which prohibits him or her from profiting from disclosed information. This has contributed to the re-establishment of incoherence of information requirements in diverse instruments of EU consumer law, despite the fact that a general duty of information was also recognized by the European legislation on consumer contracts.

⁶⁹⁹ Article 6 of Directive 2011/83/EU on consumer rights

⁷⁰⁰ K Tonner and K Fangerow, 'Directive 2011/83/EU on consumer rights' 2 *Journal of European Consumer and Market Law* (euvr) (2012) 67, 71

⁷⁰¹ AR Lodder, 'Information requirements overload? Assessing disclosure duties under the E-commerce Directive, Services Directive and Consumer Directive' in A Savin and J Trzaskowski (eds), *Research Handbook on EU Internet Law* (Elgar forthcoming 2014), 16-17

⁷⁰² Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final, Article 20

The invitation to purchase

The significance of the invitation to purchase

The Directive imposes higher standards of information requirements in case when trader's commercial communication represents an invitation to purchase. In such case stricter information duties are imposed as a consequence of the fact that an invitation to purchase is considered as a critical moment in the consumer's decision making process when a more impulsive reaction of the consumer can be expected and hence when a consumer is exposed to higher risks of being misled.⁷⁰³ As Advocate General Mengozzi correctly observed in his Opinion in *Ving Sverige*, a trader has the option to choose among other forms of advertising practices which require less information duties, but in case he opts for advertising practices that represents an invitation to purchase, in such a manner he also takes the risk of higher information requirements.⁷⁰⁴

In case a commercial communication is an invitation to purchase, the Directive defines that five sets of information will be considered as material. Namely, unlike in the case of a general duty of information in commercial communications which are not invitations to purchase where a more abstract information duty is provided, herein there is a list with concrete examples. These information requirements relate to the main characteristics of the product, the geographical address and the identity of the trader, the price inclusive of taxes, the arrangements for payment, delivery, performance and the complaint handling policy, the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's and the existence of the right of withdrawal and cancellation. The introduction of this list was criticized for being too long and closed from the perspective of economics and possibility to assess what information the consumer really needs.⁷⁰⁵

⁷⁰³ Commission 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices' SEC (2009) 1666, 49

⁷⁰⁴ Opinion of Advocate General in Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903, para 22

⁷⁰⁵ F Gomez Pomar, 'The Unfair Commercial Practices Directive: A Law and Economics Perspective' (2006) *InDret: Revista para el Análisis del Derecho* No 1, 25

From a contract law perspective, the importance of the invitation to purchase of the UCPD is twofold. First, the notion of invitation to purchase as defined by the Directive directly interferes with the existing national contract law concepts similar to the invitation to purchase, at least when it comes to consumer contracts. Second, pre-contractual information obligations of trader will vary depending on the fact whether or not particular commercial communication is an invitation to purchase.

The notion of the invitation to purchase in European Private Law

The notion of invitation to purchase (or in French *l'invitation à l'achat*) is an innovative legal term brought for the first time by the UCPD into European private law. Its innovative character is part of the process of forming of an original body of European private law with its own legal terminology that has a common European meaning which differs from similar existing concepts in national legal systems of Member States.⁷⁰⁶ Its original naming may also be explained by the fact that in such a manner it avoided opposition of Member States that would have certainly risen if any of traditional contract laws concepts had been used in the UCPD.

The invitation to purchase is defined by the Directive as “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”.⁷⁰⁷ Such a definition shows the existence of not only terminological, but also substantial similarity between the notion of invitation to purchase and certain related core contract terms of the national legal systems that are related to the offer and the formation of contracts. The similarities of this notion with English contract law term of invitation to treat, or French contract law term *invitation a offrir*, are easily noticeable.

⁷⁰⁶ H Collins, ‘Harmonisation by example: European laws against Unfair Commercial Practices’ (2010) 73 *Modern Law Review* 89

⁷⁰⁷ Article 2(1)(i) of the UCPD

Consequently, the definition provided by the UCPD has brought a common European meaning of contract law term ‘invitation to purchase’ at least when it comes to consumer contracts. Importantly, this definition was further interpreted by the ECJ in its judgment in *Ving Sverige* which is the first case in which the Court had to interpret the meaning of the provisions on misleading omissions.⁷⁰⁸ The divergence among national legal cultures is well spotted in the written observations in *Ving Sverige* submitted to the Court by some of Member States. Governments of Member States showed significantly different views and opinions in relation to the question whether commercial communication which was subject in the case shall or shall not be considered as an invitation to purchase.⁷⁰⁹

Namely, after the adoption of the Directive, what remained particularly unclear was how wide the invitation to purchase should be interpreted. In its Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive issued in 2008, the Office of Fair Trading (“OFT”) as the principal British authority in charge of enforcement of the rules on unfair commercial practices provided its own interpretation according to which the invitation to purchase shall be interpreted in a narrow manner. Accordingly, the invitation to purchase should include only the situation when consumers have the chance to directly place the order, for instance, a page on a website on which consumer can place the order.⁷¹⁰ Contrary to such a view of the OFT, the European Commission opted for a much broader meaning of the invitation to purchase.

According to this interpretation, an invitation to purchase would be any commercial communication that promotes a definable product for a particular price.⁷¹¹ In its judgment in *Ving Sverige* the Court followed the views of the Commission expressed

⁷⁰⁸ Case C-122/10 *Konsumentombudsmannen (Ko) v Ving Sverige AB* [2011] ECR I-03903

⁷⁰⁹ Opinion of Advocate General in Case C-122/10 *Konsumentombudsmannen (Ko) v Ving Sverige AB* [2011] ECR I-03903, para 40

⁷¹⁰ Office of Fair Trading, “Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive” para 7.20 to 7.30

⁷¹¹ Commission ‘Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices’ SEC (2009) 1666, 48

in the Guidance and provided a very broad meaning of the invitation to purchase. Such an approach of the Court was explained on the grounds that the invitation to purchase represents the only concept of the Directive that is to be interpreted only in accordance with one of its objectives: the objective of a high level of consumer protection defined in article 1 of the UCPD.⁷¹²

Contrary to the relevance of this objective, the requirements for strengthening of internal market are not to be taken into consideration when it comes to the invitation to purchase. Accordingly, the ECJ pointed out that a commercial communication, in order to be considered as an invitation to purchase, does not necessarily need to “include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity.”⁷¹³ Consequently, the Court concluded “an invitation to purchase exists as soon as the information on the product advertised and its price is sufficient for the consumer to be able to make a transactional decision”.⁷¹⁴ Through providing how the invitation to purchase shall be interpreted and applied by the national courts, the ECJ also intervened in the core of national contract laws.⁷¹⁵

Implications of wide interpretation of the invitation to purchase

A wide interpretation of the invitation to purchase by the Court in *Ving Sverige* is very pro-consumer oriented. However, what may be the problem with such a wide interpretation of the Court is that it may decrease the significance of classification of the information duties established by the Directive. Now, an extremely broad scope of commercial communications may be considered as an invitation to purchase.

Consequently, it may be hard to imagine in practice an advertising practice that should not be taken as an invitation to purchase and the goal of the Directive was to make some order in the overload of information requirements imposed by EU Law. In that

⁷¹² Case C-122/10 *Konsumentombudsmannen (Ko) v Ving Sverige AB* [2011] ECR I-03903, para 29

⁷¹³ *Ibid*, para 32

⁷¹⁴ *Ibid*, para 33

⁷¹⁵ HW Micklitz, ‘Unfair Commercial Practices and European Private law’ in C. Twigg-Flesner (ed) *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010), 234

sense Advocate General with its proposal for narrower interpretation seemed to have offered a more plausible interpretation in his Opinion which was eventually overruled by the Court. The Advocate General was opting for a more restrictive approach arguing that while assessing what represents an invitation to purchase, a balance between consumer's and trader's interest has to be made.⁷¹⁶ Furthermore, the Court points out that, *argumentum a contrario*, if this was not considered as sufficient condition for invitation of purchase, the invitation of purchase would be too limited which might be misused by advertisers.⁷¹⁷

However, through flexible interpretation of articles 2(i) and 7(4)(c) of the Directive which provide that a disclosure of all main characteristics of a product or its full price in a particular form of commercial communication that is considered as an invitation to purchase is not necessarily mandatory, the Court managed to establish the right balance between the interests of traders and the interest of consumers. As a result, a number of traders' commercial communications will be forms of invitation to purchase but traders have the possibility to provide missing information at another place than in their commercial communication in cases when the medium of advertising is limited to show all necessary information.⁷¹⁸ In accordance, with expected behaviour of consumer under EU consumer law as provided in its definition, the average consumer will not be lazy, but he will check the information provided on other mediums.

Conclusion

This Chapter examined the duty of information in business-to-consumer relation which was introduced, at the moment, in EU consumer law as a general duty of

⁷¹⁶ Opinion of Advocate General in Case C-122/10 *Konsumentombudsmannen (Ko) v Ving Sverige AB* [2011] ECR I-03903, para 23

⁷¹⁷ *Ibid*, para 39

⁷¹⁸ *Ibid*, para 36 and 38

traders through the provisions on misleading omissions of the Directive. Consequently, traders' failure to provide the consumer with material information in any commercial practice that causes or is likely to cause the consumer to take a transactional decision he would not otherwise have taken will always represent a form of an unfair commercial practice. Previous to the adoption of the Directive, duty of information was contained in sector specific directives on consumer contract law, characterized by high levels of mutual incoherency and with a presence of information overload on consumers which decreased the possibility of consumer to profit from presented information.

Contrary to the previously existing contract law approach, the UCPD has introduced a universal duty of information which applies to all types of consumer contracts. This obligation is drafted in such a manner that enables taking into consideration real consumer behaviour, as well as all circumstances of a particular case, while deciding whether information has been duly fulfilled which is not the case with directives on consumer contract laws and thus represents an improved regulatory response to the problem of asymmetry of information between trader and consumer.

Moreover, depending on the relevance of a particular situation for consumer's decision making process, a distinction regarding information requirements is made. Therefore, when a commercial communication is an invitation to purchase, imposed information duties are stricter. This division of information requirements is also important since it has also brought a European meaning of invitation to purchase, a *par excellence* contract law term, which has now received its own European meaning, affecting thus traditional contract law regimes of Member States.

CHAPTER V – REMEDIES

Introduction: Remedies and enforcement in EU Consumer Law

In this Chapter of my thesis, I examine the relationship between the law on unfair commercial practices and contract law from a perspective of remedies where a vibrant mutual interlink is present. The Directive has introduced a well-developed and complex three-step mechanism that secures that any unfair commercial practice is prohibited. However, contrary to its rather exhaustive substantive provisions, the rules of the UCPD are very limited when it comes to remedies and enforcement. These few provisions show that the Directive is focused on the collective dimension of enforcement, whereas individual enforcement is left aside.⁷¹⁹

What has remained untouched by the Directive is the right to redress of an individual consumer who was a victim of an unfair commercial practice through providing him with an adequate individual remedy.⁷²⁰ In that aspect, the question of particular importance is the effect of the occurrence of unfair commercial practices on the validity of a contract term or the entire contract which was concluded as a consequence of a trader's unfair commercial practice and what an individual consumer can do in such situations.

As a result of the lack of individual remedies prescribed by European legislation, consumers have to rely on traditional, national contract laws and, in particular, on the national rules about consent defects. The capability and capacity of existing contract law concepts to remedy the consequences of unfair commercial practices is, however, disputable. Consequently, contract law has to be modified and amended to adequately respond to the introduction of the rules on unfair commercial practices. Moreover, the presence of similarities between the concepts brought by the provisions on misleading and aggressive practices of the Directive and national contract rules on consent defect

⁷¹⁹ HW Micklitz, 'Legal Redress' in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 220

⁷²⁰ See Recital 9 of the UCPD

is certainly noticeable. The presence of these similarities resulted in modification of existing and development of new contract law remedies. Such a process is of a rather spontaneous character as a consequence of strict formal separation between the law on unfair commercial practices and contract law.⁷²¹ Accordingly, the UCPD does not establish an imperative duty of Member States to modify their contract laws in order to remedy consequences of unfair commercial practices, but its transposition into national legal systems had effects on contract law.

Further to this, from a perspective of remedies, a correlative interaction between the provisions on unfair commercial practices with the existing rules of European contract law is noticeable. Accordingly, the consumer may rely on contract law remedies, as forms of individual redress, established by diverse directives in the area of consumer contract law. In addition to this, the UCPD has brought an additional level of protection to consumer's contractual rights, since the breach of any of consumer's contractual rights will typically represent a form of unfair commercial practice.

Remedies and enforcement under Directive 2005/29/EC

General approach towards enforcement by the UCPD

The principle of effective judicial protection

The principle of effective judicial protection is one of the fundamental principles of EU Law, identified in articles 6 and 13 ECHR which all Member States of the EU are a part of and confirmed in Article 47 of the Charter of Fundamental Rights of the European Union. In its judgment in *Alassini*, the ECJ confirmed a mandatory obligation of Member States to secure consumer's right to effective judicial protection and access to justice.⁷²² Moreover, the Lisbon Treaty in its Article 81(2) established a legal basis for adoption of common European legislation related to the access to justice or alternative resolution disputes, which do not need to have the objective of

⁷²¹ Article 3(2) of the UCPD

⁷²² Joined Cases C-317/08 to C-320/08 *Rosalba Alassini e.a. v. Telecom It Spa e.a.* [2010] ECR I-02213, para 61

strengthening of the internal market as it is required by article 114 TFEU, thus overcoming its limited scope of application.⁷²³

Accordingly, consumers need to have guaranteed effective means in national legal systems to enforce their rights which are established by European legislation. Despite the existence of considerably developed European consumer legislation, the regulation of enforcement of consumer law has still remained primarily the competence of Member States. EU Consumer Law is focused on the provision of the rules of substantive character, whereas procedural issues are just briefly touched.

Only few pieces of European legislation are exclusively dealing with the question of enforcement of consumer law and in particular those in Directive 2009/22/EC on injunctions⁷²⁴ as well as Regulation 2006/2004 on consumer protection cooperation.⁷²⁵ However, even these legal instruments are focused on the cross-border element of enforcement, rather than on national systems of enforcement. In addition to these two, Directive 2013/11/EU on alternative resolutions of consumer disputes⁷²⁶ and Regulation 524/2013 on online resolutions of consumer disputes⁷²⁷ were adopted in order to provide unified rules and promote the alternative means to resolution of consumer disputes, providing a common principles on which all mechanism for alternative resolution of consumers throughout the European Union have to be based.

⁷²³ Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I)* [2000] ECR I-08419

⁷²⁴ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) [2009] OJ L110/30

⁷²⁵ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L 364/1

⁷²⁶ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63

⁷²⁷ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1

Procedural autonomy of Member States

EU Law provides very vague and fragmented rules on enforcement of consumer law. This is also the case with the UCPD which, as it was well observed in the Opinion of Advocate General in *Banesto*, carries out only full harmonisation of substantive rules on unfair commercial practices, whereas much more freedom is left to Member States for regulation of procedural means for combating against unfair commercial practices.⁷²⁸ Accordingly, the Directive only imposes on Member States the obligation to adopt such systems of enforcement that will ensure that the adequate and efficient means for combating against unfair commercial practices exist under national laws.⁷²⁹

In such a manner, the Directive has respected procedural autonomy of Member States in the regulation of enforcement enabling them to establish the rules in accordance with their needs and particularities of their national legal systems and society. However, the procedural autonomy is not absolute, but it is limited with the principles of equivalence and effectiveness, as pointed out by the Court. Consequently, the requirement of *adequate and efficient means* needs to be understood in relation to these two principles. The principle of equivalence requires that the rules of Member States applied for enforcement of EU consumer law are not less favourable than those governing similar situations which are subject to domestic law. The principle of efficiency means that the national rules of Member States must not make it impossible in practice or excessively difficult to exercise the rights conferred by European Union law on consumer protection.⁷³⁰

⁷²⁸ Opinion of Advocate General Trstenjak in Case C-618/10 *Banco Español de Credito SA and Joaquin Calderon Camino* [2012] ECR I-0000, para 105

⁷²⁹ See Article 11 of the UCPD as confirmed in Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000, para 44

⁷³⁰ Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000, para 50; Case C-565/11 *Mariana Irimie v Administrația Finanțelor Publice Sibiu and Administrația Fondului pentru Mediu* [2013] ECR I-0000, para 23; Case C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA* [2013] ECR I-0000, para 31; Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL* [2013] ECR I-0000, para 30

The outcome of the lack of unified rules on enforcement is that there is a material divergence among national approaches towards enforcement of the rules of the UCPD as transposed in the national legal systems of Member States. This is particularly true regarding the national institutional patterns in charge of enforcement of consumer law where impact of EU Law is especially weak.⁷³¹ Accordingly, on the one hand some Member States opted for enforcement through diverse public authorities, such as the consumer ombudsman (e.g. Sweden), diverse public authorities (e.g. Italy) or departments of the Ministry (e.g. Belgium). On the other hand, certain Member States rely primarily on private enforcement initiated by competitions (e.g. Germany). However, the majority of the countries combine the two approaches, public and private, towards enforcement.⁷³²

The existence of such fragmentation and diversity of the regulation and approaches towards enforcement of the rules on unfair commercial practices results in a rather paradoxical situation bearing in mind the fact that substantive rules are characterised with highly praised and strictly enforced principles of maximum harmonisation.⁷³³ Eventually, it is argued that the result of this paradox is that in reality a full harmonisation cannot be achieved, and what is obtained is merely a fake harmonisation - or as it has been said in French, *la harmonisation de façade*.⁷³⁴ Moreover, cross-border unified action, as an advanced form of action in comparison

⁷³¹ F Cafaggi and HW Micklitz, 'Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community' EUI Working Paper 2007/22, available at <http://cadmus.eui.eu/bitstream/handle/1814/6980/LAW-2007-22.pdf?sequence=1>, 43

⁷³² Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee, COM (2013) 139 final, 26

⁷³³ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2010] ECR I-00217; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH* [2010] ECR I-10909; Order in Case C-288/10 *Wamo BVBA v JBC NV and Modemakers Fashion NV* [2011] ECR I-05835

⁷³⁴ M Behar-Touchais, *Droit Européen des pratiques commerciales déloyales*. Rapport Conclusif in E Terryn et D Voinot, *Droit Européen des pratiques commerciales déloyales: evolution et perspectives*, larcier, 2012, 194

to coordinated action, among actors from two or more Member States is hardly possible as a consequence of the lack of unified rules.⁷³⁵

The Commission is fully aware of that and this is why the enforcement of the rules on unfair commercial practices has been considered as an area into which additional efforts shall be invested in the future with the Commission taking a more prominent role, in particular when it comes to consistency in application of the Directive.⁷³⁶ For instance, one of the tools aimed at contributing to a more uniform application was the launching of the Unfair Commercial Practices Database in September 2010 that contains case law and legal scholarship from all Member States, but which remained with much effects and which is in need of more regular update of data.⁷³⁷ However, while awaiting more action of the Commission in that direction, the Court has already taken some important steps, as it can be seen in its decision in *Köck*.⁷³⁸

Requirements for sanctions for breach of the UCPD

Member States are also given wide autonomy when it comes to designing of penalties for breach of the UCPD where common European rules are also very limited. EU Consumer law only imposes to Member States an obligation to establish adequate penalties that would fulfill a general requirement of being *effective, proportionate and dissuasive*. These types of penalties are also required in case of breach of the rules of the UCPD.⁷³⁹ However, again the meaning of these requirements has not been further explained, neither by the text of the Directive nor by other pieces of consumer legislation that also applies to them referring it to the ECJ for clarification.

⁷³⁵ P Rott, 'Cross-border collective damage actions in the EU' in F Cafaggi and HW Micklitz (eds), *New Frontiers of Consumer Protection – The Interplay Between Private and Public Enforcement* (eds) (Antwerp 2009), 393

⁷³⁶ Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee, COM (2013) 139 final, 30

⁷³⁷ <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show&CFID=569858&CFTOKEN=69303ffb8a7af70-7FF9B600-9572-9C0F-98D41F4263128ED5&jsessionid=a4032ba565e182a3d5bb27115467f1e21550TR>

⁷³⁸ Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000

⁷³⁹ See Article 13 of the UCPD as confirmed in Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000, para 44

Eventually, in its judgement in *Crédit Lyonnais*, the Court provided some clarification to the meaning of these provisions, in particular what shall be understood as dissuasive.⁷⁴⁰ In that aspect, the ECJ has already established a rather general principle in relation to the breach of competition law that is always required to be followed by a dissuasive sanction.⁷⁴¹ The subject of *Crédit Lyonnais* was not a provision of the UCPD itself, but one with the same wording regarding required sanctions for breach of the rules of Directive 2008/48/EC on consumer credit.⁷⁴² The question referred to the ECJ by a French court was whether sanction provided by French law for creditor who failed to assess debtor's creditworthiness before conclusion of a credit agreement shall be considered as dissuasive.⁷⁴³

According to the French law, the provided sanction was that in such a case, a creditor loses the right to contractual interest rate, but once he has lost it, the creditor becomes entitled to a statutory rate which was, in this particular case, even slightly higher than the stipulated contractual rate. In other words, it may be noticed that creditor actually profited from his failure to fulfill the obligation. In order to reach its decision, the Court compared the seriousness of the sanction established by French law with the severity of the infringement, in particular verifying whether such a penalty is of genuinely dissuasive effect. Eventually, the ECJ came up with an unsurprising conclusion that this particular sanction does not fulfill the requirement of being genuinely dissuasive as required by EU Law.⁷⁴⁴

Moreover, the ECJ also gave some clarification on how fulfillment of requirement of dissuasiveness shall be interpreted by the national courts. Accordingly, a sanction will not be considered as genuinely dissuasive and thus it will not be in line with EU Law

⁷⁴⁰ Case C-565/12 *LCL Le Crédit Lyonnais SA v Fesih Kalhan* [2014] ECR I-0000

⁷⁴¹ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* (2001) ECR I-6297

⁷⁴² Directive 2008/48 of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66, Article 23: *The penalties provided for must be effective, proportionate and dissuasive.*

⁷⁴³ The requirement for assessment of creditworthiness of debtor before granting a credit is imposed by Article 8 of Directive 2008/48/EC

⁷⁴⁴ Case C-565/12 *LCL Le Crédit Lyonnais SA v Fesih Kalhan* [2014] ECR I-0000, para 53

in case when the amount that a creditor should receive in case of his failure to fulfill the obligation is not significantly smaller than the amount which creditor would have received if he had fulfilled his obligation.⁷⁴⁵ This judgement of the Court is certainly useful for better understanding of what shall be required for penalties for breach of the rules on unfair commercial practices.

Limitation of procedural autonomy through substantive rules

Despite the formal recognition of procedural autonomy of Member States limited only with the principles of equivalence and effectiveness, the decision of the ECJ in *Köck* shows a rather fragile character of this autonomy which may be easily shaped by the judicial activity of the Court.⁷⁴⁶ In lack of clear and concrete procedure rules, this is done through the interpretation of the substantive rules of the UCPD as tactics used by the Court to intrude into the areas of law that have not been harmonized.

Such a phenomenon does not represent anything particularly innovative or surprising. The ECJ already had the same approach in case of Directive 93/13/EEC unfair contract terms, developing a significant case law that has materially affected procedural autonomy of Member States and shaped national rules on enforcement,⁷⁴⁷ spreading it subsequently also to some other areas of consumer law, such as consumer sales under Directive 99/44/EC on sales of consumer goods and associated guarantees.⁷⁴⁸ In such a manner, the Court through its judicial activity has become a powerful and important instrument for Europeanization of private law in the areas where there is a lack of common European legislation.⁷⁴⁹

⁷⁴⁵ Ibid., para 52

⁷⁴⁶ Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000

⁷⁴⁷ See, *inter alia*, Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579; Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* [2009] ECR I-04713; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000; Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000

⁷⁴⁸ Case C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA* [2013] ECR I-0000

⁷⁴⁹ see for further details of this kind of judicial activity of the ECJ in DU Galette, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2011)

In *Köck*, the ECJ had to assess the legality of provision on clearance sales as defined by the Austrian Federal Law on Unfair Competition through which Austria transposed the provisions of the UCPD in its national legal system. This provision represented a form of preventive measure requiring traders to acquire permission from relevant state authority in case of their intention to initiate clearance sales previous to the commencement of the sales. Namely, in case of clearance sales, *ex ante* system of protection from the unfair commercial practices seems to be relevant since *ex post* seems inefficient due to the fact that one clearance sales has ended, trader will probably not exist anymore, so no sanction could be effective. This was well pointed out by the Austrian government to which the Advocate General agreed.⁷⁵⁰

However, the Court did not agree with the Advocate General and approached this provision not from a procedural perspective, but rather considering it as an explicitly envisaged form of unfair commercial practice that allows prohibition of a commercial practice without performance of fairness assessment under the hierarchical three-step mechanism. Consequently, such Austrian rules were found to be contrary to the UCPD and its maximum harmonisation character.⁷⁵¹

In its judgement, the Court pointed out that it is true that the anticipatory or preventive measures can be in some cases more adequate and more appropriate than subsequent measures, but this shall only apply in case of such commercial practices „whose nature makes such measures necessary with a view to combating unfair commercial practices“.⁷⁵² Moreover, these measures must not simply prohibit commercial practices under the assumption that they are unfair without assessing them in accordance with the assessment system provided by the Directive.⁷⁵³

⁷⁵⁰ Advocate General Trstenjak in Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000, para 49

⁷⁵¹ Case C-206/11 *Georg Köck v Schutzverband gegen unlauteren Wettbewerb* [2013] ECR I-0000, para 50

⁷⁵² *Ibid.*, para 45

⁷⁵³ *Ibid.*, para 46

While deciding, the Court was faced with the dilemma between the requirements of maximum harmonisation as applied to substantive provision of the Directive on the one hand and the procedural autonomy left to the Member States to regulate enforcement of unfair commercial practices' rules on the other side. Eventually, priority was given to the maximum harmonisation spreading the scope of the UCPD materially and narrowing the procedural freedom of Member States.

Despite the fact that Court left the possibility to national legal systems to introduce or maintain national rules that would *ex ante* verify whether a practice is unfair, such a possibility in practice, after this decision, is very limited indeed. Through introduction of such limitation, the Court diminishes the scope and impact of inevitable consequences of procedural autonomy which result in a divergence of approaches among Member States.⁷⁵⁴ Consequently, the judgement in *Köck* shows well how the Court is interfering with procedural rules of Member States through the substantive rules of the Directive.

Collective enforcement

The approach of the UCPD towards enforcement

Collective redress is an instrument of procedural law that enables unification of many single claims or mobilisation of diffused interests into one single claim for the reasons of procedural efficiency and effectiveness. In the context of consumer law, it refers to two essential demands that can be made. The first is the injunctive relief, as a request to traders to stop with an illegal behaviour and breaching of consumer law. The second one is compensatory relief as a demand to traders to provide compensation for the suffered damages that have occurred as a consequence of their illegal behaviour.

Due to the particularities of the system of consumer protection, collective redress plays an essentially important role in securing effective protection of consumer rights. In her Opinion in *Invitel*, the Advocate General explained well what is the purpose of

⁷⁵⁴ R Sefton-Green, 'Multiculturalism, Europhilia and harmonization: harmony or disharmony?' (2010) 6 Utrecht Law Review 50, 55

collective redress from a perspective of consumer law. She pointed out that „[t]he successful enforcement of rights by way of a collective action creates a just balancing of the interests of consumers and undertakings, ensures fair competition and shows that collective actions are just as necessary as individual actions in order to protect the consumer“.⁷⁵⁵ Accordingly, there has been a noticeable tendency of increasing and emphasising a more prominent role of collective redress by the national legal systems of Member States.⁷⁵⁶

A generic term of collective redress incorporates many diverse forms of collective enforcement of consumer law that may be divided into four main groups: representative action, group action, model or test case and class action (US style).⁷⁵⁷ Contrary to this complex character of collective redress, individual redress represents a more traditional approach, which is used as a means for enforcing of the rights by an individual, in particular a consumer, whose rights were breached.

A significantly important role of collective redress is that it plays in enforcement of consumer law is the outcome of several mutually tightly interlinked factors that challenge the effectiveness, capacity and applicability of traditional individual redress to address adequately and always the occurrence of breaches of consumer law. First, consumers' knowledge about the existence and content of their rights is rather limited. Second, even in cases when they are familiar with their rights, particularly as a consequence of all the efforts aimed to educate consumers about their rights, the problem that remains is inconstant willingness and motivation of consumers to enforce their rights, as well as the familiarity and accessibility of the mechanisms they may use to enforce their rights.

⁷⁵⁵ Opinion of Advocate General Trstenjak in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (2012) ECR I-0000, para 41

⁷⁵⁶ See C Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Oxford 2008)

⁷⁵⁷ F Cafaggi and HW Micklitz, 'Administrative and Judicial Enforcement in Consumer Protection: The Way Forward' in F Cafaggi and HW Micklitz (eds), *New Frontiers of Consumer Protection – The Interplay Between Private and Public Enforcement* (eds) (Antwerp 2009), 414-420

Third, a particularly important element of accessibility is of the financial nature and the costs of enforcement, in particular if it is a litigation before the court. Fourth, the value of the product which would be the subject of the case is typically of low value which additionally decreases the motivation of an individual consumer. Fifth, fighting for the rights can be time consuming. Sixth, consumers may have doubts against whom they should complain in certain cases: seller, producer, importer or distributor.⁷⁵⁸

The provisions on enforcement as provided by the Articles 11 to 13 of the UCPD, though being few and vague, are focused on the collective dimension of enforcement.⁷⁵⁹ A rather reluctant approach of the Directive towards defining any rules for individual enforcement has been well described as if according to the Directive it represented a stepchild of enforcement.⁷⁶⁰ Such an approach is the result of the fact that the UCPD was designed to primarily protect economic interests of many consumers rather than the economic interests of an individual consumer, approaching thus consumers rather as a generic category than as individuals.⁷⁶¹

The UCPD and Directive 2009/22/EC on injunctions

Through its emphasising of the collective dimension of envisaged redress the UCPD makes a tight liaison with the provisions of Directive 2009/22/EC on injunctions, as one of few pieces of European legislation on procedural issues. Accordingly, this directive contributes to a more uniformed application of the UCPD throughout the European Union, also introducing some common rules on collective redress. Directive 2009/22/EC is aimed at securing cross border protection of consumers, in particular when consumers in one Member State are affected by activities of a trader from

⁷⁵⁸ P Spiller and K Tokeley, 'Individual consumer redress' in G Howells, I Ramsay and T Wilhelmsson with D Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010), 483-484

⁷⁵⁹ J Glöckner, 'The Scope of Application of the UCP Directive – "I Know What You Did Last Summer"' (2010) 41 *International Review of Intellectual Property and Competition Law* 589

⁷⁶⁰ HW Micklitz, 'Legal Redress' in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 219

⁷⁶¹ G Chantepie, 'Vers une harmonisation des sanctions?' in Terryn E and Voinot D, *Droit européen des pratiques commerciales déloyales: Évolution et perspectives* (Larcier 2012), 92

another Member State. This is especially applicable in the context of the UCPD since, for instance, an advertising coming from one country may also affect consumers in other country.

Directive 2009/22/EC secures that there shall be always an action for injunction possible when collective interests of consumer have been harmed as a consequence of breach of EU consumer legislation, including the UCPD, as transposed in the national legal systems of Member States.⁷⁶² The required condition of collective interests is an abstract notion, that does not mean a simple accumulation of individual interests, but it is more than that. The innovative character of this notion was pointed out as being potentially incomprehensible to national courts and the existing frameworks of civil procedure laws.⁷⁶³

As persons and entities entitled to seek protection of collective interests of the consumer when they are harmed, this directive appoints qualified entities. Accordingly, qualified entities in one Member State are allowed to ask the court or administrative authority of the other Member State to issue measures of cessation or prohibition of any breach of consumer law that infringes collective interests of consumer in the first Member State. However, despite the fact that Directive 2009/22/EC is focused on cross border dimension of injunction, it is also relevant from a perspective of national laws since it represents the benchmark according to which national collective remedies have to be evaluated.⁷⁶⁴

In accordance with the freedom left to them by Directive 2009/22/EC, Member States have recognized the status of qualified entities to diverse subjects, as well as to diverse numbers of qualified entities. It is possible to make a distinctions between three approaches towards qualified entities. The first group would include those

⁷⁶² Article 1(1) of Directive 2009/22/EC on injunctions

⁷⁶³ C Poncibo, 'The Reform of Directive 98/27/EC' in F Cafaggi and HW Micklitz (eds), *New Frontiers of Consumer Protection – The Interplay Between Private and Public Enforcement* (Intersentia 2009), 288

⁷⁶⁴ See HW Micklitz, 'A common approach on the collective enforcement of Unfair Commercial Practices and Unfair Contract Terms' Conference Paper Durham Law School, December 2012

countries that recognize consumer organization(s) as the only qualified entities, for instance the Netherlands or Portugal. The second one would include those countries that consider only a State body as a qualified entity, as is the case for Ireland or Sweden.

Eventually, the third category is a mixed one, both consumer organizations and State entities have the recognized right to ask for injunctions, as it is the case with Spain or Cyprus. Moreover, among the countries, the number of qualified entities differ, between one and several dozens. For instance, in Sweden there is only, Consumer ombudsman, whereas there are seventy-seven in Germany or seventy-one Greece.⁷⁶⁵ Moreover, the Directive also entitles Member States to freely decide before which institution, the injunction process will be lead. Accordingly, Member States have opted between the courts and administrative authorities.

Further Europeanisation of collective redress

Directive 2009/22/EC has brought only partial and fragmented rules in relation to collective redress and in last couple of years there has been a strong advocacy in favour of introduction of a more developed set of European rules on the collective enforcement of consumer law as a necessary means for effective protection of consumers throughout the European Union.⁷⁶⁶ Consumer groups also insist, as was heard at the last European Consumer Summit which took place 2013.⁷⁶⁷ Herein, it needs to be noted that the discourse on defining a complete set of rules on collective redress on the European level is not anything impressively innovative, but that it has a long tradition which dates back to 1984 and the Memorandum that the Commission published on Consumer Redress.⁷⁶⁸ However, there was lack of political will to

⁷⁶⁵ See Commission Communication concerning Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, which codifies Directive 98/27/EC, concerning the entities qualified to bring an action under Article 2 of this Directive, OJ C 115 of 15 April 2014

⁷⁶⁶ WH Van Boom and M Loos, 'Effective Enforcement of Consumer Law in Europe: Synchronizing Private, Public, and Collective Mechanisms' (January 2008). Available at SSRN: <http://ssrn.com/abstract=1082913>

⁷⁶⁷ European Consumer Summit 2013, 'Report' available at <http://www.european-consumer-summit.eu/Report/report%20expert%20panel%20plenary%2018%20March.pdf>

⁷⁶⁸ Commission, 'Consumer redress. Memorandum from the Commission to the Council' transmitted on 4

Europeanize this more sensitive question. The discussions were more focused on resolving the dilemma on *how* to regulate this area, than regarding the consensus on the need for adoption of collective redress.

In that aspect, particular concern is related to the impact that US consumer law may have on EU Consumer Law.⁷⁶⁹ Namely, the US was the first jurisdiction where class action was allowed and developed. In the United States today, the class action represents a very much used means of enforcing consumer law that has maximally diminished the role of the State in the system of protection of consumers. It is beyond this thesis to assess and compare this system with the European approach, but herein I just want to emphasize the significance of class action in the US.

Mentioning just briefly, from a European perspective, the US class is exposed to severe criticism. It has been pointed out that it is in no case suitable for Europe due to its potential abuse and frivolous character when class action is used not as means for protection of consumers' rights and interests, but for exclusively pecuniary interest of the people leading the class action and this is why another model of class action was suggested for the European Union.⁷⁷⁰ However, such a characterization of the American system was described as being incorrect since the competent courts have proven their effectiveness when it comes to screening on non-meritorious suits.⁷⁷¹

In the EU Consumer Policy strategy 2007-2013, the Commission identified collective enforcement as one of the key priorities for future action and pointed out that the introduction to collective redress mechanism both in case of breach of competition and of breach of consumer law will be assessed and considered.⁷⁷² As the first outcomes of this policy dedications, in case of competition law, a White Paper was

January 1985, COM (84) 629 final

⁷⁶⁹ J Stuyck and M Djurovic, 'The External Dimension of EU Consumer law' in M Cremona and HW Micklitz (eds), *The External Dimension of EU Private Law* (Oxford forthcoming)

⁷⁷⁰ C Hodges, 'Collective Redress in Europe: The New Model' (2010) *Civil Justice Quarterly* 370

⁷⁷¹ D Hensler, 'Using class actions to enforce consumer protection law' in G Howells, I Ramsay and T Wilhelmsson with D Kraft, *Handbook of Research on International Consumer Law* (Cheltenham 2010), 534

⁷⁷² Commission, 'Consumer Policy Strategy 2007-2013' COM (2007) 99 final

published in April 2008, whereas in November of the same year, the Green Paper on consumer collective redress in non-competition cases was issued, proposing diverse potential options for the future action.⁷⁷³ It was possible to see a rather radically different view of consumer group and industries on how to proceed with collective redress.⁷⁷⁴

Eventually, in June 2013, the Commission published the Recommendation in which it recommended that all Member States should have collective redress mechanism in the area of consumer protection in order to ensure the consumer's access to justice.⁷⁷⁵ The Recommendation in accordance with its legal nature contains non-binding principles that Member States are expected to develop in their national legal systems by mid 2015. The purpose of the Recommendation is to overcome the existing divergent approaches towards collective redress, at least to some extent.

The main objective of the Recommendation is to motivate Member States to have systems of collective redress that allows seeking both for an injunctive and the compensatory relief. Moreover, the envisaged collective redress procedure in the national laws of Member States shall be fair, equitable, timely and not prohibitively expensive.⁷⁷⁶ Certain important procedural safeguards are introduced in order to protect traders from abuse of the right.

Again, even after the principles of the Recommendation is fully implemented in practice, the enforcement will still remain a combination of judicial and administrative enforcement where most important roles will be played by Member States and where

⁷⁷³ Green Paper on Consumer Collective Redress, COM (2008) 794

⁷⁷⁴ See diverse options of collective redress: C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Oxford 2008)

⁷⁷⁵ Commission, 'Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' (2013) OJ L201/60

⁷⁷⁶ *Ibid*, para 2

the Commission is given only residual competences.⁷⁷⁷ The reluctance of the Commission to introduce binding common European rules on consumer protection is explained by the fact that EU Consumer Law as it stands now is primarily market oriented and dedicated to achievement of market oriented goals, whereas it misses a social perspective and thus it does not address the requirements of consumers.⁷⁷⁸

Collective redress in the ECJ case law

In the case of consumer contract law, the ECJ has already confirmed the significance that a positive action taken by a person not related to a particular consumer contract plays in securing of effectiveness of protection consumer rights, bearing in mind the existing inequality between contractual parties where such an action represents sometimes the only manner to protect consumers.⁷⁷⁹ In this case law, the ECJ primarily referred to the crucially important role that consumer organisations shall have in enforcing of the rights granted to consumers under EU Law, emphasising in such a manner the relevance of collective element of protection.

However, the Court pointed out that this right shall be given only to the persons or organizations which have a legitimate interest in taking these actions. Through introduction of this legitimacy requirement, the Court seems to protect from the ‘Americanisation’ of the European concept of collective redress.⁷⁸⁰ In other words, collective redress is encouraged since it is essential for securing protection of consumer rights, but it shall be allowed only to those who would initiate collective redress with the aim of protecting consumers and not to those who would do it due to their lucrative interests.

⁷⁷⁷ F Cafaggi and HW Micklitz, ‘Introduction’ in F Cafaggi and HW Micklitz (eds), *New Frontiers of Consumer Protection – The Interplay Between Private and Public Enforcement* (eds) (Antwerp 2009), 20

⁷⁷⁸ I Benohr, *EU Consumer Law and Human Rights* (Oxford 2013), 212

⁷⁷⁹ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocio Murciano Quintero e.a.* [2000] ECR I-04941, para 27; Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, para 26; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579, para 31; Order in Case C-76/10 *Pohotovost’ s.r.o. v Iveta Korčková* [2010] ECR I-11557, para 39.

⁷⁸⁰ Case C-372/99 *Commission v Italy* [2002] ECR I-819, para 14; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000, para 36

From the perspective of consequences of collective redress, the judgment of the ECJ in *Invitel* is particularly important. In this case, the Court has dealt with the consequences of collective redress represented by a Hungarian consumer organisation, the Court identified *erga omnes* effects of the decision adopted as a result of such collective redress. Accordingly, the national court is required „to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC apply will not be bound by that term“.⁷⁸¹ This decision shows that the consequences of collective redress are not necessarily only limited to issuing of order to trade for cessation of breaching of consumer law or demanding compensation of damages, but that they can also touch upon contract law issues, as it was in particular in this case in relation to a validity of a contract term.

Individual enforcement

The UCPD and individual redress

Generally speaking, individual redress was identified as an area where many more efforts are required in order to improve the access to justice of an individual consumer.⁷⁸² For instance, the capacity of the ordinary courts, as the places which a majority of individual consumers obtain access to enforce their individual rights seems rather problematic together with the usage of general procedures of civil law which results in negative impact of enforceability of consumer law by individual consumers.⁷⁸³

From a perspective of improvement of position of a consumer as initiator of individual redress, the UCPD is of no benefit. Namely, the rules on individual redress in case of breach of the provisions of the UCPD are exclusively provided by the national laws of Member States. According to the UCPD, protection of rights of individual consumers

⁷⁸¹ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000, para 43

⁷⁸² P Spiller and K Tokeley, ‘Individual consumer redress’ in G Howells, I Ramsay and T Wilhelmsson with D Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010), 509

⁷⁸³ M Loos, ‘Individual Private Enforcement of Consumer Rights in Civil Courts in Europe’, University of Amsterdam - Centre for the Study of European Contract Law (CSECL) Working Paper 2010/01

who were victims of unfair commercial practices as well as private law consequences of unfair commercial practices are beyond its scope. As pointed out by the Directive itself, it is supposed to be „without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice“.⁷⁸⁴ The lack of the individual remedies is the result of strong opposition of some Member States towards their introduction, in particular from Germany.⁷⁸⁵

Consequently, the consumer, a victim of an unfair commercial practice, shall typically rely on the existing contract law concepts, such as fraud or duress, though no formal link has been made. Contrary to this, in some cases, there may be also a question of whether there are consequences for the fact that there was a consent defect for the assessment of fairness of a commercial practice. For instance, in case when an individual the consumer decides directly to go to the civil law court to ask for contract annulment on the basis of a fraudulent advertising message, and the court may annul the contract on the grounds that the consumer was misled by the trader, so the question is what shall be the effects of that decision regarding the fairness of a commercial practice.

In that context of what seems particularly problematic is the lack of link between collective and individual redress that the provisions of the Directive do not resolve.⁷⁸⁶ This is why consumer groups have advocated strongly in favour of introduction of an explicit linking point in the Directive that would link its provisions with contract law remedies in case of contracts concluded under the influence of unfair commercial practices enable such consumer to easily terminate such contract.⁷⁸⁷ Herein, it is important to underline that an unfair commercial practice shall be always be subjected

⁷⁸⁴ Recital 9 of the UCPD

⁷⁸⁵ HW Micklitz, ‘Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse’ (2013) 31 Yearbook of European Law, 266, 316

⁷⁸⁶ HW Micklitz, ‘A common approach on the collective enforcement of Unfair Commercial Practices and Unfair Contract Terms’ Conference Paper Durham Law School, December 2012

⁷⁸⁷ Beuc, ‘Position paper on European Commission’s report on the application of the Unfair Commercial Practices Directive’ available at <http://www.beuc.eu/publications/2013-00457-01-e.pdf> last accessed on 12 May 2014, 9

to injunctions and penalties, irrespectively of potential and applicable remedies that an individual consumer, victim of unfair commercial practice may have under the national law.⁷⁸⁸

Development of individual redress?

The remaining question is what kind of redress should an individual consumer be entitled to in case of a trader's engagement in an unfair commercial practices that has affected him. In that sense, Keirsbilck argues in favour of adoption of a common European remedy whose main goal would be to return the consumer to the position in which the consumer was before the unfair commercial practice took place, i.e. as if the unfair commercial practiced had not occurred.⁷⁸⁹

Certain national legal systems developed particular new individual legal remedies for consumers, victims of unfair commercial practices. However, in the majority of European legal systems individual consumers can still rely only on the existing legal doctrines of national contract laws, in particular those on consent defects. By a general rule, a misleading practice will give grounds for application of the contract law rules on fraud, where an aggressive commercial practice corresponds to the national rules on violence.

The question of the significance of an unfair commercial practice and whether there was an unfair commercial practice immediately fulfills the criteria for a fraud (*dol*). It was pointed out that the fact that there was a unfair commercial practice improves „the chances of the consumer to avoid a contract by arguing lack of consent“. ⁷⁹⁰ However, no formal interlink has been made and this has remained primarily a doctrinal dilemma since, so far, no court decisions can be found that

⁷⁸⁸ S Orlando, 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice' (2011) 7 European Review of Contract Law 25, 37

⁷⁸⁹ B Keirsbilck, 'The interaction between consumer protection rules on unfair contract terms and unfair commercial practices: *Perenicová and Perenic*' (2013) 50 Common Market Law Review 247, 263

⁷⁹⁰ FA Schurr, 'The Relevance of the European Consumer Protection Law for the Development of the European Contract Law' (2007) 38 Victoria University of Wellington Law Review 131, 142

would clarify this relationship. A possible explanation may be that there was simply no need for such a clarification because the existing legal doctrines provides a satisfactory protection to consumers.

The general principle in private law *Ex turpi causa non oritur action*, which points out that no-one shall profit from its own illegal acts, would not support the claim of a trader who insists on a maintenance of a contractual relationship that resulted from an unfair commercial practice. Private redress is particularly problematic. The approaches of Member States towards regulation of private redress materially differ. Some Member States have recognised it. For instance, in Ireland, according to the Consumer Protection Act 2007, a consumer who is aggrieved by an unfair commercial practice has the right of action for damages that include exemplary damages.⁷⁹¹

In practice, the cases where a trader will use unfair commercial tactics with the purpose of attracting consumers are not rare. However, in certain cases, before conclusion of a contract, traders will correct its unfair commercial practice saying that actually something else is a real truth, and the consumer will decide to enter the contract in any case, with full knowledge of correct information. Despite the fact that a commercial practice is found to be unfair, and that a contract has been concluded as an outcome of such a practice, such a contract is, from the perspective of the rules on consent defects perfectly valid. This is why it shall be very cautious while deciding about potential individual legal remedies for a consumer who is a victim of unfair commercial practices.

Impact on existing contract law remedies

Diverse forms of impact

Certain provisions of the UCPD show a high level of resemblance to the existing traditional contract law concepts established in the national legal systems. That is particularly the case with contract law remedies in case of consent defects which show

⁷⁹¹ Pt 5, S. 74 (2) of Irish Consumer Protection Act 2007 (No 19/2007)

substantial and teleological similarities with three small general clauses of the Directive: misleading actions, misleading omissions and aggressive practices. In the previous Chapter on the Duty of information of the thesis, it was possible to observe how closely interlinked are the provisions on the misleading omissions and the national rules on fraud where informed consent of consumer is endangered by a trader's failure to provide material information to a consumer which results in the consumer taking a transactional decision he would have not otherwise taken. The fact that there was an unfair commercial practice will be an important factor that the courts will certainly take into consideration while deciding on a claim made by consumer on the grounds of consent defects.⁷⁹²

In that aspect, particularly noticeable is a potential impact of the concepts established by these three small general clauses on traditional contract law remedies available in case of fraud or duress. As a consequence of the lack of provided individual remedies, in case of contracts concluded under impact of misleading or aggressive selling, the consumer will have to rely on already established contract law remedies. Through the same objective of protection, i.e. free and informed consent of consumer while entering into a contract, but still to a certain extent different understanding of what shall be understood as free and informed content, these provisions of the UCPD measures represent a form of irritant to the settled ways of private law.⁷⁹³ Consequently, through the porous nature of these provisions, the concepts of the UCPD are capable of affecting these traditional national concepts.⁷⁹⁴ This is pointed out with such a high probability that it is described, at least when it comes to the UK courts, that „it would be remarkable if courts were not pressed to develop concept s

⁷⁹² G Abbamonte, 'The Unfair Commercial Practices Directive: An example of the new European Consumer Protection Approach' (2006) 12 Columbia Journal of European Law 695, 700

⁷⁹³ H Collins, 'EC Regulation of Unfair Commercial practices' in H Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer 2005), 37

⁷⁹⁴ S Whittaker, 'The Relationship of the Unfair Commercial Practices to European and National Contract Laws' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 151

such as misrepresentation, duress and undue influence“.⁷⁹⁵ The same observations are made for the French law and its provisions on consent of defects.⁷⁹⁶

Importantly, the Directive representing the first European instrument that shall apply to all commercial practices, and thus *ipso facto* as a result of tight connection between commercial practices and consumer contract, also applies to all consumer contracts. The UCPD has also finally made a distinction in contract law between general contract law and consumer contract law.⁷⁹⁷ It is true that such a distinction already existed in a majority of the legal systems, but the Directive is the first legal instrument that has formalized this distinction from a European perspective.

In general contract law, a starting presumption is that contractual parties are always equal, whereas in case of consumer contract, the initial approach is from the inequality of the contractual powers, where consumer is regarded as the significantly weaker party. This differentiation of approaches is particularly relevant when it comes to interpretation of both the law and the facts of a case since that is an aspect where the interaction between the rules on unfair commercial practices and contract law seem to be particularly noticeable.⁷⁹⁸

The rules on misleading actions and fraud

The Directive prohibits any form of misleading action that causes or is likely to cause consumer to take a transactional decision he would have not taken otherwise.⁷⁹⁹ The UCPD provides a very complex definition of what is meant under misleading actions. The essential principle is that a commercial communication must not contain any kind of untrue information. Consequently, as misleading may be considered only those information whose correctness may be verified and not the information for which

⁷⁹⁵ C Willett, 'Fairness and Consumer Decision Making Under the Unfair Commercial Practices Directive' (2010) 33 *Journal of Consumer Policy* 247, 253

⁷⁹⁶ H Collins (n 706) 114

⁷⁹⁷ L Miller *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press 2011), 21

⁷⁹⁸ S Whittaker (n 794) 149

⁷⁹⁹ Article 6 UCPD

assessment aesthetic or emotional criteria apply, as it could be the case with advertising of *the most beautiful beach on the Mediterranean Sea*.⁸⁰⁰

Moreover, even if the provided information is true, a commercial communication will be considered as unfair if it, primarily in the context of overall information, misleads consumer. Such a definition shows a clear intention of broad understanding and application of the rules on misleading actions.⁸⁰¹ It is also very tightly connected with the rules on misleading omissions. This is because the trader provides some true information, but some other information is missing for having an overall clear picture. In accordance with the internal market objective of the Directive, this second possibility of misleading action should be interpreted restrictively since there is not such a clear lie of trader as in case of untruthful information.

It is noticeable that the Directive besides the general prohibition of provision of untrue information, also prohibits the usage of true information that through the manner in which it is presented may mislead the consumer. In *Mars* the provided information was true, but the context in which it was presented was considered as misleading by the German court since despite the fact it was true that product was increased for 10%, consumers could have been misled that the price of the product remained the same or that the product was enlarged for more than 10% since the sign covered more than 10% of the label's surface. However, the ECJ did not agree with the German approach under the justification that such a form of labelling is not capable of misleading an average consumer.⁸⁰²

The necessary pre-condition for applications of these rules is that the untrue information, or the overall presentation of true information, influences consumers' transactional decisions. The mere likelihood that the consumer may perform a

⁸⁰⁰ T Wilhelmsson, 'Misleading Practices' in G Howells, HW Micklitz, and T Wilhelmsson, *European Fair Trading Law—The Unfair Commercial Practices Directive* (Ashgate 2006), 128

⁸⁰¹ *Ibid.*, 126

⁸⁰² Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I-01923

transactional decision is sufficient for fulfillment of this condition. The meaning of transactional decision is to be interpreted very broadly. Besides contract conclusions which are the most obvious example, it also includes the negative decision of consumer: not to purchase certain product. The Guidance to the UCPD enlists as the examples of obvious transactional decisions „placing an order, making a reservation, accepting a commercial offer“.⁸⁰³

Six elements of misleading actions

The Directive enlists six diverse groups of facts in relation to which untrue information shall be provided in order to constitute a form of misleading action. From the wording of the Directive, it seems that these elements are directed primarily to the second limb of the rule on misleading actions which provides that a commercial practice which contains a true information will be unfair if its overall context would mislead the consumer, whereas the untrue information is prohibited in any case.

These six elements are defined in such a broad manner to include all possible situations so this question does not seem to be particularly important from a practical point of view. These elements include, *inter alia*, the existence or nature of the product, the main characteristics of the product, the extent of the trader's commitments, the motives for the commercial practice, the price or the manner in which the price is calculated, the need for a service, part, replacement or repair, the nature, attributes and rights of the trader or his agent as well as provision of any false information regarding consumer's rights.

Besides a general prohibition of the usage of untruthful information, the Directive indicates two additional examples of misleading actions. The first one is the unlawful creation of any confusion with a product, trademark, trade name or a distinguishing mark of a competitor. In case of trademark law, it should not be neglected that the

⁸⁰³ Commission 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices' SEC (2009) 1666, 22

prohibition of the unfair competition was firstly prohibited by Paris Convention on Intellectual Property of 1883. Through this provision, the Directive also influences trademark law since the breach of trademark will also be considered an unfair commercial practice.

The second type of particular form of misleading actions is the breach of the code of conduct by which a trader is bound. In this case, it is noticeable that there is no classical fraudulent behaviour of the trader, but it is rather the breach of a required manner of behaviour that is sanctioned. In case of private regulation, the Directive gives an additional strength to private regulation since it is now binding also from a public (state) legislation perspective. The private regulation also plays a role in case of the two limbs of the general clause. Consequently, the UCPD breach of private regulation is sanctioned by a piece of state (public) legislation.

Shifting of burden of proof

A very important question in law is who shall bear a burden of proof. In case of misleading actions, the question is who should prove that the information provided in a commercial practice was unfair. In general contract law, it is always one person who claims that certain information is false, to prove its falsity. This is the case with the national rules on fraud.

Despite the initial intention to include a clear rule in the Directive which provided that marketing information shall be understood as false if they cannot be proven by a trader,⁸⁰⁴ the adopted version of the Directive did not follow the proposal, but only adopted a significantly less powerful rule in the part of the Directive dealing with procedural elements which necessitate Member States „to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the

⁸⁰⁴ See: Commission, ‘Explanatory Memorandum to the Proposal for a Directive on unfair commercial practices ‘ COM (2003) 356 final, Article 6(1)(f)

proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case“.⁸⁰⁵

In case of the demand for the annulment of the contract that was concluded as a consequence of unfair commercial practice before general civil law court, in lack of any particular consumer law provisions, the consumer would have to base his claim on the grounds of fraud as defined by general contract law rules. The question is how the general civil law court would approach the question of burden of proof. The court would probably consider that the burden of proof lays with the trader. In its case law in the bordering area of the European legislation on trademark, the Court has already pointed out that it is on the party which invokes that has the right to use the competitor’s trademark to prove it.⁸⁰⁶

In that sense, of particular importance is Article 12 of the UCPD. No answer on that, though it would be essentially important.⁸⁰⁷ Accordingly, the guidance says „[i]n order not to trigger the prohibition, traders must be able to substantiate any factual claims of this type with scientific evidence. The fact that the burden of proof rests on the trader appears to be a logical enforcement approach reflecting the principle, more broadly formulated in Article 12 of the Directive“.⁸⁰⁸ This is where the rules on misleading actions play an important role. They apply in cases of consumer contracts, independently of private law sanctions, when consumer contract has been concluded as a consequence of misleading actions, i.e. provision of untrue information or even in cases when true information has been provided but its overall context misled consumer.

⁸⁰⁵ Article 12(1)(a) of the UCPD

⁸⁰⁶ Case C-244/00, *Van Doren + Q. GmbH v. Lifestyle sports + sportswear Handelsgesellschaft mbH and Michael Orth*. ECR I-03051

⁸⁰⁷ HW Micklitz (n 760) 218

⁸⁰⁸ Commission ‘Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices’ SEC (2009) 1666, 55

In such a manner, consumers have received an additional level of consumer protection. For instance, in case of the requirements of conformity of the contract as defined by Directive 99/44/EC on consumer sale, misleading actions will apply in case if the consumer goods do not „comply with the description given by the seller“⁸⁰⁹ or „show the quality and performance which are normal in goods of the same type...taking into account any public statements on the specific characteristics of the goods made by the seller...particularly in advertising or labeling“.⁸¹⁰

On the other hand, in cases when a misleading action results in a contract, the applicable remedies will be the rules on fraud. In some of the national contract laws of Member States, the mandatory condition for the application of the rules on fraud is that fraud represents the main reason due to which a party entered into a contract. If that is not the case and the party would have entered a contract even if it had know about the fraud, but under different conditions, the general rules on fraud are not applicable. In these kinds of situations, a contract cannot be rescinded, and only damages are awarded.

The rules on misleading actions, however, equalize these two situations through a very broad provision of what is understood under the transactional decision. It was possible to see that condition for the application of the rules of misleading actions does not necessarily understand that a party was induced to enter into a contract, but also that he had concluded a contract under certain terms, this will also constitute a form of misleading action.

Aggressive commercial practices and duress

Besides protecting consumers from the unfair content of a commercial practice, the Directive also protects consumers from unfair approach by traders, securing thus his free consent to enter into a contract. The aggressive approach of traders is prohibited

⁸⁰⁹ Article 2(a) of Directive 99/44/EC on consumer sales

⁸¹⁰ Article 2(d) of Directive 99/44/EC on consumer sales

since it is capable of negatively affecting consumers' decision making process by materially impairing consumers' freedom of choice.⁸¹¹ A prohibition of certain forms of aggressive behaviour can be found in some older piece of EU consumer legislation, but a general prohibition of all aggressive practices was missing.

For instance, the Commission identified that consumers are particularly exposed to the pressure of the trader to acquire his product or use his services in case of door step selling when there is a moment of shock for the consumer and lack of time and means to think well and examine the price and characteristics of the offered product. This is why Directive 85/577/EEC on doorstep selling, as the EU consumer contract law instrument, provided a particular legal regime of protection for this kind of contracts.⁸¹²

In order to be prohibited, an aggressive practice has, according to the UCPD, first, to impair consumer's freedom of choice, and, second, to cause him to take a transactional decision he would have not taken otherwise. In accordance with the average consumer as the main benchmark for assessment whether a practice is aggressive, a certain level of robustness is expected, which means that the impairment of freedom of choice is not so easy as in case of a vulnerable consumer.⁸¹³ This must always be taken into consideration by a competent authority that applies the rules on unfair commercial practices.

The examination of some of concrete examples of aggressive practices enlisted in Annex I of the Directive may show that aggressive behaviour of a trader towards the consumer shall have a very broad meaning so that it includes practices which are

⁸¹¹ Commission, 'Explanatory Memorandum to the Proposal for a Directive on unfair commercial practices' COM (2003) 356 final, 21

⁸¹² Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31

⁸¹³ G Howells, 'Aggressive Practices' in G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 175

rather irritating than aggressive.⁸¹⁴ For instance, this would be the explicitly envisaged case of a traders' „persistent and unwanted solicitations by telephone, fax, e-mail or other remote media“. ⁸¹⁵ The rules on aggressive practices also provide protection to all consumer's contractual rights since imposition of any kind of onerous or disproportionate barrier by the trader on consumer so that he is allowed to enforce his contractual rights, will represent a form of aggressive commercial practice. This would be the case whenever a trader, in an illegitimate manner, disables consumers from enforcing his right of withdrawal by putting up a lot of administrative obstacles.

Aggressive behaviour of traders was already, to a large extent, sanctioned by the national rules on contract and criminal law, but the UCPD extended this protection by adding a new layer of consumer protection through public law proceeding without the need to initiate a civil or criminal law proceeding.⁸¹⁶ Consumer victims of aggressive practices will typically have to rely on the national contract law remedies for violence

Understanding of aggressive practice

According to the Directive, „[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“. ⁸¹⁷

The very wide definition, includes a broad scope of unfair practices. It is possible to notice that the Directive has three main elements: first, the aggressive behaviour that,

⁸¹⁴ G Howells, 'The UCPD – A Missed Opportunity?' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 107

⁸¹⁵ Point 26 of the Annex I of the UCPD

⁸¹⁶ Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee, COM (2013) 139 final, 18

⁸¹⁷ Article 8 of the UCPD

secondly, impairs consumers' freedom of choice and, third, and that such a behaviour will have the influence of consumer's transactional decision. The third of the conditions is contained in all of the three small general clauses, and its analysis has shown that it is to be understood very broadly. Therefore, since there are no special particularities required for transactional decision making in case of aggressive behaviour than those relevant for misleading practices, I will focus on the first and second conditions and different aggressive manners in which trader can hinder consumers' freedom of choice.

According to the Directive, there are three manners of aggressive behaviour: 1) harassment, 2) coercion and, 3) undue influence. The Directive does not explain what is meant under harassment and coercion, where undue influence is defined as „exploiting a position of power in relation to the consumer so as to apply pressure, even with- out using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision“.⁸¹⁸

The reason why the Directive provides only the definition of the undue influence, and not of coercion and harassment lies in the fact that these two notions are innovative terms in private law, established as part of the strategy of construction of an original system of European private law which ideally will not be melted with the national legal systems. On the other, undue influence is a common law term for a form of consent defect. This explains why the definition has been provided to establish an autonomous, European, meaning of undue influence as contrary to the term of English law.

The list of seven forms of aggressive practices enlisted in Annex I to the Directive which are always considered as unfair proves excellently how wide the potential scope of application of the rules on aggressive practices is. For instance, an aggressive practice will be the imposition of any kind of illegitimate obstacle for a shift from one

⁸¹⁸ Article 2(1)(j) of the UCPD

mobile phone operator to the other phone. It is possible to notice that in this case no aggressiveness can be spotted, but again since it represents a form of an aggressive practice.

In the case *Purely Creative*, the object of the preliminary reference before the ECJ was one of the seven explicitly enlisted forms of the aggressive practices, i.e. the interpretation of the provision which identifies the making of false impression that consumer has won a prize. The Court concluded that an aggressive practice will be the provision of false information that the consumer has already won a price whereas a consumer has to pay money or incur any cost regarding obtaining the information or the possession of the prize. The ECJ interpreted this provision very strictly and considered that in the occurrence of any kind of costs, irrelevant whether a trader will benefit from it, is sufficient. This prohibition is absolute.⁸¹⁹ The objective of ensuring a high level of consumer protection established by the Directive requires that no cost may imposed on the consumer who has won a prize.⁸²⁰

The basis for such a prohibition is that informing a consumer that he has won the prize has a psychological effect on consumers that, considering that they have won the price, make a transactional decision they would have not have otherwise made.⁸²¹ These costs might relate to, for example, calling of the premium rate telephone numbers to get additional information about the price, traveling at great expense to collect a priceless object or paying the delivery costs of a book consumer already owns.⁸²²

⁸¹⁹ Case C-428/11 *Purely Creative e.a. v Office of Fair Trading* [2012] ECR I-0000, para 42

⁸²⁰ *Ibid*, para 48

⁸²¹ *Ibid*, para 49

⁸²² *Ibid*, para 38

Adoption of new contract law remedies

Formation of new remedies

In certain cases, the UCPD caused an establishment of new contract law remedies. Namely, as a consequence of transposition of the rules of the Directive into their national legal systems, some Member States introduced new contract law remedies whose main objective is to provide adequate protection to an individual consumer who has concluded a contract under the impact of an unfair commercial practice.

This is because the capacity of previously existing, traditional contract law remedies was not capable of adequately remedying the consequences of unfair commercial practices on an individual consumer.⁸²³ Since the UCPD itself does not provide any provision in that regard, some of the Member States developed new contract law remedies which facilitate consumers to remedy the negative consequences of unfair commercial practices.

Belgian law

Besides its significant influence on consumer contract law terminology,⁸²⁴ the UCPD also had influence on the expansion of contract law in Belgium. Accordingly, the Belgian *Law on market practices and consumer protection* in its general part on consumer contracts, provides that a consumer contract may be interpreted in particular according to the commercial practices that were directly connected to it.⁸²⁵

Further to this, Belgian law developed a particular contract law remedy in case of breach of the rules on unfair commercial practices. This provision, first, allows to consumer to ask traders for reimbursement for the delivered product without the requirement to return the product to trader within reasonable period of time as of the moment when the consumer knew or was supposed to know about the existence of the

⁸²³ HW Micklitz, 'Unfair Commercial Practices and European Private law' in C Twigg-Flesner (ed) *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010)

⁸²⁴ C Cauffman, 'The Impact of EU Law on Belgian Consumer Law Terminology' Maastricht European Private Law Institute (M-EPLI) Working Paper No. 2013/04, 3

⁸²⁵ Article 40(2) of Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur

unfair commercial practice.⁸²⁶ Such a possibility is given to consumers not in all cases of trader's engagement into unfair commercial practices, but only in case of six types of misleading and aggressive practices, which are considered particularly severe, from the list of thirty one practices of Annex I of the Directive as transposed into Belgian law.⁸²⁷

Second, for the remaining cases of the unfair commercial practices, when a contract was concluded under the influence of an unfair commercial practice other than those six, the judge may order the trader to reimburse all the money that the consumer paid for a delivered product without the obligation of the consumer to return the product. The difference is that in the previously mentioned set of six cases the option to ask for reimbursement is on the consumer, whereas in the remaining cases, that is left to the discretionary power of the judge who shall decide.

However, this remedy provided by Belgian law seems to have produced very limited effects in practice. Three main factors have been identified as the main reasons for non-extensive application of these rules: „1) the unclear application criteria, which make it hard to predict whether or not the remedy will be applied, 2) the fact that consumers will have to bear the costs of the procedure and compensate the trader in case they cannot convince the court to apply the remedy and 3) the fact that consumers and even legal practitioners are not aware of the existence of this remedy“.⁸²⁸

⁸²⁶ Article 41 of Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur

⁸²⁷ Art 91 (12,16,17) and art 94 (1,2,8) of Belgium law UCPD (points 12, 16 and 17 of Annex I) and points 24,25 and 31 of the Annex I to the UCPD

⁸²⁸ R Steennot, 'The Belgian Civil Remedy in Case of an Unfair Commercial Practice Towards a Consumer: an effective, proportionate and dissuasive sanction?' *Advances in Economics, Risk Management, Political and Law Science* ; available at <http://www.wseas.us/e-library/conferences/2012/Zlin/EPRI/EPRI-01.pdf>, 22

Luxembourgish law

According to the Luxembourgish law, besides a fine of up to 120 000 EUR for a trader who breaches the rules of *Consumer Code* on unfair commercial practices,⁸²⁹ a clause or all clauses of a consumer contract which are concluded as a consequence of unfair commercial practices are considered as null and void. The nullity can be invoked before the competent court only by the affected consumer.⁸³⁰ Consequently, this is a classic example of individual redress that Luxembourgish law has developed.

French law

Similarly to the case of Luxembourgish law, the French law introduced that a consumer contract concluded under the impact of an aggressive commercial practice is to be considered as *nul et de nul effet*.⁸³¹ In other words, aggressive practice results in absolute nullity of contract. However, such effects are only limited to aggressive practices whereas in case of failure to present all material information in an advertisement or in case that they are not true, the applicable remedies will be the ones derived from general contract law on consent defects, and fraud (*dol*) in particular. Consequently, the consumer will be allowed to terminate the contract (art of Code Civil) and will have the right to ask for damages.⁸³²

It is true that from the perspective of the directive making of such a distinction is legal, but it is again hard to explain why the French policy makers decided to introduce such a sanction only in case of aggressive practice, whereas in case of misleading practices general rules of contract law from Code Civil apply. The explanation may be found in the fact that misleading practices in French legal theory are considered as less harmful for consumer-to-business relations than aggressive practices.⁸³³

⁸²⁹ Art. L. 122-8 (1) of the Luxembourgish Consumer Code

⁸³⁰ Art. L. 122-8 (2) of Luxembourgish Consumer Code

⁸³¹ Article L. 122-15 of the French Consumer Code

⁸³² T Revet, J Rochfeld and C Peres, 'Les pratiques commerciales trompeuses sur les sources du droit des contrats' (2008) 4 *Revue des Contrats* 1083

⁸³³ G Chantepie, 'Vers une harmonisation des sanctions?' in E Terryn and D Voinot, *Droit européen des pratiques commerciales déloyales: Évolution et perspectives* (Larcier 2012), 90

The United Kingdom

In English law, the existing traditional doctrines on consent defects of private law were found to be unsatisfactory to provide an adequate legal protection for individual consumers. The problem was that the existing concepts of consent defects are not adapted to the UCPD and consumer needs. For example, consumers seldom use the concepts misrepresentation, duress and undue influence as defined under English contract law since they are complicated.⁸³⁴ Accordingly, this was the reason why after transposition of the UCPD in English law, the Law Commission initiated a process of introduction of private law redress in English law. The same initiative was launched in Scotland, by the Scottish Law Commission.

The Law Commission and the Scottish Law Commission in their mutual Report on Consumer Redress for Misleading and Aggressive Practices pointed out the fact that the Unfair Trading Regulations of 2008 does not give a right to consumer to initiate himself an action in order to receive compensation or other remedies.⁸³⁵ This is why consumers „must rely on existing private law doctrines, such as the law of misrepresentation and duress. This is problematic: the law of misrepresentation is complex and uncertain; while the law of duress leaves gaps in protection“.⁸³⁶ Accordingly, new remedies are about to be adopted in the UK, in particular the right to unwind as pointed out in Consumer Protection (Amendment) Regulations 2014 accepted by the British Government.⁸³⁷

Poland

In Poland, the consumer who was a victim of unfair commercial practice has the right to file a claim directly against traders and to ask for cancellation of the contract.

⁸³⁴ G Howells, ‘Unfair Commercial Practices – Future directions’ in R Schulze and H Schulte-Nölke, *European Private Law - Current Status and Perspectives* (Sellier 2011), 137

⁸³⁵

⁸³⁶ Law Com No 332 and Scot Law Com No 226, Consumer Redress for misleading and aggressive practices, available at http://lawcommission.justice.gov.uk/docs/lc332_consumer_redress.pdf

⁸³⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300129/bis-14-693-consumer-protection-amendment-regulations-2014.pdf

However, as a consequence of social and economic factors, i.e. primarily the consumer's ignorance of their rights and lack of motivation, willingness and resources to ask for contract termination, the consumer rarely initiates individual actions against traders in practice.⁸³⁸

⁸³⁸ M Namyslowska, 'To B2C or not to B2C, Some reflections on the Regulation of Unfair Commercial Practices from a Polish Perspective' (2013) 36 J Consum Policy 329, 337

Remedies under consumer contract law

Contract law remedies of European contract law

Despite the fact that, generally speaking, the rules on unfair of commercial practices are focused on the collective dimension of the protection of consumer interests, whereas the provisions of consumer contract law prevalingly deal with individual protection, an intense mutual interaction between these two sets of rules may be observed. This interaction and the mutual correlation will be examined in this part of the Chapter. To start with, on the one hand, the rules on unfair commercial practices may represent useful tools for consumers to secure their contractual rights and remedies that are granted to them by contract law instruments.

On the other hand, a consumer who is victim of unfair commercial practices that resulted in the formation of a contract, besides relying on the traditional contract law concepts, in particular those on consumer defects, may also use some of the legal instruments that have been introduced by European contract law and transposed in national legal systems as remedies. Among them, provisions related to unfairness of a contract term, right to conformity, right of withdrawal and inertia selling seem to be of particular importance. These concepts may prove to provide, in certain cases, a very efficient protection to the consumer who has concluded a contract under the impact of unfair commercial practice.

Directive 93/13/EEC on unfair contract terms

The ambiguous relationship between the UCPD and the UTD

Directive 93/13/EEC on unfair contract terms (“UTD” or “Directive 93/13/EEC”) is one of the most important instruments of EU Consumer Law. Adopted more than twenty years ago, it was the first piece of European legislation which introduced the concept of the duty of good faith into EU consumer law, though with limited effects being applied only to non-individually negotiated contract terms.

The main objective of the UTD is the prohibition of stipulation of unfair contract

terms in consumer contracts and continuous usage of such a practice by traders. In accordance with such a purpose of the UTD, Member States are required to secure that consumers are not bound by contract terms which are unfair.⁸³⁹ This is because traders traditionally had a common business practice of imposing the same contract terms to a large groups of consumers who, due to their lack of bargaining power and economic incentive, are not capable of imposing their own terms.⁸⁴⁰ Unlike the UCPD, the UTD is a directive that requires only minimum harmonisation.

German law was the inspiration for the adoption of unified European rules both in the area of unfair commercial practices and the area of unfair contract terms since both of these branches of law have their roots based in the German legal tradition: The German Act on General Terms and Conditions of Trade (AGBG) and The German Unfair Competition Act (UWG).⁸⁴¹ The objective of the UTD partially overlaps with the UCPD since the UTD is also aimed at protecting consumers from unfair behaviour of traders, in particular thorough prohibition of stipulation of contract terms in consumer contracts that are considered as unfair. This is why Advocate General Trstenjak calls for „a coherent interpretation of the relevant rules of law so as to avoid conflicting assessments, which is all the more necessary as the two directives demonstrate a convergence in the direction they take to afford protection, in as much as both seek to protect the ability to make judgments and the freedom of choice in business dealings“.⁸⁴²

After the adoption of the UCPD, what remained imprecise was the relationship between the provisions of the two directives, in particular regarding their mutual correlation.⁸⁴³ On the one hand, it was unclear what were the consequences on a contract term of a situation when it is discovered that such a contract term was

⁸³⁹ Article 6(1) of the UTD

⁸⁴⁰ HW Micklitz, N Reich and P Rott, *Understanding EU Consumer Law* (Intersentia 2009), 122

⁸⁴¹ HW Micklitz, 'A common approach on the collective enforcement of Unfair Commercial Practices and Unfair Contract Terms' Conference Paper Durham Law School, December 2012, 1

⁸⁴² Opinion of Advocate General *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* Case C-453/10 [2012] ECR I-0000, para 90

⁸⁴³ See S Orlando (n 788)

stipulated as a result of an unfair commercial practice. In particular, the question was whether an unfair commercial practice necessarily means that a contract term concluded as its outcome shall also be automatically declared unfair. In that aspect it was argued that the requirements of good faith in the fairness test of the UTD allows, and even obliges, the national courts to take into consideration the advertising practicing while assessing the fairness of a contract term.⁸⁴⁴ On the other hand the dilemma was whether usage of contract terms represents a form of unfair commercial practice.

Herein, it is important to emphasise that there is difference among national legal systems regarding legal consequences of the cases when a contract term is found unfair. Accordingly, some of Member States, such as Germany, Spain or Romania, opted for the principle of absolute nullity, i.e. an unfair contract term is considered null and void. The relative nullity, i.e. that an unfair contract term is voidable and consumer may ask for its annulment, was also one of the choices of national legislators, for instance those in the Netherlands or the Czech Republic. However, in some of Member States (Belgium, Poland), it seems to be unclear what are the legal consequences of an unfair contract term. Scandinavian countries allow their courts to substitute or modify the unfair provisions in order to make them fair.⁸⁴⁵ This initial observation is important since it shows that the lack of unified approach towards effects of unfairness of a contract term among Member States, unlike in case of unfairness of commercial practice where in all countries there is unanimous prohibition of all practices which are found to be unfair.

Indirect effects of unfair commercial practice on contract term

The ambiguousness between the rules on unfair commercial practices and unfair contract terms was clarified by the ECJ in its judgment in *Perenicova*.⁸⁴⁶ This was a

⁸⁴⁴ T Wilhelmsson, 'Contract Law Enforcement of Provisions on Marketing: The Solution of the Consumer Sales Directive' in H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices*, 239

⁸⁴⁵ H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium* (Sellier 2007), 391 et seq.

⁸⁴⁶ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000

case referred to the ECJ by a Slovak court in which the dispute arose over a consumer credit agreement whose several terms were challenged by consumers as being unfair. Especially problematic was the stipulated interest rate which was higher than the amount which had been initially presented to consumer before conclusion of the contract. One of the two main questions raised for a preliminary reference was whether provision of false information of the annual percentage rate in consumer credit contract represents a form of unfair commercial practice.⁸⁴⁷

Furthermore, if the answer to this question was affirmative, the Court was asked whether this automatically leads also to the unfairness of a contract term which represents the result of such an unfair practice. In its judgment, the Court stated that provisions of untrue information of the annual percentage rate is to be considered as a form of misleading action.⁸⁴⁸

Such an approach is in accordance with the rules on provision of false information to the consumer in relation to the price provision as defined by the UCPD.⁸⁴⁹ However, the unfairness of such a practice does not result directly in the unfairness of a contract term concluded as a consequence of such a practice, but it shall represent one of criteria that the national courts may take into consideration while assessing the fairness of a contract term as provided by the UTD.⁸⁵⁰ The explanation of the Court was primarily based on the formal separation between the two sets of rules introduced by the UCPD.⁸⁵¹ As a consequence, the fact that a contract was concluded as a consequence of unfair commercial practice cannot have any kind of direct effect on the validity of a contract.

⁸⁴⁷ The other question was exclusively related to the interpretation of the provisions of the UTD, so it is not relevant for the examination performed here.

⁸⁴⁸ It is possible to notice that some of the Governments in their written observations, considered this practice as being not a form of misleading actions, but a misleading omission (see Opinion of Advocate General in Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS financ spol. s r. o.*, [2012] ECR I-0000, para 32-33) which shows very well how tight in practice is the connection between the misleading actions and misleading omissions.

⁸⁴⁹ Article 6 of the UCPD

⁸⁵⁰ Opinion of Advocate General in Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 43

⁸⁵¹ Article 3(2) of the UCPD

What seems particularly noticeable in *Perenicova* is the diversity of the view of the parties that submitted their observations on the case to the ECJ. In that sense, slightly surprising are the arguments of the Commission which in its submission to the Court asked for a very narrow and strict interpretation of article 3(2) of the UCPD arguing that any prescribed contract law consequence of an unfair commercial practice by national laws are to be considered as illegal and as being contrary to EU law and maximum harmonization character of the Directive.⁸⁵² Bearing in mind the fact that article 3(2) of the UCPD was primarily introduced as a safeguard of national contract laws, representing an outcome of Member States' opposition to any kind of interference into their contract law traditions, it is very surprising to notice that a view of the Commission is more extreme than of the Member States which participated in this case with their submissions.

The Austrian Government claimed that the sanction of contract invalidity is to be considered as disproportionate, as well as contrary to article 3(2) of the UCPD, but did not argue that this article prohibits prescription of such effects in national laws.⁸⁵³ The submissions of the German and Slovak governments were materially more moderate and in line with the views of the Court pointing out that the fact that an unfair commercial practice may have influence on the fairness of contractual terms in accordance with rules on assessment of contract term fairness prescribed by article 4 of the UTD.⁸⁵⁴ The Spanish Government argued for a much more consumer friendly interpretation claiming that an unfair commercial practice shall have effects on validity of consumer credit agreement if that is a more favourable approach for the consumer who has been affected by such a practice.⁸⁵⁵

⁸⁵² Opinion of Advocate General in Case C-453/10 *Jana Perenicová and Vladislav Perenic v. SOS financ spol. s r. o.*, [2012] ECR I-0000, para 41

⁸⁵³ Opinion of Advocate General in Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 39

⁸⁵⁴ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 37 and 40

⁸⁵⁵ *Ibid.*, 38

However, in *Perenicova*, the Court confirmed its previous case law on the interpretation of article 6(1) of the UTD which required from national courts or other competent authorities to „draw all the consequences that follow under national law, so that the consumer is not bound by that term“.⁸⁵⁶ Further to this, competent national authority shall assess whether a contract can exist without the unfair contract term. Article 6(1) of the UTD itself, as it stands, does not allow the national authority to declare the entire contract void if such a contract can exit without the unfair term.

The voidance of the entire contract may be provided only by Member States, in accordance with the principle of minimum harmonisation as prescribed by the UTD, under the condition that such a measure provides a better level of protection for the consumer.⁸⁵⁷ According to the UTD a contract term is unfair when it was not individually negotiated, it is contrary to the requirements of good faith and this causes a significant imbalance in the mutual rights and obligations arising from consumer’s contract to the detriment of the consumer and this test must always be performed.

In summation, two main consequences of the judgment are that, first, the stipulation of an unfair contract term will typically represent a form of unfair commercial practice, and, second, that the breach of the provisions of the UCPD does not have a direct effect on a validity of a contract or its term, but it will represent one of the factors that may be taken into consideration while deciding whether a term is unfair. A crucially important question is what this decision implies for the national legal systems since a diversity of approaches towards a validity of a contract, or a contract term, were identified as one of the most problematic issues in the application of the Directive.⁸⁵⁸ In other words, the question concerns which cases the consumer, as a victim of unfair commercial practices which resulted in a contract, will be actually able to rely on the rules on unfair contract terms as an effective remedy.

⁸⁵⁶ Ibid, 30

⁸⁵⁷ Ibid, 36

⁸⁵⁸ S Whittaker, ‘The Relationship of the Unfair Commercial Practices to European and National Contract Laws’ in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 151-154

Which terms are covered?

The scope of application of the UTD is limited exclusively to non-individually negotiated contract terms. This means that a term which has been individually negotiated falls out of the scope of the UTD. Initially, the Commission also intended to include in the scope of application of the directive the contract terms which were individually negotiated, but such an idea was eventually rejected.⁸⁵⁹ However, non-individually negotiated terms are to be interpreted in a very broad manner.⁸⁶⁰

Therefore, on the European level fairness of individually negotiated terms are only covered by the provisions of the UCPD, unless the scope of application of the UTD is widened under the national laws. Consequently, an individually negotiated contract term, if it is false, may represent a form of unfair commercial practice. Moreover, the UCPD protects consumers *ex ante* from unfair contract terms, since, under the condition they fulfill the requirements to be considered as unfair commercial practices, the terms will be prohibited before the contract is concluded.

While examining the question posed by the referring court on the effects of unfair commercial practices in contracts, what has to be taken into consideration is the other question posed in the same request for preliminary reference: whether a consumer contract containing unfair contract terms is to be considered in its entirety as non-binding for consumers if that is more advantageous for consumers. The Court in its answer opted for the objective approach, explaining that contracts will continue to exist without the unfair contract term if that is possible. Any advantages for consumers are not taken into consideration while deciding whether a contract may exist without the unfair contract term unless such a possibility has not been established under minimum harmonization principle advocated by the UTD.

⁸⁵⁹ See HW Micklitz, N Reich and P Rott (n 840) 123 et seq

⁸⁶⁰ P Nebbia, *Unfair Contract Terms in European Law* (Hart 2007), 118

It should not be neglected that the UTD has a limited scope of application, and applies only to non-individually negotiated terms, whereas the terms which were individually negotiated fall out of the scope of the directive. In certain cases, they may fall under the transparency requirements under article 5 UTD, but legal consequences of breach of transparency requirements are not defined by EU Law. Moreover, Directive 87/102/EEC on consumer credit, as noticed by the Advocate General, does not provide any legal consequences in case of incorrect indication of annual percentage rate.⁸⁶¹

Therefore, the follow-up question is what is the consequence for the contract or its term if its stipulation is not sanctioned by any EU legal instrument and the national legislation does not provide adequate legal mechanisms. This was probably on the mind of a judge in a Slovakian court who could see how disadvantageous these contracts for consumers could be. Considering that the Court might opt for the objective interpretation while deciding whether the entire contract containing unfair terms should be void, as it eventually did. The Court asked whether the fact that there was an unfair commercial practice could save consumers from the contract.

Eventually, what is the outcome of *Perenicova* is that the unfair commercial practice cannot *per se* have any direct effects on the validity of the entire contract, but only on its terms, through the application of the rules on assessment of fairness of contract terms as established by the UTD. However, again this impact is limited only to the particular contract terms since the unfairness of a contract term will lead to the nullity of the entire contract only if the contract cannot continue to exist without these contract terms.

As pointed out above, what remains problematic is when a particular contract term cannot be subsumed under the UTD. What are then the contractual consequences of

⁸⁶¹ Opinion of Advocate General in Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 33

unfair commercial practices? The burden of regulating consequences on a contract stipulated as an outcome of unfair commercial practice has remained with the Member States. However, the question is what if the Member States, as it is the case in Slovakia, do not provide an adequate mechanism for consumers in the case of contracts stipulated under the impact of unfair commercial practices?

Transparency requirements

Directive 93/13/EEC on contract terms imposes strict requirements on traders for full transparency of contract terms. In all cases when the consumer is provided with the terms of the contract in writing, these terms have to be drafted in plain, intelligible language.⁸⁶² The assessment of fairness of the main subject matter of the contract and the stipulated price and remuneration are left out of the scope of the application of the directive with the exception of transparency obligation. Therefore, so called ‘core terms’ of a contract will be considered as unfair if they are not provided in plain intelligible language.⁸⁶³ Consequently, the transparency represents the minimum level of regulation that the European Union provides for core terms.⁸⁶⁴ This is why in practice these rules play an important role.

The requirement of ‘plain, intelligible language’ is a standard that shall always be assessed on a case-by-case basis. Its purpose is, as it was identified in *Commission v. Spain* by Advocate General Geelhoed that the terms contained in general conditions have to be „completely plain and intelligible to the consumer. Their meaning must not depend on which of a number of possible divergent interpretations is placed on them“.⁸⁶⁵ Besides this form of protection, the Directive adds another layer of protection stating that in case of any doubts about the meaning of the term, the one that is most favorable for the consumer will prevail.⁸⁶⁶

⁸⁶² Article 5 of Directive 93/13/EEC on unfair contract terms

⁸⁶³ Article 7(2) of Directive 93/13/EEC on unfair contract terms

⁸⁶⁴ HW Micklitz, ‘Reforming European Unfair Terms Legislation in Consumer Contracts’ (2010) 6 ERCL 347, 366

⁸⁶⁵ Case C-70/03 *Commission v Spain* [2004] ECR I-07999, para 14

⁸⁶⁶ Article 5 of Directive 93/13/EC on unfair contract terms

The UTD requires that consumer contracts have to be drafted in plain, intelligible language. The main purpose of this provision is that the consumer may more easily understand the purpose of a particular contract term, both from a formal aspect, i.e. that a consumer may easily read a contract term prohibiting thus, for instance, a common practice of drafting terms and conditions in a small font, and from a substantial practice, that a term is comprehensible for the consumer, and not, for instance, that a term is drafted in an incomprehensible and ambiguous manner.

This is in line with the general rules on the duty of information as one of the main instruments for consumer protection in EU consumer law, which requires not only clarification of *what* information has to be presented to consumers, but also in *what manner* such an information has to be presented, with the aim that consumer may truly profit from the presented information.

The lack of any prescribed clear consequences of the lack of transparency of contract terms has been subject to serious criticism as one of the most distinguished shortcomings of the directive.⁸⁶⁷ The UTD only establishes the rule of *interpretatio contra proferentem*, i.e. that in case when there is a doubt about the meaning of a term, the more favourable interpretation for consumer shall prevail.⁸⁶⁸ However, it should be noted that in certain cases this will not be sufficient, since a more consumer friendly option would be to declare such a term as void in order to secure a better protection of the consumer than he would receive under a more favourable interpretation of a term.⁸⁶⁹

This has not been clarified by Directive 2011/83/EC which only in a very gentle manner affects Directive 93/13/EEC. In the CESL, the fulfillment of prescribed transparency requirements is one of the factors that shall be taken into consideration

⁸⁶⁷ H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds) (n 845) 348

⁸⁶⁸ Article 5 of the UTD

⁸⁶⁹ P Nebbia (n 869) 142

while assessing fairness of a contract term.⁸⁷⁰ It is not sufficiently clear what is the aim of such a provision, in particular whether a lack of fulfillment of transparency requirement would directly lead to the unfairness of contract term and what effects it will have in practice.

Nevertheless, this is a point in which, from a perspective of consequences and remedies, the UCPD shall play an important role. The rules on misleading omissions establish that a form of misleading omission will be not only lack disclosure of material information to consumers, but also provision of material information to consumer in „an unclear, unintelligible, ambiguous or untimely manner“.⁸⁷¹ Consequently, a usage of contract terms which does not fulfill the transparency requirement prescribed by the UTD may represent a form of unfair commercial practice.⁸⁷² However, such a contract term will represent an unfair commercial practice under a condition that it represents the information „that the average consumer needs, according to the context, to take an informed transactional decision that he would not have taken otherwise“.⁸⁷³

Is there anything else beyond the decision?

The follow-up question is whether something more lies behind the decision of the Court in *Perenicova* and whether the abolition of article 3(2) of the UCPD could result in a more coherent and effective system of consumer protection. I would argue that there are two additional factors that would prohibit direct influence of the breach of the duty to trade fairly on contract law even if this was put aside. The first factor is of legal, and the second is of a factual nature.

First, the factor of legal nature is a lack of a European unified enforcement system and imposed constitutional constraint arising thereof. Namely, in general, there is

⁸⁷⁰ Article 83 of the CESL

⁸⁷¹ Article 7(2) of the UCPD

⁸⁷² S Orlando (n 788) 34

⁸⁷³ Article 7(2) of the UCPD

significant differentiation among the Member States in relation to the established mechanism of enforcement of the provisions of the UCPD as transposed in national legal systems. It is possible to make the distinction between two systems of enforcement: through the general civil courts or through the administrative institution.

In those countries which opted for administrative systems, the relevant authorities can adopt the provisions on infringement of the duty of to trade fairly and issue adequate sanctions. Contrary to this, all contract law consequences of such a practice are to be decided by general courts, usually on the basis of general contract law. Since judges, according to the basic principles of rule of law which applies for all Member States as democratic countries, are allowed to judge only on the basis of the law, and not on the decision of any other state authority, they are constitutionally bound to found their judgements on the conclusions of an administrative authority. However, in practice the decisions of an administrative authority will have strong effects on the general court and they will follow it in a huge majority of cases.

In that sense, the decision of the Court in *Perenicova* respected this tension between public and private law and constitutional constraints established by national legal systems. If there was a unified European regulation of enforcement and if there was more consistency and coherence among different pieces of European legislation on consumer protection, characterized by bifurcation, the Court could have adopted some other decision. However, as it stands now, the Court could have hardly adopted any other decision. In as much, the Court did not change much in national laws regarding the effects of the breach of the duty to trade fairly. Member States were left free to maintain their provisions of direct contractual law consequences of breach of the duty to trade fairly, if they had such rules. On the other hand, the decision clearly showed that a breach of the duty to trade fairly may, although indirectly, have effects on contracts in cases that any of the Member States may claim contrary.

For example, in Hungary as a consequence of the lack of any kind of private redress, the provisions of unfair contract terms have to be used for annulment of contract terms that were found to represent a form of unfair commercial practices and to claim damages. The enforcement of the rules on unfair commercial practices is based on administrative law, whereas claim for damages is based on the provisions on unfair contract terms of the Hungarian Civil Code.⁸⁷⁴

A second factor is of the factual nature and it is based on the fact that the judgment in *Pereinicova* is in accordance with reality. Namely, it is possible to imagine a case where a contract will be concluded as a consequence of unfair commercial practice, but that the contract itself is absolutely legally perfect, that its validity cannot be questioned on the basis of any legal ground. A hypothetical example could be if a consumer due to the false information in advertising comes to a travel agency where an employee explained to a consumer that the information on price was false, and provided consumer with corrected information under which the consumer accepts in order to conclude the contract. Such a contract would be absolutely valid, hardly any consent defects could be raised as a grounds for voiding of contract. Opposite to this, advertising would be a form of unfair commercial practice since the provided information was misleading and it had the effect of the consumer to go to the travel agency and make a transactional decision.

This example shows that a contract concluded as a consequence of commercial practice may be perfectly valid. Its autonomous invalidity on the basis of the breach of the duty to trade fairly would absolutely represent a negative phenomenon that would be contrary to the interest of the consumer. Contrary to this, it is not possible to imagine a case where an unfair contract term would not be found to represent a breach of the UCPD. Eventually, if the term cannot be subsumed under some of the thirty-

⁸⁷⁴ V Balogh and K Cseres, 'Institutional Design in Hungary: A case Study of the Unfair Commercial Practices' (2013) 36 *Journal of Consumer Policy* 343, 362

one listed practices or the small general clauses, both of the conditions defined in the two limbs would be always fulfilled in case of an unfair contract term.

Further to this, even in cases when a consumer contract has been concluded as the outcome of an unfair commercial practice, the annulment of such a contract may not always be in the interest of the consumer. If as an example is again taken a contract on consumer credit in which traders imposed an unreasonably high annual percentage rate that is found to be illegal, it may just so happen that it is in the consumer interest to simply maintain a contractual relation just with modified annual percentage rates that would be decreased to a legally acceptable rate.

This is because a consumer, for instance, might have already taken the money and spent it, or he really needs it urgently for a certain purpose, and now in case of contract annulment, according to the general rules of contract law, he or she would be obliged to give back the money. The amount of damages the consumer is entitled to would most probably not be near to the amount of the credit obtained, so it may be in his best interest to stay in that contractual relationship. Of course, from a financial perspective for a consumer the ideal situation would be to keep what he received after contract annulment without the obligation to give it back to the trader, as it is provided by some national legal systems, such as Belgian law. However, such a sanction may be, arguably, found to be disproportionate.

Directive 2011/83/EU on consumer rights

Right of withdrawal

The duty of information and the right of withdrawal represent two most important instruments for consumer protection introduced by Directive 2011/83/EU. Herein, I address only the right of withdrawal since the duty of information is examined in detail in Chapter IV of this Thesis. From the perspective of the UCPD, the right of withdrawal, on the one hand, may represent an easy and efficient means to remedy the consequences of unfair commercial practice on a contract, whereas, on the other hand,

the rules on unfair commercial practices provide an additional level of protection to the consumer's right of withdrawal.

The right of withdrawal itself is a fundamental right of consumer that is granted to him by the European legislation in case of several types of consumer contracts. It represents a material exception to the general contract law principle *pacta sunt servanda*, allowing consumers to freely terminate an already concluded contract.

Directive 2011/83/EU grants the right to consumers, in case of doorstep selling and distance selling contracts, hereby confirming the approaches that already existed in the old directives on doorstep and distance selling.⁸⁷⁵ Accordingly, in case of these contracts, the consumer is given a period of fourteen days to once more re-consider their economic decision and accordingly terminate a contract without the obligation to provide any kind of explanation or justification, with a simple expression of will. In case when a trader has not informed the consumer about the existence of this right, the consumer has the right to terminate the contract fourteen days as of the date when traders provides him with that information. In any case, this additional period of time is limited to one year at maximum, in which case the Directive 2011/83/EU precluded the previously unlimited period of time in case of trader's failure to inform consumer about this right as it was identified by the ECJ.

Consequently, in case of these two types of contracts, a person who concluded a contract under the influence of the unfair commercial practice may use this right under the condition they find this out within fourteen days that they concluded the contract. This is a simple and easy way for a consumer to remedy an unfair commercial practice. Namely, the right to withdraw represents a powerful remedy for consumers in case of certain types of unfair commercial practices, such as for instance aggressive door-step selling.⁸⁷⁶ In these kinds of cases consumers have some time to reconsider

⁸⁷⁵ Article 9 of Directive 2011/83/EU on consumer rights

⁸⁷⁶ MB Loos, 'Rights of Withdrawal' in G Howells and R Schulze (eds) *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), 245–249

their decision and remedy the contract concluded as an outcome of unfair commercial practice.

The consumer is given this additional period to once more re-consider their decision due to the particularities of these contracts. In case of doorstep selling, consumer is not psychologically ready to make an economic decision, there is this surprising moment, whereas in case of distance selling he or she does not have a full picture of the product they are acquiring. The circumstances related to conclusions of these contracts show that these are such types of consumer contracts where unfair trading practices of a trader may particularly be present and dangerous and this is why the European legislation has regulated, to a certain extent, fairness of commercial practices in these two areas even before the adoption of the UCPD.

Equally, in case of some other, particularly sensitive types of consumer contracts such as timeshare or consumer credit, consumers are also given this period of withdrawal, which eventually may represent a very adequate means that the consumer may use to terminate a contractual relation, rather than more complicated rules on consent defects, when used within the prescribed period of time.

Failure to inform consumer as a form of UCP

Traders' failure to inform the consumer about the existence of his or her right of withdrawal will represent a form of commercial practice, as it is explicitly and directly pointed out by the UCPD. Unlike other cases of information requirements, such as omission of material information on product characteristics or provision of false information on after-sales services, which may directly influence consumer's decision on a pre-contractual stage whether or not they will conclude a contract, the information on the right of withdrawals has not received such a power. It rather has influence on consumer once the contract has been concluded. If the consumer is not duly informed about the right to withdraw from a contract, the consumer is simply

much less likely to withdraw from a contract.⁸⁷⁷

If a consumer knows that he or she is allowed to withdraw from a contract without any particular formal requirement and without any negative consequences, he or she might decide to use their right to terminate the contractual relation. This is particularly present now with the introduction by Directive 2011/83/EU of mandatory maximum period of one year during which consumer may withdraw if a trader has not informed him about his right.⁸⁷⁸ This rule precluded the previously existing case law which did not put any time limits in such a case.⁸⁷⁹

In addition to this, the imposition of any kind of illegal obstacles to the execution of the consumer's right of withdrawal will also represent a form of unfair commercial practice. For instance, that would be the case when a trader, through threats to the consumer, prohibits him from withdrawing from a contract. Such a practice would certainly represent a form of aggressive commercial practice. Accordingly, through the provisions on unfair commercial practices, one of fundamental rights of consumers to withdraw from certain types of consumer contracts has been additionally secured.

Inertia Selling

As a consequence of the prohibition of inertia selling as one of thirty-one exhaustively enlisted in the Directive, European contract law through Directive 2011/83/EU on consumer rights developed a particular contract law remedy for a consumer who was a victim of inertia selling. In general, this is one of the few of contract law's remedies developed on a European level, which represented a direct, contract law, answer to the introduction of pan-European prohibition of inertia selling through the UCPD.

⁸⁷⁷ A Nordhausen, 'Information requirements in E-commerce directive and the Proposed Directive on Unfair Commercial Practices; in Howells G, Jansen A and Schulze R (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate 2004)

⁸⁷⁸ Article 10(1) of Directive 2011/83/EU on consumer rights

⁸⁷⁹ Case C-481/99 *Georg Heining and Helga Heining v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945

Inertia selling represents another crossroad point on which the rules on unfair commercial practices and contract law intersect. EU Consumer Law is, particularly, dedicated to the protection of consumers from common forms of aggressive practice by traders to a non-solicit supply with goods or provisions of service for which they subsequently demand payment under the justification that consumers have agreed to enter into a contract simply by remaining silent.

Such traders' practices are based on the fact that consumers are sometimes simply too passive and lazy to return the product, and therefore, it would be simply easier for them to pay for it. In addition, some consumers are misled to think they obtained a product for free, so they feel free to keep or use it, thinking that they will not have to provide any compensation. Initially, Member States had diverse approaches to the prohibition of inertia selling, i.e. inertia selling was not prohibited by all national legislations, particularly those of the "new" Member States. For instance, Poland, Czech Republic or Latvia had no particular rules that would prohibit inertia selling.⁸⁸⁰

Today, inertia selling is prohibited in all Member States as one of the thirty-one exhaustively listed practices in Annex I of the UCPD which shall in all circumstances be considered as unfair.⁸⁸¹ In that manner, the Directive prohibits traders from imposing contractual relations on the consumer. However, the UCPD does not define what is a direct contract law consequence on inertia selling for a victim of such an unfair practice, but only sanctions the unfair behaviour of the trader. This is why the Commission considered that it is necessary to introduce through a new unified contractual remedy whose main purpose is to exempt consumer from any kind of obligation from unsolicited supply of goods or provision of service.⁸⁸²

⁸⁸⁰ H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds) (n 845), 570-571

⁸⁸¹ Article 5(5) and Point 29 of Annex I of the UCPD

⁸⁸² Recital 60 of Directive 2011/83/EU on consumer rights

Accordingly, Directive 2011/83/EU on consumer rights, directly referring to the UCPD which inspired the European legislator to provide a contractual remedy to consumers in case of inertia selling, establishes that a consumer is liberated “from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services”.⁸⁸³ The fact that consumers do not provide traders with any response shall not mean that the consumer consented with such a supply or provision. In that manner, a unified European principle has been established that in case of an unsolicited supply of a good or provision of a services, in business-to-consumer relations, mere silence of the consumer is never to be considered as the acceptance.

All in all, the fact that the consumer was supplied with goods or provided with services that they had never ordered or asked for will always represent a form of an unfair commercial practice and, consequently, traders will be sanctioned for his unfair behaviour. Directive 2011/83/EU is important since it provides a remedy for a consumer who was a victim of such an unfair commercial practice which significantly facilitates his position. In the case when a consumer had to rely on general contract law rules, which is a particular improvement in the countries which did not have contract law rules that would apply in case of inertia selling.

Directive 99/44/EC on consumer sales and associated guarantees

The rules on conformity of acquired goods

Directive 99/44/EC on consumer sales and associated guarantees (“Sales Directive”) has established common European rules for consumer sales contracts. Its main consequence is the establishment of a European concept of legal guarantee, i.e. the obligation of the conformity of a consumer sales contract for the period of two years during which the trader is liable for any lack of conformity of the sold goods with the contract. Same as the UTD, this is a minimum harmonisation directive, so Member

⁸⁸³ Article 27 of Directive 2011/83/EU on consumer rights

States are free to introduce any period longer than two years and to grant any higher level of protection than the one prescribed by the directive.

The UCPD is relevant for the Sales Directive since it secures the consumer's right to conformity by providing that one of the forms of misleading practices will be a provision of false information by trader to consumers about his or her rights, referring in particular to the rights of repair and replacement as defined by the Sales Directive which are fundamental remedies available to consumers in case of lack of conformity of purchased goods.⁸⁸⁴ The other way around, according to the Sales Directive, one of the cases when the acquired goods will be considered as not being in conformity with the contract of sales is the case when the quality and performance of a good are not in accordance with seller's, producer's or producer's representative public statements about the goods, in particular taking into consideration advertising as labeling.⁸⁸⁵

Traders shall be liable to consumer for any lack of conformity that existed in the moment when goods were delivered.⁸⁸⁶ In case of the occurrence of lack of conformity, the consumer has first the right to replacement of defective goods or its repair, or in case when neither of the two is possible, the consumer can opt for contract termination or diminution of the paid price. The choice between the remedies is on the consumer. The Sales Directive is dedicated to protect contractual relationships between trader and consumer. This is why contract rescission is the only subsidiary option, when the previous two are impossible.⁸⁸⁷

As a consequence, the consumer does not have the option to rescind the contract if the lack of conformity is minor.⁸⁸⁸ A strong parallel between these provisions and the

⁸⁸⁴ Article 6(1)(g) of the UCPD

⁸⁸⁵ Article 2(2)(d) of the Sales Directive

⁸⁸⁶ Case C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA* [2013] ECR I-0000, para 27; Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-02685, para 26; Joined Cases C-65/09 and C-87/09 *Gebr. Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH* [2011] ECR I-05257, para 43

⁸⁸⁷ HW Micklitz, J Stuyck and E Terryn (eds), *Cases, Materials and Text on Consumer Law* (Hart 2010), 361

⁸⁸⁸ Article 3(6) of the Sales Directive

provision on misleading actions of the UCPD is noticeable which explicitly mentions provision of false information about a product's characteristic as one of the forms of misleading practices.⁸⁸⁹

Therefore, in case of such a misleading action, the consumer will be able to use remedies provided in accordance with the Sales Directive which are, alternatively, the right to repair or to replace the product to be in accordance with any public statement the trader has made. In case of a misleading action, the option of repair seems to be of little practical usage since the case is that the trader typically has lied to the consumer, so that the consumer's first option would be to replace the product with the one that would be in accordance with what trader had initially advertised or promised to consumer.

In case when none of the options are possible, for example simply because the trader actually was never selling the product he advertised, the consumer may opt between diminishing of the price and contract rescission. In such a manner, at least when it concerns a consumer sales contract, the Sales Directive provides efficient contractual remedies to the consumer since he may, as his first choice, receive the goods he aimed to buy. Second, if that remedy is not possible, for some reason, the consumer may terminate the contract and in such a manner remedy negative consequences of unfair commercial practices.

Accordingly, Wilhelmsson rightly points out to the remedies against non-conformity of goods as the most noticeable example of the contract law remedies against misleading advertising. Equally, in Scandinavian countries there is a long tradition for traders being liable for non-conformity of sold products if the product is not in conformity with the information a trader has provided before selling of the product in

⁸⁸⁹ Article 6(1)(b) of the UCPD

advertising or otherwise if it may be assumed that this information influenced the commercial decision of the consumer.⁸⁹⁰

In case of consumer choice to terminate the contract, a trader is not allowed to demand any compensation from the consumer for the usage of goods which turned out not to be in conformity with the contract. This was clearly pointed out by the ECJ in its case law.⁸⁹¹ Moreover, a trader is obliged to bear all cost of removing defective goods and installments of the ones with which they were replaced unless this represents a disproportionate cost for the trader.⁸⁹² Any behaviour of trader contrary to these rules will also be considered as unfair commercial practice, in particular an aggressive commercial practice since a trader would impose onerous obstacle to consumer to enforce his contractual rights.

False description of product characteristics as a form of unfair commercial practice

The Sales Directive defines what are the situations when it is considered that the acquired good is considered not to be in conformity with the contract. According to the Sales Directive, the lack of conformity will exist when acquired goods, first, do not comply with a description provided by a trader or as was shown in a sample or model; second, when they do not fit the specific purposes for which consumers purchased them and which the trader accepted; third, when the good is not fit for the purpose such products are normally used for; fourth, when the quality and performance of a good are not in accordance with seller's, producer's or producer's representative public statements about the goods, in particular taking into consideration advertising and labeling.⁸⁹³

The UCPD explicitly identifies the provision of false information about product

⁸⁹⁰ T Wilhelmsson (n 844) 229

⁸⁹¹ Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-7315

⁸⁹² Joined Cases C-65/09 and C-87/09 *Gebr. Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH* [2011] ECR I-05257

⁸⁹³ Article 2(2) Directive 99/44/EC

characteristics as one of the forms of misleading practices.⁸⁹⁴ In this kind of situation, it is possible to imagine two situations: first in which the consumer was advertising one product with the purpose of selling the other product, or, second, the situation in which a trader simply lied about the characteristics of the product. Both of these cases will represent a form of unfair commercial practice, but they may differ from contract law consequences.

Traders may subsequently correct any statements made on labeling or through advertising which will prevent them from potential application of the rules on lack of conformity.⁸⁹⁵ However, despite made changes, traders may still remain liable for their unfair commercial practices since they provided false information that caused a consumer to make a transactional decision they would have not made otherwise. For instance, the correction of the advertised conditions in the finally issued guarantee to consumers will always represent a form of unfair commercial practice.⁸⁹⁶

False provision of consumer rights

The provisions of the UCPD explicitly provides that one of the forms of misleading action will be the provision of false information by a trader to consumers about their rights as consumers where the UCPD in particular refers to the right to repair and replacement as is defined by the Sales Directive.⁸⁹⁷ Provision of any false information in that aspect will represent a form of misleading action.⁸⁹⁸

A particularly common example in practice is the case when a trader advertises the consumer's statutory rights in case of a lack of conformity as a particular feature of a

⁸⁹⁴ Article 6(1)(b) of the UCPD

⁸⁹⁵ G De Nova, 'Conflicts of Interests and the Fair Dealing Duty' in H Collins (ed), *The Forthcoming Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 117

⁸⁹⁶ A Wiewiorowska-Domagalska, *Consumer Sales Guarantees in the European Union* (Sellier 2012), 98

⁸⁹⁷ Article 6(1)(g) of the UCPD

⁸⁹⁸ See M Djurovic, 'The Apple Case: The Commencement of Pan-European Battle against Unfair Commercial Practices' (2013) 9 *European Review of Contract Law* 253

product it offers.⁸⁹⁹ This is why such a behaviour is explicitly and always prohibited by the UCPD as one of thirty-one exhaustively listed practices, namely „[p]resenting rights given to consumers in law as a distinctive feature of the trader’s offer, which are always considered unfair“. ⁹⁰⁰ Another example may be the simple refusal of a trader to remedy the lack of conformity while it is noticed by the consumer.

After Sales Services

Promising of the provisions of after-sales services represents a very powerful advertising tactics of some traders to attract consumers.⁹⁰¹ Initially, the Sales Directive was supposed to include the rules on after-sales services, understood in a strict sense, as those not linked to the application of a guarantee and offered for an additional fee, in particular regarding the supply of spare parts.⁹⁰² Eventually, due to the complexity of the question of after-sales service, in particular its time limitation and content, the final text of the Sales Directive contains no provision on after-sales services which was identified as one of the gaps.⁹⁰³

This is where the rules of the UCPD may play an important role since according to Article 6(1)(b) UCPD provision of false information regarding after-sales services will constitute an unfair commercial practice.⁹⁰⁴ The mere fact that after-sales are not provided will not represent an unfair commercial practice, but it is necessary that „the trader’s conduct would lead the average consumer to have materially different expectations about the after-sale service available“. ⁹⁰⁵

⁸⁹⁹ Report on the UCPD COM (2013) 139 final, 19

⁹⁰⁰ Point no 10 of Annex I to the UCPD

⁹⁰¹ N Saccani, L Songini and P Gaiardelli, ‘The role and performance measurement of after-sales in the durable consumer goods industries: an empirical study’ (2006) 55 *Journal of Productivity and Performance Management* 259

⁹⁰² Commission, ‘Green Paper for consumer goods and after-sales services’ COM (1993) 509 final, 15

⁹⁰³ H Schulte-Nolke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium* (Sellier 2007), 650

⁹⁰⁴ Two out of thirty-one exhaustively listed practices deal with the issue of after-sales services, in particular in the context of the language and the country in which the services are provided (practices number 8 and 23 of Annex I of the UCPD)

⁹⁰⁵ Commission, ‘Explanatory Memorandum to the Proposal for a Directive on unfair commercial practices ‘ COM (2003) 356 final, para 59

The question of after-sales services becomes particularly relevant in two cases of sales contracts: after the expiry of the period in which the consumer is granted remedies for lack of conformity and when a trader has promised the provision of post-sale services as an additional feature to the product. The first case would include as an unfair commercial practice, for instance, a trader's failure to inform the consumer that the spare parts for the product they acquired would not be produced anymore which might mean as a consequence a shorter period of usage of the acquired good than the consumer would normally have expected.

The second case would relate to the example of when a trader promises post-sale care to a consumer, but once the contract has been concluded, simply refuses to provide any care.⁹⁰⁶ In such a case, the trader will be sanctioned for their unfair behaviour on the ground of the provisions on unfair commercial practices, so that the UCPD secures that the consumer truly receives the post-sale services that they were promised.

The case of post-sale services is also connected to another form of unfair commercial practice which points out that a form of misleading actions will be the provision of false information regarding „the need for service, part, replacement or repair“.⁹⁰⁷ These provisions include cases when, for instance, a trader provides false information at the conclusion of the contract about the need for subsequent service or repair.⁹⁰⁸ These provisions are also very relevant in case when the statutory period to remedy the lack of conformity has elapsed and trader lies to the consumer in stating that he needs an expensive repair, when in reality this is not the case.

⁹⁰⁶ C Twigg-Flesner et al., 'An Analysis of the Application and Scope of the Unfair Commercial Practices Directive - Report for the Department of Trade and Industry' (2005) <http://www.berr.gov.uk/files/file32095.pdf> accessed 12 May 2014, 39

⁹⁰⁷ Article 6(1)(e) of the UCPD

⁹⁰⁸ T Wilhelmsson (n 800) 143

Conclusion

This Chapter of the thesis analysed the interlink between the law of unfair commercial practices and contract law from the perspective of applicable remedies. Accordingly, it was possible to see that the Directive does not provide any remedies to individual consumers and that it is focused on collective dimensions of enforcement in the case of breach of its rules. Collective redress is currently developing in the European Union and it will certainly affect the process of enforcement of the UCPD in some near future.

In lack of the rules provided by the Directive, an individual consumer who is a victim of unfair commercial consumer typically needs to use traditional contract law rules. However, in case of traditional contract laws of Member States, the lack of capacity of contract law rules, in particular those of consent defect, to provide adequate remedy to consumers who were victims of unfair commercial practices that resulted in the conclusion of a contract. This is why the adoption of the UCPD led to the modification of the existing and the development of new contract law remedies in some national legal systems of the Member States with the purpose of securing effective protection to an individual consumer.

Furthermore, besides traditional contract law rules, in certain cases individual consumers may use the remedies which are provided by European legislation on consumer contracts. These remedies in certain cases enable consumers to remedy in an easy and rapid manner any contractual consequences of an unfair commercial practice. This is particularly the case with the rules on unfair contract terms, right of withdrawal, inertia selling and certain rules on consumer sales. In addition to this, the rules on unfair commercial practice provides an additional level of protection to these rights of consumers.

CHAPTER VI - CONCLUSIONS

The main conclusive observations

This thesis unpacked the complex, multi-layered and often ambiguous relationship between the law on unfair commercial practice and consumer contract law. The main purpose of the dissertation is to contribute to clarifying the inter-linkage between these two areas of law, particular as regards the mechanisms and manners through which the UCPD has affected and shaped consumer contract law.

The principal conclusion drawn herein is that despite the existence of a strict formal separation between these two branches of law, as established by the UCPD, these two areas of law are in reality tightly coupled and interrelated. Therefore, EU Consumer law should be regarded as a unitary and not as a dualistic construction. Being artificial, the separation line introduced by Article 3(2) of the UCPD, does not manage to prevent the interaction between the two rules.

In that context, this thesis has demonstrated the particularly strong impact that the Directive has had on consumer contract law. This impact is not a finite, but rather an ongoing process, whose nature is best described as intentionally aimed, yet spontaneous. The outcome of the process is an increasing Europeanisation of contract law throughout the European Union. In the process, an exceptionally prominent role is played by the ECJ, an institution that seems to be the engine of the process, powered by the fuel derived from the innovatively introduced European legal terminology. Accordingly, the Directive may be described as an extremely influential instrument for Europeanisation of contract law.

In the thesis it was possible to see that the interaction between the law on unfair commercial practices and contract law is best observed at the four juncture points, which also encompass in themselves all the regulatory regime of the Directive. These four points concurrently represent the four chapters of the thesis and they include: the average consumer, the duty to trade fairly, the duty of information and remedies. Consequently, the interlink between the examined two areas of laws was separately examined in case of each of these four points in order to get a final and complete picture of the relationship and its characteristics.

Average consumer

The average consumer is the main benchmark for assessment of fairness of a commercial practice. The average consumer is defined as a reasonably well-informed, reasonably observant and circumspect consumer, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice. Moreover, the average consumer is the main objective of protection established by a hierarchical, mandatory three-step mechanism aimed at sanctioning any kind of trader's commercial practice which is unfair. As confirmed by the ECJ, while applying the rules on unfair commercial practices, national courts always have to bear in mind expected behaviour and reactions to a commercial practice of an average consumer.

The average consumer represents a universal European standard of expected behaviour by consumer on the market. Initially developed through the case law of the ECJ, the average consumer was for the first time codified in EU consumer law through the UCPD. Besides a generally applicable standard of the average consumer, the Directive has also introduced a standard of the vulnerable consumer, as a member of a group of particularly vulnerable consumers due to some of their characteristics and in particular due to their mental or physical infirmity, age or credulity. The standard of the vulnerable consumer is used as a subsidiary standard in case a commercial practice is targeted to a particular group of vulnerable consumers. However, it was possible to see that the case law of the ECJ shows a rather restrictive and exceptional approach towards the use of the vulnerable consumer standard.

In the Chapter II on the average consumer, I argued that there is a noticeable tendency of taking the standard of average consumer as defined by the UCPD to consumer contract law as the principal standard for assessment of the fulfillment of information and transparency requirements of traders. Namely, a related standard to the one of average consumer from the UCPD was missing in consumer contract law.

Directives on consumer contract law are particularly focused on securing that the consumer receives all the necessary information he may need for the conclusion of a particular consumer contract. These pieces of information have to be provided in a clear, transparent

manner. However, what remained as an open question was the standard in comparison to which fulfillment of these obligations is to be performed. This is why I showed that a standard of expected consumer's behaviour is increasingly needed in consumer contract law as a standard for the verification of correct fulfillment of transparency and information requirements determined by directives on consumer contract law.

Consequently, in this Chapter of the thesis, I demonstrated that the codification of the standard of the average consumer by the UCPD has resulted in the ongoing tendency to also treat the average consumer as the main standard of consumer contract law. The examination of relevant legislation and case law has proven this. The adoption of the same standard of expected consumer behaviour in the law on unfair commercial practices and contract law is further supported by the arguments of coherency and legal certainty since transparency and information duties are evenly regulated by both of these two sets of rules of EU consumer law. Consequently, I argue that an adoption of different standards would result in an incoherent system of EU consumer law with ample legal uncertainty.

Duty to trade fairly

The duty to trade fairly has been established by the Directive, and entails a complex system for the protection of consumers from any kind of unfair commercial practice. It is for the first time that through the UCPD such a general obligation of trader was brought in EU consumer law. The duty to trade fairly is a standard of universally expected behaviour of the trader towards the consumer that applies to a widest possible number of situations. Considering the main objective, the duty to trade fairly represents a concept related to the universal duty of good faith that exists in the majority of national contract laws of the Member States. The aim of the duty to trade fairly is to secure a constant level of fairness in the relationship of traders towards consumers on the market. However, indirectly, it also secures a just and fair game between competitors on the market.

The duty to trade fairly was defined in detail and substantively explained by the general fairness clause. The general fairness clause is designed in such a manner as to have the capacity to sanction any kind of unfair commercial practices of traders towards consumers. Its scope of application is very broad and thus it provides a very broad-spectrum character to this duty. Moreover, the general fairness clause is of utmost importance for understanding

this duty since it explains what is substantially meant by the concept of fair trade in business-to-consumer relationships on the market. In accordance with its two limbs, any commercial practice of traders which is contrary to the requirements of professional diligence and which materially distorts or is likely to materially distort economic behaviour of an average consumer is considered unfair.

What I argued in this chapter of the thesis is that the duty to trade fairly as defined by the UCPD and developed by the ECJ has also become a generally applicable duty of consumer contract law. In European consumer contract law, as a consequence of its fragmentary character, there was no general duty as a universally accepted standard of behaviour of traders. However, after the adoption of the Directive, the duty to trade fairly also applies to and regulates all phases and aspects of a contractual relationship between traders and consumers.

Equally, it is not a sector specific duty, but applies unexceptionally to all forms of consumer contracts. This is particularly the consequence of a very wide meaning of the notion of commercial practice, tightly connected to a contract, that covers trader's behaviour towards consumers not only before a conclusion of a consumer contract, but also during and after the conclusion of a contract. Consequently, what I have demonstrated in Chapter III of the thesis is that the duty to trade fairly, as defined by the UCPD, has become the first universally applicable duty in EU consumer law that secures fair behaviour of traders towards consumers in their contractual relations.

Duty of information

The duty of information as a general obligation was first introduced by the UCPD. According to the provisions on misleading omissions, any failure of the trader to provide the consumer with material information that causes or is likely to cause consumers to take a transactional decision he would have not otherwise taken will always be a form of an unfair commercial practice.

The entire EU consumer law is based on the information paradigm according to which only a well-informed consumer is capable of adopting rational economic decisions while acting at the market. However, the inequality of bargaining powers between the trader and the

consumer is particularly noticeable when it comes to the possession of information. Hence, the consumer suffers from a chronic lack of information while negotiating for a consumer contract.

This is why the European consumer policy maintained that such an existence of information asymmetry between the trader and the consumer can be only remedied through the imposition of a pre-contractual information obligation on traders, according to which the trader is obliged to disclose all relevant information to the consumer before conclusion of a contract. As a consequence of such an approach, the duty of information has become the main regulatory tool in all directives on consumer contract law since the very beginning of developments in the EU consumer law.

However, I showed in Chapter IV of the thesis that prior to the adoption of the UCPD, the duty of information was regulated in an incoherent and fragmented manner through sector specific directives in the area of consumer contract law, dealing with different types of consumer contracts. There was no universal obligation of information, applicable to all types of consumer contracts. Eventually, a universal pre-contractual duty of information has been established for the first time through the provisions on misleading omissions of the UCPD that covers all contractual relations between traders and consumers. In other words, while stipulating a consumer contract, the trader is obliged to present to consumer all information he may need to take an informed transactional decision.

Importantly, I demonstrated that in the UCPD, the duty of information is drafted in such a manner as to enable taking into consideration real consumer's behaviour when deciding whether information has been duly fulfilled which is not the case with directives on consumer contract laws. Moreover, depending on the relevance of a particular situation for consumer's decision making, the Directive makes a distinction regarding information requirements.

In cases when the consumer is closer to making an economic decision, when a commercial communication is an invitation to purchase, the information imposed will be stricter since the consumer is closer to making his or her economic decision. This distinction is also important. As I showed, it has generated the concept of invitation to purchase, a *par excellence* contract

law term, which has now received its own European meaning, affecting thus traditional contract law regimes of Member States.

Remedies

The chapter on remedies of this thesis analysed the link between the law of unfair commercial practices and contract law from the perspective of remedies. In Chapter V of the thesis, I argued that the UCPD is exclusively focused on collective protection of consumers, whereas the protection of an individual consumer, a victim of unfair commercial practice was left outside the scope of the Directive. This is why an individual consumer typically has to rely on traditional national contract law concepts or on remedies provided by fragmented rules of European consumer contract law with the purpose of remedying the consequences of unfair commercial practices that he or she was affected by.

However, in the case of traditional contract laws of Member States, there has been a noticeable lack of capacity of contract law rules, in particular those on consent defect, to provide adequate remedy to the consumer which was a victim of unfair commercial practice. Accordingly, I demonstrated that the UCPD has brought about the development of new contract law remedies in some national legal systems of the Member States with the purpose of securing effective protection of individual consumers.

Moreover, both the rules on the UCPD concerning misleading and aggressive practices and the rules on traditional contract law concepts of consent defects aim to secure free and informed consent of the consumer while stipulating a contract. However, when it comes to the content of these two sets of rules, certain differences are noticeable. I showed in this chapter that the rules on misleading and aggressive practices affect the interpretation of traditional contract law rules on fraud and duress at least when it concerns a consumer contract which was concluded as a result of a misleading or aggressive practice.

Further to this, besides traditional contract law concepts, in certain cases individual consumer may use the remedies which are provided by European consumer contract law. I argued that some of them represent, in certain cases, the most convenient remedies to a consumer who was a victim of unfair commercial practice. This is particularly the case with the rules on unfair contract terms, since the occurrence of unfair commercial practices represents one of

the factors that national courts use while assessing fairness of a contract terms or the entire contract. Equally, this chapter demonstrated that certain rules on consumer sales, as well as those derived from Directive on 2011/83/EU, also provide effective protection to the consumer who is a victim of a commercial practice. Contrary to the usage of contract law concepts as applicable remedies in case of occurrence of unfair commercial practices, the rules on unfair commercial practice will provide an additional and complete guarantee to protection to all contractual rights of consumer.

Europeanization of contract law through the UCPD

Impact on contract law concepts

Through the examination of the relationship between the law of unfair commercial practices and contract law, I also showed that the UCPD was used as an instrument to penetrate into national contract laws and contribute to their Europeanisation. In the introduction to the thesis, it was noticeable that the Member States were more keen to accept the harmonisation of the law of unfair commercial practices, than the harmonisation of contract law. This is not a consequence of legal argumentation, but rather of politics. As a result, the European legislation on unfair commercial practices provides a complete and developed set of substantive rules, whereas when it comes to contract law, we witness a noticeable lack of coherency and consistency, while the character of rules on contract law is highly fragmented.⁹⁰⁹

Consequently, the UCPD was used as a tool to Europeanize, in a subtle manner, contract law. The standard of consumers in the directives on consumer contract law was missing not because it was a negligent omission, but since it was not possible to reach a consensus of what standard for the average consumer should be taken as a benchmark. The introduction of any general duty in contract law, resembling to the duty to trade fairly of the Directive, as a specific universally applicable duty to all consumer contracts and all phases of contract formation, conclusion and execution, also seemed impossible.

⁹⁰⁹ C Twigg-Flesner, *Europeanisation of Contract Law* (2nd edn Edward Elgar 2013), 116

The same applies for the duty of information which was, despite its recognition, regulated in an incoherent and fragmented manner. In the case of remedies, there was no direct imposition to adapt existing, or adopt new, contract law remedies, since Member States strongly opposed that. This process was eventually the result of the need to adequately reply to the new rules on unfair commercial practices.

Consequently, the process of Europeanisation through the UCPD represents an intentionally expected spontaneous process by the European policy makers. Accordingly, Collins is right when he observes that the adoption of the UCPD may represent a basis, a form of foundation, for the future development of unified contract law throughout the European Union.⁹¹⁰ Through the rules of the UCPD, contract law has been harmonised through a non-contractual legal instrument. In such a manner, potential obstacles and Member States' opposition were smartly avoided. In such a manner the UCPD was used as an efficient tool of EU law to reform and develop national contract law without entering into policy discussion on national levels.⁹¹¹

Any related concern of Member States was dismissed through the introduction of article 3(2) of the UCPD which was seen as making a formal separation between the rules on unfair commercial practices and contract law, thus officially leaving untouched national the contract law fortresses. In that aspect, article 3(2) of the UCPD acted as a 'peacekeeper' that enabled the passing of the Directive. However, after the transposition of the Directive into national legal systems, due to their tight connections, the boundaries between the law on unfair commercial practices and contract law have blurred.⁹¹²

The refined means of impact

The subtleness of the used method to penetrate into national contract laws can also be seen in the manner in which some of the provisions are formulated throughout the UCPD. To start, the definition of the average consumer is provided not in the normative part of the Directive,

⁹¹⁰ H Collins, 'EC Regulation on Unfair commercial practices' in H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International 2004), 39

⁹¹¹ C Twigg-Flesner, 'Time to Do the Job Properly – the case for a new approach to EU Consumer Legislation' 33 *Journal of Consumer Policy* (2010) 355, 361

⁹¹² M Namysłowska, 'To B2C or not to B2C, Some reflections on the regulation of Unfair Commercial Practices from a Polish Perspective' 36 *Journal of Consumer Policy* (2013) 329, 337

but in its Recitals, which strictly legally speaking do not have binding legal effects on Member States. The duty to trade fairly is also particularly wrapped into the innovative and mysterious concept of the general fairness clause. Equally, the duty of information is described nowhere in the UCPD as a universal pre-contractual positive duty of traders that is also always applied in case of any consumer contract formation, but it has been brought through the unclear rules on misleading omissions.

Any potential ambiguousness of the meanings or applications of these concepts was subsequently clarified by the ECJ in its case law where their real meaning and functions were unveiled and confirmed. Accordingly, the universal character of the duty to trade fairly and the general duty of information were underlined whereas the average consumer was confirmed as the main benchmark for assessment of fairness of a commercial practice, being a notion of utmost importance.

When it comes to remedies for individual consumers, Member States were not imposed with an obligation to reform their contract laws. A non-existence of such obligation was clearly underlined through article 3(2) of the UCPD. However, the modifications and development happened in a spontaneous and expected manner as a response to the necessity to remedy consequences of unfair commercial practice on an individual consumer. Such an impact was, to a large extent, already expected immediately after the adoption of the Directive.⁹¹³

Importantly, besides the fact that the UCPD is strictly limited to cover only business-to-consumer relations, its provisions also affect contract law rules which are not limited exclusively to consumer contract law and thus in such a manner having a potentially broader impact. That is the case, for instance, with the notion of invitation to purchase. Moreover, a possible development of the European rules on unfair commercial practices in business-to-business relations may further contribute to the effects of the law on unfair commercial practices, representing a model for shaping the national contract laws even further.⁹¹⁴

To that extent, the European Parliament in its resolution adopted already in January 2009 called the Commission to either extend the scope of UCPD on business-to-business relations

⁹¹³ S Whittaker (n 858) 141

⁹¹⁴ 'A Framework of Principle for European Contract Law?' (2009) 125 Law Quarterly Review 616

or to adopt a black list in the Misleading Directive of the practices that will be unfair in all cases in order to clarify the situation.⁹¹⁵ In 2013 the European Commission expressed, in its Green Paper, its intention to adopt European legislation that would also cover business-to-business unfair commercial practices.⁹¹⁶ Any further harmonization of the law on unfair commercial practices beyond the business-to-consumer commercial practices is very likely to broaden even more the scope of Europeanisation of contract law, now overpassing the limited boundaries of consumer contract law.

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The significance of innovative legal terminology

The examination of the Directive revealed usage of numerous innovative legal terms which have been introduced for the first time in European Private Law, but most of which substantially resemble those embedded in contract law despite their absolutely original naming. Some of the examples include the terms of professional diligence, invitation to purchase or honest market practices. Consequently, the innovative legal terminology plays an important role in the process of Europeanisation of contract law.

The adoption of innovative legal terminology was initially identified as having introduced legal uncertainty due to unclear meaning of some of the terms.⁹¹⁷ However, its legal linguistic originality also enabled impact of the rules of the UCPD on related contract law concepts. And it is exactly their initial unclear meaning that was used to avoid any obstacles in passing the Directive, in addition to building a new system of European private law. A simple examination of the meaning of these notions reveals how closely linked they are to the existing traditional contract law concepts.

On the other hand, it is also true that the traditional concepts of national contract laws may, to some extent, also affect the concepts established in the law on unfair commercial practices, in particular in relation to the interpretation and application of the rules of the UCPD practiced

⁹¹⁵ European Parliament Resolution of 13 January 2009 on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising (2008/2114(INI)), para 7

⁹¹⁶ Commission, 'Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe' COM (2013) 037 final

⁹¹⁷ G Howells, 'Unfair Commercial Practices – Future directions' in Schulze R and Schulte-Nölke H, *European Private Law - Current Status and Perspectives* (Sellier 2011), 134

by the national courts.⁹¹⁸ The European Union does not guarantee that there will be a common interpretation of these provisions.⁹¹⁹ This results in a highly present risk that the national authorities will approach and interpret the transposed concepts from the Directive in accordance with pre-existing national legal, social and cultural perspectives.⁹²⁰

This is where the ECJ plays a fundamentally important role by providing an autonomous meaning of these terms, as it already did in case of invitation to purchase, professional diligence or misleading omissions protecting in such a manner impact of national legal traditions on the notions brought by the Directive. Already at its early stage, the Court confirmed that all of the notions of the UCPD have their own European and autonomous meaning that differs from the related concepts in the national legal systems.⁹²¹

Ex officio assessment of fairness of commercial practice

The necessity of *ex officio* assessment of fairness?

Eventually, this thesis puts forward the argument that, *de lege ferenda*, an obligation should be imposed on national courts to first verify *ex officio* whether a consumer contract has been concluded under the influence of an unfair commercial practice and, second, to apply appropriate contract law consequences on such a contract. Such an approach would be fully in line with the existing case law of the ECJ on the ground of Directive 93/13/EEC on unfair contract terms (“UTD”). Only through an *ex officio* obligation of fairness of a commercial practice, an individual consumer, who is a victim of unfair commercial practice, will always be guaranteed a complete, easy and effective protection from an unfair commercial practice.

The assessment should be performed with the purpose of verifying whether consumers can terminate such a contract or have any other kind of available remedies provided by the national legal system, which would protect the consumer from the consequences of the

⁹¹⁸ J Stuyck, E Terryn and T Van Dyck, ‘Confidence through fairness? The new Directive on unfair business-to-consumer on commercial practices in the Internal Market’ (2006) 43 Common Market Law Review 107, 138

⁹¹⁹ R Van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: not to be continued’ in S Grundmann and J Stuyck, *An Academic Green Paper on European Contract Law* (Kluwer Law International 2002), 257

⁹²⁰ C Willett (n 795) 250

⁹²¹ Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB* [2011] ECR I-03903, para 32

trader's unfair behaviour towards the consumer. Only the introduction of such a principle would secure the correct fulfillment of "effective legal redress" requirement imposed by EU law, with the obligation that a consumer who concluded a contract under the impact of unfair commercial practices is awarded with the right to avoid any disadvantageous contractual consequences of an unfair commercial practice.⁹²²

The Court already has a consistent law recognizing the obligation of the national courts to assess fairness of a contractual terms on the basis of the highest public interest, and the obligation of national courts to provide the consumer with effective legal redress has also spread from the area of unfair contract terms to other areas of consumer law, as it is the case with the rules on consumer sales⁹²³ or doorstep selling.⁹²⁴

In the lack of detailed rules on enforcement, the Court had to develop certain procedural principles for enforcement of consumer law through interpretation of the rules, which are included in the directive containing rules of substantive character, such as the legislation on unfair contract terms. Namely, in the area of enforcement of EU consumer law, Member States are given procedural autonomy under the condition that their enforcement systems are in accordance with the principles of equivalence and effectiveness.⁹²⁵ However, the case law of the ECJ shows that despite the existence of this procedural autonomy, the ECJ has interfered with the national procedure laws of Member States with the purpose of securing *effet utile* of consumer protection, which must be especially secured through individual enforcement.⁹²⁶

Accordingly, what I argue here is that duty to trade fairly in business-to-consumer relations is also of highest public interest, so the same principles regarding the obligatory motion of the court should also apply in the case of unfair commercial practices. That would also secure

⁹²² HW Micklitz, 'A common approach on the collective enforcement of Unfair Commercial Practices and Unfair Contract Terms' Conference Paper Durham Law School December 2012, 19-20

⁹²³ Case C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA* [2013] ECR I-0000

⁹²⁴ Case C-227/08, *Eva Martín Martín v EDP Editores, SL* [2009] ECR I-11939

⁹²⁵ Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECR I-0000, para 50; Case C-565/11 *Mariana Irimie v Administrația Finanțelor Publice Sibiu and Administrația Fondului pentru Mediu* [2013] ECR I-0000, para 23; Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL* [2013] ECR I-0000, para 30

⁹²⁶ V Trstenjak, 'Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU' (2013) 21 *European Review of Private Law* 451, 476

through more efficient and coherent normative coordination between the UTD and UCPD a higher general level of consumer protection. In its case law, the Court has constantly underlined the need for *ex officio* assessment of fairness of a contract term as the only manner to secure effective legal protection to the consumer as a weaker party in comparison to traders as a much stronger party.

Now, equally, as in case of the UTD, the weak position of the consumer has also recently been confirmed in the Court's case law on the UCPD. Therein, in his relationship towards the trader, the consumer was described as being in a weaker position, "in that the consumer must be considered to be economically weaker and less experienced in legal matters than the other party to the contract".⁹²⁷ This approach of the Court in respect to the UCPD is equal to its position adopted in the case law on unfair contract terms.

Ex officio obligation in Court's case law on the UTD

In *Oceano*, as the first case that substantially examined the provisions of the Directive, the Court approached the consumer as a weaker party in a contractual relationship with trader "as regards both his bargaining power and his level of knowledge".⁹²⁸ Furthermore, the consumer was indicated as economically weak party with insufficient financial resources to initiate litigation before the court. While free legal aid programs may prove as a solution to this problem, what remains problematic is the fact that the consumer is not aware of his rights.⁹²⁹

The lack of awareness surrounding his rights was the justification of the Court for the explanation of why the national courts do not need the motion of consumers in order to assess whether a contract term is unfair or not, but that they may assess it by his own motion. By this approach, the private law principle of *Ignorantia legis non excusat* (*Ignorance of the law is no excuse*) was precluded on the basis of justification that consumer is a much weaker party.

⁹²⁷ Case C-59/12 *BKK Mobil Oil Korperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2013] ECR I-0000, para 35

⁹²⁸ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocio Murciano Quintero e.a.* [2000] ECR I-04941, para 25; Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, para 25; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579, para 29

⁹²⁹ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocio Murciano Quintero e.a.* [2000] ECR I-04941, para 26

Such an approach was confirmed in *Cofidis* where the Court pointed out that national courts should assess without the motion of consumers whether a term is unfair because the consumer is “unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve”.⁹³⁰ In *Cofidis*, the Court reaffirmed the competence of the national courts to ascertain the illegality of an unfair terms even in cases when the consumers do not themselves raise the issue of fairness within the time limit defined by the national law. Furthermore, the Court pointed towards the effective protection as primary purpose of Directive 93/13/EEC.⁹³¹ In *Cofidis* the risk was presented that the consumer might not use its right due to his ignorance or the costs of the procedure.

In *Mostazza Claro*, the Court established the obligation of the national courts to assess whether a contractual term that is the subject of a dispute falls within the scope of Directive 93/13/EEC. This was justified by the reasons of public interest that the regime set by this Directive is designed to protect.⁹³² The ECJ emphasised in its decision that the purpose of Directive 93/13/EEC is to strengthen consumer protection “and, in particular, to raising the standard of living and the quality of life in its territory”.⁹³³

Moreover, the Court imposed the obligation upon the national courts to raise the motion of unfairness even in cases when the consumer is represented by a professional lawyer before the court in a particular case, i.e. a qualified person who possesses a high level of legal knowledge.⁹³⁴ The special regime of protection by unfair contract terms imposes that “the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier”.⁹³⁵

⁹³⁰ Case C-473/00 *Cofidis SA v Jean Louis Fredout* [2002] ECR I-10875, para 34

⁹³¹ *Ibid*, 35

⁹³² Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, para 38

⁹³³ *Ibid*, para 37

⁹³⁴ Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, para 107

⁹³⁵ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421

The fact that assessment of fairness of a contract term represents a duty, and not the mere power of the national courts was confirmed in *Pannon*.⁹³⁶ Furthermore, in this judgment, the Court allowed the consumer to choose whether they wanted this option or not, as the Advocate General Trstenjak stressed out in her Opinion in *VB*: “[t]he advantage of that approach is that it refrains from imposing protection on the consumer, but is based rather on the idea of protecting consumers by providing them with information”.⁹³⁷

In *Asturcom Telecomunicaciones*, the Court invoked the principle of public policy already present in national contract laws pointing out that the obligation imposed by the UTD that consumer must not be bound by an unfair contract term must have to be regarded “as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy”.⁹³⁸ As a consequence, the national court is under the obligation to assess whether the contract is concluded contrary to the principle of public policy.⁹³⁹ Moreover, national courts are obliged to ensure the establishment of all consequences under the national law, so that the consumer does not get bound by unfair contract terms.⁹⁴⁰

The subsequent case law confirmed that public interest requirements impose the obligation on the national court to assess fairness of a contract term in circumstances of the case and to ensure that consumers are not bound by these clauses.⁹⁴¹ In order to ensure that consumers are fully liberated from all of the consequences of the stipulated unfair contract terms, national courts have the right to declare the entire contract void.⁹⁴²

This case law of the Court shows that for the reasons of protection of highest public interest, the EU law even has the right to penetrate into national civil procedure laws of Member States.⁹⁴³ An evolution from a simple right of national courts into their mandatory requirements has been noticeable. This evolution has achieved its current peak in the

⁹³⁶ Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Gyórfi* [2009] ECR I-04713

⁹³⁷ *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* Case C-137/08 [2010] ECR I-10847, para 106

⁹³⁸ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira* [2009] ECR I-9579, para 52

⁹³⁹ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira* [2009] ECR I-9579, para 54

⁹⁴⁰ *Ibid*, para 59

⁹⁴¹ *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* Case C-137/08 (2010) ECR I-10847; Order in Case C-76/10 *Pohotovost' s.r.o. v Iveta Korčkovská* [2010] ECR I-11557; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000

⁹⁴² Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000, para 35-36

⁹⁴³ DU Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2011)

judgment in *Invitel*.⁹⁴⁴ In this case, the Court pointed out that decision of the national court in which a contract term was found unfair has *erga omnes* effects on all consumer contracts that contain it, including the contracts of those consumers who did not initiate or join the process before the national courts on the assessment of fairness of a contract term.⁹⁴⁵

Indirect effects of unfair commercial practices on a contract

In accordance with such an approach of the Court, I argue that the UCPD is also designated to protect highest public interest. Namely, the main purpose of the Directive is to protect the economic interest of the consumer by prohibiting all kinds of commercial practices of traders that may impair it.⁹⁴⁶ To this end, this prohibition leads to the accomplishment of two extremely important goals of the European Union: the achievement of a high level of consumer protection and the strengthening of the internal market.⁹⁴⁷ The Directive accomplishes these two goals by providing the most complete legal mechanism for protection of consumer's free and informed choice, which enables the consumer to make his transactional decision while being fully aware of all the necessary information, and without any illegal influence by the trader.

In the case of unfair commercial practices, the actors are the same as in the case of unfair contract terms: trader as a stronger, and consumer as a weaker party. Moreover, as shown in *Perenicova*, there is a close link between unfair commercial practices and unfair contract terms: the stipulation of an unfair contract term is considered as a form of unfair commercial practice.⁹⁴⁸

The obligation of the national court to assess *ex officio* the fairness of a commercial practice and apply all relevant contract law consequences on a contract concluded under its impact, would not be contrary to the judgment of the ECJ in *Perenicova*. In this case, the Court pointed out that the occurrence of unfair commercial practices does not have a direct effect

⁹⁴⁴ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0000

⁹⁴⁵ *Ibid*, para 44

⁹⁴⁶ Article 5(1) of the UCPD

⁹⁴⁷ Article 1 of the UCPD

⁹⁴⁸ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* [2012] ECR I-0000

on fairness of a contract term, but that in any case it represents one of the factors national courts may take into consideration while assessing the fairness of a contract term.⁹⁴⁹

Herein, I argue that the national courts should check whether the fact that there was an unfair commercial practice, in particular the facts that constituted that unfair commercial practice, has particular contract law consequences under the national contract law, and if the answer is affirmative, in line with its case law on the UTD, the national courts has to draw the appropriate conclusions under national law in order to ensure that the consumer is exempted from all negative contractual consequences of an unfair commercial practice.⁹⁵⁰

Such an approach is in line with the decision of the ECJ in *Perenicova* since the mere fact that trader was engaged in an unfair commercial practice would not automatically lead to the annulment of a contract concluded as the outcome of such practice, direct nullity of its term or any other contract law consequences, but the national court would have to check where the facts connected to a particular unfair commercial practices have, under the rules national contract laws, any effect on the validity of concluded contract.

All in all, I advocate that the protection of consumers' economic interests as protected by the UCPD needs to be recognised as being of highest public interest, and thus *ex officio* doctrine should apply, as it is already the case with the unfair contract terms and some other areas of consumer law. Accordingly, in case where the presence of unfair commercial practice has been confirmed, the national courts should be obliged to apply all relevant contract law consequences defined by the national laws in order to provide an adequate and effective protection to an individual consumer, the victim of unfair commercial practice.

⁹⁴⁹ Ibid, para 43

⁹⁵⁰ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira* [2009] ECR I-9579, para 59; Case C-342/13 *Katalin Sebestyén v Zsolt Csaba Kövári, OTP Bank, OTP Faktoring Követeléskezelő Zrt and Raiffeisen Bank Zrt* [2014] ECR I-0000, para 35

Final conclusion

In summation, this thesis examined the relationship between the law on unfair commercial practices and consumer contract law. The thesis developed the claim that that the UCPD has had a strong impact on consumer contract law, despite the formal separation between two branches of law established in Article 3(2) of the UCPD. In order to substantiate this claim, the thesis examined the implications for consumer contract law of the main components of the regulatory regime laid down by the UCPD, namely, the notion of the average consumer, the duty to trade fairly, the duty of information and the remedies.

By looking both at the theoretical underpinnings and at the actual operation of this regulatory regime, the thesis casts light on the way in which the UCPD has shaped consumer contract law. The thesis further showed that this is an ongoing phenomenon whose ramifications may be far-reaching, for it implies that the UCPD is powerfully fueling the Europeanization of contract law.

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