

# Unfair Commercial Practices

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## 1. Introduction

The Unfair Commercial Practices Directive (hereafter: UCP Directive)<sup>2</sup> aims to combat unfair commercial practices in business-to-consumer transactions. Traders who engage in unfairly influencing consumers by aggressive or misleading practices may distort consumers' economic choice-making. By countering such practices, the Directive attempts to fortify consumer choice and the fair operation of business-to-consumer markets.

This chapter offers an introduction and analysis of the UCP Directive. First, an outline of the Directive is provided (para 2) after which the key elements of the Directive are introduced (paras 3 and 4). Then, the relationship between the UCP Directive and other European Directives as well as national laws on fair competition and consumer protection is discussed in light of the broad scope and the maximum harmonisation principle which underlies the UCP Directive (paras 5 and 6). Further, certain aspects of enforcement of the UCP Directive are considered (para 7). After these mostly descriptive sections of the chapter, some further attention is devoted to one of the main themes running through the UCP Directive, namely the tension between championing self-reliance of 'average consumers' and offering protection against certain unsavoury practices (para 8). Moreover, in conclusion some unresolved issues and matters meriting further research are discussed (para 9). A bibliography completes the chapter (para 10).

## 2. Outline of the Directive

The UCP Directive is a general horizontal framework Directive with maximum harmonisation character. The Directive aims to combat unfair commercial practices in marketing, sales and after-

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<sup>2</sup> Directive 2005/29 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 (Text with EEA relevance), *OJ* 2005 L 149/22 (hereafter: UCP directive).

sales activities of traders in business-to-consumer transactions. By doing so, it targets those practices that unfairly distort consumers' choice-making in such transactions.

The UCP Directive was adopted in 2005 and evolved out of its precursor, the 1984 Misleading and Comparative Advertising Directive.<sup>3</sup> However, its scope is considerably wider since it does not merely cover advertising but all business-to-consumer commercial practices in all sectors of economic activity.<sup>4</sup> Hence, the UCP Directive is a generic horizontal framework which scope is not limited to specific sectors of economic activity or specific elements of economic exchange.<sup>5</sup>

The core of the UCP Directive lies in the prohibition of practices contrary to the requirements of professional diligence which materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to a product or service, in particular with regard to 'transactional decisions' (i.e., decisions concerning the conclusion of a contract and decisions to exercise existing contractual rights).<sup>6</sup>

The concept of 'practice' is defined 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.<sup>7</sup> Note, however, that not only marketing, advertising and sales practices prior to entry into contract are covered but also after-sales conduct (e.g., dissuading consumers from exercising their contractual rights).<sup>8</sup> Thus, the subject-matter covered by the UCP Directive includes the entire pre-contractual, contractual and post-contractual decision-making process of consumers. In principle, the scope of the Directive includes any business-to-consumer contract.<sup>9</sup>

Briefly described, the UCP Directive is built up as follows. First, it sets out a general prohibition of unfair commercial practices generally (article 5), followed by specific prohibitions of misleading actions and omissions (article 6-7) and aggressive practices (article 8-9). Annex I to the Directive contains a list of 'blacklisted' practices deemed misleading or aggressive per se. Furthermore, the Directive contains rules on self-regulatory codes of conduct (article 10) and on enforcement and sanctions (article 11-13). The final provisions of the Directive amend the Misleading and Comparative

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<sup>3</sup> 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* 1984 L250/17, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising to include comparative advertising, *OJ* 1997 L290/18. On how historical background, see J Stuyck, E Terryn and T Van Dyck, 'Confidence through fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market' (2006) 43 *Common Market L.Rev.* 107, 109 ff.

<sup>4</sup> Cf. H Collins, 'The Unfair Commercial Practices Directive' (2005) *ECLR* 417, 418.

<sup>5</sup> Thus, the UCP Directive regime also applies to regulated products such as medicinal products; cf. ECJ 16 July 2015, Cases C-544/13 and C-545/13 (*Apoteket Farmaci*).

<sup>6</sup> According to article 2 (k) UCP Directive, 'transactional decision' denotes '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'.

<sup>7</sup> Article 2 (d) UCP Directive.

<sup>8</sup> See Article 3 (1) UCP Directive.

<sup>9</sup> Indeed, according to ECJ 16 April 2015, Case C-288/13 (*Nemzeti Fogyasztóvédelmi Hatóság / UPC Magyarország Kft.*), the unfair practice can consist of one single case rather than a multitude of cases. So, even a one-off instance of the provision of erroneous information can constitute a practice in the sense of the UCP Directive.

Advertising Directive, which is now restricted in application to business-to-business practices of misleading and comparative advertising.<sup>10</sup>

### 3. Unfair commercial practices

The general clause of article 5 UCP Directive prohibits the use of commercial practices which are both contrary to the requirements of professional diligence and materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to a product or a service.<sup>11</sup> Note that article 5 serves as a ‘safety net’ since there is no further need to test article 5 when a practice can be categorised as misleading or aggressive for the application of article 6 and following.<sup>12</sup>

The normative yardstick of ‘professional diligence’ is open-textured. According to article 2 (h) it refers to ‘the 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’.<sup>13</sup> The ‘professional diligence’ standard is a normative yardstick of care or competence.<sup>14</sup> It does not prescribe a requirement of taste and decency.<sup>15</sup> In article 2 (e) UCP Directive, the notion of ‘material distortion’ is defined as the impairment of the ability to make an informed decision, thereby causing the average consumer to take a transactional decision that he would not have taken otherwise. This notion of causality is not factual but hypothetical since it asks what the average consumer, the ‘reasonably well informed and reasonably observant and circumspect consumer’<sup>16</sup>, would have done not what actual consumers have done or would have done. Obviously, the yardstick of the average consumer refers to a non-existent human model. To complicate matters, the Commission has asserted that it is a normative instead of a statistical yardstick.<sup>17</sup> In my opinion, this is unsatisfactory because it creates a

<sup>10</sup> Cf. article 14 UCP Directive.

<sup>11</sup> Article 5 UCP Directive. Generally on the unfairness concept in the UCP Directive, see, eg, B Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Hart Publishing, Oxford|Portland 2011) 271 ff; S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29; New Rules and New Techniques* (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford 2006) ; GG Howells, H-W Micklitz and T Wilhelmsson, *European Fair Trading Law; The Unfair Commercial Practices Directive* (Ashgate, Aldershot 2006) ; W van Boom, A Garde and O Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Markets and the Law, Ashgate Publishing, Aldershot 2014) .

<sup>12</sup> ECJ 19 September 2013, Case C-435/11 (*CHS Tour Services GmbH v Team4 Travel GmbH*); ECJ 16 April 2015, Case C-288/13 (*Nemzeti Fogyasztóvédelmi Hatóság / UPC Magyarország Kft.*). See also European Commission, *First Report 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) (European Commission, Brussels 2013) 12.

<sup>13</sup> On ‘professional diligence’, see, eg., H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73 *Modern Law Review* 89, 89 ff.

<sup>14</sup> C Wadlow, 'The Emergent European Law of Unfair Competition and its Consumer Law Origins' (2012) *Intellectual property quarterly* 1, 9.

<sup>15</sup> Cf. Recital 7 Preamble UCP Directive. See on the relationship between ‘taste and decency’ and ‘professional diligence’ G Howells, H-W Micklitz and T Wilhelmsson, 'Towards a better understanding of unfair commercial practices' (2009) 51 *Int. J. of Law and Management* 69, 79 ff.

<sup>16</sup> ECJ 16 July 1998, C-210/96 (*Gut Springenheide*). Cf. Recital 18 of the Preamble of the UCP Directive.

<sup>17</sup> European Commission, *Guidance on the Implementation / Application of Directive 2005/29/EC on Unfair Commercial Practices (SEC (2009)1666)* (European Commission, Brussels 2009) 28.

disincentive for courts and enforcers to properly investigate how markets really work and it introduces (or continues) the risk that decisions on how average consumers would or would not react to commercial practices are mere conjecture and far off the empirical mark.

#### 4. Misleading and aggressive practices

Misleading practices consist of misleading actions and misleading omissions. According to article 6 UCP Directive, there are basically three types of misleading *actions*:<sup>18</sup>

- 1) giving false, untruthful or deceptive information,
- 2) creating confusion with competitors' products, trademarks, names and distinguishing marks, and
- 3) non-compliance with firm and verifiable commitments contained in a code of conduct to which the trader indicated he was bound.<sup>19</sup>

The first and main category of misleading actions comprises acts of giving false, untruthful or deceptive information which deceives or is likely to deceive the average consumer, even if the information is factually correct and thus causes or is likely to cause the average consumer to take a transactional decision that he would otherwise not have taken. The misleading information can relate to the product, its existence, nature, characteristics, price, or to other circumstances such as trader identity, qualifications or relevant consumer rights.<sup>20</sup>

According to article 7 UCP Directive, an *omission* is misleading if it omits or discloses in an unclear, unintelligible, ambiguous or untimely manner, material information 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.<sup>21</sup> Any decision directly related to the decision whether or not to purchase a product is covered by the concept of 'transactional decision'.<sup>22</sup>

Failure to identify the commercial intent of the commercial practice is also misleading if this intent is not already apparent from the context.<sup>23</sup> Article 7 (4) furthermore imposes a positive duty on traders to disclose certain information when they make 'an invitation to purchase' to a consumer.<sup>24</sup> The listed items of information include, e.g., main characteristics of the product, price inclusive of taxes. Moreover, article 7 (5) provides that 'information requirements established by Community law in relation to commercial communication' is to be disclosed as well. A non-exhaustive list of such Community rules is laid down in Annex II to the Directive. The result of all this is that non-compliance

<sup>18</sup> See article 6 (1) and (2)(a) and (b) UCP Directive respectively.

<sup>19</sup> Note that falsely claiming to be a signatory to a code of conduct is also an misleading practice. See Annex I (1) UCP Directive. See also article 10 UCP Directive which allows Member States to encourage code owners to exercise control on unfair commercial practices.

<sup>20</sup> Article 6 (1) UCP Directive.

<sup>21</sup> Article 7 UCP Directive.

<sup>22</sup> ECJ 19 December 2013, C-281/12 (*Trento Sviluppo & Centrale Adriatica v Autorità Garante della Concorrenza e del Mercato*).

<sup>23</sup> Article 7 (2) UCP Directive.

<sup>24</sup> According to article 2 (i) UCP Directive, an 'invitation to purchase' means 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. Cf. ECJ 12 May 2011, C-122/10 (*Konsumentombudsmannen / Ving Sverige AB*); European Commission 2013 47 f.

with these specific (and mostly pre-contractual) information duties is deemed an unfair commercial practice.

Aggressive practices are those which in their factual context, taking account of all features and circumstances, by harassment, coercion, use of physical force, or undue influence, significantly impair or are 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 otherwise not have taken. The use of psychological pressure such as the exploitation of vulnerability or discouraging the average consumers from asserting their rights is also considered to constitute an aggressive practice.<sup>25</sup> For example, traders who introduce artificial obstacles for consumers to terminate their contracts and switch to other traders or to exercise their contractual rights may thus commit aggressive practices.<sup>26</sup>

Annex I to the Directive consists of a 'black list' of practices considered unfair under any circumstances.<sup>27</sup> The blacklisted practices are deemed unfair in the sense that no further evidence of unfairness, misleading or aggressive nature is required. The list covers 23 misleading and 8 aggressive practices. For example, deemed misleading is a commercial practice which describes "a product as 'gratis', 'free', 'without charge' or similar, if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item".<sup>28</sup> In *Purely Creative*, the ECJ was called to construe Annex I, para. 31, according to which a commercial practice which creates 'the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either there is no prize or other equivalent benefit, or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost' (prize draw and lottery scams) is deemed aggressive. The Court held that in applying this rule, it is irrelevant that the cost imposed on the consumer is *de minimis* compared with the value of the prize. Furthermore, the prize draw can even be deemed aggressive if the consumer has a number of methods by which he may claim the prize, of which at least one is free of charge, if, according to one or more of the proposed methods, the consumer would incur a cost in order to obtain information on the prize or how to acquire it.<sup>29</sup>

## 5. Maximum harmonization principle

The UCP Directive follows the maximum harmonization principle.<sup>30</sup> So, national legislation offering less or more protection to consumers is in contravention of EU law. As a result, some member states were obliged to repeal existing protective measures such as specific price listing regulations while others found that national rules specifying the format of certain pre-contractual information overstepped the maximum harmonisation boundaries.<sup>31</sup>

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<sup>25</sup> Article 8 and 9 UCP Directive.

<sup>26</sup> See article 9 (d) UCP Directive. Cf. European Commission 2009 11.

<sup>27</sup> See article 5 (5) in conjunction with Annex I of the UCP Directive. On the relationship between the different categories, see, eg., Stuyck, Terryn and Van Dyck, 132 ff.

<sup>28</sup> See Annex I, para. 20, UCP Directive.

<sup>29</sup> ECJ 18 October 2012, Case C-428/11 (*Purely Creative Ltd and Ors v Office of Fair Trading*). Cf. ECJ 3 April 2014, Case C-515/12 ('*4finance*' UAB) concerning the application of Annex I, point 14.

<sup>30</sup> Cf. Recital 14, 15, 5 UCP Directive.

<sup>31</sup> WH van Boom, 'Price Intransparency, Consumer Decision Making and European Consumer Law' (2011) 34 *Journal of Consumer Policy* 359, 367 f. It should be noted, however, that it can be argued that the maximum

The underlying rationale of maximum harmonisation character of the UCP Directive is that this guarantees a pan-European level playing field by creating legal certainty and a fair balance between traders' duties and consumers' rights.<sup>32</sup> To a large extent, the matter of maximum harmonisation turns on whether the general clauses and the Annex of the UCP Directive may be supplemented by national rules which are more concrete in nature.

However, the generic scope of the Directive is not exceptionally well demarcated.<sup>33</sup> The scope is such that it may cut through various national legal fields and doctrines, such as laws of 'market practices' in economic law and contract law doctrines of mistake, misrepresentation, duress, fraud, deceit, and even through related areas such as the field of economic torts. Moreover, one can question the efficacy of maximum harmonisation through a horizontal Directive which has such a broad-brushed sphere of application and whose general clauses of unfairness ultimately need a case-by-case application at national level.<sup>34</sup> Therefore, it is important to review the exceptions to the maximum harmonisation character.

Firstly, the relationship between the UCP Directive and sector-specific or product-specific rules is as follows. In case of conflict between provisions of the UCP Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter take precedence (article 3 (4)).<sup>35</sup> For instance, EU regulation 1008/2008 on Air Services sets particular rules on information disclosure in the online sales of airline tickets. Because of their more specified nature, these rules take priority over the general pre-contractual information duties laid down in the UCP Directive.<sup>36</sup> This priority also applies in case the specific EU rules are of a minimum harmonization character.

Secondly, according to article 3 (8) UCP Directive both national and EU rules on establishment or authorisation of regulated professions as well as the deontological codes and rules that uphold standards of integrity of these professionals, are exempt from maximum harmonisation.

Thirdly, the UCP Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract (article 3 (2)).<sup>37</sup>

Fourthly, in the domain of financial services and immovable property the UCP Directive is of minimum harmonisation (Article 3 (9) UCP Directive). The reasoning for this exception was that the complexity and risks surrounding financial products and markets may require more detailed rules

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harmonisation character of the UCP Directive on issues of pre-contractual information duties has become unsustainable in light of article 5 (4) and Recital (12) of the Preamble to the Consumer Rights Directive.

<sup>32</sup> See, e.g., Recital (12).

<sup>33</sup> For an example of the creative type of argumentation that may sometimes be needed to conclude that a certain national rule does not contravene against the UCP Directive, see ECJ 17 October 2013, C- 391/12 (RLvS Verlagsgesellschaft mbH / Stuttgarter Wochenblatt GmbH).

<sup>34</sup> Cf. Stuyck, Terryn and Van Dyck, 148; B Keirsbilck, 'Towards A Single Regulatory Framework on Unfair Commercial Practices?' (2009) EBLR 507, 509.

<sup>35</sup> Cf. Weatherill and Bernitz (eds), 17 and 44. Further on convergence and divergence of the UCP Directive and other EU rules consumer protection, see A Garde, 'The Unfair Commercial Practices Directive - A successful example of legislative harmonisation?' in P Syrpis (ed) *The Judiciary, the Legislature and the EU Internal Market* (Cambridge U.P., 2012) 118 ff.; Van Boom, Garde and Akseli 1 ff.

<sup>36</sup> See article 23 of Regulation EC No. 1008/2008 on Air Services. Cf. European Commission 2009 18-19; European Commission 2013 5.

<sup>37</sup> Note that where article 3 (2) UCP Directive speaks of 'contract law', 'Vertragsrecht', 'droit des contrats', the Dutch version refers to 'verbintenissenrecht' (the law of obligations generally). Indeed, it is arguably better to read 'contract law' as 'private law' since in some legal systems the pre-contractual duties on fair exchange of information are considered part of tort law rather than contract law.

and policies at Member State level.<sup>38</sup> In its recent evaluation of the UCP Directive, the European Commission addresses the question whether article 3 (9) UCP Directive merits repealing.<sup>39</sup> The Commission concludes that the exceptions to the maximum harmonization principle will be left unchanged.<sup>40</sup> Therefore, Member States will continue to be allowed to apply more stringent rules on commercial practices in the financial services domain.

Fifthly, rules on 'the health and safety aspects of products' are excluded from maximum harmonisation (Article 3 (3) UCP Directive).<sup>41</sup> So, advertising restrictions concerning medical devices, pharmaceuticals et cetera, are left untouched by the UCP Directive. It is not entirely clear whether rules on marketing and advertising of gambling services can also be filed under this exception.<sup>42</sup>

The sixth and final exception to the maximum harmonisation character of the UCP Directive lies in its aim. Since the central aim of the Directive is the protection of consumers against unfair commercial practices, the question is whether national rules which impose more (or more specific) restrictions on commercial practices in order to protect other interests than consumer interests are excluded from the sphere of application of the Directive. For instance, what if a national legislature bans certain practices with a view of the protection of fair competition between competitors or the protection of employees? In *Pelckmans Turnhout*, the ECJ ruled that national provisions pursuing objectives not related to consumer protection are outside the scope of the Directive.<sup>43</sup>

The restrictions that maximum harmonisation imposes on Member States is most acutely felt in relation to the blacklist (Annex I). There, the general clauses on unfair, misleading and aggressive practices have been supplemented by a list of specific prohibitions. The ECJ has ruled on numerous occasions that the blacklist is exhaustive and that the Directive does not allow categorical prohibitions of other practices at national level. The basic idea is that 'it was essential to overcome the specific legal barriers caused by the fragmented regulation of unfair commercial practices, which gave rise to cost, complexity and uncertainty for both businesses and consumers'.<sup>44</sup> Instead, national authorities and courts are only allowed to decide on a case by case basis whether other practices than those banned in the blacklist are unfair, misleading or aggressive. On that basis, the ECJ has ruled that the following national rules are incompatible with the UCP Directive:

- Rules that generally prohibit combined offers<sup>45</sup>
- Rules that generally prohibit practices under which participation in a prize competition or lottery is conditional on the purchase of goods<sup>46</sup>

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<sup>38</sup> See Recital (9).

<sup>39</sup> Article 18 UCP Directive charges the EC with submitting a review of the experiences with the UCP Directive by 12 June 2011. The review was submitted in March 2013.

<sup>40</sup> See European Commission 2013.

<sup>41</sup> On this exception see, e.g., Van Boom, Garde and Akseli 1 ff.

<sup>42</sup> Although Recital (9) of the Preamble to the UCP Directive suggests that regulation concerning gambling services remain unaffected by the Directive, it is unclear where exactly in the Directive this exception is laid down.

<sup>43</sup> ECJ 4 October 2012, C-559/11 (*Pelckmans Turnhout NV v Walter Van Gestel Balen et al*). Cf. Recital (6) of preamble to the UCP Directive.

<sup>44</sup> (COM(2013) 139 final) 4.

<sup>45</sup> ECJ 23 April 2009, C-261/07 and C-299/07 (*VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV*). In a similar vein ECJ 11 March 2010, C-522/08 (*Telekomunikacja Polska*). Cf. Cour de cassation (France) (Cass. civ. 1<sup>re</sup>) 15 November 2010 and Oberste Gerichtshof (Austria) 15 February 2011, both reported by EI Obergfell, 'Richdlinienkonforme Bewertung von mitgliedstaatlichen Kopplungsverboten im Lichte der Rechtsprechung des Europäischen Gerichtshofs' (2012) Zeitschrift für Europäisches Privatrecht 631 ff.

- Rules that generally prohibit sales with bonuses<sup>47</sup>
- Rules that general prohibit advertising of upcoming sales in a particular period<sup>48</sup> or without authorization.<sup>49</sup>

Therefore, the Annex is exhaustive and Member States are not allowed to introduce or maintain their own list of unfair practices. How this rigid stance is to be reconciled with the scope of application and exceptions to the maximum harmonisation principle, is not entirely clear. What if a black list is part of the national contract law regime (e.g. 'a contract following a combined offer is voidable'), or aims at protecting both consumer interests and the fair operation of markets generally?

## 6. Relationship with other EU rules of consumer protection

Given the generic scope of the UCP Directive, there are several points of contact between the UCP Directive and other EU rules consumer protection. Here, I briefly review these relationships.

As already mentioned above, the UCP Directive itself formulates a priority rule for other Community rules regulating specific aspects of unfair commercial practices (article 3 (4)). This is relevant where the UCP Directive merely formulates vague standards and dedicated EU rules are more specific, e.g., where concrete rule-based provisions offer more guidance than the UCP Directive does in terms of how traders should behave in their marketing practices.<sup>50</sup> Note, however, where such specific EU rules do not exist, purely national rules may prove to be in violation of the maximum harmonisation character of the UCP Directive.

As far as information duties under the UCP Directive is concerned, article 7 provides that in the case of a so-called 'invitation to purchase',<sup>51</sup> 'Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material'. This means that when a trader makes an 'invitation to purchase', he shall provide the consumer with information, if not already apparent from the context, deemed material by Community law in relation to commercial communication. Annex II to the UCP Directive refers to information duties laid down in several articles of fourteen specific Directives. Thus, the UCP Directive provides that non-compliance with those specific information duties constitutes an unfair commercial practice, which brings these duties within the national enforcement framework concerning unfair commercial practices.

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<sup>46</sup> ECJ 14 January 2010, C-304/08 (*Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH*).

<sup>47</sup> ECJ 9 November 2010, Case C-540/08 (*Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Österreich'-Zeitungsv-erlag GmbH*). Cf. ECJ 10 July 2014, Case C-421/12 (*Commission / Belgium*).

<sup>48</sup> ECJ 15 December 2011, C-288/10 (*Wamo BVBA v JBC NV and Modemakers Fashion NV*) and ECJ 11 December 2011, C-126/11 (*Inno NV v Unizo and others*).

<sup>49</sup> ECJ 17 January 2013, C-206/11 (*Köck v Schutzverband gegen unlauteren Wettbewerb*).

<sup>50</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 080/27); referred to in Annex II of the UCP Directive.

<sup>51</sup> On what constitutes an 'invitation to purchase', see, e.g., ECJ 12 May 2011, C-122/10 (*Konsumentombudsman / Ving Sverige AB*).

A further interesting relationship is the one between the UCP Directive and the Unfair Contract Terms Directive 93/13.<sup>52</sup> In its 2012 *Pereničová* decision, the ECJ held that unfairness of a certain contract practice in the sense of the UCP Directive does not by necessity cause the contract to be 'not binding on the consumer' in the sense of article 6(1) of Directive 93/13.<sup>53</sup> Thus, it seems that using unfair contract terms in itself is not an unfair commercial practice; courts should fully investigate the consequences of such use in light of the specific circumstances.<sup>54</sup>

A latest addition to the consumer *acquis* is the 2011 Consumer Rights Directive (CR Directive).<sup>55</sup> In several respects, the CR Directive and the UCP Directive overlap. For instance, both Directives lay down similar rules on material information that needs to be provided prior to entry into contract.<sup>56</sup> Moreover, the CR Directive supplements the UCP Directive in respect of inertia selling (unsolicited deliveries). Such practices are prohibited under both Directives but in addition to the prohibition under Article 5(5) and point 29 of Annex I UCP Directive, article 27 CR Directive provides a contractual remedy by exempting the consumer from the obligation to provide any consideration for such unsolicited supply or provision.<sup>57</sup>

## 7. Enforcement

The method of enforcement is by and large left to the discretion of Member States. Article 11 UCP Directive sets out that Member States shall implement adequate and effective means to combat unfair commercial practices in order to enforce compliance, e.g., by means of powers conferred on courts or administrative authorities to issue stopping orders, prohibitive injunctions, publication and rectification orders, et cetera. It is left to the discretion of Member States to choose the exact form of the enforcement mechanisms, as long as it offers recourse to an administrative or judicial procedure to those persons and organizations having a legitimate interest, which includes competitors.<sup>58</sup> According to article 13 UCP Directive, Member States shall also ensure that a system for sanctioning unfair commercial practices. This needs to be a system of effective, proportionate and dissuasive penalties.

The implementation techniques vary considerably. For instance, the Member States employ a wide range of enforcement methods against a background of diverging enforcement styles and cultures.<sup>59</sup>

<sup>52</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993 L 095/29.

<sup>53</sup> ECJ 15 March 2012, C-453/10 (*Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o.*).

<sup>54</sup> Note that the German Supreme Court decided in 2010 that the use of general contract terms affecting consumer rights in contravention of compulsory statutory protection constitutes an unfair commercial practice. See BGH 31 March 2010, GRUR 2010, 1117. Cf. S Augenhofer, 'Aktuelle Entwicklungstendenzen im Europäischen Verbraucherrecht' in S Augenhofer (ed) *Verbraucherrecht im Umbruch* (Mohr Siebeck, Tübingen 2012) 21.

<sup>55</sup> 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, *OJ* 2011 L 304/64.

<sup>56</sup> Compare for instance article 7 (4) UCP Directive (information in case of 'invitation to purchase') and article 5 and 6 CR Directive (information duties 'before the consumer is bound').

<sup>57</sup> See CR Directive, preamble 60.

<sup>58</sup> Article 11 (1) UCP Directive.

<sup>59</sup> On the various approaches in enforcement technique, see F Weber, *The Law and Economics of Enforcing European Consumer Law - A Comparative Analysis of Package Travel and Misleading Advertising* (Markets and the Law, Ashgate, Aldershot 2014) ; Wv Boom and M Loos (eds), *Collective Enforcement of Consumer Law - Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (European Studies in Private Law, Europa Law Publishing, Groningen 2007) .

In the UK, the Directive was implemented through the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).<sup>60</sup> These Regulations did not introduce any form of individual redress to consumers but merely a system of administrative enforcement orders and criminal law sanctions.<sup>61</sup> However, recently proposed amendment of the Regulations introduces certain rights for consumers, including the right to unwind, the right to a discount and the right to damages.<sup>62</sup> In other countries, such as Germany, private enforcement by (subsidized) private associations with standing to sue for injunction is traditionally the main form of enforcement.<sup>63</sup> Again other legal systems have an enforcement practice which combines public authority market monitoring with private consumer association bargaining, settling and litigating strategies.

In its recent review, the EC has taken the view that at this stage it is not appropriate to amend the UCP Directive substantively. It has, however, voiced concerns over enforcement efforts and effectiveness of these efforts in targeting particularly problematic practices.<sup>64</sup>

## 8. Protection and self-reliance

The core of the UCP Directive lies in the *information paradigm*: by assuring a flow of correct and meaningful information, transactional decisions of ‘average consumers’ are undistorted and can therefore be assumed to be taken in accordance with consumer preferences.<sup>65</sup> From this perspective, the UCP Directive is typical of the classical economic framework of EU consumer policy. According to the Court’s case law, the ‘reasonably well informed and reasonably observant and circumspect’ consumer is expected to seriously attempt collecting and understanding all available information on material aspects of a contract.<sup>66</sup> So, the ‘average consumer’ is neither credulous nor easily impressed or quickly deceived but a self-reliant, confident and pro-active being. In line with the classical

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<sup>60</sup> In the UK, administrative enforcement generally was the responsibility of the Office of Fair Trading (OFT). Enforcement in the financial services domain is the responsibility of the FCA. See S. 213 Enterprise Act 2002 as amended by s. 95 Financial Services Act 2012. Recently, the powers of the OFT were transferred to the Competition and Markets Authority (CMA) and (mostly) the local Trading Standards authorities. See Consumer Protection from Unfair Trading Regulations 2008 as amended by the Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013.

<sup>61</sup> *McGuffick v Royal Bank of Scotland plc* (2009) EWHC 2386 (Comm). Cf. Enterprise Act 2002, Part 8 (Enforcement of certain consumer legislation).

<sup>62</sup> See the 2013 Draft Consumer Protection from Unfair Trading (Amendment) Regulations.

<sup>63</sup> See, e.g., the German model, on which, e.g., D Poelzig, 'Private or public enforcement of the UCP Directive? Sanctions and remedies to prevent unfair commercial practices' in W van Boom, A Garde and O Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Markets and the Law Ashgate Publishing, Aldershot 2014) ; see also WH van Boom, *Efficacious Enforcement in Contract and Tort (inaugural lecture EUR)* (BJU, The Hague 2006) . Note, however, that even the German legal system uses administrative law (cf. the Consumer Protection and Food Safety Authority Act 2002 (Gesetz über die Errichtung eines Bundesamtes für Verbraucherschutz und Lebensmittelsicherheit (BVL-Gesetz - BVLG)) and criminal sanctions (cf. §16-19 Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb; UWG)).

<sup>64</sup> European Commission 2013.

<sup>65</sup> The information paradigm is also apparent from the requirement under article 7 (4) UCP Directive to provide certain material information prior to contracting. For additional and partially overlapping ‘material information’ requirements see article 5 (1) of the Consumer Rights Directive 2011/83/EU. Obviously, the UCP Directive is also concerned with aggressive commercial practices.

<sup>66</sup> ECJ 16 July 1998, C-210/96 (*Gut Springenheide*); ECJ 19 September 2006, C-356/04 (*Lidl and Colruyt*); cf. ECJ 6 July 1995, C-470/93, Jur. 1995 p. I-01923 (*Mars*).

economic framework, the UCP Directive is geared towards empowering rather than restraining this 'homo economicus' in its transactional decision-making processes.<sup>67</sup>

However, the Directive does not only revolve around 'average consumers' since it also refers to particular consumers who are vulnerable "to the practice or the underlying product because of their mental or physical infirmity, age or credulity".<sup>68</sup> Therefore, the UCP Directive oscillates between two objectives, namely empowerment of self-reliant and autonomous consumers (i.e., 'average' consumers) and protection of 'vulnerable average consumers' (whatever that may mean). With regard to the first objective, the Directive subscribes to the information paradigm which aims at fortifying autonomy and emphasizing individual responsibility. On the other hand, the Directive attains the protection of consumers generally and vulnerable consumers in particular against traders who exploit their superior knowledge on consumer behaviour and human deficiencies.

Obviously, the question is what makes consumers vulnerable in connection with commercial practices. Given the many human traits and deficiencies of ordinary consumers laid bare by psychological and marketing studies, one could argue that *all* consumers are vulnerable individuals and as such deserve some form of protection.<sup>69</sup> By contrast, it is sometimes said that consumers should take more responsibility for their decisions. For example, in discharging its duties, the Financial Conduct Authority (FCA), is under a duty to apply a number of principles including the principle 'that consumers should take responsibility for their decisions' (s. 3B FSMA 2000). This sounds stern but what does it actually mean in markets where products are difficult to comprehend to begin with, are deliberately made even more complex, and where consumers are short-sighted, inert and/or literally or figuratively illiterate? As a consequence, national courts called to apply the UCP framework may find that in fact it offers less potential for redress to consumers than national doctrines such as mistake, fraud and tort do. Thus, they may be tempted to avoid the straight-jacket of maximum harmonisation by resorting to such national private law doctrines. Since the UCP Directive is without prejudice to contract law<sup>70</sup> – or perhaps even broader: the law of obligations? – there may be an implicit policy to turn to national private law remedies in those instances where the UCP Directive turns out to be too 'trader friendly'.<sup>71</sup>

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<sup>67</sup> Thus, the UCP Directive can have a damping effect on more protective national legal systems. See Stuyck, Terry and Van Dyck, 134 ff.

<sup>68</sup> Article 5(3). Cf. 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 Publishing, Oxford 2006) 115 ff.; R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) 30 *Journal of Consumer Policy* 21, 22 ff.

<sup>69</sup> For a similar argument, see Stuyck, Terry and Van Dyck, 121 f. On these human frailties of consumers, see, e.g., CP Haugtvedt, PM Herr and FR Kardes (eds), *Handbook of Consumer Psychology* (Psychology Press, New York 2008) ; M Evans, A Jamal and G Foxall, *Consumer Behaviour* (John Wiley & Sons Ltd., Chichester 2006) . On the legal ramifications of these human traits generally, see, e.g., RB Korobkin and TS Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *Cal. L. Rev.* 1051, 1051; CR Sunstein (ed), *Behavioral Law and Economics* ((Cambridge Series on Judgment and Decision Making), Cambridge University Press, Cambridge 2000) ; RH Thaler and CR Sunstein, *Nudge - Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, New Haven 2008) .

<sup>70</sup> Article 3 (2) UCP Directive provides that it is 'without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'.

<sup>71</sup> See Van Boom, Garde and Akseli.

## 9. Unresolved aspects and further research

Given the wide ambit of the Directive and its general horizontal nature, a number of controversial aspects become apparent when studying the Directive. In the previous paragraphs some of these aspects were already identified. For instance, paragraph 4 exemplified the problematic issues caused by the interplay of the broad general horizontal scope of the UCP Directive and its underlying maximum harmonisation principle. Future research would do well to venture further into this area and analyse from a comparative perspective the various restrictions set by the UCP Directive to national laws of fair competition. This could increase our understanding of the incursions the UCP Directive has made in the different countries and the impact it has had on the various legal doctrines. The same applies to the embedding – where applicable – of the core concepts of the UCP Directive within national systems of private law, notably contract and tort law. Did the UCP Directive have a direct or indirect impact on these areas of law?

Following the analysis in paras 4 to 6, the relationship between the UCP Directive and various specific EU rules pertaining to advertising, marketing and sales and after-sales processes could be further explored as well. For instance, the ‘division of labour’ between the UCP Directive on the one hand and the Consumer Rights Directive and the Unfair Contract Terms Directive is far from clear. To what extent do these three Directives interact, converge or clash?

Finally, an issue also worthy of more extensive research was addressed in para 8, namely the limits and limitations of the information paradigm as one of the main pillars for EU consumer policies. The UCP Directive relies heavily on this paradigm but simultaneously offers specific protection to certain categories of vulnerable consumers such as the elderly and children deemed worthy of more protection than the ‘ordinary average consumer’. It seems that the theoretical and empirical backbone of the UCP Directive are in need of fortification on this point. Therefore, comprehensive reflection on what makes these consumers vulnerable and whether the law can realistically address the resulting matters is due.

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