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**Unfair Commercial Practices in e-Commerce**

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## Introduction

The new information society services that have been emerged and developed in the past decades, changed undoubtedly the daily lives of millions of citizens and consumers around the world by transforming and shaping the way they connect, consume, communicate and purchase. In the context of current pandemic crisis and due to the implemented restrictions and quarantine, online transactions flourished even more. The coronavirus crisis also confirmed the importance of digital technologies and e-commerce to our lives and the dependency of our economy and society on online services. Furthermore, the rise and dominance of social media in our everyday life created the circumstances for the growth of new and different kinds of commercial practices, including advertising and marketing techniques that were adapted to this new era and exploited to the fullest the potentials they were offered. Online social media providers earn gigantic revenue streams from the display of advertising and marketing content and from selling to third parties access to user's profiles for targeting reasons. The powers, that these social media providers enjoy from the profiling and analyzing of their users' content and data, have contributed to the creation of a new powerful industry and their overall dominance in marketing and advertising sectors. The concerns and fears that have respectively arisen relate to the degree of users' profiling and the limitless commercialization of people's information to the highest bidders. Moreover, advertising systems and algorithms used by very large online platforms have also raised further concerns about potential economic and societal risks and harm that entail, requiring 'further public and regulatory supervision on account of their scale and ability to target and reach recipients of the service based on their behavior within and outside that platform's online interface.'<sup>1</sup>

The ratio and the very reason that made imminent the development of EU Consumer Law Protection was the need for leveling out the existing asymmetry of information and bargaining power that consumers suffered. This imbalance of powers between the stronger trader/supplier and the weaker consumer was early detected and resulted in a series of European legislative acts that targeted at filling these gaps. Key elements towards this bargaining equality would constitute transparency, due diligence and informational requirements that shall be imposed on traders and information society providers. These requirements and principles have been promoted and already established in many European texts, mainly the Unfair Contract Terms Directive, the Sales Directive, the Directive on Misleading Advertising, the e-commerce Directive and the Unfair Commercial practices Directive that will be elaborated in this thesis. However, as already noted, consumer protection has been jeopardized lately due to the new digital developments and the coronavirus crisis, calling for more efficient measures and response. In light of the above, the EU is putting her effort, through the proposal of new legislative acts about digital services and artificial intelligence, in finding the most efficient solutions that would combine

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<sup>1</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 final, 2.

consumer protection and market's freedom. Although such a challenge appears to be a tough one, it seems that EU is close to winning this bet.

The scope of this dissertation is to elaborate on the unfair commercial practices detected within the broad field of e-commerce and not merely on platforms or online services that qualify under the e-commerce Directive as information society service providers. It aspires to cover the full picture of unfair, deceptive and aggressive practices and omissions, including problematic advertising and marketing techniques that are observed in online commerce and threaten the consumers' welfare and protection. Additionally, in last chapters, a short comparison with other existing legal instruments will be made and the potentials of the new EU proposals on digital services and artificial intelligence will be examined, indicating current inefficiencies, possible solutions and future developments.

# 1. E-commerce

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## I. Definition and historical background

Ordinary shops and markets are losing some of their glory and clientele during the past decades as they are gradually replaced, to a large degree, by online market places and e-shops. Most people seem to prefer purchasing goods and services with one click through their smartphones, laptops or tablets rather than visiting real shops and wandering around malls or open markets. The introduction of World Wide Web in 1991 and the accessibility of Internet to everyone led to the progressive dominance of Internet within our lives and the gigantic growth and expansion of e-commerce. The birth of the "digital global civilization" that characterized the past decades triggered businesses to take advantage of the web and its global accessibility within their commercial transactions.<sup>2</sup> Electronic marketplaces, large e-malls (as Amazon), consumer-to-consumer auction platforms (like e-Bay), multichannel retailers (like L.L. Bean), and many millions of e-retailers constitute now a brand new reality.

However, e-commerce, in its primary version, originated in a standard for the exchange of business documents, such as orders or invoices, between suppliers and their business customers<sup>3</sup>, dated back to 1950-1960. Later, during 1980's, businesses started interchanging computer-to-computer electronic data and conducting electronic business transactions. But what is actually e-commerce? What are the characteristics that it gathers and what services and facilities does it offer?

Electronic commerce is defined as a business model that enables the conducting of business transactions and includes the selling of information, services, and goods by means of computer telecommunications networks. These transactions are processed through the exchange of data or currency.<sup>4</sup> E-commerce generally operates in four major market segments and can be conducted over computers, tablets, smartphones, and other smart devices. These four market segments can be analyzed into 1) business to business (B2B) where businesses are doing business directly with each other, 2) business to consumer (B2C) where businesses offer their products and services for sale to consumers, 3) consumer to consumer where individuals may by themselves put their products into sale on market places such as eBay and 4) consumer to business<sup>5</sup> where individuals sell their products and services to businesses.<sup>6</sup>

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<sup>2</sup> Popi Kalabouka-Giannopoulou, *Law of Transactions* (in greek), (Nomiki Vivliothiki, 2020), 3.

<sup>3</sup> <https://www.britannica.com/technology/e-commerce>.

<sup>4</sup> The new-emerged cryptocurrencies are also included within the currency definition.

<sup>5</sup> <https://www.investopedia.com/terms/e/ecommerce.asp>.

<sup>6</sup> Shopify. "Ecommerce", available at <https://www.shopify.com/encyclopedia/what-is-ecommerce>.

Among the many pros that e-commerce offers are the convenience that users enjoy when purchasing, the wide variety of products offered to consumers, the personalization of the products offered to consumers based on their profiles and preferences, the global character of marketplaces and the minimized expenses for sellers who do not have to maintain shops.

On the other hand, like every innovation, apart from the advantages, e-commerce entails also drawbacks relating indicatively to the limited customer service and the lack of intimacy between consumers and products. However, among the fundamental problems that the online community faces, are those of privacy and security of users' personal data, which will be further discussed in the next chapters. Some of the problems that arose from the vagueness of Internet and concerned e-commerce, led to the adoption of a Directive regulating e-commerce at European level. The scope, objective and the basic provisions of the Directive will be analyzed right below.

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## **II. E-commerce Directive<sup>7</sup>**

The rise of e-commerce and Information Society was early detected by Member States both at national and at European level. The right to Information Society has been recognized constitutionally since many years in most member states, whereas European Union in turn adopted in 2000 the e-commerce Directive in order to build a more unified and efficient European legal framework. The Directive was the result of four years of discussions and two proposals<sup>8</sup> and attempted to solve a series of problems that have arisen among consumers, platforms and traders. The disparities in Member States' legislation and case-law, concerning information service providers acting as intermediaries, caused barriers to the smooth functioning of the internal market, urging for a codification. A unified legal framework, binding both service providers, traders and consumers across EU would enhance legal certainty, consumer confidence<sup>9</sup> and facilitate electronic commercial transactions among member states. Such approximation would lead to the achievement of the objective pursued by the Directive, i.e. 'the proper functioning of the internal market without internal frontiers, the elimination of barriers and the free movement of information society services between Member States'.<sup>10</sup> As regards the nature of the Directive, we shall highlight

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<sup>7</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178 of 17 July 2000, pp. 1-16); hereinafter: "E-Commerce Directive".

<sup>8</sup> Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM/98/0586 final - COD 98/0325, OJ C 30, 5.2.1999 & Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market, COM/99/0427 final - COD 98/0325 - OJ C 248E, 29.8.2000.

<sup>9</sup> Recitals 7 & 8 of the preamble of the e-commerce Directive.

<sup>10</sup> Article 1 (1) & (2) of the e-commerce Directive.



that this is of minimum harmonization, with provisions strictly limited to the minimum needed to achieve the aforementioned objectives pursued<sup>11</sup>.

Concerning consumer protection, it was also the intention of the drafters of the Directive, although not directly stated, to preserve the *acquis communautaire* and more specifically the *acquis consommateur*<sup>12</sup>, as it derives from the wording<sup>13</sup> of article 1 (3) of the e-commerce Directive. With regard to public health, consumers and minors, where a higher level of protection must be safeguarded, the Directive is *complemented* with other legal instruments, ensuring that enhanced protection, as long as the freedom to provide information society services is not impaired. Therefore, legal protection granted to consumers by other horizontal European legal instruments<sup>14</sup> will be respected and applied within e-commerce. However, by virtue of article 1 (3), in cases of a conflict between the provisions in the e-commerce directive and the rest of the *acquis*, the Directive gives priority to the provisions of the former concerning the freedom to provide information society services.

A derogation from the above is inserted in article 3 (4) (i) case 4, where ‘Member States may take measures and restrict the freedom to provide information society services *from another Member State* in respect of a given information society service, *if this is necessary for the protection of consumers*. We see, therefore, that by virtue of the principle of proportionality and subsidiarity, the Directive provides a legal framework on e-commerce and information society service providers, aiming at ensuring a minimum level of unification and harmonization among national jurisdictions. Whereas, in cases where the consumers’ protection is jeopardized, Member States are entitled to deviate from the provisions of the Directive concerning the freedoms and rights granted to information service providers, in favor of consumers.<sup>15</sup>

The object of the Directive, as already mentioned, is the regulation of information society services and electronic commerce, which, the latter, comprises a wide range of economic activities which take place on-line; from selling goods to providing on-line information, on-line advertising or *commercial communications*<sup>16</sup>. For purposes of consistency and for the full understanding of the notions that will be later analyzed, a definition on service providers shall also be given right shortly.

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<sup>11</sup> Recital 10 of the e-commerce Directive.

<sup>12</sup> Eliza Alexandridou, *The Law of E-Commerce* (in greek), (Sakkoulas Publications, Athens-Thessaloniki, 2010), 24-25; Eliza Alexandridou, *Consumer Protection Law* (in greek), (Nomiki Vivliothiki, 2018), 23.

<sup>13</sup> *This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health, and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.*

<sup>14</sup> Such as the UCPD, GDPR, Directive on unfair contract terms, Directive on misleading and aggressive Advertising etc.

<sup>15</sup> Article 3 (4)(a)(i) of the e-commerce Directive.

<sup>16</sup> Recitals 18 & 21 of the e-commerce Directive.

In accordance with the Directive 98/48/EC<sup>17</sup> to which the e-commerce Directive refers<sup>19</sup>, information society services constitute *any service normally provided for remuneration, at a distance, by electronic means<sup>20</sup> and at the individual request of a recipient of services.*<sup>21</sup> The e-commerce Directive, recognizing that responsible for the provision of information society services are service providers, intended to define, in a series of articles, the occasions on which service providers are to be found liable when hosting, storing or transmitting information on-line. In line with the provisions and requirements envisaged in the Directive, the liability of the service providers will be established when they deliberately and actively participate in the transmission or storage of information, i.e. when they initiate the transmission, select the recipient of the transmission or when they modify the information contained in the transmission. However, they are not to be found liable for ‘mere conduit’ or for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information’s onward transmission.<sup>22</sup>

Additionally and pursuant to core article 15 of the Directive, there is no general obligation on behalf of the service providers to monitor the information they transmit or store unless they have actual knowledge or are aware of circumstances indicating illegal activity or information. However, by virtue of professional diligence obligations under the UCPD, that will be shortly analysed, platforms should in principle take appropriate measures which - without amounting to a general monitoring obligation - enable third party traders to comply with EU consumer and marketing law requirements.<sup>23</sup> Such obligations may imply that platforms and websites shall design their interfaces so as information by traders is easily presented and displayed to platform users.

Among the main concerns and problems, that this new virtual reality has created, is the intensification of the existing information and power asymmetry between information society service providers and consumers to the detriment of the latter. The concentration of powers on behalf of service providers and platforms and the

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<sup>17</sup> Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217, 5.8.1998.

<sup>18</sup> The Directive has been repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, which has maintained the exact same definitions of information society services.

<sup>19</sup> Article 2 (a) of the e-commerce Directive.

<sup>20</sup> “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means” as defined in article 2 (a) 2 of the above Directive 98/48/EC.

<sup>21</sup> Article 2 (1) of the Directive 98/48/EC.

<sup>22</sup> Articles 12 & 13 of the e-commerce Directive.

<sup>23</sup> Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ C 526, 29.12.2021, para. 4.2.1.

exploitation of consumers' inexperience and unawareness of the digital environment urged the inclusion in the e-commerce Directive of a series of information requirements against information services providers. For example, pursuant to articles 5 (2) and 6 of the Directive, whenever information service providers refer to prices, those shall be indicated clearly and unambiguously. The total price shall be disclosed and information service providers shall also define whether tax and delivery costs are also included or not.

Furthermore and in line with article 6 of the Directive, Member States shall guarantee that traders clearly identify promotional offers, discounts, gifts and premiums among others, while they shall also clarify the conditions where consumers are entitled to such promotional offers. Additionally, when commercial communications constitute an information society service those communications apart from the fact that they must be clearly identifiable as such, they must also mention the name of the person (natural or legal) that are made for. In line with the above, general information about the product and the trader shall be easily available and accessible on the home web page of the company.<sup>24</sup>

These information requirements that the e-commerce Directive imposes on information society service providers are critical to consumers' awareness and freedom of choice, especially when they form part of commercial communications and practices. As it will be indicated within the next pages of this thesis, the omission or the unambiguous representation of important information to consumers by traders (including platforms, social media, e-shops or websites), may have damaging repercussions to consumers' economic behavior when it is related to the promotion of goods and services as it may be capable of affecting their decision making. This is also recognized and confirmed in the Unfair Commercial Practices Directive<sup>25</sup> (hereinafter UCPD), where information requirements established by Community law in relation to commercial communications including advertising or marketing shall be regarded as material.<sup>26</sup> The importance and impact of material information on the unfairness of a commercial practice will be shortly explained.

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### **III. Relationship with the UCPD and the applicability of the UCPD to online platforms, search engines, marketplaces, comparison tools, social media and user review tools**

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<sup>24</sup> See also Alexandridou, Consumer Protection Law, 280.

<sup>25</sup> 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) 2006/2004 of the European Parliament and of the Council [2005] OJ 2005 L 149/22.

<sup>26</sup> Article 7 (5) of the UCPD.

E-commerce, as has been already defined, constitutes the activity of electronically buying or selling of products or online services usually over the Internet.<sup>27</sup> It does not include only transactions but also communications (such as advertising) concluded before, during or even after a transaction. Pursuant to the wording of the Directive, commercial communications are essential for the financing of information society and may include discounts, promotional offers, promotional competitions or games and should, in the interests of consumer protection and fair trading, meet a number of transparency requirements.<sup>28</sup> These activities might take place in online platforms, search engines, marketplaces, comparison tools, social media, user review tools or even collaborative economy platforms and may involve the use of technologies such as indicatively algorithms, Artificial Intelligence, tracking and targeting technologies, automated decision-making and algorithmic personalisation.

Many practices on behalf of the platforms and hosting service providers have been concluded to be problematic and many complaints have been brought before the European Commission and other competent national authorities by consumers with regard to violations of the e-commerce Directive and the UCPD. Particular concerns were expressed about paid placements within search - engines, dimming techniques in online comparison tools, representations of fake consumer reviews in users' review tools, hidden advertising and endorsements within social media, IP tracking, geo-localization techniques, unsolicited commercial communications and cookies to name only a few. These practices, although not prohibited per se by the above Directives, raise imminent dangers on the economic behavior, rights and interests of consumers and for these reasons they shall be carefully evaluated.

The UCPD, that will be further elaborated in the next chapters, is one of the main horizontal pieces of EU legislation that regulates unfair commercial practices in business to consumer transactions, both online and offline. It requires for its application a relationship between a trader and a consumer. Pursuant to a very recent guidance document of the European Commission<sup>29</sup>, the UCPD applies also to online intermediaries, including social media, online marketplaces, app stores, search engines, comparison tools and various other traders operating in the digital sector as long as they qualify as trader under the UCPD. In accordance with the definition given in the UCPD, *trader means any natural or legal person who, in commercial practices covered by the Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name or on behalf of a trader.*<sup>30</sup> Crucial in this assessment is the involvement and engagement of the platform. Does it act simply as intermediary that generally provides infrastructure to suppliers and consumers or does it have more active powers directly enabling contractual transactions between third party traders and consumers? The more active the role of the platform is, the more likely is to qualify as a trader under the UCPD with regard to commercial practices.

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<sup>27</sup> <https://en.wikipedia.org/wiki/E-commerce>.

<sup>28</sup> Recital 29 of the e-commerce Directive.

<sup>29</sup> See Commission Notice 2021.

<sup>30</sup> Article 2 (b) of the UCPD.

One of the first instances where Courts dealt with these issues was when the French Supreme Court<sup>31</sup> found a price comparison website liable under the UCPD. That website was offering the products of a trader that paid extra fees at higher ranks in comparison to other traders that have not paid these extra amounts. Such a practice, which was not communicated to consumers - visitors of the website, was an indirect promotion of the products of the trader who paid extra.<sup>32</sup> In that occasion the price comparison platform was acting as an active provider and not simply as an intermediary; thus the platform could not justify an exemption under the e-commerce Directive. As an early conclusion generally drawn from the above, also reflected in the Commission's May 2016 guidance document<sup>33</sup>, we may observe that when platforms are regarded as traders, by virtue of the UCPD, they shall act pursuant to the requirements of professional diligence -in line with article 5 (2) of the UCPD- and in a way that they will not mislead or deceive their users.

However, in many cases, more than one undertaking can fulfill the criteria and qualify as a trader within the meaning of the UCPD and hence be held liable. As already stated, the definition of trader covers also situations where someone is acting 'in the name of' or 'on behalf of another trader'. This provides flexibility and efficiency to competent authorities as both the service provider and the company in favor of which advertisements are placed in social media can be held jointly liable under the UCPD.<sup>34</sup> This joint liability can also be found between an app developer and an app store provider with regard to in-app purchase within online games pursuant to the European Commission.<sup>35</sup>

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<sup>31</sup> CA Grenoble 21 October 2010 (*Kelkoo*), No 08/03251 followed by C. Cass. 29 November 2011, No 10-27402.

<sup>32</sup> See also Charlotte Pavillon, 'THE INTERPLAY BETWEEN THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE AND CODES OF CONDUCT', *Erasmus Law Review*, Volume 5, Issue 4 (2012), p. 274.

<sup>33</sup> Jana Valant, Application of the Unfair Commercial Practices Directive, Overview of the Commission's May 2016 guidance document European Parliament, (2017):11, available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/595888/EPRS\\_IDA\(2017\)595888\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/595888/EPRS_IDA(2017)595888_EN.pdf).

<sup>34</sup> Judgement of the Latvian Administrative court, Case No. A420632710, 8 March 2012.

<sup>35</sup> Commission notice 2021, para. 2.2.

## 2. Unfair Commercial Practices

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### I. Historical background of the UCPD

The adoption of the Unfair Commercial Practices Directive on 11 May 2005 was a much anticipated step towards a higher level of consumer protection and a better functioning of the internal market. The introduction of such a legal instrument that could eliminate the existed disparities between the laws of the Member States, relating to unfair commercial practices, was a common request for years.<sup>36</sup> The existed fragmented legal framework generated appreciable distortions of competition and caused uncertainty as to which national rules apply to unfair commercial practices, thus harming consumers' economic interests.<sup>37</sup> The European Commission in order to tackle these inefficiencies and pursue a more holistic, common and effective approach began a long consultation process and published the so called Green Paper on Consumer Protection<sup>38</sup> as early as October 2001. The Green Paper in its findings underlined that there was a causal link between the regulatory fragmentation and the lack of consumer confidence in the Internal Market.<sup>39</sup> It was these discrepancies that made the regulatory environment very unpredictable for consumers and strengthened their belief that they could not rely on the same level of protection when dealing with foreign traders. Furthermore, more obstacles arose from the fact that Member States' courts and enforcement agencies applied different benchmarks when assessing the notion of average consumer or the unfair character of a commercial practice.<sup>40</sup> In response to all the above, the Commission decided to proceed and adopt a framework Directive<sup>41</sup> that would apply horizontally to goods and services.

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<sup>36</sup> This fragmentation was easily detected from the relevant and contradictory case law. Famous examples constitute the well-known cases: Case C-99/01 *Linhart & Biffl v Unabhängiger Verwaltungssenat* [2002] ECR I-09375, Case C-220/98 *Estée Lauder v Lancaster* [2000] ECR I-00117, Case C-373/90 *Criminal Proceedings against X* [1992] ECR I-131, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657.

<sup>37</sup> Recital 4 of the UCPD.

<sup>38</sup> Green Paper on Consumer Protection, 2 October 2001, COM(2001)531 final.

<sup>39</sup> *Ibid*, para. 3.1.

<sup>40</sup> Stephen Weatherill et als, eds., *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Oxford and Portland, Oregon, Hart Publishing, 2007) 12.

<sup>41</sup> Although the Directive was referred as a framework Directive in its travaux préparatoires, this characteristic is strongly doubted by many scholars due to the particular situations addressed and described as per se unfair in its Annex.

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## II. General overview of the UCPD

The very purpose and aim of this Directive is to protect the *economic* interests of consumers and to harmonize the *business-to-consumer*<sup>42</sup> economic aspects of the marketing laws of the Member States.<sup>43</sup> The Directive is also aiming at the liberalization and enhancement of open markets<sup>44</sup> and at the creation of a common level playing field for advertising and marketing throughout the Union.<sup>45</sup> Although the relationship between consumers or businesses fall outside the scope of this Directive, indirect effects that may favor the protection of competitors and the enhancement of free competition can also emerge from it. This is also confirmed by the Directive which indirectly protects ‘legitimate businesses from their competitors who do not play by the rules of the Directive and thus guarantees fair competition in fields coordinated by it’<sup>46</sup>. For example, the use of brands, trade names and packaging which mislead the average consumer about the commercial origin of the products and cause her to purchase the products on the basis of that misconception is regarded as unfair practice from the viewpoint of competitors and business firms.<sup>47</sup> However, the mere fact that competitors’ economic interests are harmed is left outside the scope of the Directive<sup>48</sup>; the consumers’ economic interests shall be materially distorted and affected in order for the application of the UCPD. Consequently, the Directive constitutes a legal tool that primarily aspires to protect and safeguard the economic interests of consumers but it also simultaneously recognizes the potential dynamic and boost that the Directive can offer businesses. Last but not least, and although it is not plainly stated, the Directive also indirectly intends to guarantee and enhance the *trust of businesses to interstate transactions* within the internal market by eliminating the barriers of the fragmented legal frameworks.

The fundamental innovation in this Directive is the fact that it provides for a **full harmonization** between the laws of the Member States. All the previous Directives and the EU’s legal instruments were of minimum harmonization, as they set the minimum standards of protection, below which Member States could not deviate. However, Member States were free to adopt stringer and more protective provisions if they so wished to. Although this possibility gave more regulatory flexibility to

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<sup>42</sup> Article 3 of the UCPD.

<sup>43</sup> Weatherill, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques*, 15.

<sup>44</sup> *Ibid*, 37.

<sup>45</sup> Many scholars strongly support that the opening of the markets and the enhancement of interstate transactions constitute the genuine aspiration and purpose of the Directive. See indicatively Cornelia Delouka-Igglesi, “Articles 9, 9a-9h Advertising - Unfair Commercial Practices,” in *Consumer Protection Law*, ed. Eliza Alexandridou, 606 (Nomiki Vivliothiki, 2018).

<sup>46</sup> Recital 8 of the UCP Directive.

<sup>47</sup> Practice number 13 of the Annex appears to impair the economic interests of both the consumers and competitors.

<sup>48</sup> These practices that harm competitors and businesses can constitute the subject matter of protection of other legal texts.

Member States, it also created different level playing fields and fragmented legal frameworks<sup>49</sup> which in turn appeared to be problematic especially in cross border transactions. The relevant concerns became more imminent the last years due to the rise of e-commerce and electronic transactions. For all the above reasons, the European legislator opted for this different tool, that of maximum-full harmonization.<sup>50</sup>

What is also innovative in this Directive, contrary to other legal documents, is the fact that it provides full protection against unfair commercial transactions *not only before but also during and even after the transaction*.<sup>51</sup> Such a provision guarantees fuller and more efficient protection to consumers, as the unfair or deceptive practice of the trader can take place in various phases of the transaction, especially in long-term contracts and services.

As per the relationship of the Directive with other legal instruments and its application on cases where sector-specific regulation exists, the Directive will behave as a gap filler and a safety net. In application of the principle *lex specialis derogat legi generali*, when such specific legislation exists and regulates the subject matter in an exhaustive manner, its provisions will prevail over those of the UCP Directive.<sup>52</sup> Therefore, the UCPD complements the Community acquis<sup>53</sup>, which is applicable to commercial practices harming consumers' economic interests.<sup>54</sup> For example, when the general information that the service providers are obliged to provide, in accordance with the requirements under the E-commerce Directive, is presented in a misleading way, then the provisions of the UCPD will prevail<sup>55</sup> over those of the E-commerce Directive, as the latter lacks specific provisions on the issues of unfair commercial practices. Moreover, it is also worth noting that contract law<sup>56</sup> as long as health and safety aspects of products are explicitly excluded from the scope of the

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<sup>49</sup> Recitals 11 & 12 of the UCPD.

<sup>50</sup> The ECJ has addressed the issue of the full harmonization character of the Directive in many preliminary rulings. It concluded that Member States cannot set more restrictive provisions than the standards that the UCP Directive set. Indicatively see Cases C-261/07 & C-299/07 *VTB-VAB NV Vs. Total Belgium & Galatea BVBA Vs. Sanoma Magazines Belgium NV*, ECLI:EU:C:2009:244; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, ECLI:EU:C:2010:12; Case C-288/10 *Wamo BVBA v JBC NV and Modemakers Fashion NV*, ECLI:EU:C:2011:443; Case C-126/11 *INNO NV v Unie van Zelfstandige Ondernemers VZW (UNIZO) and Others*, ECLI:EU:C:2011:851.

<sup>51</sup> Article 3 (1) of the UCPD.

<sup>52</sup> *Ibid*, 17.

<sup>53</sup> It is also worth mentioning that this application of the *lex specialis* principle is restricted to Community and not national law.

<sup>54</sup> Recital 10 of the UCPD.

<sup>55</sup> Pursuant to art. 3(4) of the UCPD In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

<sup>56</sup> and in particular, the rules on the validity, formation or effect of a contract (Art. 3 para. 2 of the UCPD).



Directive.<sup>57</sup> However, if a trader makes a false or otherwise misleading claim with regard to the safety of a product, the claim can be regarded as misleading under the UCPD.<sup>5859</sup>

In order to achieve the aforementioned goal of full harmonization, the UCPD *structures* its provisions regarding the unfairness of commercial practices in *three stages*. The first step is the evaluation of the commercial practice by virtue of Annex I of the Directive. Annex I functions as a black list, as it provides for a catalogue of 31 commercial practices that are unfair at all circumstances. Therefore, in case a commercial practice matches one of the 31 circumstances included in Annex I, it is deemed to be unfair per se without further examination of any other factors or prerequisites.

The second phase includes the examination of the commercial practice by virtue of the specific prohibitions of articles 6-7 regarding misleading actions and omissions and of articles 8-9 regarding aggressive commercial practices. If this second test is satisfied and a commercial practice appears to fulfill the criteria of unfairness that one of those provisions set, then the examination stops there.

However, if not, the UCPD provides for a last but equally important test, that of the general clause of Article 5. It constitutes the heart of the Directive as it encompasses the basic elements that color a commercial practice as unfair. The prerequisites, that the general clause sets, depict the consumers' interests that the legislator aims to safeguard and also reflect the ratio behind this enhanced consumer protection.

Before proceeding with a separate analysis of article's 5 general clause, of articles' 6 and 7 misleading actions/omissions and of articles' 8 and 9 aggressive practices, it worths emphasizing the factors that *do not* affect the unfairness of a commercial practice. As it can be envisaged from article 11 of the Directive, the trader's intention or negligence is of no importance to the unfairness of the commercial practice. Similarly, it is not necessary to show that consumer has suffered any loss or damage as a result of the unfair commercial practice<sup>60</sup>, as damage is not a prerequisite under the UCPD. The above were also confirmed by the CJEU which concluded in the *Nemzeti Fogyasztovedelmi Hatosag*<sup>61</sup> case that there is no minimum threshold in terms of the frequency of the action or of the number of consumers affected, and the fact that the practice was unintentional is irrelevant<sup>62</sup> by virtue of the UCPD.

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<sup>57</sup> Art. 3 (3) of the UCPD.

<sup>58</sup> Weatherill, *The Regulation of Unfair Commercial practices under EC Directive 2005/29*, 16.

<sup>59</sup> Joined cases C 544/13 and C-545/13, *Abcur AB v Apoteket Farmaci AB and Apoteket AB*, ECLI:EU:C:2015:481.

<sup>60</sup> Geraint Howells, et als, eds, *Rethinking EU consumer law*, (Routledge, 2018) 57.

<sup>61</sup> Case C-388/13 *Nemzeti Fogyasztovedelmi Hatosag v UPC Magyarország Kft.* ECLI:EU:C:2015:225.

<sup>62</sup> *Ibid.*, paras 45 & 47.

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### III. Analysis of the General Clause (Art. 5 of the UCPD)

As it has been already emphasized, the general clause of article 5 constitutes the heart of the Directive and also the safety net that covers the remaining commercial practices that cannot meet the criteria of the specific prohibitions of article 6-9 and of Annex I. Article 5 in its beginning provides the fundamental provision of the Directive; *that unfair commercial practices shall be prohibited.*

#### PROFESSIONAL DILIGENCE

In order to define the unfairness, the Directive sets as first prerequisite that it must be “*contrary to the requirements of professional diligence*”.<sup>63</sup> The notion of professional diligence is defined in Art. 2(h) as 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*”. This notion generally refers to a ‘standard of special skill and care’ which presumably merely stresses the fact that a trader’s actions are measured against the particular skills and care expected of a trader rather than persons generally.<sup>64</sup> As a concept is broader than subjective good faith, since it encompasses not only honesty but also competence on the part of the trader.<sup>65</sup> Therefore, the behavior of an honest but incompetent antique dealer who sells fakes, believing them to be originals, would not be in conformity with the requirements of professional diligence.<sup>66</sup>

The introduction of professional diligence as reference point was carefully constructed in order to provide for objectivity and guarantee the aspiration of the Directive towards maximum harmonization. This measure of diligence sets undoubtedly a higher threshold which is not always clear cut and shall be assessed on a case by case basis. The European Court of Justice has given instructions for the interpretation of professional diligence in many cases that were brought before it. Indicatively, in *Deroo Blanquart v Sony* case<sup>67</sup>, the Court concluded that the fact that ‘the consumer was correctly informed’ and that the trader’s behavior ‘met the expectations of a significant proportion of consumers’ were strong indications of transparency, good faith and due care on behalf of the trader. Another useful tool for this assessment can be the soft law rules that the various codes of professional conduct predict. Especially the ones drafted by multinational organizations such as the International Chamber of Commerce can set the basis for each profession’s desirable way of conduct.

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<sup>63</sup> Article 5 (2) (a) of the UCPD.

<sup>64</sup> Howells, *Rethinking EU Consumer Law*, 58.

<sup>65</sup> Weatherill, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, 22.

<sup>66</sup> *Ibid.* See also Delouka-Igglesi, *Consumer Protection Law*, 622-623.

<sup>67</sup> Case C-310/15 *Vincent Deroo-Blanquart v Sony Europe Ltd.* ECLI:EU:C:2016:633.

## THE MATERIAL DISTORTION OF ECONOMIC BEHAVIOR

The second prerequisite that the Directive sets in order to examine the unfair character of a commercial practice is whether ‘*it materially distorts or is likely to materially distort the economic behavior 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*’<sup>68</sup>.

As it can be easily concluded, this second criterium inserts multiple factors - the notion of material distortion, the notions of average and targeted consumer and the notion of economic behavior- that all shall be taken into account cumulatively when assessing the unfairness of a commercial practice. But before proceeding with a general overview of this second paragraph of art. 5, we shall first de-codify and interpret each one of the notions it encompasses. Due to their importance and special weight with regard to the e-commerce sphere, the notions of average, targeted and vulnerable consumer will be examined and analyzed separately in the next chapter.

Pursuant to the European legislator, the commercial practice must *materially distort or is likely to materially distort* the economic behavior of consumers. As per the relevant definition given in paragraph (e) of art. 2 of the Directive, the material distortion entails *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 otherwise*. However, and since this definition creates new issues, as it inserts more vague notions that need in turn further interpretation, the legislator offers additional guidance by providing further clarifications with regard to the notion of transactional decision.

In accordance with the definition given in the Directive, ‘*transactional decision*’ means *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>69</sup> The CJEU<sup>70</sup> has respectively concluded that a transactional decision is any decision ‘directly related to the decision whether or not to purchase a product’ which includes among others the “decision to enter into a shop”, spend more time online with regard to a booking process or even ‘click through a website as a result of a commercial offer’<sup>71</sup>. It derives from this ruling that the transactional decision must relate *directly* with the formation of a decision that concerns the relevant product. Therefore, any circumstances of a commercial practice that are capable of affecting the consumer’s decision making, even when referring to

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<sup>68</sup> Article 5 (2) (b) of the UCPD.

<sup>69</sup> Art. 2 (k) of the UCPD.

<sup>70</sup> Case C-281/12 *Trento Sviluppo Srl, Centrale Adriatico Soc. Coop. are v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2013:859.

<sup>71</sup> Commission notice 2021, para. 2.4.

only some terms and aspects of a purchase, may lead to the assessment of a practice as unfair.

As already highlighted, the object of the material distortion is the *economic* behavior of the consumer, which comes in full line with the purpose of the Directive as stipulated in art. 1 of it.<sup>72</sup> Therefore, any repercussions of moral nature to the behavior of the consumer fall outside the protective scope of the Directive. Although this choice on behalf of the European legislator has raised much criticism by scholars<sup>73</sup>, as it restrains the protection granted to consumers, it serves better, to my opinion, the goal of full harmonization. It is indisputable that morals and ethics provide differentiations and discrepancies among different societies and cultures and thus they could threaten the desirable unification of legislations within the internal market. However, one exemption to the above has been inserted indirectly in the preamble 7 of the Directive; that of taste and decency.<sup>74</sup> This deviation offers Member States broader discretion and flexibility to interpret the consequences of a practice to the consumers' behavior by virtue of the notions of taste and decency. This exemption, apart from threatening the goal of maximum harmonization, restricts the scope of the Directive as it provides member states with the ability to ban commercial practices in further occasions, irrespective of the prerequisites of professional diligence.<sup>75</sup>

Furthermore, by providing that the distortion of the economic behavior shall be *material*, the Directive sets a threshold, below which commercial practices that negligently distort the consumer's economic behavior will not be evaluated as unfair. The influence of the commercial practice to the economic behavior of the consumer shall be of that importance and tension that would make the consumer take a decision that she would not have taken otherwise. In order for the court to assess the material element of distortion, it must take into account several circumstances and characteristics on a case by case basis, including inter alia the method of communication used for the transmission of the commercial practice. One of the leading cases of the ECJ regarding the material character of the distortion was that of Vincent V. Deroo Blanquart<sup>76</sup>. In that case the European judge concluded that "*A commercial practice consisting of the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model of computer not equipped with pre-installed software does not in itself constitute an*

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<sup>72</sup> Art. 1 of the Directive: "*The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.*"

<sup>73</sup> See indicatively Delouka-Igglei, Consumer Protection Law, 625; Kalabouka—Giannopoulou, Law of Transactions, 151.

<sup>74</sup> Pursuant to the wording of the preamble 7 of the Directive, "*Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice.*"

<sup>75</sup> Emmanouil Mastromanolis, The distortion of the consumer's economic behavior as a prerequisite of unfair commercial practices (in greek), (ChID, 2016), p. 730.

<sup>76</sup> See Vincent Deroo-Blanquart v Sony Europe Ltd case, above.

*unfair commercial practice within the meaning of Article 5(2) of Directive ...unless such a practice is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behavior of the average consumer with regard to the product, a matter which is for the national court to determine by taking account of the specific circumstances of the case in the main proceedings.*"<sup>77</sup> Therefore, the prerequisite of material distortion does not in practice appear to be that restrictive, and it is an issue that national courts shall interpret ad hoc by virtue of the circumstances brought before it.

In comparison to the material distortion test, the Directive aspires to broaden the scope of its protection by including not only real but also potential turbulence in the consumer's economic behavior owed to unfair commercial practices. The inclusion of the *likeliness test* aims to enhance the consumers' protection by not imposing on them too much burden to prove the actual distortion of their economic behavior. Any commercial practice that is capable, in the due course of events, of distorting the economic behavior of consumers can be regarded as unfair.<sup>78</sup> The test was carefully structured in order to avoid requiring the proof of economic damage on behalf of the consumers, as that would impair significantly the level and the quality of their protection.

Another critical element for the assessment of the unfairness of the commercial practice is that this material distortion must be *directly linked with a particular product*. For example, commercial practices that indirectly present and advertise products, other than those that constitute the direct and clear object of the advertisement, shall fall out of the scope of the Directive. However, such an approach appears to be particularly problematic, as many practices such as the grey advertising<sup>79</sup> or the use of adwords in search machines, might escape the scope and regulation of the Directive, even though they are capable of influencing the transactional decisions of consumers.<sup>80</sup> Further analysis on these issues will be made in chapter 5 of this thesis regarding advertising and marketing practices.

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<sup>77</sup> Ibid, para. 1 of the ruling of the decision.

<sup>78</sup> Mastromanolis, The distortion of the consumer's economic behavior as a prerequisite of unfair commercial practices, 740.

<sup>79</sup> Delouka-Igglei, Consumer Protection Law, 614.

<sup>80</sup> Kalampouka-Giannopoulou, Law of Transactions, 143.

### 3. The notions of average and vulnerable consumer

The basic ratio and idea behind the consumers' protection is the well established and accepted principle that the consumer positions herself in a weak position vis-vis the seller or supplier, as regards both her bargaining power and her level of knowledge. This structural imbalance in the marketplace is the result of the asymmetry of information and powers from which consumers suffer. The amateur and unexperienced consumer is regularly deceived and exploited by the professional and experienced trader who (the latter) has in her possession information, techniques and marketing - negotiating skills to influence the consumer's decision making to her profit.<sup>81</sup>

These are the inefficiencies that EU Consumer law has struggled to overcome by inserting some protectionist provisions for consumers to the detriment of free competition. But are consumers that weak and vulnerable to traders' commercial practices that need enhanced protection? Does the notion of rational homo-economic consumer exist or does it remain a romantic figment of law and economics' theories? The truth appears to be somewhere in the middle where the relevant gaps are to be filled with the findings and conclusions of the behavioral economics along with the existing case law of the Court of European Justice. It is therefore, crucial to detect and analyze the profile of the consumer, especially that of the modern one who uses the internet and the e-commerce in her everyday life so as to understand the biases and inefficiencies that "victimize" her.

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#### I. The notion of average consumer

The notion of the average consumer constitutes the benchmark in the assessment of the unfair, misleading and aggressive character of a commercial practice as it sets the reference point for the distortion of her economic behavior. However, it has been realized, way before the adoption of the Directive, that a regime designed to control commercial practices will not have a uniform impact on consumers, precisely because consumers themselves do not form a homogeneous group.<sup>82</sup> Therefore, apart from the established notion of the 'average consumer' (1), the UCPD also recognizes two more categories; that of the average targeted consumer (2) and that of the vulnerable one (3); each of them gathering special characteristics and thus requiring different treatment and level of protection.

Before proceeding with the concepts of average, average targeted and vulnerable consumer, it worths clarifying that by virtue of the UCPD, *'consumer' means any natural person who, in commercial practices covered by this Directive, is acting for*

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<sup>81</sup> Christina Livada, The concept of protectable consumer according to Union Law (in greek), *DEE*, no 11 (2005): 1140.

<sup>82</sup> Weatherill, The Regulation of Unfair Commercial Practices under EC Directive 2005/29 - New Rules and New Techniques, 115.

*purposes which are outside his trade, business, craft or profession.*<sup>83</sup> Therefore, a consumer must accrue two cumulative prerequisites in order to be characterized as such and to be granted this special and enhanced protection.

Firstly, a consumer may be only natural persons (positive prerequisite); no legal persons, or SMEs fall within the definition of the Directive. This apparently narrow interpretation of the consumer, as adopted in many cases<sup>84</sup>, has raised much criticism since it leaves outside of the scope of the Directive other weak players that should be entitled to this protection. Although a potential broadening of the definition, to cover legal persons, might appear fairer on some occasions, where the asymmetry of information might be equally disturbing, different interpretation will probably cause legal uncertainty within the internal market and threaten the maximum harmonization goal.

Secondly, the natural person must act for purposes *not* linked to her trade, business, craft or professions. This negative prerequisite has caused divergent and inconsistent rulings between Member States and the ECJ<sup>85</sup> as to the intensity of the association of the transaction with the person's trade or profession, and the mentality of the person at the time of the transaction. A more objective approach is favorable in this examination where special focus should be given to the *object* of the transaction and the *aim* that is about to be accomplished with this transaction. If this transaction intends to serve and facilitate trade and professions purposes, it shall be regarded to fall within professional and trade purposes, since the person is regarded to be more experienced and familiar with such transactions and therefore not in a "weak" and "amateur" position.

The notion of the average consumer is not something brand new; it has emerged and been a focal point in ECJ rulings with regard to the Misleading Advertising Directive<sup>86</sup> especially as per the well-informed part. However, the scope of the UCPD is broader than that of the Misleading Advertising, since the former comprises both commercial communications (information) and commercial conducts. In line with the principle of proportionality, the Directive *'takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice'*.<sup>87</sup> Moreover, and pursuant to the Directive, pure statistics does not suffice to indicate and determine the average consumer, whereas it requires from national courts and authorities to exercise their own faculty of judgement, ad hoc, with due regard given to the case-law of the Court of Justice. It is therefore particularly the CJEU that can contribute and "navigate a course between the rich

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<sup>83</sup> Article 2, paragraph (a) of the UCPD.

<sup>84</sup> Joined cases C-541/99 *Cape Snc v Idealservice Srl* & C-542/99 *Idealservice MN RE Sas v OMAI Srl*, ECLI:EU:C:2001:625, 16-17.

<sup>85</sup> Case C-464/01, *Johann Gruber v Bay Wa AG*, ECLI:EU:C:2005:32, 47.

<sup>86</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006.

<sup>87</sup> Recital 18 of the UCPD.

diversity of actual consumer behavior and the need for an operational regulatory benchmark”.<sup>88</sup>

## **OBSERVATIONS AND INSIGHT FROM THE SCOPE OF BEHAVIORAL ECONOMICS**

The Court generally tends to accept and perceive the average consumer as a remarkably self-aware individual who is able to take care of herself adequately in the integrating market and who acquires available information and act wisely on it without the need for longstanding national measures of consumer protection.<sup>89</sup> It appears therefore that the average consumer test reflects the economists’ idealistic paradigm of a rational consumer in an efficient marketplace. Or otherwise called, the paradigm of homo oeconomicus: a person that is rational, has a particular preference system, behaves based on her self-interest and self-love and who takes into account all the available information and resources in such a way as to maximize her efficiency and utility.<sup>90</sup>

This notion may be useful for economists’ calculations and predictions, but departs from the unpredictable realities of individual human behavior and is hardly an appropriate standard for legislative or judicial sanctions<sup>91</sup>. However, the illusion that the concept of homo oeconomicus depicts reality has been substantially abandoned. Perfectly rational decisions are often not possible in practice due to the finite computational resources available. Human forecasts are biased and flawed and the hypothetical rationality of consumers lies within the limits of her knowledge, preferences, limited resources and available time.<sup>92</sup> For example, although consumers may be aware of the principal aim of commercial practices and advertising, they are usually not aware of the way and extent of that influence to their emotions, biases and psychology which is exactly what makes their protection necessary. For these reasons, the European Court of Justice has been strongly criticized, as it sets a particularly high level of competence that leaves out those consumers that are more in need of that protection.<sup>93</sup> But who is actually this average consumer that she is supposed to be reasonably well-informed and reasonably observant and circumspect?

Towards this de-codification of the notion of the average consumer, key tool and valuable assistance has emerged to be the insights and conclusions drawn by behavioral economics and consumer psychology as they have the ability to increase

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<sup>88</sup> Weatherill, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 - New Rules and New Techniques*, 135.

<sup>89</sup> Weatherill, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, 128.

<sup>90</sup> Antonis Karampatzos, *Private Independence and Consumer Protection* (in greek), (P. N. Sakkoulas, 2016), p. 15-18.

<sup>91</sup> Rosella Incardona et als eds., *The average consumer, the Unfair Commercial Practices Directive, and the cognitive revolution*, *J Consumer Policy*, (2007), 30:35.

<sup>92</sup> Jan Trzaskowski, *Behavioural Economics, Neuroscience, and the Unfair commercial Practices Directive*, *J Consum Policy* (2011), 34:387.

<sup>93</sup> Howells, *Rethinking EU Consumer Law*, 67.



the legal predictability. A new notion, that of “bounded rationality”, has emerged from the gulfs of behavioral economics to replace and develop the inefficiencies of homo oeconomicus. It encapsulates the fact, in terms of compromise, that the rationality of individuals is limited by the information and cognitive limitations of their minds, taking into account the finite amount of time and resources they have to make decisions.<sup>94</sup>

In the same path, the Court of Justice have indirectly reflected consumer behavioralism in some cases<sup>95</sup>, recognizing in that way the need for more realistic and objective components that only behavioral economics and psychology can contribute to. One innovative step towards evolution has been made by the Court of Justice in the characteristic case of *Gut Springenheide*<sup>96</sup>. In that case, the court in order to assess any misleading effect of a description or statement designed to promote sales, enabled national courts to commission an expert’s opinion or a consumer research poll so as to be able to conclude rulings based on the reality-based average consumer’s reactions. The reference to an expert’s opinion could be considered an opening towards including studies based on behavioral economics and neuroscience in the average consumer test when interpreting the UCPD.<sup>97</sup>

The potential contribution of behavioral economics into the interpretation of the Directive was also recognized in the non-binding staff working document of the EU Directorate-General for Health and Consumers<sup>98</sup>, where it has been stated that behavioral economics should be used when interpreting the UCPD and the average consumer benchmark since it may identify common features in human decision-making and therefore predict potential impact and implications of commercial practices to a more representative sample of average consumer. Moreover, as per the findings of behavioral economics’ studies, not only the content of the information provided, but also the way in which information is presented can have serious impact on how consumers respond to it.<sup>99</sup> It therefore appears that statistics, research polls, the findings of behavioral economics, consumer psychology and neuroscience can be of tremendous importance and value for the better interpretation-implementation of the UCPD.

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<sup>94</sup> Trzaskowski, *Behavioural Economics, Neuroscience, and the Unfair commercial Practices Directive*, 387.

<sup>95</sup> Case C-195/14 *Bundesverband der Verbraucherzentralen und Verbraucherverbände eV v Teekanne GmbH & Co KG* EU:C:2015:361.

<sup>96</sup> Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt*, ECLI:EU:C:1998:369, paras 30, 35-37.

<sup>97</sup> Trzaskowski, *Behavioural Economics, Neuroscience, and the Unfair commercial Practices Directive*, 384.

<sup>98</sup> COMMISSION STAFF WORKING DOCUMENT GUIDANCE ON THE IMPLEMENTATION/ APPLICATION OF DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses, SWD/2016/0163 final, 52-53, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>.

<sup>99</sup> *Ibid*, 385.

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## II. The notion of vulnerable consumer

Apart from the benchmark of the average consumer, as already explained, the Directive recognized two other categories of consumers with different and more fragile profiles that may require enhanced protection and treatment. This extended protection can be granted to clearly identifiable groups of consumers who are particularly vulnerable to the commercial practice or the underlying product because of their mental or physical infirmity, age or credulity.<sup>100</sup> In such cases where *the economic behavior only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.*<sup>101</sup>

As per the foreseeability requirement, the UCPD adds an element of proportionality to the assessment of the commercial practice and aspires to safeguard honest traders against particularly naive and ignorant consumers. The traders should not act more than what can be reasonably expected from them. For example online games or applications that are likely to concern children or teenagers, as a vulnerable group, do not always target explicitly children, although they may use anime and cartoons - characteristics that are more popular among those ages. Hence, the fact that they are more attractive to them and are capable of distorting their behavior suffices only as long as the trader could foresee that.

The concept of vulnerability is in general multi-dimensional and can be the result of various factors such as age, gender, credulity, infirmity and other personal characteristics. Pursuant to a European Commission's study<sup>102</sup>, "vulnerable consumer" is "*a consumer, who as a result of socio-demographic characteristics, behavioral characteristics, personal situation or market environment: 1) is at a higher risk of experiencing negative outcomes in the market; 2) has limited ability to maximize his/her well-being; 3) has difficulty in obtaining or assimilating information; 4) is less able to buy, choose or access suitable products; or 5) is more susceptible to certain marketing practices*".<sup>103</sup> Although, all these dimensions seem to have a standing in the vulnerable consumer's economic behavior, the last one regarding certain marketing practices appears as the most relevant within the internet sector.<sup>104</sup> Moreover, the fact that different forms of vulnerability are particularly present in the digital environment as a result of intense data collection and

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<sup>100</sup> See Weatherill, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, 39.

<sup>101</sup> Recital 19 of the UCPD.

<sup>102</sup> European Commission, Study on consumer vulnerability in key markets across the European Union, Final Report (EACH/2013/CP/08), xx, available at [https://ec.europa.eu/info/sites/default/files/consumers-approved-report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/consumers-approved-report_en.pdf)

<sup>103</sup> Ibid, 20.

<sup>104</sup> Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 43.

personalisation techniques was also highlighted by the European Commission in its recent commission notice.<sup>105</sup>

The criterium of age constitutes one of the factors that may affect a consumer's decision making and response to a commercial practice as people of different age present different characteristics and maturity with regard to the understanding and process of information, marketing practices and advertising. In particular, pursuant to the findings of the above study, elderly consumers (65+) faced more difficulties in processing material information and comparing offers and deals in key markets than middle aged consumers (33-44)<sup>106</sup> who generally tend to be more mature, experienced and rational at that age. On the other hand, young consumers between 16-24 years old appeared to be less likely to take action when experiencing a problem and more likely to overpay for services because they cannot use certain payment methods compared to middle aged consumers of 34-44 years old.<sup>107</sup>

In the same line, children are considered to be a special and particularly fragile category that needs advanced attention and approach, especially within the limitless and vague cyber world. This has been recognized by the UCPD which expressly states in its preamble that "*Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group.*"<sup>108</sup> The enhanced attention and level of protection that children need, as a group of consumers with special characteristics and vulnerabilities, was early detected by the drafters of the UCPD who have predicted in the black list of Annex I a ban in favor of children's protection. Pursuant to No 28 of the per se unfair commercial practices of Annex I "*Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them (pester power)*" is regarded as an aggressive commercial practice without further examination.

Relevant conclusions drawn from the European Commission's study on online marketing to children<sup>109</sup> as long as other findings of the OECD and the ICC will be further elaborated in the next paragraphs.

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### **III. Children as particularly vulnerable consumers**

Extensive research has been conducted in order to measure the effects and consequences that various marketing techniques and practices have on children. The challenges that online marketing and general the online sector raises, concern new

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<sup>105</sup> Commission notice 2021, para. 2.6.

<sup>106</sup> Ibid, 44.

<sup>107</sup> Ibid.

<sup>108</sup> Recital 18 of the UCPD.

<sup>109</sup> European Commission, *Study on the impact of marketing through social media, online games and mobile applications on children's behavior*, final report, 2016, available at: [https://ec.europa.eu/info/sites/default/files/online\\_marketing\\_children\\_final\\_report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/online_marketing_children_final_report_en.pdf).

more complicated features and techniques used within e-commerce world which appear more effective and problematic compared to traditional and conventional advertising. Children, although competent and consistent users of the Internet and other digital media, are usually more innocent and unexperienced consumers, who tend to generally face particular difficulties in recognizing and distinguishing online marketing from non-commercial content.

The issue has been of special attention by the United Nations and the World Health Organization. The Children's rights and business principles<sup>110</sup> in its general obligations, explicitly stated that marketing and advertising shall "respect and support children's rights". Pursuant to the above principles children shall have a right to participate in digital media but their rights to health and privacy must be effectively protected and not be economically exploited.

The need for such enhanced protection especially within Internet and e-commerce had been early recognized by the European Commission that conducted a specific study on those issues.<sup>111</sup> Pursuant to the findings and conclusions of the study, children have clear difficulties in recognizing online advertising and consciously defending themselves against commercial persuasion. Furthermore, and in order for the European National Consumer Protection Authorities to clarify these issues, they acted through Consumer Protection Cooperation (CPC) Network and carried out a joint enforcement action on online games that offered in-app purchases and which are likely to appeal children.<sup>112</sup> They concluded that Article 5 (3) of the UCPD and No 28 banned commercial practice of Annex I of the UCPD may apply to games that are likely to delude children, *while not specifically targeted at them as long as the trader could reasonably be expected to foresee these repercussions*.<sup>113</sup> In general, point 28 of Annex I has been used many times by national authorities when dealing with online commercial practices that contain direct exhortation to children as it constitutes a great tool against such techniques. Indicatively a Norwegian Market Court has banned an online commercial practice involving a game playing community in which children dress virtual dolls and where children were invited to 'buy more' and 'upgrade now' on the grounds of No 28 Annex I.<sup>114</sup>

However, how can we determine and distinguish that an exhortation targets directly children and not consumers in general? Unfair commercial practices and especially advertising that distort the economic behavior of children are often spotted within online games, mobile applications and social media platforms that have become quite appealing and luring for those ages. The examination and assessment of

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<sup>110</sup> Children's rights and business principles, New York, NY: UNICEF, United Nations Global Compact, Save the Children (2012): 26, available at <https://www.unicef.org/media/96136/file/Childrens-Rights-Business-Principles-2012.pdf>.

<sup>111</sup> European Commission, Behavioural Study on Advertising and Marketing Practices in Online Social Media, (2018), Final Report, available at [https://ec.europa.eu/info/sites/default/files/osm-final-report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/osm-final-report_en.pdf).

<sup>112</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_847](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_847)

<sup>113</sup> See Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 93.

<sup>114</sup> Commission notice 2021, para. 3.7.

the direct exhortation shall be conducted on a case-by-case-basis, by taken into account several factors existed in the above such as the use of bright colors or simplistic language, the inclusion of popular characters and cartoon-like graphics and/or the absence of indications regarding age restrictions.<sup>115</sup>

On this examination we should also bear in mind that different subcategories based on children's age and maturity exist,<sup>116</sup> which exhibit diversions in behavior and response to commercial practices. For example teenagers constitute a sub-age group of children that are characterized by an intensive risk-taking and rebellion behavior. Therefore, promoting products which are particularly appealing to teenagers might exploit their lack of attention or reflection, as well as their risk-taking behavior, due to their immaturity and credulity.<sup>117</sup> Adolescents for example are reported to be mentally, neurologically and socially more likely to be susceptible to HFSS<sup>118</sup> advertising; despite their increasing cognitive ability, they may be more impulsive, because of neurological and hormonal changes, and they are typically more subject to peer influence, including risky decision-making. In contrast to older adolescents and younger children, young adolescents aged 12–14 years are more likely to heed the behavior of adolescent peers and less likely to follow adults regarding risky behavior<sup>119</sup>. In addition, adolescents typically have independent spending money and, in countries like Cyprus, Ireland and the United Kingdom, it has been observed that they use “fast” and “junk” food as an identity marker to set them apart from adults.<sup>120</sup> It has also be found that children cannot consistently recognize simple static advertisements on websites, even at the age of 10–12.<sup>121</sup> They also face particular

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<sup>115</sup> Competition and Markets Authority, “Principles for online and app-based games”, 2014. <https://www.gov.uk/government/publications/principles-for-online-and-app-based-games>.

<sup>116</sup> According to the Persuasion Knowledge Model theory regarding the capacity of individuals to recognize that a message is attempting to persuade them and to activate critical thinking, presents differentiating behavioral responses by virtue of children's. In general, theory appears to agree on a categorization of three different age groups: a) below 7 years old are considered as 'limited processors', b) between 7 and 11 years old are considered as 'cued processors' and c) above 12 years old as 'strategic processors'. For example, children below 7 tend to accept an advertising message as an unbiased source of information.\* On the other hand, children around 7-8 years old, although they still experience a difficulty in recognizing an advertising from information, they usually understand and appreciate the purpose and persuasive intent of an advertising. (See *EC study on the impact of marketing through social media, online games and mobile applications on children's behavior*, p. 67.)

<sup>117</sup> See Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 45.

<sup>118</sup> High in Fat, Sugar and Salt.

<sup>119</sup> Lisa Knoll et als eds, Social Influence on Risk Perception During Adolescence. *Psychol Sci*, no 26 (2015), <https://journals.sagepub.com/doi/10.1177/09567976155569578>.

<sup>120</sup> World Health Organization, Regional Office for Europe, Tackling food marketing to children in a digital world: trans-disciplinary perspectives Children's rights, evidence of impact, methodological challenges, regulatory options and policy implications for the WHO European Region, 2016, 16, available at [https://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0017/322226/Tackling-food-marketing-children-digital-world-trans-disciplinary-perspectives-en.pdf](https://www.euro.who.int/__data/assets/pdf_file/0017/322226/Tackling-food-marketing-children-digital-world-trans-disciplinary-perspectives-en.pdf).

Ali Blades et als eds., Young children's ability to recognize advertisements in web page designs, *Br J Dev Psychol* no 27 (2009):75.

difficulties in identifying marketing and advertising techniques in social media, where the boundaries between marketing and other content are increasingly blurred.<sup>122</sup>

Regarding the most prominent marketing and advertising techniques that have emerged and raise serious concerns about children's protection, these are particularly the advergames<sup>123</sup>, product placement and sponsorship. They are usually present in social media sites, online games and mobile applications. Sometimes they are also combined, making the impact of the practice and marketing message even more persuasive and charming. Additionally, children have been found to have far lower recognition of advertisements on webpages than they would for identifying television advertisements at the same age<sup>124</sup>, while advergames further increase difficulty in recognizing advertising messages.<sup>125</sup> Furthermore, it has been reported that the Internet locations most visited by children are not child-specific, but are platforms that provide access to a wide range of content for mixed ages, like Google, Facebook, Instagram and YouTube.<sup>126</sup> Right below we will examine some of the main and most problematic commercial practices detected within the online sector and e-commerce.

**Advergames.** This method, i.e. the combination of marketing and gameplay, constitutes the most alarming and problematic practice towards children as the placement and presentation of the advertised product integrates perfectly into games' environment in a way that it is inconceivable for children to detect and understand. This type of games is a sui generis communication, specifically designed by the marketing department of a company to promote its brand or product, by making them central reference points in the game.

Such practices have been particularly used within food's industry. In an analysis of 2013, it has been found that half of food brand websites were using advergames to lure children into buying these products. This phenomenon is really intense within the USA as it has been found to foster the consumption of unhealthy foods and lead to obesity.<sup>127</sup> Pursuant to a study by Folkvord<sup>128</sup>, food advergames increased the consumption of energy-dense snacks<sup>129</sup>, not only when they promoted this type of

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<sup>122</sup> See above note n. 109.

<sup>123</sup> Ronald Faber et als eds., Advertising and the Consumer Information Environment Online. *Am Behav Sci*, no 48 (2004):453.

<sup>124</sup> Blades, Young children's ability to recognize advertisements in web page designs, 77.

<sup>125</sup> Emma Boyland et als eds., Food Advertising to Children and its Effects on Diet: Review of Recent Prevalence and Impact Data, *Pediatric Diabetes*, no 16 (2015): 333.

<sup>126</sup> Sonia Livingstone et als eds., Risks and safety on the internet: the perspective of European children: full findings and policy implications from the EU Kids Online survey of 9-16 year olds and their parents in 25 countries. EU Kids Online, Deliverable D4. EU Kids Online Network, London, UK, 101, <http://eprints.lse.ac.uk/33731/1/Risks%20and%20safety%20on%20the%20internet%28lsero%29.pdf>.

<sup>127</sup> See European Commission, Study on the impact of marketing through social media, online games and mobile applications on children's behavior, 54.

<sup>128</sup> Frans Folkvord et als eds., The effect of playing advergames that promote energy- dense snacks or fruit on actual food intake among children, *Am J Clin Nutr.*, no 97 (2013): 244.

<sup>129</sup> compared to children who did not play those advergames.

food but also when they even advertised fruit<sup>130</sup>. Moreover, another study has proved that advergames that encompassed brand placement, enhanced brand recognition by affecting the attitude of children towards the particular advertised brands.<sup>131</sup> Last but not least, there has been another particularly interesting finding in a study on children's responses to commercial practices about the Coca Cola advergame<sup>132</sup>. Many children did not understand the commercial intent of the game, or even notice the Coca Cola cans within the game. They considered that the game was about promoting recycling and not of marketing content.

**Product placement.** It is a well established practice as it can be found in early years, from television and Hollywood films to video games, but product placement has intensely developed the last years within digital world. As product placement is regarded the insertion of a brand or product into an entertainment medium, in our case online games as already referred. This product placement may vary from merely placing a logo on a virtual billboard, to integrating the product into the game's plot.<sup>133</sup>

**Sponsorship.** Sponsorship differentiates itself from advertising due to the different object each targets, whereas sometimes they can be found combined and interchanged. On the one hand advertising is interested in promoting a specific product or service. On the other hand sponsorship is primarily aiming at promoting the entire image or brand of an enterprise. Online game sponsorship refers to a situation in which a person, company or organization finances an online game either directly or indirectly, i.e. through the sponsoring of a tournament, zone (level), or a session of game play, in order to promote its image or brand.<sup>134</sup>

**In-app purchase.** Apart from advergames, children are very familiar with in-app purchases which often encounter when using an app. In-app purchasing refers to the buying of goods, services and features from inside an application on a mobile device, such as a smartphone or tablet.<sup>135</sup> In the same above study, children that had experienced being asked to make additional in-app purchases, commented that they have found it difficult to make a decision when prompted to make an in-app purchase.<sup>136</sup> The children described this interruption to their games, when notifications for in-app purchases appeared, quite disturbing and pressing; creating a dilemma to them, forcing them to buy further features in order to continue playing. The majority of children also commented that it was quite demanding for them to decide rationally on making or not the in-app purchase, because the fever of the game was usually at the highest level at the time the notification popped.

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<sup>130</sup> See European Commission, *Study on the impact of marketing through social media, online games and mobile applications on children's behavior*, 80.

<sup>131</sup> *Ibid*, 71.

<sup>132</sup> *Ibid*, 102-103.

<sup>133</sup> *Ibid*, 55.

<sup>134</sup> *Ibid*, 56.

<sup>135</sup> <https://www.investopedia.com/terms/i/inapp-purchasing.asp>.

<sup>136</sup> See European Commission, *Study on the impact of marketing through social media, online games and mobile applications on children's behavior*, 80.

**Social media - Influencers.** The overall children's digital and social media consumption has undoubtedly increased drastically the last years, especially with the rise of Instagram and other relevant social media platforms that became apparently accessible and attractive among such ages. Brand ambassadors and influencers have appeared to cause greater impact to youth, compared to traditional advertising methods, as they present a more human and approachable profile. Pursuant also to social learning theory children's liking of a character and persona increases the probability of imitating and following the character's action.

The impact of social media marketing, via influencers' Instagram profiles, on children has reported to be very successful, especially when promoting food and snacks. A recently published study concluded that: Children who viewed influencers with unhealthy snacks had a significantly increased overall intake of unhealthy snacks compared to children who viewed influencers with nonfood products.<sup>137</sup><sup>138</sup> Quite worrying has also been reported to be the impact of alcohol advertisements on children's drinking behavior, especially through the promotion of alcohol by social media platforms such as Facebook, Youtube and Instagram. The exposure to alcohol advertising has been reportedly increased through users' engagement.<sup>139</sup> For example "likes" on relevant content activated the "personalized content" algorithms of those social media platforms to sending more relative content in the users' feedback.

Against these practices many attempts have been made and different measures have been adopted in order to protect and safeguard these young consumers. Indicatively, many websites safeguard and filter their content with relation to the age of the users; some of them also provide for parental mediation, training and ad breaks. Although, the big online players and platforms, such as Google Play, Facebook and App Store, have developed and integrated such measures, general enforcement problems still exist. For example, filters and parental control tools within devices or software that block, control and restrict disturbing content and in-app purchases can work only if parents are aware and capable of using and activating these features. Additionally, it has been found that these measures, such as age limitation and restriction, can be easily circumvented by children. For example YouTube automatically blocks content inappropriate for young ages, based on the birth information that users provide when subscribing and creating an account in the platform. This content limitation that Youtube enacts on under aged users can be easily overcome if the user simply watches the videos as a guest instead of subscribing to channels and watching them from their profiles.<sup>140</sup>

This above findings confirm that hidden, embedded and unnoticed advertising within advergaming is reportedly more dangerous, especially for children, who cannot detect the commercial elements and product placements and are therefore more

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<sup>137</sup> Anna Coates et als eds., Social Media Influencer Marketing and Children's Food Intake: A Randomized Trial, *Pediatrics* 4, no 143, (2019):3-4.

<sup>138</sup> On the other hand viewing influencers with healthy snacks did not significantly affect their intake.

<sup>139</sup> See European Commission, Study on the impact of marketing through social media, online games and mobile applications on children's behavior, 72.

<sup>140</sup> Ibid, 73.



vulnerable to the impacts of such practices into their psychology, diet and behavior. However, there is still so much more left to be done, as the current framework and existing protective measures are proven to be insufficient from safeguarding children's interests. Stricter sanctions shall be imposed on social media platforms, apps and websites that fail to comply with their established obligations and more effective enforcement tools shall be created and implemented by the competent authorities; while both parents and children shall be respectively trained and informed about the actual dangers that the digital world encompasses.

## 4. Specific Prohibitions

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### I. Misleading commercial practices (art. 6 & 7 of the UCPD)

As already elaborated, article 5 of the UCPD constitutes the core of the Directive as it sets out the general lines and prerequisites for the assessment of unfair commercial practices. Following this general prohibition, paragraph 4 of article 5 of the UCPD provides a categorization of unfair commercial practices into two specific<sup>141</sup> subcategories which are by far the most common, namely: misleading and aggressive commercial practices<sup>142</sup>, which in turn are individually defined in articles 6-7 and 8-9 respectively. Whether a practice is misleading or aggressive must be examined and assessed in light of the criteria set out in those articles alone. No further prerequisites need to be met apart from those specifically described in articles 6-9.

A controversy has initially arisen, as to whether the prerequisite of art. 5 (2) regarding the professional diligence's requirement should also be met, but it has now been solved both by interpretation and CJEU rulings. First of all, a grammatical interpretation does not support a view that extra requirements than those specifically referred to in these articles are required. Articles 6-9 and art. 5(4) do not contain any reference to the more general criteria set out in Article 5(2). Such an interpretation would be the only one capable of preserving the effectiveness of the specific rules laid down in Articles 6 to 9 of the UCPD. As the Court in the *CHS Tour Services v Team4 Travel* case<sup>143</sup> concluded '*if the conditions for the application of those articles were identical to those set out in Article 5(2) of the directive, those provisions would have no practical significance, even though they are intended to protect the consumer from the most common unfair commercial practices*'.<sup>144</sup> Therefore, "if a commercial practice satisfies all the criteria set out in Article 6(1) of that directive for being categorized as a misleading practice, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article 5(2)(a) of the directive in order for it legitimately to be regarded as unfair and, therefore, prohibited in accordance with Article 5(1) of the directive".<sup>145</sup>

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<sup>141</sup> See Case C-281/12 *Trento Sviluppo Srl*, para. 27.

<sup>142</sup> Recital 13 of the UCPD.

<sup>143</sup> Case C-435/11 *CHS Tour Services GmbH v Team 4 Travel GmbH*, ECLI:EU:C:2013:574.

<sup>144</sup> *Ibid*, para. 46.

<sup>145</sup> *Ibid*, para. 48.

## MISLEADING ACTIONS

Pursuant to art. 6 of the UCPD, a misleading action is any commercial practice that *contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.* The elements, or otherwise the specified categories of information that are enumerated in the same article, concern some determining factors that are able to affect consumers' choices, such as the existence and nature of the product, the main characteristics of it (indicatively benefits, accessories, customer assistance), the price, the potential need for service or replacement and other information about the trader and the rights of consumers. Therefore, in order for a commercial practice to be regarded as misleading, for the purposes of Article 6(1) of the UCPD, the information provided by the trader, apart from untruthful and/or misleading, shall be also capable of causing the average consumer to take a transactional decision that she would not have taken in the absence of such a misrepresentation or untruthfulness of the information concerned.<sup>146</sup>

Key factor in the assessment of misleading practices is the impact that these practices may have on the decision making of the average consumer. The mere fact that a commercial practice encompasses false or deceiving information in order to persuade consumers to purchase those products is not per se prohibiting or misleading as there are occasions where such untruthful information is usual in relevant transactions or the consumers do not perceive those declarations as serious.<sup>147</sup> What matters here is that this false information shall have the ability to influence the consumers' transactional decisions to purchase or not. Therefore, the terms of the article encompass both objective and subjective elements as they are strongly related to the perception of the practice on behalf the average consumer concerned. Hence, the benchmark of the average consumer is inevitably present in this article too, as it sets the reference point and the market's reality check.

It should also be highlighted that crucial for the assessment of misleading commercial practices is their *overall* impression and impact on consumers, and not the separate examination of their elements. The general representation, design, "catch", size and structure of the information provided in the advertising/commercial practice are all elements to be taken into account when examining the influence of them on the average, well-informed, observant and circumspect consumer.<sup>148</sup>

Article 6 sets another two parameters, or to put it differently circumstances, where a commercial practice is to be regarded as misleading, following an overall examination of the relevant features and its contextual background. The first one, as stated in paragraph 2 (a) of article 6 covers marketing or comparative advertising occasions where the commercial communication *creates confusion with any products,*

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<sup>146</sup> See Case C-281/12 Trento Sviluppo Srl, paras. 33-34.

<sup>147</sup> Delouka-Iggesli, Consumer protection Law, 637.

<sup>148</sup> Ibid, 638.

*trademarks, trade names or other distinguishing marks of a competitor.* What interests us for the scope of the UCPD is the causal link between the confusion that similar products might cause to the average consumer and the impact of this confusion to the consumers' transactional behavior. As it became clear from the preamble of the Directive, "*it is not its intention to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading*".<sup>149</sup> Consequently, the mere copying or the similarities between products are not found to be per se misleading and thereby prohibiting. For the purposes of the UCPD, only the commercial practices that confuse and mislead, with regard to trademarks or other distinguishing marks, and hence cause consumers to make choices not otherwise taken<sup>150</sup> are of interest. The UCPD does not intend substituting other existing EU trademark or copyright law, as the Directive serves primarily different purposes, mostly concentrated on consumer protection, contrary to other legislation which are aiming at serving other objectives as well.

Another occasion, in which a commercial practice is found to be misleading, is when the trader does not comply with the commitments contained in the respective codes of conduct which she is expected to be bound by. That would be the case both when the relevant commitment is firm and verifiable and when the trader explicitly indicated in the commercial practice her commitment.<sup>151</sup> As it derives from the above, it is mostly the trust, which consumers show to the traders' commitments as to their compliance with codes of conduct, that must be safeguarded. And it is that trust that led consumers to take transactional decisions, not otherwise taken. Therefore, in case that traders, who have explicitly declared that they are bound by a code of conduct, breach their commitments, such commercial practices are to be found misleading and prohibiting pursuant to the Directive.

The Directive has also evaluated the potential assistance that codes of conduct might offer to the attainment of a higher level of consumer protection. However, it was not the legislator's intention to substitute judicial authorities and courts or to recognize the co-regulation<sup>152</sup> of unfair commercial practices by codes of conduct. As per the preamble<sup>153</sup> of the Directive, the role of codes of conducts shall be enhanced so as to provide *assistance and efficiency* to the application of the Directive, especially in specific economic fields where such codes can offer their expertise.

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<sup>149</sup> Recital 14 of the UCPD.

<sup>150</sup> See also Delouka-Igglesi, Consumer protection Law, 642-643.

<sup>151</sup> See also article 2 (b) (i) & (ii) of the UCPD.

<sup>152</sup> Delouka-Igglesi, Consumer protection Law, 643.

<sup>153</sup> Recital 20 of the UCPD.

## MISLEADING OMISSIONS

Article 7 of the UCPD establishes the prohibition of misleading *omissions* in order to provide an enhanced and complete legal framework that will work as a safety net for consumers against misleading commercial practices, whether for actions or omissions.

Pursuant to para. 1 of art 7 of the UCPD, “*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 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.*” As it is apparent from the wording of the prohibition, key factors for the assessment of an omission as misleading is the material character of the information omitted and the effect of this absence to consumers’ transactional decisions.

Furthermore, paragraph 2 of the same article, equalizes the omission of material information with the provision of material information in an unclear, unintelligible, ambiguous or untimely manner, as long as such ambiguity causes or is likely to cause the average consumer to take a transactional decision that she would not have taken otherwise. The same goes with the hiding or the non-identification of the commercial intent of the commercial practice in case it (the commercial intent) is not apparent from the context. Therefore, not every misrepresentation or omission of material information will constitute a misleading practice, but only those that entail consumers making choices not otherwise taken.

It is also worth mentioning that the Directive is not completely absolute regarding the omission of material information. It explicitly recognizes some flexibility in para. 3 of article 7 with regard to the medium used to communicate the commercial practice. Where space or time limitations exist, those factors shall be taken into account before concluding that material information, which is capable of influencing consumers’ transactional decisions, has been omitted. It is also important that in cases where such limitations exist, the reference to another medium or means -such as the trader’s website- where the critical information can be searched and found, could contribute against the misleading character of the omission.<sup>154</sup>

However, the European legislator does not require that such information shall be necessarily disclosed to all advertisements, but only in cases where the trader makes an invitation to purchase.<sup>155</sup> The trader’s invitation to purchase is a broad concept, elaborated and defined in art. 2 (i) of the UCPD, as *the 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 enabling the consumer to make a purchase*, including entering/visiting a shop/e-shop with the intention to purchase. Therefore, as it has also been reaffirmed in the *Konsummentobudsmannen*

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<sup>154</sup> Delouka-Iggleles, Consumer protection Law, 646.

<sup>155</sup> Recital 14 of the UCPD.

v Ving Sverige AB case<sup>156</sup>, a commercial communication qualifies as an ‘invitation to purchase’ as long as the information about price and characteristics of the product is sufficient for a consumer to decide on whether to make a purchase or not.<sup>157</sup> This may be the case even if the information is given on the traders website where the trader refers to.<sup>158</sup>

Moreover, the Directive clarifies the material character of the information in paragraph 4 of art. 7 by providing a list of information that shall be regarded as material in the case of an invitation to purchase and is related to the main characteristics of the product, the geographical address and identity of the trade, the price, the arrangement for several services such as payment and the legitimate rights of the consumers. It is apparent that an a priori and exhaustive listing of specific information that is always to be found material is neither possible nor useful, since other factors may be critical and determining in the decision making of consumers. This was also the conclusion of the court in the recent and very interesting case of Vincent Deroo-Blanquart v. Sony Europe Limited<sup>159</sup>, where the Court concluded that *the material nature of a piece of information must be assessed against the background of which a commercial practice forms part and taking account of all of its characteristics*. Whether that information is to be regarded as material, shall be assessed on a case by case basis and this examination is to be left to the discretion of national courts; without that necessarily threatening the full harmonization goal since the national judge is assisted and guided in this evaluation by the definitions and explanations provided in the UCPD.

Indicative examples of occasions where the omission of material information may constitute a misleading practice can be found even in comparison tools. Omitting information about the criteria for the outcome and ranking of results in comparison tools could be misleading if for example the outcome of the query is the best value for money offer and not the cheapest deal that consumers might expected.<sup>160</sup> Furthermore, the email addresses of online traders constitute material information and therefore should be easily provided to consumers. Consequently, as it has been already confirmed by court, the not posting of the (correct) email address on the trader’s website could equate to a misleading omission as long as the consumer may take a transactional decision not otherwise taken.<sup>161</sup>

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<sup>156</sup> C-122/10 *Konsummentobudsmannen v Ving Sverige AB*, ECLI:EU:C:2011:299.

<sup>157</sup> Howells, *Rethinking EU Consumer Law*, 65.

<sup>158</sup> See Case C-122/10 *Konsummentobudsmannen v Ving Sverige AB*, para. 59.

<sup>159</sup> See Case C-310/15 *Vincent Deroo-Blanquart*, para. 49.

<sup>160</sup> Commission notice, para. 2.9.1.

<sup>161</sup> Commission notice, para. 2.9.5.

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## II. Aggressive commercial practices (art. 8 & 9 of the UCPD)

The second specific subcategory of unfair commercial practices, following the misleading commercial practices, is that of the aggressive commercial practices. It is the first time that aggressive commercial practices are explicitly regulated at an EU level, whereas they were previously treated as unfair.

In the Unfair Commercial Practices Directive, article 8 defines what constitutes an aggressive commercial practice and describes the criteria that must be fulfilled in order for a commercial practice to be characterized as such. More specifically, *a commercial practice shall be regarded as aggressive if ...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.* Therefore, the three types / causes of aggressive commercial practices are the *use of harassment, coercion and undue influence.* In this assessment, other factors such as the factual context and features are to be taken also into account.

Article 9 of the UCPD, in order to specify and complement the assessment of aggressive commercial practices, provides for a list of factors and circumstances that can be used as indicators of aggressiveness. They refer to the timing, location and nature of the traders' persistence (a), the use of threatening or abusive language and behavior (b), the exploitation of a specific misfortune or circumstance which is of such gravity that can impair the consumer's judgement, of which the trader is aware (c), the onerous or disproportionate non-contractual barriers that traders impose on consumers so as to restrict them from exercising their contractual rights (d) and to any threat that may refrain consumers from taking action that cannot legally be taken (e). This list is assumed to be an exhaustive one, by virtue of the desired maximum harmonization goal of the Directive.<sup>162</sup> Thus, national courts should restrict themselves in the assessment of those factors without pursuing and examining further circumstances. However, some scholars and law professors position themselves in favor of the indicative character<sup>163</sup> of the list, without persuasively touching the implications that such an approach arises as to the full harmonization goal of the Directive.

As to the meanings of coercion, harassment and undue influence, only that of undue influence is explicitly defined in the Directive as *the exploitation of a position of power in relation to the consumer as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.*<sup>164</sup> The concept of coercion, will inevitably contain the use of physical force as explicitly clarified in art. 9 of the UCPD, whereas the intention of the European legislator was also to encompass all the practices and circumstances where psychological force is used against consumers. Such indirect

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<sup>162</sup> Howells, Rethinking EU Consumer Law, 66.

<sup>163</sup> See also Delouka-Igglesi, Consumer Protection Law, 652.

<sup>164</sup> Paragraph 2 (j) of the UCPD.

inclusion is of utmost importance since in most cases, psychological violence is what is used against consumers and not the easily detectable and already regulated in other codes and legislations<sup>165</sup> physical force.

Apart from the absence of definitions for the other two means that are capable of impairing the average's consumer's freedom of choice, the fact that these concepts were introduced for the first time within the context of unfair commercial practices might cause interpretative issues to national courts. However, the critical point in this context is the significant impairment and distortion that coercion, harassment and undue influence can cause to the consumer's free choosing that will thereby force them to make a transactional decision not otherwise taken. Therefore, the causal link, between the practices used and the impact of them on the decision making of consumers, will result in the aggressive and therefore unfair character of the commercial practice.

A characteristic and widespread example of aggressive commercial practices in e-commerce is the pressure selling through the use of aggressive advertising techniques and psychological tactics. Such a pressure selling technique includes phrases such as "only one room left!", "hurry up", "last items", "highly sought after!", "another booking!" that force consumers proceeding quickly with reservations and bookings. In a very interesting case of the Hungarian Competition Authority against Booking.com, the Authority highlighted that pop-up messages – highlighted in red – such as "someone in that accommodation is booking now", that appeared to consumers during their booking process, aimed at ensuring that a consumer would not only initiate the booking process, but also complete it.<sup>166</sup> Moreover, pre-ticked boxes were also found to be aggressive<sup>167</sup> and not in compliance with professional diligence requirements. As it has been envisaged from the above, such aggressive practices unduly influence, press and impair consumers' freedom of choice to make transactional decisions not otherwise taken.

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<sup>165</sup> Although, deception, fraud and harassment are already covered in civil and criminal law, the protection granted by the UCPD adds an additional and quite effective layer of protection without consumers starting criminal or contract law proceedings.

<sup>166</sup> Turi A., HCA imposes record fine on Booking.com for unfair commercial practices, 2.7.2020, available at: [https://www.lexology.com/commentary/competition-antitrust/hungary/schoenherr/hca-imposes-record-fine-on-booking-com-for-unfair-commercial-practices?utm\\_source=ILO+Newsletter&utm\\_medium=email&utm\\_content=Newsletter+2020-07-02&utm\\_campaign=Competition+%26+Antitrust+Newsletter](https://www.lexology.com/commentary/competition-antitrust/hungary/schoenherr/hca-imposes-record-fine-on-booking-com-for-unfair-commercial-practices?utm_source=ILO+Newsletter&utm_medium=email&utm_content=Newsletter+2020-07-02&utm_campaign=Competition+%26+Antitrust+Newsletter).

<sup>167</sup> Decision of the Latvian Consumer Rights Protection Authority of 23 October 2012. See also Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 77.



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### III. Unfair Commercial practices and COVID-19

One of the many unfortunate effects of the coronavirus pandemic has been the emergence and increase of unfair commercial practices, both misleading and aggressive, especially in the area of e-commerce, which are exploiting the public's fears and anxiety in this unprecedented situation of serious societal concern, thereby reducing their judgement. Many "dangerous and deceptive" practices and allegations with regard to COVID-19 have been brought before National Consumer and Competition Authorities during the past months. For example, the Norwegian Consumer Authority has held that the marketing of a pill described as capable of activating and strengthening the immune system, of protecting against viruses, was in breach of national legislation about unfair commercial practices, even though COVID-19 was not explicitly mentioned in the advertisement<sup>168</sup>. Such practice was found to be both deceptive and aggressive since it took advantage of the psychological distress (anxiety, fear) and uncertainty that the coronavirus pandemic has created to the psychosynthesis of people. In another case<sup>169</sup> brought before the same National Authority, another advertisement on Facebook regarding a product that strengthened the immune system and inhibited viruses was also found to be misleading and unfair, irrespective of the fact that no direct reference to the battle against coronavirus was made. In the same line, the Italian competent authority ordered the suspension of a drug that was advertised as the "*only drug against the Coronavirus (COVID-19)*" and the "*only remedy to combat the Coronavirus (COVID-19)*" even though, at that time and as stated by the world health authorities, there was no effective cure against the virus.<sup>170</sup> Pursuant to the Authority 'the way the product was sold was *misleading, aggressive and capable of affecting the consumer's judgement*, since the trader was exploiting the alarm caused by the constant increase in the number of people infected by COVID-19'.<sup>171</sup>

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<sup>168</sup> Hanna Beyer Olausson, COVID-19, unfair commercial practices and online platform liability, 13.5.2020, available at: <https://www.wr.no/en/news/covid-19-unfair-commercial-practices-and-online-platform-liability/>.

<sup>169</sup> Ibid.

<sup>170</sup> PS11723 - ICA: Coronavirus, marketing of an antiviral drug sold for more than 600 euros suspended and the shutdown of the <https://farmacocoronavirus.it> website ordered: <https://en.agcm.it/en/media/press-releases/2020/3/PS11723>

<sup>171</sup> Ibid.

## 5. Advertising and Marketing practices in the online sector

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### I. Definition and characteristics of advertising and marketing practices

Advertising and marketing techniques constitute the cornerstones of commercial practices. Especially advertising is considered to be the *conditio sine qua non* of every libertarian economic system<sup>172</sup> and a great source of revenue for a variety of economic players which has been advanced in a separate and powerful industry of modern societies and markets. The impact of advertising to the economic welfare of consumers was early recognized<sup>173</sup> by European legislators and constituted one of the founding reasons for the regulation of Advertising at a European level. Particularly, and by virtue of a more competitive and efficient market, comparative and not misleading advertising may be a legitimate means of informing consumers about products and market conditions. Moreover, a truly genuine comparative advertising is capable of filling the gaps of informational and bargaining power asymmetry. A proper balance of powers and a well-functioned market through the enhancement of genuine competition requires primarily the protection and fair treatment of the average consumer. However, such protection shall not be paternalistic or overprotective, but it shall give space and the right motives - nudges to consumers to flourish economically within a healthy, transparent and efficient market. For consistency purposes and before proceeding with an in depth analysis of the online advertising and marketing practices, they shall be given some definitions on the notions that are about to be elaborated in this chapter.

**Marketing** is defined as ‘the sum of activities involved in directing the flow of goods and services from producers to consumers and facilitating this exchange’.<sup>174</sup> Marketing is also referred to as the systematic planning, implementation, and control of a mix of activities intended to bring together buyers and sellers for the mutually advantageous exchange or transfer of products - services.<sup>175</sup> It is in practice a step-by-step process that consists of strategic marketing analysis, marketing-mix planning, marketing implementation, and marketing control which elements are subsequently divided into different components: advertising, market research, media planning, public relations, community relations, customer support, and sales strategy.

**Advertising** therefore constitutes a subset of marketing. Although it may be a very decisive and important step in the marketing process, as it is the most visible part of the procedure, it still constitutes one among the various marketing phases. Pursuant to the New Oxford American Dictionary, advertising is the activity of describing or drawing attention to a product, service, or event in a public medium in order to

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<sup>172</sup> See also Delouka-Igglesi, Consumer Protection Law, 579.

<sup>173</sup> Article (4) of the Preamble of the MCAD.

<sup>174</sup> <https://www.britannica.com/topic/marketing#ref27201>.

<sup>175</sup> <https://www.thebalancesmb.com/marketing-vs-advertising-what-s-the-difference-2294825>.

promote sales or attendance.<sup>176</sup> It also encompasses the techniques and practices used to bring products, services, opinions to public notice for the purpose of persuading the public to respond in a certain way toward what is advertised and purchase the products, services at question.<sup>177</sup> As advertising can be regarded any paid and public<sup>178</sup> announcement which constitutes a persuasive message made by an identifiable sponsor to existing (or potential) customers.<sup>179</sup> As already elaborated above for an advertisement to be effective, its designing and placement must be based on research - insight - knowledge of the public targeted, of the consumers' behavior and psychology and of the respective market area.<sup>180</sup>

The EU Directive on Misleading and Comparative Advertising (MCAD)<sup>181</sup> defines advertising as *“the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations”*.<sup>182</sup> As misleading advertising, it considers *“any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor”*<sup>183</sup>. It becomes apparent from the above definitions in conjunction with the definitions on misleading commercial practices and misleading advertising under the UCPD that common element comprises the representation/communication of the product or services to consumers for trade, promotional and persuasion purposes. The broadness of the definitions serve precisely the aim of covering all potential techniques and activities that intend to draw general public's attention with regard to the promotion of particular products and brands. It was therefore the influence of advertising into consumers' choices and transactional decisions that required a separate regulatory approach and led to the adoption of the MCA Directive in 2006, specifically targeting misleading and comparative advertising.

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<sup>176</sup> [https://www.oxfordlearnersdictionaries.com/definition/american\\_english/advertisement](https://www.oxfordlearnersdictionaries.com/definition/american_english/advertisement) & [https://www.oxfordlearnersdictionaries.com/definition/american\\_english/advertising](https://www.oxfordlearnersdictionaries.com/definition/american_english/advertising).

<sup>177</sup> <https://www.britannica.com/topic/advertising>

<sup>178</sup> meaning non-personal

<sup>179</sup> Lake Laura, The Differences Between Marketing and Advertising, The Balance Small Business website, 25.7.2019, available at <https://www.thebalancesmb.com/marketing-vs-advertising-what-s-the-difference-2294825>.

<sup>180</sup> The way in which advertising affects cognition, emotions and non conscious processing has been long studied. Among the many findings, critical for the purposes of this thesis is the conclusion that ‘in digital media, where marketing is often less recognizable, advertising may be processed implicitly even more often.’ See for this reason: Daniel Kahnemann, *Thinking, fast and slow*; (New York, NY: Farrar, Strauss and Giroux, 2011) & World Health Organisation, above note n. 109 , p. 16.

<sup>181</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006.

<sup>182</sup> Article 2 (a) of the MCAD.

<sup>183</sup> Article 2 (b) of the MCAD.

However, the UCPD one year earlier, in 2005, had already regulated the issue of commercial practices -encompassing marketing and advertising- towards consumers as a whole. In its definition of "business-to-consumer commercial practices"<sup>184</sup> the UCPD plainly includes any *act, omission, course of conduct or representation, commercial communication, explicitly including advertising and marketing, by a trader, directly connected with the promotion, sale of a product to consumers*. It derives from the above definition, that advertising and marketing by virtue of the UCPD constitute subcategories of commercial communication.

The past years the increase and dominance of online advertising against the more traditional television and press advertising has been indisputable. The advantages of interaction, intimacy, directness and the lower costs that online advertising offers make it more attractive even to small and medium size enterprises who can now more easily and affordably communicate and promote their products to consumers-users through online platforms, social media and websites. Moreover, internet offers a whole new dynamic for advertisements as it provides for a combination of text, graphics and audiovisual elements, offering more creativity and a variety of new possibilities. As to the effects of broadcast marketing and online advertising, it has been confirmed that social media marketing increases target audience reach, ad memorability and brand linkage to a greater extent than television alone.<sup>185</sup> These are exactly the characteristics that advertisers wanted to take advantage of, by sometimes sidestepping the protective law that traditionally regulates such practices. The new windows that the internet opened entail also major threats to consumer welfare as they impose new unprecedented and more disguised dangers.

However, before proceeding with the renumeration of unfair commercial practices as detected in e-commerce, there will be a short analysis of the different kinds of marketing and advertising that have been developed especially within the online sector and concern e-commerce transactions.

First of all, **comparative** advertising which is also present online is defined as '*any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor*;<sup>186</sup> As it is easily derived from the above definition, the *comparison* between products or competitors that results from the way the advertising is presented is critical. The reference and identification created to consumers' minds with respect to other brands or products is the ultimate goal of this type of advertising. However, in order for it to be legitimate and not confusing for consumers or unethical/damaging to competitors it must comply with some cumulative prerequisites.<sup>187</sup> It shall for example compare objectively the goods and their characteristics, not discredit the respective trademarks and signs, not present the advertised goods as replicas of other brands, not take unfair advantage of the

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<sup>184</sup> Article 2 (d) of the UCPD.

<sup>185</sup> Brand awareness optimisation. In: Introducing new ways to buy, optimise and measure ads for a mobile world. Facebook website post, 30 September 2015 (<https://en-gb.facebook.com/business/news/Ad-Week-UK>).

<sup>186</sup> Art. 2 (c) of the MCAD.

<sup>187</sup> Article 3 of the MCAD.

reputation of other trademarks and not cause confusion to consumers as per the advertiser and the competitors.<sup>188</sup>

Another type of advertising, broadly used, is the **direct** advertising, where the advertiser communicates directly with the consumer, whether in person, or electronically via telephone, email etc. Unsolicited communications, or otherwise called spamming<sup>189</sup>, that have flooded our everyday life and our email addresses, fall under this category as they constitute a direct, massive, fast and rather cheap practice for traders to inform and promote their products. However, this “one to one” advertising method appears to be particularly aggressive and disturbing for consumers as it intrudes into their private sphere. The practice was early detected and regulated in art. 13 of the 2002/58 Directive<sup>190</sup> which prohibits direct marketing practices such as unsolicited communications by automated electronic emails without the subscribers’ prior consent.<sup>191</sup> In line with the above and in conjunction with recital 40 of the same Directive, ‘prior explicit consent of the recipients must be obtained before such communications are addressed to them’. Therefore, an opt-in system has been introduced by the Directive.<sup>192</sup>

However, and only in cases where *a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details at the time of their collection and on the occasion of each message in case the customer has not initially refused such use.*<sup>193</sup> The exception to the rule of prohibited unsolicited communications appeared to establish a more lenient “soft”<sup>194</sup> opt-in system. The ratio behind this, was that consumer may be less protected against such practices but she reserved the right to be easily unsubscribed from those catalogues and lists with a few “clicks”.<sup>195</sup> However, recent developments following the adoption of the GDPR, require consent by way of a ‘clear affirmative action’<sup>196</sup> which shall be given separately to other terms and conditions while users

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<sup>188</sup> See also Delouka-Igglesi, Consumer Protection Law, 588-594.

<sup>189</sup> Also found as “junk e-mail”, “unsolicited bulk e-mail”.

<sup>190</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002.

<sup>191</sup> The Directive, therefore, by requiring the prior consent of consumers, inserts an opt-in system that is more protective for them.

<sup>192</sup> Andrew Murray, *Information Technology Law*, (Oxford University Press, 2019) 463.

<sup>193</sup> Article 13 (2) of the Directive 2002/58/EC.

<sup>194</sup> See also Delouka-Igglesi, Consumer Protection Law, 602.

<sup>195</sup> See also Konstantinos Christodoulou, *Epitome of Electronic Civil Law* (in greek), (A. N. Sakkoulas Publications, 2013), 26-28.

<sup>196</sup> Recitals 32, 42 & art. 4 (11) of the GDPR.

shall also be granted a right to object to data processing and a right to withdraw consent.<sup>197</sup>

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## II. Misleading marketing practices

Examples of problematic practices, particularly present and common within e-commerce area that will be shortly after analyzed, are the use of subscription traps, misleading advertising, native advertising, influencer marketing, false limited offers, false expiring offers, false free offers, false prize winning and phishing. All the relevant practices entail dangers to consumers since they lack transparency, impartiality, objectivity and truth with regard to the advertised prices and other material information and may misinform and influence consumers making choices not otherwise taken.

**Subscription traps.** Many complaints were brought by consumers before national authorities concerning subscription traps<sup>198</sup>, i.e. unsolicited recurring charges that often come after a business induces consumers through a ‘free trial’ or a very low offer to keep the subscription without disclosing that the subscription involves ongoing fees and recurring charges.<sup>199</sup> Such practices do not usually provide consumers with adequate, material information about the relevant terms and conditions in a plain and unambiguous way, causing thus consumers making transactional decisions not otherwise taken. Moreover, pursuant to the European Commission<sup>200</sup> and the European Consumer Centre Sweden<sup>201</sup>, consumers tend to continue paying subscriptions, they never agreed to, or they often appear over optimistic and confident about remembering to unsubscribe from such “free trials” but they end up trapped in subscriptions they never ordered for, facing difficulties unsubscribing. As it has also been confirmed by the EC, disproportionate and burdensome barriers for terminating service contracts were also regarded as aggressive when they resulted in trapping consumers in de facto automated renewals<sup>202</sup>.

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<sup>197</sup> Murray, Information Technology Law, 465.

<sup>198</sup> Hungarian Competition Authority, 17 August 2020, VJ/19/2018, *be2.hu* and [academicssingles.hu](http://academicssingles.hu).

<sup>199</sup> OECD, “Good Practice Guide on Online Advertising: Protecting consumers in e-commerce”, OECD Digital Economy Papers, No. 279, OECD Publishing (2019): 8, available at [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2018\)16/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2018)16/FINAL&docLanguage=En).

<sup>200</sup> European Commission (2017), *Misleading « free » trials and subscription traps for consumers in the EU*, <https://publications.europa.eu/en/publication-detail/-/publication/bf621260-9441-11e7-b92d-01aa75ed71a1/language-en>.

<sup>201</sup> European Consumer Centre Sweden (2017), *Subscription Traps in Europe*, [http://www.konsumenteuropa.se/globalassets/rapporter/too\\_good\\_to\\_be\\_true\\_it\\_probably\\_is\\_unf](http://www.konsumenteuropa.se/globalassets/rapporter/too_good_to_be_true_it_probably_is_unf)

<sup>202</sup> Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 78.

## MISLEADING PRICING

Price is material information and one of the most determining factors when consumers make transactional decisions to purchase or not products or services. Therefore, misleading pricing techniques such as reference pricing, bait pricing and drip pricing may be particularly dangerous for consumers.

**Reference price** is known as that price with which users compare the price of a competitor's product or the previously advertised price.<sup>203</sup> Consumers by contrasting prices with those of competitors or when they are offered large discounts and the previous higher advertised prices are indicated, are more likely to consider, on a subconscious level, their purchases as justified and good deals. It is an a priori good practice since it enables consumers to make informed decisions by comparing different prices offered for the same product. However, inaccurate reference pricing could cause false consumer perception of value and make consumers purchase products presented as offers.

**Bait pricing** in turn refers to advertisements that display low prices in order to attract consumers, whereas when consumers visit the sites they find the product unavailable or offered at a higher price.<sup>204</sup> Such practice, which is considered to be an illegal marketing practice in many OECD countries<sup>205</sup>, appears quite problematic since it may mislead and deceive consumers to enter the advertiser's digital environment and even though the offers and terms promised are not valid, make them proceed with transactional decisions not initially planned. The limited amount and the expiring duration of the offered products put psychological pressure on consumers to purchase the products quickly, before they are exhausted, without consumers having enough time to appreciate and review their decisions.

The above were confirmed by the Hungarian Competition Authority in a recent ruling against booking.com, where it found that Booking was misleadingly advertising that certain hotel rooms were offering a "free cancellation" possibility. In practice, pursuant to the HCA, the rooms which were advertised with a free cancellation policy were also available at significantly cheaper prices (without the free cancelling option). Therefore, this possibility was not offered for free to consumers, who were actually about to pay extra for this feature. The HCA also found that free cancellation was contingent on time and other limitations and that such material information were omitted from the advertising and became evident to the consumer only after choosing the accommodation<sup>206</sup>. Such practices found to be misleading, aggressive and therefore unfair as they were aiming at causing consumers making transactional decisions not otherwise taken.

Another common misleading pricing practice is the **drip pricing**. This practice includes the representation of low attractive prices, which do not correspond to

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<sup>203</sup> <https://economictimes.indiatimes.com/definition/reference-price>

<sup>204</sup> OECD, Good Practice Guide on Online Advertising: Protecting consumers in e-commerce, 20-21.

<sup>205</sup> Ibid, 15.

<sup>206</sup> See Turi, HCA imposes record fine on Booking.com for unfair commercial practices.

reality, since substantial additional fees and non- optional charges are about to apply and increase the final purchased price.

In line with the above, it is worth noting that in 2020 the Commission and the CPC network received commitments from travel booking websites with regard to the transparency and fairness of their price commercial practices. More specifically, they agreed to clarify in their websites if lower prices were available only to members of special reward/“genious” programmes and not to misrepresent offers as time-limited whereas such offers would be also available afterwards.<sup>207</sup>

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### III. Disguised advertising

Apart from the above practices, the most challenging and problematic issues that relate to advertising practices within the internet sphere and are particularly harmful to consumers are those of disguised advertising practices. As disguised advertising is defined any form of commercial communication that presents itself as non-commercial and “blends in” perfectly with the environment where it is placed.<sup>208</sup> It is particularly the format and design of the advertising that makes it appear as non-commercial content and it can be easily perceived by consumers as genuine and regular content. A Nielsen Media report also found that exposure to “homepage ads” on Facebook on a desktop or laptop computer increased ad recall, brand awareness and purchase intent – effects that were enhanced dramatically by adding social context.<sup>209</sup> These particularly problematic practices can be divided into three further types of disguised advertising practices: native advertising, influencer marketing and advertorials.

**Native advertising** intends to mimic user-generated content and blend in perfectly as a chameleon in the respective digital environment so as to capture consumers’ attention, and influence their decision making without them understanding the latent commercial messages. This advertisement type includes commercial messages posted in news media sites, online magazines, social media and other sites. This is however more common on Social Media providers that have their own advertising platforms (such as Google and Facebook) and allow advertisers to adapt their advertising message to the framework, context and style of the rest of the social media’s feed and design so as to appear as ‘natural content flow’.<sup>210</sup> Studies from the Federal Trade Commission, the Korean Federal Trade Commission and the European Commission have shown that most consumers face difficulties in distinguishing independent

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<sup>207</sup> Commission notice 2021, para. 2.8.2.

<sup>208</sup> Ibid, 45-46.

<sup>209</sup> Gibs J, Bruich S. Advertising effectiveness: understanding the value of a social media impression. A Nielsen/Facebook report. New York, NY; 2010 (<http://www.nielsen.com/us/en/insights/news/2010/nielsenfacebook-ad-report.html>).

<sup>210</sup> The blending is even more smooth and natural within the smartphone’s environment due to the display if the content; it covers the entire screen of the user.



editorial content from commercial and advertisements.<sup>211</sup> The problematic issues arisen with native advertising are the deception of consumers about the impartiality, independency and non-commerciality of a content. Even the disclosure of relevant labelling is not per se enough and shall be accompanied with more plain language and clear context in order to enable consumers identify sponsored form non-sponsored content. In order to assess whether the ad is clearly distinguishable as such, benchmark will be the average consumer and the impact that text, images, placement and other design elements have on them. It is also worth mentioning that the current developments in artificial intelligence and machine learning are facilitating the emergence and development of new types of personalized and interactive native formats making it thus even more complex for consumers.<sup>212</sup>

**Influencer marketing.** This new marketing method has also resulted from the rise of social media and the realization of some people's recognition and influence on others. The promoters are called influencers as they have special reach and impact on their 'followers' and are able to cause a positive impact on consumer perceptions. The problematic in this practice is that it often appears as a spontaneous, non commercial personal endorsement<sup>213</sup>, whereas the influencer does not highlight or inform<sup>214</sup> that the product is sponsored and that she has been paid for promoting it, thereby qualifying as a 'trader' or alternatively, as a person 'acting in the name of or on behalf of a trader'.<sup>215</sup> The effectiveness of such methods is based on the credibility and engagement that the influencers have with their public and the selection of the right target audience.<sup>216</sup> In an interesting case in Stockholm, an influencer who was also a CEO of the respective company promoted on Instagram fish oil, claiming indirectly that it was capable of strengthening the immune system and protecting against COVID-19. Since the commercial intent was unclear and the claims about COVID were not scientifically supported, such techniques were found to be both aggressive and misleading.<sup>217</sup>

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<sup>211</sup> OECD, Good Practice Guide on Online Advertising: Protecting consumers in e-commerce, 22.

<sup>212</sup> Chad Pollitt, Programmatic Native Advertising? Get the Best Practices Right Here, (2018), available at <https://blog.nativeadvertisinginstitute.com/best-practices-programmatic-native-advertising>.

<sup>213</sup> Endorsements are a form of advertising that uses famous personalities or celebrities who command a high degree of recognition, trust, respect or awareness amongst the people. Such people advertise for a product lending their names or images to promote a product or service. (<https://economictimes.indiatimes.com/definition/endorsements>).

<sup>214</sup> The Competition and Markets Authority (CMA) of UK found that a UK-based marketing Company, called Social Chain, that arranges advertising for business through social media was promoting content (about products, services, apps) through social media personalities/influencers without informing consumers or labelling that the content was paid-for-advertising. Therefore, it has been reported that consumers dealt difficulties identifying and distinguishing undisclosed advertising from other content. See <https://www.gov.uk/government/news/cma-acts-to-prevent-misleading-online-practices>.

<sup>215</sup> Commission notice 2021, para. 4.2.6.

<sup>216</sup> See European Commission, Behavioral Study on Advertising and Marketing Practices in Online Social Media, 33.

<sup>217</sup> Stockholms Tingsrätt Patent- och marknadsdomstolen, Mål nr PMT 5929-20, 10 December 2020.

Since 2017, many National Authorities<sup>218</sup> have sent a number of letters and requests to influencers and advertising companies requiring from them to expressly indicate the material connection and commercial character of their advertising content, recommending the use of hashtags<sup>219</sup> among other ways.<sup>220</sup> However, the ineffectiveness of disclosures<sup>221</sup> is also very prominent in this type of advertising and requires reconsideration and reevaluation of their designing.

**Advertorials** on the other hand constitute another edgy and concerning practice that has been flourished in recent years. In this case, the sponsored content is disguised without making clear to readers and consumers that it is a paid editorial content intending to promote a product. While consumers perceive it as a piece of objective information, it is actually a commercial practice that advertises indirectly products and brands. The trap with the above practices is that consumers, usually being overconfident, believe that they are able to recognize such commercial practices, whereas surveys and reports speak otherwise. In a recent behavioral study that was ordered by the European Commission, it has been confirmed that some of the factors that prevent consumers from effectively identifying commercial content have been: the absence of a clearly visible brand or product (lack of disclosure), the absence of a link to the trader's website and the use of text or visuals that could not immediately be associated with commercial purposes.<sup>222</sup>

Last but not least, huge concerns have also arisen from two other practices, phishing and false prize winning, which apart from unfair they may be also found in breach of other legal instruments. In '**phishing**'<sup>223</sup>, scammers use email or text messages to trick consumers into giving their personal information like passwords, account numbers or Social Security numbers. Through fishing and scamming, scammers aim either at receiving direct revenue from users' payment or at getting access to data, which can later be monetized.

Another problematic practice, particularly common online is **false prize winning** where consumers fill in their personal information in order to receive the promising prize. In several cases there is no prize and the users' personal data is stored and then sold by the website. In all such misleading cases, which are also covered by the UCPD's Black List, the purpose may be for traders to earn revenue from advertising exposure in the landing website, or gain access to personal information that can be

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<sup>218</sup> The Italian Competition Authority (AGCM), the French DGCCRF, the Competition and Markets Authority (CMA), the Hungarian Competition Authority (HCA) and the Federal Trade Commission (FTC) among others.

<sup>219</sup> Indicatively #advertising, #sponsored, #paidad, #announcement, #supported, #promotion

<sup>220</sup> Pursuant to the OECD guide (p. 34), simply tagging the brand in an Instagram post is not always a clear indication of the material connection between the advertiser and the influencer.

<sup>221</sup> Sometimes, consumers are even ignorant of the presence and function of disclosure labels that assist them in identifying and distinguishing commercial from non sponsored content.

<sup>222</sup> OECD, Good Practice Guide on Online Advertising: Protecting consumers in e-commerce, 35.

<sup>223</sup> According to data released by the FBI's Internet Crime Complaint Center (IC3) in its *2019 Internet Crime Report*, IC3 received 467,361 complaints that year and recorded more than \$3.5 billion in losses to individual and business victims only in the USA. See <https://www.fbi.gov/news/stories/2019-internet-crime-report-released-021120>.

later exchanged with other enterprises where usually no relevant information about these purposes is provided to consumers. A more in-depth analysis on issues of personal data is made in the next chapter.

## **ONLINE ADVERTISING - MARKETING AND THE UCPD**

The linkage of the above practices with the UCPD is located on the impact that commercial intent and ads have on consumers' economic behavior and their decision making. Inability of consumers identifying advertising may prevent the activation of their persuasion knowledge, which normally stimulates critical processing of the ad's content, thus affecting them making transactional decisions not otherwise taken.<sup>224</sup> Moreover, the omission of information about the commercial purpose of the content, that is regarded as material, is prohibited as misleading under art. 7 of the UCPD. The black list of Annex I of the UCPD, contains in turn some problematic disguised advertising practices. Point 22 and point 11 constitute examples of clear-cut failures of traders (particularly relevant for *online* traders) to indicate the commercial intent of their content. Pursuant to point 11 "*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)*" is considered to be per se prohibited. Whereas pursuant to point 22 "*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*" is also at all circumstances prohibited.

Therefore, traders are obliged to inform consumers about the commercial nature of their content by *disclosure labelling*, through the use of expressions such as sponsored, promoted, advertised, recommended, highlighted and the use of ad indications (hashtags). In case that these commercial communications are not clearly disclosed on social media platforms, both social media platforms and third party traders that use social media platforms may be found liable for hidden advertising in article 7(2) and point No 22 of Annex I UCPD.

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<sup>224</sup> See OECD, Good Practice Guide on Online Advertising: Protecting consumers in e-commerce, 40.

## 6. Interplay with other legal instruments

The UCPD is, as previously explained, a horizontal piece of legislation, applying both to online and offline transactions, including a wide range of commercial communications and practices. Where sector specific regulations exist and overlap with the UCPD, those shall prevail and be implemented pursuant to the principle of *lex specialis derogat lex generalis*. Therefore, the UCPD applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices.<sup>225</sup> However, in occasions where sector specific regulations do not suffice and the consumer protection might be jeopardized, the UCPD may act as a safety net, fill the gaps and complement the Community acquis.<sup>226</sup> Right below, there will be a short but compact analysis of the relationship between the UCPD and other European legal instruments oriented to consumer protection.

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### I. Consumer Rights Directive<sup>227</sup>

The Consumer Rights Directive (hereinafter CRD) was adopted in 2011 and entered into force on 13 June 2014. It is a primarily maximum harmonization directive that applies to all business to consumer contracts which divides into three further categories: 1) off-premises contracts, 2) distance contracts and 3) on-premises contracts. The Directive provides some material information requirements, common for all the above three types of contracts, whereas it additionally requires differentiated information requirements on each category. The CRD introduces a detailed set of pre-contractual information obligations, regulates the right of withdrawal for distance and off-premises contracts and harmonizes certain provisions dealing with the performance and some other aspects of business-to-consumer contracts.

For the purposes of this dissertation, only the distance contracts are of interest. Pursuant to the CRD *'distance contract' means any contract concluded between the trader and the consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;*<sup>228</sup>

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<sup>225</sup> Recital 10 & article 3 (4) of the UCPD.

<sup>226</sup> See Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 13.

<sup>227</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 Text with EEA relevance, OJ L 304, 22.11.2011.

<sup>228</sup> Article 2 (7) of the CRD.

As to the relationship between the CRD and the UCPD, we may comment that many similarities are detected in the field of pre-contractual information duties. Article 7 of the UCPD provides a list of information that is regarded as material in the case of an invitation to purchase which list overlaps to a great extent with the information required under articles 5 and 6 of the CRD before the conclusion of a contract. The provisions of the CRD are more extensive and complete and by virtue of article 7 (5) of the UCPD *information requirements established by Community law in relation to commercial communication shall be regarded as material*. It therefore derives from the above that although the existing variations of information requirements between the two texts are not critical, the CRD shall be given priority over the UCPD, for purposes of consistency, specificity and completeness.<sup>229</sup>

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## II. Unfair Contract Terms Directive

The UCT Directive<sup>230</sup> that was adopted in 1993 is a minimum harmonization Directive that concerns pre-formulated contractual terms, i.e. clauses that have not been individually negotiated in advance. A term *shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*.<sup>231</sup> Although the element of unfairness is crucial in both Directives, and they both apply to business-to consumers contracts, each one's consequences differ substantially. The UCTD provides that in case that contract terms are found to be unfair, then these terms *will not bide the consumer*<sup>232</sup>, whereas the UCPD is without prejudice to contract law and merely requires 'adequate and effective means to combat unfair commercial practices'<sup>233</sup>. In line with the above, some states have already provided for a private right of redress, but UCPD is mostly concerned with regulating the conduct of traders when conducting business with consumers.<sup>234</sup> Therefore, the enforceability of the UCPD is mainly focused and dependent upon the monitoring of public bodies and institutions.

As per the relationship between the UCTD and UCPD, the Court in the *Pereničová*<sup>235</sup> case made some really interesting and helpful conclusions. The case involved a commercial practice, indicating in a credit agreement an APR lower than the real rate. Pursuant to the findings of the court, such a practice constitutes *false information*, by virtue of art. 6 of the UCPD, as to the total cost of the credit and

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<sup>229</sup> See Howells, Rethinking EU Consumer Law, 86.

<sup>230</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993.

<sup>231</sup> Article 3 of the Unfair Contract Terms Directive.

<sup>232</sup> Article 6 (1) of the Unfair Contract Terms Directive.

<sup>233</sup> Article 11 (1) of the UCPD.

<sup>234</sup> Howells, Rethinking EU Consumer Law, 84-85.

<sup>235</sup> Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, ECLI:EU:C:2012:144.

hence it may *mislead* consumers and cause them to take a transactional decision not otherwise taken.

Regarding the effect of that finding on the unfairness' assessment of a contract term by virtue of Article 4(1) of the UCTD, it must be observed that that provision gives a particularly wide definition, by expressly including 'all the circumstances' attending the conclusion of the contract in question. That element, however, regarding false information, is not such as to establish, automatically and on its own, that the contested terms are unfair, but it is only one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13.<sup>236</sup>

Therefore, the finding that a contract term constituted an unfair commercial practice is not per se a determining factor to lead to an automatic conclusion of that term as unfair also under the UCTD. Conversely, the use of an unfair contract term has been supported to constitute an unfair commercial practice as it may mislead the average consumer to her decision making.<sup>237</sup>

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### III. Misleading and Comparative Advertising Directive

The purpose of the Directive on Misleading and Comparative Advertising (hereinafter MCAD) is 'to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.'<sup>238</sup> Since the UCPD went in place, the MCAD is applied only to business-to-business (B2B) relations<sup>239</sup> concerning misleading advertising<sup>240</sup> with the exception of comparative advertising whose provisions continue to apply to advertising directed at consumers.

Apart from the above, concerning the relationship between the two Directives, we shall highlight that the MCAD explicitly refers to the UCPD when assessing the character of the advertising. Pursuant to the MCAD, comparative advertising shall, as far as the comparison is concerned, be permitted when *it is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of the UCPD*.<sup>241</sup> Hence, the relationship between the two Directives is close, as they cross-

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<sup>236</sup> See C-453/10 Jana Pereničová case, paras. 41-45.

<sup>237</sup> Howells, Rethinking EU Consumer Law, 87.

<sup>238</sup> Article 1 of the MCAD.

<sup>239</sup> The permissibility of comparative advertising is assessed, apart from the prerequisites that the Directive on Misleading Advertising sets, on the compliance of the advertising with articles 6 and 7 of the UCPD. The reference in the core body of the Advertising Directive to the requirements of the UCPD indicates and reaffirms the special position granted to the UCPD.

<sup>240</sup> [https://ec.europa.eu/info/law/law-topic/consumers/unfair-commercial-practices-law/misleading-and-comparative-advertising-directive\\_en](https://ec.europa.eu/info/law/law-topic/consumers/unfair-commercial-practices-law/misleading-and-comparative-advertising-directive_en)

<sup>241</sup> Article 4 (a) of the MCAD.

reference each other<sup>242</sup> in order to offer a more complete, holistic and efficient approach when combating misleading and unfair practices and tactics within the advertising field.

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## IV. GDPR

The past years' unprecedented rise of digital economy and online platforms has also created challenges and market failures regarding the commercialization and trade of personal data. The constantly evolving adding value of big data is indisputable and has been characterized as the black gold of the 21st century.<sup>243</sup> Moreover, the conflict between privacy and disclosure of electronic data has called for solutions mitigating both information availability and information protection. These issues have also been characterized as the economics of privacy and they refer particularly to the claim of individuals to determine for themselves when, how and to what extent information about themselves is communicated to others.<sup>244</sup> Apart from the privacy paradox that may arise in some occasions, most of the problems are due to a lack of transparency of data-related processes and intelligibility of declarations of consent, where users are unaware of what happens with their data, how data is collected, processed and passed on to third parties.<sup>245</sup> The huge ongoing scandal about Facebook's unlawful policies<sup>246</sup> proves unfortunately our worst fears: that a huge industry of collection, processing and trade - commercialization of our personal data has been established with gigantic profits for advertisers and platforms. Apart from the revenue gained, the most dangerous problem lies with the powers of these players to manipulate people's behavior and even control election results. The success story of Facebook can be summarized simply in one phrase: '*When you do not pay for the product, you are the product*' and in our case we and our personal data constitute the counter performance.

Personal data is generally generated and constitutes part and aspect of the well established right of privacy and of the right to respect for private life.<sup>247</sup> The right of privacy is subdivided into 1) Informational Self-determination (Recht auf informationelle Selbstbestimmung) which encompasses the right of person to their

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<sup>242</sup> See also See Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 20-21.

<sup>243</sup> Konstantinos Christodoulou, *Law of Personal Data* (in greek), (Nomiki Vivliothiki, 2020): 245-246.

<sup>244</sup> Marco Botta et als eds., The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey, *The Antitrust Bulletin*, Vol. 64(3) (2019): 430.

<sup>245</sup> Ibid, 432.

<sup>246</sup> Stoller M., Facebook was born, lives and thrives in scandal. It's been lawless for years, *The Guardian*, available at :<https://www.theguardian.com/commentisfree/2021/oct/26/facebook-scandal-mark-zuckerberg-frances-haugen>.

<sup>247</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, article 6, available at: <https://www.refworld.org/docid/3ae6b3b04.html>.

personal data and 2) the right to be let alone <sup>248</sup>. In line with above, EU was trying to grant consumers relevant protection since 1995 by introducing the Directive 1995/46. However, differentiations and disparities among member states' legislation created the need for a unified and more efficient solution. In response to the above issues, the EU adopted in 2016 the 679/2016 Regulation<sup>249</sup>, generally known as GDPR which has been proven to be a very useful tool for the individuals' right to data protection.

The issues arisen under the informational self-determination, which are also primarily linked to the UCPD, concern the circumstances and information presented to users before granting consent to their personal data's process and transfer and the rise of techniques like targeting advertising, profiling and cookies. The existing information asymmetry and the difficulty of consumers to make rational, informed choices about consenting or not to the processing of their personal data appears to be a common ground for both GDPR and UCPD. Furthermore, unsolicited communications/spamming that were already discussed constitute an infringement of everyone's right to be let alone which is to be examined separately from the processing of personal data. What constitutes or not spamming was already elaborated in previous chapters. However, what is important to highlight here, is that practices and techniques which concern unsolicited communications irrespective of the implemented<sup>250</sup> opt-in / opt-out system, might also constitute unfair commercial practices under the UCPD, as long as they fulfill the criteria set by it.

More light into the above spreads the answer given by Ms Jourová on behalf of the European Commission<sup>251</sup> in a parliamentary question brought before it about dark patterns<sup>252</sup> and their regulation under GDPR and UCPD. The use of dark patterns and the placement of cookies in websites and apps that are capable of influencing consumers' decisions requires user's consent. The prerequisites for such a valid consent are described and provided in articles 4 (11) and 7 of the GDPR. Moreover, the UCPD prohibits the disclose of false or deceptive information that may influence the consumer's consent and result in making her taking a transactional decision not otherwise taken. Therefore, and pursuant to the answer given by the EC, 'data subjects or consumers who have been misled can submit complaints to the relevant authorities or bodies in the Member States tasked with the enforcement of the GDPR or the UCPD, or bring claims to national courts, either individually or collectively.'<sup>253</sup>

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<sup>248</sup> Christodoulou, *Law of Personal Data*, 2-3.

<sup>249</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016.

<sup>250</sup> See Christodoulou, *Law of Personal Data*, 247-252.

<sup>251</sup> [https://www.europarl.europa.eu/doceo/document/E-8-2019-000774-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2019-000774-ASW_EN.html).

<sup>252</sup> "Dark Patterns are tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something." pursuant to the <https://www.darkpatterns.org>.

<sup>253</sup> See above note n. 231.



In line with the above, the Italian NCA adopted in 2018 a decision<sup>254</sup>, sanctioning Facebook for a breach of Italian consumer law relating to the way Facebook informed users when registering in it about the transfer of their personal data to third-party websites as a counter performance required to gaining access to the social network. Pursuant to the findings of the Italian NCA, Facebook engaged both in a misleading and an aggressive commercial practice. Firstly, Facebook was found to mislead consumers by promising at the moment of registration a “free” service, while the service is actually “paid” with the personal data that users transfer to Facebook.<sup>255</sup> Secondly, Facebook was also found to be engaged in a number of practices which aimed at discouraging users from blocking the transfer of their personal data to third-party websites, through the use of a default option in the Facebook’s settings allowing this transfer. Furthermore, Facebook warned its users that by modifying the default settings, their “social experience” could be affected and they would not be able to access certain content and services provided by Facebook. Facebook was thus found to mislead users by encouraging them not to change the default settings.<sup>256</sup> This was also the case with WhatsApp which was found to ‘*de facto*’ force the users of its service (WhatsApp Messenger) to accept in full the new Terms of Use, and specifically the provision to share their personal data with Facebook, by inducing them to believe that without granting such consent they would not have been able to use the service anymore<sup>257</sup>. Such a practice encompasses elements of misleading and aggressive character since it provides limited information to users, in a non plain way, as to the use of their personal data and their possibility - ability of using the app even if not consenting to the modified terms and conditions of WhatsApp.

Therefore, the presentation of online products and services as free whereas the payment for such services is the collection of users’ personal data may constitute an unfair commercial practice if such marketing techniques are not accompanied with adequate explanations on how their preferences, personal data and user-generated content is used.<sup>258</sup> Protection under EU data protection legislation like GDPR is not precluded and continues to cover possible breaches.

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<sup>254</sup> Decision of the AGCM adopted on November 29, 2018, in relation to Facebook Inc. and Facebook Ireland Ltd. The (Italian) text of the decision [hereinafter AGCM Decision] and the corresponding press release are available at <http://www.agcm.it/media/comunicati-stampa/2018/12/Usodeidati-degli-utenti-a-fini-commerciali-sanzioni-per-10-milioni-di-euro-a-Facebook>. An English version of the press release is available at <http://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers'-data-for-commercial-purposes>.

<sup>255</sup> Ibid, para. 4.

<sup>256</sup> Ibid, para. 5.

<sup>257</sup> AGCM, WhatsApp fined for 3 million euro for having forced its users to share their personal data with Facebook, Press Release, available at: <https://en.agcm.it/en/media/detail?id=a6c51399-33ee-45c2-9019-8f4a3ae09aa1>.

<sup>258</sup> This was also the finding of the Hungarian Competition Authority in Vj-85/2016/189 Facebook Ireland Ltd, 16 December 2019.

## 7. New developments - tackling the issues

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### I. Directive 2019/2161<sup>259</sup> regarding the better enforcement and modernization of Union consumer protection rules

The last decade, due to the intensified digitalization and globalization, a growing trend of large-scale abusive practices that were affecting consumers across the EU and undermined their trust in the Single Market emerged. Complaints were brought before national competent authorities concerning unfair and misleading practices and techniques within the online sector which deceived consumers. Several problematic practices with regard to transparency issues, personal data, purchases in marketplaces, endorsements, ranking prices and consumer reviews were observed and have as a result the jeopardization of consumers' protection.

In light of the above, the EC conducted an impact assessment and a comprehensive evaluation of the EU Consumer Law Directives -the Fitness Check- which confirmed the concerns of the EC; that although the substantive rules were overall fit for purpose, their effectiveness was hindered due to the lack of awareness, sufficient enforcement and consumer redress opportunities.<sup>260</sup> In response to this evaluation, the EC proceeded on 11 April 2018 with the adoption of the 'New Deal for Consumers'<sup>261</sup> initiative in order to modernize some EU consumer rules in view of digital developments, in particular the spectacular rise of e-commerce and the globalization of electronic marketplaces by simultaneously removing disproportionate burdens on traders.<sup>262</sup>

Part of this 'New Deal for Consumers' legislative package forms the Directive (EU) 2019/2161 on better enforcement and modernization of Union consumer protection rules, which was adopted by the European Parliament and the Council on the 27th of November 2019 and entered into force on the 7th of January 2020. The Directive amends the Directive on Unfair Contract Terms (Directive 93/13/EEC), the Directive on Consumer Rights (Directive 2011/83/EU), *the Directive on Unfair Commercial Practices (Directive 2005/29/EC)*, and the Directive on Price Indication (Directive 98/6/EC).

Firstly, the Omnibus Directive (as it is otherwise called) seeks to expand the scope of the existing consumer rights legislative framework currently applying only to

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<sup>259</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, OJ L 328, 18.12.2019.

<sup>260</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0098&from=EN>

<sup>261</sup> [https://ec.europa.eu/info/law/law-topic/consumer-protection-law/review-eu-consumer-law-new-deal-consumers\\_en#impact-assessment-and-evaluation-fitness-check](https://ec.europa.eu/info/law/law-topic/consumer-protection-law/review-eu-consumer-law-new-deal-consumers_en#impact-assessment-and-evaluation-fitness-check)

<sup>262</sup> Ibid.

physical goods and services so as to cover also *digital goods, content, and services*.<sup>263</sup> Among the amendments that were made and the new measures that were introduced by the Omnibus Directive are particularly the disclosure requirements for online marketplaces, the personalized pricing, the prerequisites for ranking offers, the transparency and authenticity requirements for consumer reviews, the dual quality products and the provisions on “free” services. Additionally, the Omnibus Directive, in order to achieve the aspired goals of better enforcement, transparency and modernization of consumer protection law, introduced a series of provisions about penalties and sanctions for infringements of EU consumer protection law. For the purposes of this thesis, special focus is to be given to the introduced amendments to the UCPD concerning unfair commercial practices in e-commerce.

As per the UCPD, the 2019/2161 Directive brought some necessary and anticipated changes. First of all, it included within its definition of product, *digital service and digital content* in order to synchronize and adapt to the new but already adopted at that time DMA and DSA. It also provided definitions for ranking and online marketplace, notions that constitute the core of the amendments and modernization of the UCPD. Furthermore, it inserted a further misleading practice in art. 6 (2) about dual products and three extra paragraphs on what constitutes material information on online marketplaces, ranking criteria and consumer reviews<sup>264</sup> of products in art. 7. On top of that, key amendment to the UCPD is the inclusion of penalties and of provisions on redress and remedies that consumers are entitled to when confronted with unfair commercial practices. It is also worth mentioning that this Directive may apply and be enforced also against traders that although established outside the EU they sell into the EU.<sup>265</sup>

Last but not least, the 2019/2161 Directive, in order to achieve greater uniformity and efficiency, added four extra per se unfair practices into the black list of Annex I. Three practices out of four are especially designed for e-commerce transactions and depict this new wind of digital changes that the directive aspired to bring. These practices had been addressed in many cases by national competent authorities and were found to be unfair under the general provisions of the UCPD. Therefore, the inclusion of them in the black list of Annex I was a much anticipated step that would enhance consumer protection. In particular 1) *Providing search results in response to a consumer’s online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search*

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<sup>263</sup> <https://hsfnotes.com/tmt/2020/06/11/the-omnibus-directive-a-new-deal-for-eu-consumers-part-2-the-objectives-and-provisions-of-the-omnibus-directive-in-focus/>.

<sup>264</sup> Following an investigation conducted by the CMA in 2014-2015, the British Authority revealed that a knitwear retailer, Woolovers Limited, was “cherry-picking” customer reviews in her website, by not approving and uploading bad reviews which entailed consumers having been misled and deceived as to other consumers’ reviews of the products. The Authority recognized the dangers that the above practice creates and concluded that critical reviews must be published as well as those that praise the company’s products and services, in order for consumers to have a complete, genuine and not manipulated picture of the products they are interested in purchasing. See <https://www.gov.uk/government/news/cma-acts-to-prevent-misleading-online-practices>.

<sup>265</sup> See above note n. 247.

results.’,<sup>266</sup> 2) Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers and 3) Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products.’<sup>267</sup> are regarded as prohibited practices at all circumstances.

The aim of the 2019/2161 Directive is to create a joined-up set of protection from which consumers can benefit regardless of whether they are purchasing or using physical or digital goods, content or services and irrespective of whether those goods and services are delivered online or offline. Although, this new legislative act is brand new and no conclusions can be drawn from its enforcement, greater traders’ awareness and compliance is expected. Towards this efficiency will contribute the sanctions’ framework which is must stricter now and it is assumed to function in a precautionary way for traders and online marketplaces.

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## II. Digital Services Act Proposal

In the same pace, the European Commission in response and in order to keep ahead of the threats and challenges that have emerged within the digital world published on 15 December 2020 the Digital Services Act package which proposes two pieces of legislation: the Digital Services Act and the Digital Markets Act. This package aims at dealing with the challenges that have arisen from the informational asymmetries between online intermediaries and their users. The jeopardization of users’ rights and interests and the problematic way algorithmic systems shape information flows online were in the spotlight of the EC’s impact assessment. The need for algorithmic accountability and transparency audits, especially with regard to algorithmic decision making on online advertising and how information is prioritized and targeted<sup>268</sup> were at the top of the agenda.

The DMA, which will not be examined further for the purposes of this thesis, introduces broad reforms to the application of EU competition law to ‘gatekeepers’ in the digital sector. The proposals set out in-principle criteria (both qualitative and quantitative) and thresholds (three-limbed test) for companies that offer ‘core platform services’, which, if met, raise the rebuttable presumption that the company is a gatekeeper.<sup>269</sup>

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<sup>266</sup> Point 11a of Annex I does not prohibit a priori the inclusion of advertisements or higher ranking that result from payments. It simply requires traders to clearly inform consumers about the inclusion of advertisements or other parameters that may affect the display and ranking of search results. In view of these developments and following a joint action on behalf go the CPC network, Booking.com and Expedia platforms accepted to show on the search results page when payments affect the ranking of accommodations. ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2444](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2444))

<sup>267</sup> Article 3 (7) of the 2019/2161 Directive.

<sup>268</sup> DSA Proposal, 9.

<sup>269</sup> <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/digital-markets-act-ec-publishes-details-of-proposed-competition-rules-for-gatekeeper-digital-platforms>.

On the other hand, the Digital Services Act (hereinafter DSA) seeks to ensure that European citizens can be confident about their safety online, that businesses can thrive in the digital world and that e-commerce rules stay up to date in the Digital Decade.<sup>270</sup> In order to achieve the above, the DSA intends to modernize the existing framework concerning the handling of illegal or potentially harmful content online and the liability of online intermediaries for third party content. As to the nature of the DSA and its relationship with other legal instruments, the DSA will be complementary to the consumer protection acquis and specifically with regard to GDPR and Directive (EU) 2019/2161 which establish specific rules to increase transparency as to certain features offered by certain information society services.<sup>271</sup>

Key provisions of the DSA, that are of particular interest to this dissertation, concern new rules and mechanisms on online advertising with special focus on targeted advertising, use of personalized content and personal data.<sup>272</sup> Pursuant to the ratio behind the Directive, the DSA is interested in imposing transparency obligations towards users of online platforms, enable them to make use of their rights as data subjects and also enable scrutiny by authorities and vetted researchers on how advertisements are displayed and targeted.<sup>273</sup> However, online platforms will not be required to provide detailed information and data on how exactly the advertisements' algorithm functions but only the main parameters used for the display of specific advertising and of the logic behind it, including whether or not it is based on profiling.

It was the importance, impact and reach of online platforms (especially of the very large ones) on online trade and economic transactions that made imminent the regulation of them by imposing specific transparency obligations on them about online advertising. The way they design their services is generally optimized to benefit their often advertising-driven business models and can cause societal concerns.<sup>274</sup> Advertising systems used by very large online platforms pose particular risks and require further public and regulatory supervision on account of their scale and ability to target and reach recipients of the service based on their behavior within and outside that platform's online interface.<sup>275</sup>

Therefore, as per the transparency requirements on online advertising, the proposed article 24 requires that *online platforms that display advertising on their online interfaces shall ensure that the recipients of the service can identify, for each specific advertisement displayed to each individual recipient, in a clear and unambiguous manner and in real time: (a) that the information displayed is an advertisement; (b) the natural or legal person on whose behalf the advertisement is*

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<sup>270</sup> <https://digital-strategy.ec.europa.eu/en/policies/online-platforms-and-e-commerce>

<sup>271</sup> DSA Proposal, 5.

<sup>272</sup> Pursuant to recital 52 of the Proposal, the DSA is '*without prejudice to the application of the relevant provisions of Regulation (EU) 2016/679, in particular those regarding the right to object, automated individual decision-making, including profiling and specifically the need to obtain consent of the data subject prior to the processing of personal data for targeted advertising*'.

<sup>273</sup> DSA Proposal, 5.

<sup>274</sup> Recital 56 of the DSA Proposal.

<sup>275</sup> Recital 63 of the DSA Proposal.

*displayed*; Additional requirements are imposed, by art. 30 of the DSA, on very large online platforms, that display advertising on their online interfaces, regarding the establishment and maintenance of repositories and the information about advertisements that they shall include. Last but not least, and in line with the general recognition of the importance that codes of conduct contribute to business life and commercial transactions, art. 36 of the DSA encourages their drafting in order to support and complement the transparency obligations on online advertising and to provide for more flexible and effective compliance mechanisms.<sup>276</sup> The respective codes of conduct shall address primarily the transmission of information conducted by providers of online advertising intermediaries to recipients and the transmission of information held by providers of online advertising intermediaries to the repositories.

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### III. Artificial Intelligence Act Proposal<sup>277</sup>

One of the latest developments at European level which will stimulate our interest within the next years is the Artificial Intelligence Act Proposal (hereinafter AIA Proposal). The EC has developed an AI strategy the past years that resulted in the publication of the AI package in April 2021 in order keep ahead of the changes. The EU through this proposed package continues its tradition and mindset concerning digital area and artificial intelligence and requires AI to be legally, ethically and technically robust, while respecting democratic values, human rights and the rule of law.<sup>278</sup>

The AIA constitutes the first comprehensive attempt of the EU to regulate Artificial intelligence. The proposal contains horizontal rules applying to all industries and aspires to become a new blueprint. It is structured in a pyramid form, depicting the four risk categories, starting from the no risk level to the unacceptable risk level where the respective artificial intelligence practices are prohibited. Each layer-level entails different risks and requires different compliance measures. The proposal, following the good example of the GDPR, provides the installation of an enforcement and supervision body at Union level: the European Artificial Intelligence Board (EAIB). Moreover, it is worth noting that the new proposal has also an extraterritorial effect as it requires compliance of any AI products with its criteria and standards before entering the EU. This effect is anticipated to be of particular interest if anyone considers that the economic superpowers of China and the USA will have to comply with the strict EU rules if they want to reach the EU consumers.

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<sup>276</sup> Recital 70 of the DSA Proposal.

<sup>277</sup> European Commission, 2021, Proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (artificial intelligence act) and amending certain Union legislative acts, 21.4.2021 COM(2021) 206 final 2021/0106 (COD).

<sup>278</sup> Mauritz Kop, EU Artificial Intelligence Act: The European Approach to AI, *Transatlantic Antitrust and IPR Developments* (2021). Available at: <https://law.stanford.edu/publications/eu-artificial-intelligence-act-the-european-approach-to-ai/>.

Furthermore, article 5 of the proposal appears to provide for some rules that might affect online advertising as far as the advertising is based on AI in scope.<sup>279</sup> In particular the proposal prohibits “(a) *the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person’s consciousness in order to materially distort a person’s behavior in a manner that causes or is likely to cause that person or another person physical or psychological harm; (b) the placing on the market, putting into service or use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behavior of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm;*”

It is evident from the wording of the prohibition clauses on unacceptable risk situations that the UCPD was of great influence. The AIA proposal encompasses the notions of “material distortion of a person’s behavior” and “vulnerabilities of a specific group of persons among others. However, it requires *psychological* harm and not economic, as a result of a material distortion of behavior. This prerequisite on the one hand may cause complexities and vagueness as to the evaluation of the harm incurred but on the other hand may present a diverse into a more substantive and human-centric approach that aspires to cover and protect occasions more sensitive but equally protectable.

However, one of the drawbacks of the AIA Proposal regarding its application on unfair commercial practices in e-commerce is the fact that it does not apply to consumers but to companies and public authorities.<sup>280</sup> This entails that consumers are not under the scope of the proposal and hence they cannot notify the competent authorities on incidents or any malfunctioning of those systems; providers of high-risk AI systems are incumbent with those duties.

Another shortcoming of the proposal is the fact that great sources of concern and danger are left outside the scope of the proposal. I am referring to algorithms on ads, pricing, reviews and recommendations among others which tend to constitute the pillars of the newly established digital industry. None of these areas are regarded and characterized by the proposal as high-risk AI systems or prohibited artificial intelligence practices by virtue of art. 5 and Annex III of the Proposal. Does it mean that the AIA evaluate the risk of anti-plagiarism software higher than Facebook’s and Google’s algorithms? The counterargument on these regulating gaps is located on the complementary establishment and application of other legal tools and instruments, such as the UCPD, the DSA, the DMA and the e-commerce Directive to name only a

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<sup>279</sup> Fourberg N. et als. eds., *Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice*, Publication for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, (European Parliament, Luxembourg, 2021): 70. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL\\_STU\(2021\)662913\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL_STU(2021)662913_EN.pdf).

<sup>280</sup> Pursuant to art. 3(4) of the AIA Proposal ‘user’ means any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity.

few.<sup>281</sup> However, to my thinking and to the extent that the EU approach concerning the digital age and the artificial intelligence aspires to be not only efficient but also holistic and reality-based, the exemption of these areas from the AIA scope appears particularly problematic.

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#### **IV. General overview- critique with relation to consumers rights and remedies**

New technologies and the rise of e-commerce have led not only to new conveniences to consumers but also to new challenges, dangers and threats. There have been increased concerns the past years about advertising and marketing practices in online platforms and social media that infringe the UCPD. It is apparent that traders will always try to find “windows” and new techniques to avoid law barriers and promote their products in the most persuasive and efficient way.

Towards this battle against digital aggressive and exploitative techniques, the EU might use the same weapon to fight back, algorithms and AI, in order to detect abnormalities that distort consumers’ economic behavior. Therefore, competent authorities should be modernized, act independently and conduct more in-depth investigations when such manipulative techniques and unfair commercial practices are brought to their attention. Furthermore, the need for legal clarity and confidence for both platforms and users is undeniable, where such clarity asks for harmonized and not fragmented rules. As to the solutions proposed regarding transparency, disclosure of material information and respect of personal data among others, what is also required is training the simple user-consumer in order to detect on her own some of the potential disturbing and manipulative techniques and commercial practices and providing her with the power to easily report them.

The UCPD has generally proven its value all these years as a very good piece of legislation that has contributed to a great extent to consumer protection. However, the challenges that the online sector, and in particular the enormous industry around e-commerce, raised, seem too tough to tackle. Europe is struggling to keep up with the recent digital and AI developments, be competitive in economic terms in relation to USA and China and at the same time stay loyal to its ideals and values. Such a balance, especially when it comes to artificial intelligence and advertising - marketing algorithms proves to be a nightmare. In this battle, the values and freedoms that our society is built on are jeopardized as the algorithms that were created to reveal the patterns behind our lives and behavior, are now used to define people, shape our environment and ultimately predict and determine our future. And this is exactly the most dangerous trap, because when enterprises rely on predictions generated by AI, they create the world AI predicts, thus making the world a more deterministic place.

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<sup>281</sup> As per the reasoning of the proposal “Other manipulative or exploitative practices affecting adults that might be facilitated by AI systems could be covered by the existing data protection, consumer protection and digital service legislation that guarantee that natural persons are properly informed and have free choice not to be subject to profiling or other practices that might affect their behavior.”; see AIA Proposal, 14.



Europe shall prove wrong the saying according to which “America innovates, while Europe regulates”, and be confident to mark its own way and set the very grounds for the digital future. It is in the Union interest to ensure that Europeans can benefit from the new technologies developed and functioning according to Union values, fundamental rights and principles.<sup>282</sup> However it is left to be seen whether such an approach with the proposed acts (DSA, DMA AIA) and the already adopted legislative pieces will work or simply complement the already detailed and perhaps overcrowded legal map. Because what is really needed right now is practical and efficient solutions and not more bureaucracy or technicalities.

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<sup>282</sup> See AIA Proposal, 2.

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