



Margarida Luísa Espinhosa Cepeda Lopes

**Drawing the Thin Line Between Fair and Unfair Commercial Practices:
Selected Case Studies from *The Choice Factory***

Dissertation to obtain a Master's Degree in
Law, in the specialty of Business Law and
Technology ("Law and Tech")

Supervisor:

Dr. Fabrizio Esposito, Professor at NOVA School of Law

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ANTI-PLAGIARISM STATEMENT

I hereby declare on my honour that the present dissertation is my own work and that all my citations are duly acknowledged and referenced. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary breach.

Lisbon, June 2023

(Margarida Luísa Espinhosa Cepeda Lopes)

DECLARAÇÃO ANTI PLÁGIO

Declaro por minha honra que a presente dissertação é original e que todas as minhas citações estão devidamente identificadas e referenciadas. Tenho consciência de que a utilização de elementos alheios não identificados constitui uma grave falta ética e disciplinar.

Lisboa, Junho de 2023

(Margarida Luísa Espinhosa Cepeda Lopes)

ACKNOWLEDGMENTS (AGRADECIMENTOS)

À minha Avó Ofélia,
que estará certamente orgulhosa da sua neta que estudou Direito e que é advogada.

Aos meus Pais, Luísa e Victor,
pelo sacrifício, pela inspiração e pelo exemplo, pelo terno colo e por me terem
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para me guiar num período desafiante e intenso. Foi um privilégio.

*“O sonho é ver as formas invisíveis
Da distância imprecisa, e, com sensíveis
Movimentos da esperança e da vontade,
Buscar na linha fria do horizonte
A árvore, a praia, a flor, a ave, a fonte —
Os beijos merecidos da Verdade.”*

Pessoa, Fernando, ‘II. Horizonte’, in *Mensagem e Outros Poemas Sobre Portugal* (p. 87),
Assírio e Alvim, 2014

READING AGREEMENT

For coherence with the Master's plan, which is taught in English, the present dissertation is written in said language.

Quoting other authors' works is to be done in the footnotes and in the Bibliography chapter, where hyperlinks will be provided, if applicable.

Eventual transcriptions of Portuguese authors' work are translated into English for the sake of linguistic coherence, despite the importance of preserving the authenticity of the publications cited.

When referring to works in the footnotes, quotation is done in the following way:

- I. Articles and books: Author(s), title, year, publication (if applicable), publisher (if applicable), and pages to which it is intended to refer (if applicable);
- II. Multimedia: Author(s) (if applicable), title, website and year.

Subsequent citations of works that have already been cited are referred to by mentioning the surname of the author, year and number of the footnote where it is mentioned for the first time.

As per legislative instruments and case law, they will be succinctly mentioned within the text and completely identified in the footnotes.

ABBREVIATIONS

B2C	Business-to-Consumer
EC	European Commission
EU	European Union
GDPR	General Data Protection Regulation 2016/679
UCPD	Unfair Commercial Practices Directive

CHARACTER DECLARATION

I hereby declare that the body of this dissertation, including spaces and footnotes, occupies a total of 122.511 characters.

DECLARAÇÃO DE CARACTERES

Declaro que o corpo desta dissertação, incluindo espaços e notas de rodapé, ocupa um total de 122.511 caracteres.

ABSTRACT

Technological and digital innovation, the emergence of digital marketing and the widespread of data use for commercial purposes have allowed data-driven behavioural marketing to be progressively more present in the advertising sector.

Due to businesses' demand to sell more, marketers and advertisers come up with advertising techniques based on behavioural science findings that may not be as harmless as they seem. Hence, consumers may fall victim to over personalised, misleading or aggressive advertisements, for instance through violations of the GDPR or even the use of dark patterns, that may constitute unfair commercial practices under the UCPD.

The Choice Factory, by Richard Shotton, bestselling author and consultant, is a book in which the author employs behavioural biases to suggest practical marketing techniques to sway consumers into buying more.

Therefore, this dissertation analyses four of those marketing and advertising techniques, suggested by Richard Shotton, to further explore if they are harmless to the consumer or if, in fact, they are unlawful under the UCPD.

The analysis is divided in three parts. Firstly, this dissertation acknowledges and makes an overview of recent developments in the EU's legal framework regarding consumer protection that could prevent eventual marketing and advertising abuses towards consumers, while also providing an overview of behavioural marketing, its influence and the marketers' perspective of it.

Secondly, since according to recent Guidance provided by the EC on the interpretation and application of the UCPD and the UCPD itself, case-by-case assessments are required to ensure legal certainty, this dissertation intends to do precisely that, analysing the techniques provided in *The Choice Factory* in light of the existing EU's legal framework and explaining how some of these commercial practices could be considered unfair and, therefore, prohibited under the UCPD.

Lastly, some comments are made on the statements by Richard Shotton on the ethics regarding using behavioural science to influence consumers.

Keywords: behavioural marketing; behavioural advertising; unfair commercial practices; misleading commercial practices; aggressive commercial practices; professional diligence; economic behaviour; average consumer; cognitive biases; dark patterns; Unfair Commercial Practices Directive, General Data Protection Regulation.

RESUMO

A inovação tecnológica e digital, o surgimento do marketing digital e a generalização da utilização de dados para fins comerciais têm permitido que o marketing comportamental orientado para os dados esteja progressivamente mais presente no sector da publicidade. Devido à vontade das empresas e profissionais de aumentar as suas vendas, os *marketers* e os publicitários apresentam técnicas publicitárias baseadas em conclusões provenientes da ciência comportamental que podem não ser tão inofensivas como parecem. Como tal, os consumidores podem vir a ser vítimas de publicidade personalizada, enganosa ou agressiva, através de, por exemplo, violações do RGPD ou mesmo da utilização de padrões obscuros, que podem constituir práticas comerciais desleais ao abrigo da DPCD. *Como Vender Mais*, de Richard Shotton, autor e consultor, é um livro em que o autor emprega preconceitos comportamentais para sugerir técnicas práticas de marketing com o objetivo de convencer os consumidores a comprar mais.

Posto isto, esta dissertação analisa quatro dessas técnicas de marketing e publicidade, sugeridas por Richard Shotton, para inferir se são inofensivas para o consumidor ou se, de facto, poderão constituir práticas ilícitas ao abrigo da DPCD.

A análise foi dividida em três partes. Em primeiro lugar, esta dissertação reconhece e faz um esboço geral dos recentes desenvolvimentos legislativos no quadro da UE em matéria de proteção do consumidor que podem prevenir eventuais abusos na área do marketing e publicidade, fornecendo, em simultâneo, uma análise do conceito de marketing comportamental, da sua influência e do entendimento dos marketers sobre este tema.

Em segundo lugar, uma vez que, de acordo com orientações recentes fornecidas pela CE sobre a interpretação e aplicação da DPCD e da própria DPCD, há necessidade de efetuar apreciações caso a caso, para garantir a segurança jurídica, esta dissertação pretende fazê-lo, analisando as técnicas fornecidas no livro *Como Vender Mais*, à luz do contexto legal comunitário existente e explicando como algumas destas práticas comerciais poderiam ser consideradas desleais e, por isso, proibidas ao abrigo da DPCD.

Finalmente, são feitos alguns comentários acerca das declarações de Richard Shotton sobre a ética aplicada à utilização da ciência comportamental para influenciar consumidores.

Palavras-chave: marketing comportamental; publicidade comportamental; práticas comerciais desleais; práticas comerciais enganosas; práticas comerciais agressivas; diligência profissional; comportamento económico; consumidor médio; viés cognitivos;

padrões obscuros; Diretiva sobre Práticas Comerciais Desleais, Regulamento Geral da Proteção de Dados.

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I - INTRODUCTION

In the B2C (business-to-consumer) relationship, the consumer has always been the weaker party. Consumers, although having more information available and being more demanding nowadays, are less able to negotiate and unconsciously fall victim to refined behavioural marketing. Particularly in times when the digital evolution is greater and when they have access to all markets online.

In the European Union (EU), there have been great efforts in regulating and implementing measures to protect consumers throughout the years in various aspects. And, indeed, the consumers need such high level of protection¹, in a balanced way that does not affect their critical thinking².

Businesses invest in marketing and advertising because their main goal is, quite understandably, to sell. Traditionally, marketing is “*the process or technique of promoting, selling, and distributing a product or service*”³, and market science was more restricted and mostly based on survey data. Nowadays, marketers have at their disposal, not only a possibility to reach a wider range of audiences, but also a valuable asset⁴ provided by the digital economy: data⁵. This enables the so-called behavioural marketing, where millions of people have their data collected for this purpose⁶, to be more efficient at tracking consumers and personalising advertising⁷, which is a component of marketing, particularly online⁸.

¹ Article 114 of the Treaty on the Functioning of the European Union.

² 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 (Text with EEA relevance) 2021.

³ “Marketing.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/marketing>.

⁴ Kean Birch, D Cochrane and Callum Ward, ‘Data as Asset? The Measurement, Governance, and Valuation of Digital Personal Data by Big Tech’ (2021) 8 Big Data & Society.

⁵ Alessandro Acquisti, ‘The Economics of Personal Data and the Economics of Privacy’.

⁶ Frederik J Zuiderveen Borgesius, ‘Singling out People without Knowing Their Names – Behavioural Targeting, Pseudonymous Data, and the New Data Protection Regulation’ (2016) 32 Computer Law & Security Review 256 <<https://www.sciencedirect.com/science/article/pii/S0267364915001788>> accessed 10 March 2023.

⁷ Juan Miguel Carrascosa and others, ‘I Always Feel Like Somebody’s Watching Me. Measuring Online Behavioural Advertising’ (arXiv, 9 September 2015) <<http://arxiv.org/abs/1411.5281>> accessed 10 March 2023.

⁸ Kaan Varnali, ‘Online Behavioral Advertising: An Integrative Review’ (2019) 27 Journal of Marketing Communications 1.

The practice of using tracking technologies to facilitate behavioural advertising raises some concerns among regulators⁹ and has been on the EU's radar lately¹⁰, since it is uncertain if consumers comprehend how they can effectively control tracking and processing of their personal information for such purposes^{11,12}.

Although consumers are tendentially more aware and informed¹³ and thus more difficult to convince, the pressure to archive results and sell is growing bigger every day. And since behavioural advertising is much more effective than non-targeted¹⁴, understandably, behavioural data-driven advertising generates billions of euros yearly¹⁵. This allows for some legally dubious marketing strategies to occur, for instance, over personalized marketing¹⁶ by reaching for behavioural science strategies, which can be problematic if the consumer is not aware of them, as we will see.

In 2005 the UCPD¹⁷ was adopted. This Directive aimed to enhance consumer trust¹⁸, thus facilitating cross border business. The goal is to reduce unfair business practices by enforcing these EU rules on a national level.

⁹ Edith G Smit, Guda Van Noort and Hilde AM Voorveld, 'Understanding Online Behavioural Advertising: User Knowledge, Privacy Concerns and Online Coping Behaviour in Europe' (2014) 32 *Computers in Human Behavior* 15 <<https://www.sciencedirect.com/science/article/pii/S0747563213004299>> accessed 10 March 2023.

¹⁰ Giovanni Sartor, Francesca Lagioia and Federico Galli, 'Regulating Targeted and Behavioural Advertising in Digital Services How to Ensure Users' Informed Consent', a study requested by the European Parliament's Committee on Legal Affairs. .

¹¹ Alexander Nill and Robert J Aalberts, 'Legal and Ethical Challenges of Online Behavioral Targeting in Advertising' (2014) 35 *Journal of Current Issues & Research in Advertising* 126 <<https://doi.org/10.1080/10641734.2014.899529>> accessed 10 March 2023.

¹² Lorrie Faith Cranor, 'Can Users Control Online Behavioral Advertising Effectively?' (2012) 10 *IEEE Security & Privacy* 93.

¹³ '2022 Consumer Study: Consumers Want It All' (*IBM*, 13 January 2022) <<https://www.ibm.com/thought-leadership/institute-business-value/en-us/report/2022-consumer-study>> accessed 10 March 2023.

¹⁴ Simone Aiolfi, Silvia Bellini and Davide Pellegrini, 'Data-Driven Digital Advertising: Benefits and Risks of Online Behavioral Advertising' (2021) 49 *International Journal of Retail & Distribution Management* 1089 <<https://doi.org/10.1108/IJRDM-10-2020-0410>> accessed 10 March 2023.

¹⁵ 'The Economic Value of Behavioural Targeting in Digital Advertising | Data-Driven Advertising' <<https://datadrivenadvertising.eu/the-economic-value-of-behavioural-targeting-in-digital-advertising/>> accessed 10 March 2023.

¹⁶ Shobhana Chandra and others, 'Personalization in Personalized Marketing: Trends and Ways Forward' (2022) 39 *Psychology & Marketing* 1529 <<https://onlinelibrary.wiley.com/doi/abs/10.1002/mar.21670>> accessed 16 February 2023.

¹⁷ Amended in 2019 by Directive (EU) 2019/2161 of 27 November 2019 on "as regards the better enforcement and modernisation of Union consumer protection rules", which was part of the "Review of EU consumer law - New Deal for Consumers"

¹⁸ European Commission, 'Objective of the Directive', <https://commission.europa.eu/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_pt?2nd-language=fr>

The EU has made recent efforts in modernizing existing legislation on consumer rights and improving its enforcement, aiming to prevent online commercial practices that exploit behavioural biases and make it difficult for consumers to make informed choices.

Suspecting that some of these practices might be considered unfair to the consumer, the main focus of this research is figuring out if some prominent marketing and advertising techniques are in fact lawful in light of the existing legislation, specifically the Unfair Commercial Practices Directive (UCPD). As an empirical model, “*The Choice Factory*”¹⁹, by Richard Shotton²⁰, will be used.

This book is a practical guide, aimed for marketers and advertisers, that uses behavioural science findings to delineate 25 biases that can be explored to sell more. Biases are “*an inclination or predisposition for or against something*”²¹, a prejudice that allows for cognitive short-cuts when faced with decision making. These can be positive or negative, based on actual facts, beliefs (conscious) or instincts (unconscious²²) and sometimes can lead to poor, ill-considered decisions.

According to the Author, these can be used to businesses’ advantage. As the title of the book implies, it is all about producing choices or making people – consumers – decide in a certain way, while thinking they have decided from themselves.

Even though behavioural marketing is not illegal under European Union Law per se, some practices relating to behaviour marketing might be unlawful under the UCPD, if consumers end up making choices that they would not make otherwise.

Freedom of marketing²³ must exist and some level of nudging must be allowed, but there is also a need to protect the consumer from decisions taken under manipulation driven by excessive or aggressive targeting. A balance is needed and identifying potentially unlawful behaviours from businesses and understanding the way they impact consumer choices is crucial.

¹⁹ Richard Shotton, *The Choice Factory: 25 Behavioural Biases That Influence What We Buy* (1st edition, Harriman House 2018).

²⁰ Hereafter also referred to as “*Author*”.

²¹ “Bias” American Psychological Association Dictionary of Psychology, <https://dictionary.apa.org/bias>.

²² Our unconscious bias is frequently in contrast with what we guess we believe. Pragma Agarwal, ‘What Neuroimaging Can Tell Us about Our Unconscious Biases’ (*Scientific American Blog Network*) <<https://blogs.scientificamerican.com/observations/what-neuroimaging-can-tell-us-about-our-unconscious-biases/>> accessed 16 February 2023.

²³ Sartor, Lagioia and Galli (n 10).

Thus, this dissertation investigates if the marketing/advertising techniques suggested by Richard Shotton, based on the biases and empirical data presented in *The Choice Factory*, are in accordance with the UCPD. Although not all marketing/advertising techniques seem to be harmful to consumers, this research will focus on analysing four practices from the book – that may cause a stir, in a legal expert’s perspective.

Therefore, this dissertation will be structured in three main chapters, including the present one, in the following order.

In Chapter II, an overview will be made of recent developments in the EU’s legal framework regarding consumer protection that could prevent eventual marketing and advertising abuses towards consumers, while also providing an outline of behavioural marketing, its influence and the marketers’ perspective of it. In additions, relevant conclusions from a behavioural study conducted on unfair commercial practices in the digital environment will be highlighted to further set the scenery for the subsequent analysis.

In Chapter III, since according to recent Guidance provided by the EC on the interpretation and application of the UCPD and the UCPD itself, case-by-case assessments are required to ensure legal certainty, an abstract analysis of the techniques provided in *The Choice Factory* will take place, in light of the existing EU’s legal framework as well as an explanation of how some of these commercial practices could be considered unfair and, therefore, prohibited under the UCPD. Still in this Chapter, some comments can be found on the statements by Richard Shotton on the ethics regarding using behavioural science to influence consumers.

Lastly, Chapter IV will be dedicated to the dissertation’s conclusive remarks.

This is the scope of the present dissertation, a legal analysis of potentially abusive marketing strategies with the aim of using the UCPD to prevent them, especially in the digital environment and towards fragile groups of people.

II - STATE OF THE ART

2.1 – Overview of consumer rights in the EU

There is a tendency to see the consumer as the more vulnerable party in commercial relations²⁴. Although nowadays consumers have more knowledge at their disposal than they did a few decades back, one thing is certain: they still have less resources, information and negotiating abilities than businesses or professionals. Hence the need to reduce that disadvantage in commercial transactions with adequate legislation, in a balanced way that does not lead to patronizing the average consumer.

This need to defend the consumer is a well acknowledged concern in the EU, as since the 1970's, the EU has been committing and working towards providing a safe and fair environment for consumers to freely transact, free from unfair commercial practices, not only in the EU but also abroad. This can have the effect of improving economic growth in the single market.

The gist of the evolution of consumer rights law in the EU is transparency, fairness, privacy and empowerment of individuals with tools to make decisions, especially in a modern digital economy.

Though some may think the EU's consumer protection laws are quite harsh on businesses, they raise consumer assurance when making transactions. This assurance may come from guaranteed product safety, ensured fair competition between businesses that ultimately gives the consumers access to various products at fair prices, protected privacy, assured protection against unfair commercial practices and the establishment of clear and enforceable rules to hold businesses accountable.

Thus, assured consumers may be more eager to do business than uninformed and unprotected ones, which ultimately generates economic growth and development. And that may explain why other countries mimic EU law in this regard.

Recently, with the rapid development of the digital economy (digital single market), EU regulations have been adapting to this new paradigm.

²⁴ Sandra Passinhas, 'O Lugar da Vulnerabilidade do Direito do Consumidor Português' (Vulnerability's place in Portuguese Consumer Law), Estudos de Direito do Consumidor, Faculdade de Direito da Universidade de Coimbra (2019)

For instance, in 2018, the EC adopted a *New Deal for Consumers*²⁵ aiming to modernize and improve enforcement of EU consumer law. This New Deal included Directive (EU) 2019/2161 of 27 November 2019 for better enforcement and modernisation of Union consumer protection rules (that amended the Unfair Contract Terms Directive 93/13/EEC, the Price Indication Directive 98/6/EC, the Unfair Commercial Practices Directive 2005/29/EC and the Consumer Rights Directive 2011/83/EU) and Collective Redress Directive (EU) 2020/1828 of 25 November 2020 (Collective Redress Directive) on representative actions for protecting consumers' collective interests, for instance when infringements represent a low individual value²⁶, repealing the Injunctions Directive 2009/22/EC.

Then, in November 2020, the EC launched the *New Consumer Agenda*²⁷, aiming to empower consumers in the digital and green transitions. It acknowledges that the EU has solid legislation regarding consumer protection, while delineating consolidation measures and priorities to tackle current challenges such as the recent Covid-19 pandemic.

To encourage and ensure consumer protection, this Agenda focused on five key priorities: green transition, digital transformation, effective enforcement of consumer rights and international cooperation.

With relevance to this research, in the second priority, related to the digital transformation, it is important to note that the EC's goal was to prevent online commercial practices that make it difficult for consumers to make informed choices, exploit their behavioural biases or manipulate their decision-making processes, such as dark patterns and concealed advertising.

This Agenda also takes into account that there is a need to consider consumers' rights when legislating on the digital economy. As for the third priority, related to the effective enforcement of consumer rights, the EC has committed to support Member States to implement and enforce consumer law²⁸.

²⁵ 'New Deal for Consumers' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/es/MEMO_18_2821> accessed 4 March 2023.

²⁶ 'The New Deal for Consumers: Our Outline of the Key Pillars and Initial Steps to Get Ready' (*Allen Overy*, 3 October 2021) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/the-new-deal-for-consumers-our-outline-of-the-key-pillars-and-initial-steps-to-get-ready>> accessed 4 March 2023.

²⁷ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL New Consumer Agenda Strengthening consumer resilience for sustainable recovery 2020.

²⁸ Through a Consumer Protection Cooperation network. Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities

Also, due to this Agenda, the EC has been updating its guidance on several Directives, considering the changes that were brought by the New Deal for Consumers package.

For instance, the EC has presented legal interpretation and guidance on the Interpretation and Application of the Unfair Commercial Practices Directive²⁹ and on the Consumer Rights Directive³⁰ pertaining to online platforms' obligations and certain potentially harmful practices in digital markets such as dark patterns, influencer marketing and data-driven personalisation.

Moreover, within the context of the previously mentioned Agenda, in order to verify whether the existing consumer law instruments, such as the Unfair Commercial Practices Directive, Consumer Rights Directive and Unfair Contract Terms Directive, are still fit for safeguarding consumer protection in the digital environment, in May 2022, the EC promoted a *Fitness Check of EU consumer law on digital fairness*³¹. Furthermore, the Fitness Check will be backed by an external behavioural study on unfair commercial practices in the digital environment, the *Behavioural study on unfair commercial practices in the digital environment - Dark patterns and manipulative personalisation*³² which was published in May 2022.

Also within the scope of dark patterns, the European Data Protection Board published *Guidelines 3/2022 on Dark patterns in social media platform interfaces: How to recognise and avoid them*³³, which were adopted in March 2022 and provided suggestions to designers and social media providers in order to avoid interface designs that might violate the GDPR.

responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance) Text with EEA relevance 2022.

²⁹ 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 (Text with EEA relevance) (n 2).

³⁰ And also on the Price Indication Directive (Article 6a) and on the Unfair Contract Terms Directive.

³¹ The Commission consulted the public through a Call for Evidence and a public consultation. The final version is set to be presented in the second quarter of 2024. 'European Commission - Have Your Say' (*European Commission - Have your say*, 14 June 2022) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en> accessed 4 March 2023.

³² European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation: final report, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/859030>.

³³ European Data Protection Board, 'Guidelines 3/2022 on Dark Patterns in Social Media Platform Interfaces: How to Recognise and Avoid Them', <https://edpb.europa.eu/our-work-tools/documents/public-consultations/2022/guidelines-32022-dark-patterns-social-media_en> accessed 4 March 2023.

To further ensure online user safety and set a fair playing field for businesses, the Council of the EU adopted the *Digital Services Act Package*, a regulatory package which includes both the Digital Services Act and the Digital Markets Act.

The DSA (Regulation (EU) 2022/2065), promises to protect fundamental rights in the digital space and determines responsibilities and a transparency framework for intermediaries of services such as online marketplaces.

On the other hand, the DMS (Regulation (EU) 2022/1925), is set to ensure a competitive and fair digital sector for business by promoting a higher degree of competition and imposing clear rights and obligations for platforms such as, for instance, online marketplaces.

Most recently, the Consumer Protection Cooperation³⁴ has carried out a “sweep” or assessment to 399 online retail traders’ websites, on a wide range of products, trying to uncover dark patterns that could manipulate consumers into making unwanted choices, including the use of fake countdown timers or hidden information.

The results, released in the end of January 2023 show that nearly 40% of the websites were using manipulative methods to trick consumers. For instance, 42 used fake countdown timers and 70 were hiding relevant information from the consumer³⁵.

This is an indication that, in fact, all of the above-mentioned efforts made to protect the consumer are much needed.

As previously mentioned in the introduction section, the UCPD is the legal instrument on which the present review will be primarily based on. This Directive’s relevance to this analysis stems from the following aspects: applicability, consumer protection focus, ingrained legal principles and enforcement and remedies provided by the UCPD.

Firstly, we must keep in mind that *The Choice Factory* studies consumer behaviour and the influencing circumstances it entails. And since the UCPD specifically addresses unfair commercial practices in business-to-consumer relationship (Article 3 of the UCPD), providing a comprehensive legal framework for protecting consumers, it is relevant to assess how the practices described potentially violate the Directive.

³⁴ A network of authorities that coordinate at a EU level to enforce consumer protection rights, helping national authorities to uncover and face cross-border irregularities. ‘Manipulative Online Practices’ (European Commission - European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_418> accessed 5 March 2023.

³⁵ *ibid.*

Secondly, this Directive's aim, according to Article 1, is to archive a high level of consumer protection against unfair commercial practices which may harm their economic interests, consequently contributing to the functioning of the internal market and ensuring a level playing field for businesses operating within the EU by approximating provisions of the Member States on these matters. Therefore, an analysis of *The Choice Factory* within the UCPD allows for a critical examination of the strategies used by marketers and businesses that may be potentially manipulative or breach consumer rights.

Moreover, the UCPD establishes a set of legal standards and obligations for businesses operating in the EU, such as the adoption of codes of conduct (Article 10 of the UCPD) or the obligation of providing truthful information (Article 6 *a contrario* of the UCPD). All in all, it prohibits misleading commercial practices and aggressive marketing techniques. Therefore, it is fundamental for evaluating whether the approaches described in the book comply with these legal standards and obligations.

Finally, the UCPD presents instruments for enforcement by national authorities in Member States (Article 11) and remedies in case of violations, such as the consumers' rights to seek redress if they have been subject to unfair commercial practices (Article 11a of the UCPD). Hence, the analysis of *The Choice Factory* in view of the UCPD allows for an examination of potential violations and the corresponding legal consequences or remedies that may arise.

Other EU law instruments may also be relevant to analysing the book from different perspectives (e.g., the GDPR, which will also be taken in consideration when analysing potential unlawful data collection practices). However, the UCPD particularly focuses on unfair commercial practices, which makes it a fundamental instrument for evaluating *The Choice Factory's* contents within the context of consumer protection in the EU.

Having this in mind, to better establish a context, some relevant UCPD concept definitions will now be analysed in connection with marketing/advertising.

2.1.1 – The functioning of the UCPD and relevant concept definition within the scope of marketing/advertising

At a broad level, advertising is regulated at a more general level by the UCPD (notwithstanding other more specific instruments such as the E-commerce Directive³⁶), which prohibits unfair commercial practices.

The UCPD introduces, firstly, the concept of professional diligence as a standard that, if not met and if, cumulatively³⁷, the commercial practice distorts or is likely to materially distort the economic behaviour of the average consumer, will constitute an unfair commercial practice.

Besides that standard, the UCPD sets two more categories of unfair commercial practices: misleading practices (which includes misleading actions and misleading omissions) and aggressive practices that cause or are likely to cause the consumer to take a transactional decision that he/she would not have taken otherwise.

An example of a misleading action could be making false statements regarding a certain product. Failing to provide important material information about the trader could be considered a misleading omission. As for the aggressive practices, they usually involve harassment, coercion or undue influence to affect the consumer's decision.

Furthermore, in Annex I, the UCPD provides a list of specific practices that can be considered misleading (for example, falsely stating that a product will only be available for a very limited time³⁸) or aggressive (for example, including in an advertisement a direct exhortation to children to buy advertised products³⁹) and constitute unfair commercial practices (that are prohibited) regardless of having an impact on the consumer's transactional decision.

In regard to enforcement, the UCPD requires Member States to ensure that there are adequate and effective means to combat unfair commercial practices, which include legal provisions under which legitimate parties may take legal action against such unfair

³⁶ 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 ('Directive on electronic commerce') 2000.

³⁷ 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 (Text with EEA relevance) (n 2).

³⁸ Annex I, no. 7 of the UCPD.

³⁹ Annex I, no. 28 of the UCPD.

commercial practices and/or bring such unfair commercial practices before an administrative authority competent to decide on complaints or to initiate appropriate legal proceedings⁴⁰.

According to the UCPD, consumers must have access to proportionate and effective remedies, including compensation for eventual damage suffered and a price reduction or the termination of the contract⁴¹.

Member states are also required, for instance, to formulate rules on penalties for infringement of national provisions that arise from the UCPD⁴².

For the purpose of this dissertation's objective of analysing specific marketing/advertising practices in light of the UCPD, some relevant concepts mentioned and defined in that instrument must be considered to first infer if these practices can fit into said concepts.

Moreover, further interpretation of those concepts was provided in the Guidance on the interpretation and application of the UCPD⁴³.

Though not legally binding, guidelines⁴⁴ play an important role in EU law since they help interpret and apply legal provisions appropriately by providing explanations for complex legal terms, examples to avoid ambiguity, and practical recommendations on how to meet legal requirements, often derived from case-law, to explain the intent and scope of the legal instrument. Additionally, this class of soft law⁴⁵ promotes harmonization in the interpretation and application of EU law across different jurisdictions since these instruments usually apply to several Member States with different legal systems and practices.

Furthermore, guidelines can adapt overtime to societal, technological, and economic developments, presenting new solutions, withing the existing framework, for emerging

⁴⁰ Article 11 of the UCPD.

⁴¹ Article 11a of the UCPD.

⁴² Article 13 of the UCPD.

⁴³ 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 (Text with EEA relevance) (n 2).

⁴⁴ 'Guideline - EU Monitor' <<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dou1h8az4>> accessed 11 June 2023.

⁴⁵ P Popelier and others (eds), *Lawmaking in Multi-Level Settings: Legislative Challenges in Federal Systems and the European Union* (1st edition, Nomos 2019).

challenges or legal developments, and serve as a common reference for national authorities, ensuring that EU law remains effective.

In conclusion, clear and well-founded Guidelines can be highly persuasive⁴⁶, reducing the risk of non-compliance and preventing potential legal disputes.

Regarding the Guidance on the interpretation and application UCPD, it offers guidelines on understanding and applying the provisions of that Directive, ensuring consistent interpretation across Member States. This intelligibility is vital for uniform and consistent transposition and application of the UCPD across the EU.

In addition, it provides traders with a better understanding of their responsibilities, and they are hence more likely to comply with the UCPD, which promotes consumer protection. Moreover, this Guidance allows consumers to better identify unfair commercial practices and, for instance, make informed decisions, hence protecting them from misleading or aggressive marketing tactics.

Finally, said Guidelines aid enforcement authorities to understand their obligations under the UCPD, promoting an effective application of the UCPD and cooperation among Member States, improving the collective effort to reduce unfair practices in the EU.

The following paragraphs will elucidate on terms stipulated in the UCPD and subsequently interpreted in the mentioned Guidance, which hold relevance for the later analysis of commercial practices.

(a) Trader

Article 2, (b) of the UCPD states that a trader is “*any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name or on behalf of the trader*”.

According to the above-mentioned Guidance⁴⁷, traders can also be other persons who act in the name or on behalf of a trader, including consumers. In combination with national

⁴⁶ Corina Andone and Florin Coman-Kund, ‘Persuasive Rather than “Binding” EU Soft Law? An Argumentative Perspective on the European Commission’s Soft Law Instruments in Times of Crisis’ (2022) 10 *The Theory and Practice of Legislation* 22 <<https://doi.org/10.1080/20508840.2022.2033942>> accessed 11 June 2023.

⁴⁷ See section 2.1.

laws on liability, a trader can be jointly liable for UCPD derived infringements. For instance, a company that places advertisements in media on behalf of another company can be considered a trader⁴⁸, according to a Judgment of the Latvian Administrative court on Case no. A420632710, and also be liable for the unfair commercial practice committed.

Moreover, for instance, individuals who practice influencer marketing, by taking part in commercial endorsement online, can also be considered traders⁴⁹. And traders' obligation to provide clear communications to consumers⁵⁰ applies to traders even if they are not the supplier of the promoted products.

However, according to the mentioned Guidance, even if individuals or companies are not considered traders, they could be considered to be acting on behalf of the trader whose products are being promoted by the commercial practice. Consequently, their acts fall within the scope of the Directive.

In conclusion, companies or individuals who fall into the category of traders within the UCPD and persons acting on behalf of traders, are responsible for communications directed at consumers.

Marketers and advertisers (either individuals or agencies) can be considered traders themselves when *acting for purposes relating to their trade, business, craft or profession*.

When hired by traders to create campaigns and communications (which are commercial practices), they are not explicitly classified as traders, unless they participate in commercial practices for the purpose of promoting goods or services on behalf of the trader who hired them (much like influencers).

In any case, marketers and advertisers, when acting on behalf of traders, as stated before, must act with professional diligence and with respect for the UCPD, to ensure traders are not committing any unfair commercial practices.

⁴⁸ According to a Judgment of the Latvian Administrative court on Case no. A420632710 (8th March 2012).

⁴⁹ 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 (Text with EEA relevance) (n 2).

⁵⁰ Article 7, parag. 2 of the UCPD.

(b) Commercial Practice

A commercial practice, under Article 2 (d) of the UCPD, is “*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*”.

In regard to marketing and advertising, relevant to this dissertation, the Article is quite specific since it embraces commercial communications, “*including marketing and advertising*” as commercial practices.

(c) Transactional decision

Under Article 2 (k), a transactional decision is “*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*”.

This concept is important to infer if a commercial practice is unfair under Articles 5 to 9 of the UCPD, since those practices are only considered unfair if they distort consumers’ economic behaviour, causing them, as explained before, to take a transactional decision that they would not take otherwise (in conjunction with Article 2 (e) which defines material distortion of consumers’ economic behaviour as “*using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise*”).

Moreover, it is a broad concept that does not only cover the transaction per se but also pre-purchase, such as the decision to enter a website as a result of an online advertisement, and post-purchase decisions, such as the decision to switch to another service provider⁵¹.

⁵¹ 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 (Text with EEA relevance) (n 2).

(d) Average vs. vulnerable consumer

According to recital 18 of the UCPD, and in harmony with the principle of proportionality, an average consumer is one “*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*⁵²”.

As previously mentioned, there is a need to reach a balance between the protection of consumers and the promotion of free trade in a competitive market⁵³.

While this concept of average consumer must be interpreted having in mind the high level of consumer protection⁵⁴, under the UCPD, defending naive and hasty consumers would not be following the principle of proportionality, generating an unfounded obstacle to trade⁵⁵.

Furthermore, to assess the impact of a consumer practice has on a particular group of consumers, the perspective of the average member of that group should be employed (Article 5, parag. 2, (b) of the UCPD).

There is a possibility, however, that a trader’s commercial practice reaches different groups of consumers, for instance, reaching a group of average consumers and, even unintentionally, a group of vulnerable consumers. In this case, Guidance on interpretation of the UCPD states that the general assessment “*should take into account the consumers that were actually reached by the practice, irrespective of whether they were the consumers that the trader intended to reach*”.

Leaving to national authorities and courts the responsibility to determine whether a practice could mislead the average consumer considering the presumed consumers' expectations, in a given case.

Regarding vulnerable consumers, according to Article 5, parag. 3 of the UCPD, “*Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the*

⁵² Case C-210/96, Gut Springenheide and Tusky, 16 July 1998, para 31.

⁵³ 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 (Text with EEA relevance) (n 2).

⁵⁴ Article 114 of the Treaty on the Functioning of the European Union.

⁵⁵ 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 (Text with EEA relevance) (n 2).

practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group”.

Under the UCPD, consumers classified as vulnerable should be granted a higher level of protection than the average consumer, on account of mental or physical infirmity, age or credulity, among other context-dependent vulnerabilities⁵⁶, against commercial practices that may distort their economic behaviour “*in a way which the trader could reasonably be expected to foresee*”. Hence, emphasizing the proportionality aspect of the protection, only requiring traders to behave reasonably.

(e) Professional Diligence

Article 5, parag. 2 of the UCPD sets out a general self-standing mechanism consisting of two cumulative requirements to infer if we are in the presence of an unfair commercial practice. The first requirement is that the practice is contrary to the requirements of professional diligence and the second is that the practice “*materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers*”.

This concept of professional diligence is guided by principles such as honest market practice and good faith, applicable to business activity. It can also encompass other national and international standards and eventual codes of conduct adopted and be interpreted according to trade practices that may be different across the EU⁵⁷.

(f) Misleading actions

Misleading actions are classified in Article 6 of the UCPD. In essence, misleading actions are those which contain “*false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even*

⁵⁶ *ibid.*

⁵⁷ Vanessa Marsland, ‘Advertising regulation in the European Union’, *World Trademark Review*, 2007.

if the information is factually correct, (...) and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise”⁵⁸.

The stated information relates to general conditions such as the existence, main characteristics, price, need for a replacement or repair and nature and attributes of the product or even on the consumer’s rights.

Additionally, a misleading action could be a commercial practice that “*in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*” and implicates marketing that creates confusion with a competitor, noncompliance with codes of conduct adopted by the trader or marketing a good as being the same that is being marketed in other Member State, while being different in composition/characteristics⁵⁹.

According to the Guidance on interpretation and application of the UCPD, the national courts and administrative authorities must assess the misleading character of commercial practices case-by-case.

(g) Misleading omissions

Under Article 7, parag. 1 of the UCPD, a misleading omission is essentially a commercial practice that “*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*”.

Additionally, under Article 7, parag. 2 of the UCPD, a commercial practice can be deemed as a misleading omission if “*a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to*

⁵⁸ Article 6, parag. 1 of the UCPD.

⁵⁹ Article 6, parag. 2 of the UCPD.

cause the average consumer to take a transactional decision that he would not have taken otherwise”.

This is the information that must be provided, in general terms, to the average consumer in order for him to make an informed decision.

Regarding invitations to purchase, Article 7, parag. 4 of the UCPD provides a list of material information that must not be omitted since, for instance, these invitations must be accompanied by the price of the product, according to Article 2, (i) of the UCPD.

(h) Aggressive commercial practices

Under Article 8 of the UCPD, a commercial practice can be deemed aggressive if *“in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken”.*

And according to Article 9 of the UCPD, to determine the above cited, some of the commercial practice’s circumstances must be considered such as *“(a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behaviour; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgement, of which the trader is aware, to influence the consumer’s decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; (e) any threat to take any action that cannot legally be taken”.*

However, according to the above-mentioned Guidance⁶⁰, a commercial practice not included in Annex I of the UCPD cannot be deemed aggressive *“until a factual and case-specific assessment of its features has been carried out in the light of the criteria set out in Articles 8 and 9 of that directive”*⁶¹.

⁶⁰ 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 (Text with EEA relevance) (n 2).

⁶¹ Case C-628/17, Orange Polska, 12 June 2019, para. 31.

2.2 – Overview of behavioural marketing

The book that will be analysed in this dissertation uses behavioural science findings, materialised in biases, to outline effective advertising strategies from an advertiser's viewpoint. Moreover, some of the suggested marketing/advertising practices fall into a particular form of marketing, behavioural marketing.

It is, therefore, important to clarify some of these concepts that typically do not fall within the legal domain.

Advertising is, much like pricing or product development, a strategic component of marketing, which is broader concept that entails an approach to attaining business objectives through, for instance, planning and branding. This element of marketing involves promoting and communicating to an audience through media outlets. The objective: persuasion.

Behavioural science is the field of study of human behaviour and related interactions with the environment, such as decision-making⁶², through various fields, for instance, psychology, neuroscience, and sociology that help identify factors that might influence behaviour.

This science can be used by marketers to create more personalised strategies to engage consumers, for instance, through understanding how humans behave in certain situations by collecting data from surveys and providing advertising to a more sculpted audience.

Behavioural marketing is a marketing approach that is tendentially more tailored, using behavioural science, data and technology to personalise marketing communications⁶³, target and provide advertising to a certain consumer based on their actions and behaviour.

The widespread of Internet use, the rise of digital advertising and, for instance, the introduction of *cookie*⁶⁴ analysis, made it possible to identify, through precise targeting of personal data, online behavioural patterns in users, which enables the feeding of personalized marketing campaigns that may be more likely to appeal to consumers and increase their engagement.

⁶² Shotton (n 19).

⁶³ Aleecia McDonald and Lorrie Cranor, 'Beliefs and Behaviors: Internet Users' Understanding of Behavioral Advertising'.

⁶⁴ Steven C Bennett, 'Regulating Online Behavioral Advertising, 44 J. Marshall L. Rev. 899 (2011)'.

Nowadays, the development of data analytics and the rise of artificial intelligence also facilitate the collection and analysis of great amount of data, which leads companies to generate better and more polished online behavioural marketing strategies, such as online behavioural advertising⁶⁵.

Among marketers, there is a tendency to think of this kind of online behavioural marketing as positive⁶⁶ and allowing to create great revenue⁶⁷. In fact, it allows marketers to effectively adapt communications, in real-time, to their target audience. And, often, consumers are thankful and expect some personalisation⁶⁸.

However, when done with a high level of personalisation and in a way that targets and manipulates the consumer, it can backfire. Consumers tend to be creeped out when they sense their online behaviour is being tracked⁶⁹ and that an overuse of their personal data has taken place⁷⁰. And, for instance, most American adult Internet users find the idea of behavioural marketing invasive⁷¹.

Though there seem to be many benefits in behavioural marketing for businesses, there are also some concerns. Namely, concerns about transparency, consumer privacy, and data protection, as this practice hugely relies on the collection and use of personal data; and consumer manipulation⁷², since some unfair commercial practices can lead individuals into, for instance, making decisions they would not make otherwise.

This is to say that, if the marketing strategy, for instance to advertise or price, involves collecting and processing consumer data without them knowing or consenting, or if it entails false or misleading information resulting in deceptive or manipulative marketing

⁶⁵ Sophie C Boerman, Sanne Kruikemeier and Frederik J Zuiderveen Borgesius, 'Online Behavioral Advertising: A Literature Review and Research Agenda' (2017) 46 *Journal of Advertising* 363 <<https://www.tandfonline.com/doi/full/10.1080/00913367.2017.1339368>> accessed 7 March 2023.

⁶⁶ *ibid.*

⁶⁷ Jianqing Chen and Jan Stallaert, 'An Economic Analysis of Online Advertising Using Behavioral Targeting' (1 August 2010) <<https://papers.ssrn.com/abstract=1787608>> accessed 7 March 2023.

⁶⁸ 'The Value of Getting Personalization Right—or Wrong—Is Multiplying | McKinsey' <<https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/the-value-of-getting-personalization-right-or-wrong-is-multiplying>> accessed 7 March 2023.

⁶⁹ Tobias Dehling, Yuchen Zhang and Ali Sunyaev, 'Consumer Perceptions of Online Behavioral Advertising', *2019 IEEE 21st Conference on Business Informatics (CBI)* (IEEE 2019) <<https://ieeexplore.ieee.org/document/8808011/>> accessed 6 March 2023.

⁷⁰ Lisa Barnard, 'The Cost of Creepiness: How Online Behavioral Advertising Affects Consumer Purchase Intention' (University of North Carolina, 2014) <<https://core.ac.uk/download/pdf/210603295.pdf>>

⁷¹ McDonald and Cranor (n 63).

⁷² Jacob Leon Kröger, Milagros Miceli and Florian Müller, 'How Data Can Be Used Against People: A Classification of Personal Data Misuses' (30 December 2021) <<https://papers.ssrn.com/abstract=3887097>> accessed 21 February 2023.

practices, such strategy or advertising method may be unlawful under EU law, namely, under the GDPR and/or the UCPD.

Thus, here is where consumer rights and behavioural marketing may conflict, deeming relevant to analyse specific new marketing/advertising strategies that may be prone to harm consumers, to verify if they are in compliance with consumer rights rules. Rules that, for instance demand that businesses obtain explicit consent from consumers before collecting and processing their data for marketing purposes, handing them the right to opt-out of such marketing at any time.

Furthermore, there is even conflict among marketers, as some believe that behavioural marketing is completely lawful and ethical in its entirety⁷³, for instance, Richard Shotton, the author of *The Choice Factory*. Others, like Lazar Dzamic, feel that there are ethical concerns regarding this type of marketing, who goes as far as to imply that the EU law may not suffice⁷⁴ to protect consumers against nudging⁷⁵.

Whether to conclude if behavioural marketing and advertising are considered ethical and lawful depends on several factors, such as the level of personalisation, the exact practices used, the type of data being collected and also the fairness of the commercial practices applied.

And the recent changes in EU legislation might help protect the consumer even further⁷⁶, but might not be enough, since consumers are now, not only the addressees of marketing but also its active participants⁷⁷.

⁷³ Shotton (n 19).

⁷⁴ Lazar Dzamic, 'Ethical Challenges in Modern (Digital) Marketing' (*Business School Lausanne*, 25 January 2022) <<https://www.bsl-lausanne.ch/blog/ethical-challenges-in-modern-digital-marketing/>> accessed 7 March 2023.

⁷⁵ Mykola Nicolayenko, 'Reflexões sobre nudging: influência na tomada de decisão e mudança comportamental' (masterThesis, 2019) <<https://repositorio.ul.pt/handle/10451/41524>> accessed 7 March 2023.

⁷⁶ Anne-Lise Sibony, 'European Consumer Protection through the Behavioral Lens' [2017] *European Law Journal*.

⁷⁷ Carlos André Maciel Pinheiro Pereira, 'Lei Geral de Proteção de Dados Pessoais e Os Impactos Na Publicidade Comportamental: Uma Análise Direcionada Ao Marketing Digital e Compliance' [2022] *Revista FIDES* <https://www.academia.edu/78043758/Lei_geral_de_prote%C3%A7%C3%A3o_de_dados_pessoais_e_os_impactos_na_publicidade_comportamental_uma_an%C3%A1lise_direcionada_ao_marketing_digital_e_compliance> accessed 6 March 2023.

2.2.1 – Relevant conclusions from the *Behavioural study on unfair commercial practices in the digital environment - Dark patterns and manipulative personalisation: final report*⁷⁸

This Behavioural study from 2022 conducted for the EC investigates the regular presence and negative impact of dark patterns and manipulative personalization in the digital environment, exposing potential risks, highlighting consumers' vulnerabilities and addressing practices that can possibly mislead or manipulate consumers, which may constitute unfair commercial practices that are unlawful under the UCPD.

Additionally, it comprises policy remedies to address the issues found. These remedies aim to tackle unfair practices in the digital environment and the findings by, for instance, informing the existing Guidance, ensuring compliance with the UCPD and enhancing consumer protection moreover against unfair behavioural marketing practices in the digital environment.

Furthermore, the study's findings can support enforcement authorities in identifying and addressing potentially unlawful practices by providing practical examples and insights into the prevalence and impact of dark patterns and manipulative personalization.

Some relevant conclusions from the referred study, which will be useful for a better perception of the reality in the digital environment, where consumers are being subjected to many unfair commercial practices, are the following:

- a. There is a prevalent and increasing use of dark patterns, across different markets, such as hidden information, preselection, nagging, difficult cancellations and forced registration. On e-commerce platforms, traders commonly use countdown timers.
- b. It is usual for traders to use more than one dark pattern in one interface.
- c. Manipulative personalisation poses some hazards due to personalisation practices that focus on targeting consumer vulnerabilities and are difficult to perceive.
- d. There is an insufficiency of consumer awareness and ability to regard the use of dark patterns by traders. However, when it is noticed, consumers perceive it negatively.
- e. Consumers have become familiar with these unfair practices as part of a regular digital experience.

⁷⁸ Lupiáñez-Villanueva and others (n 32).

- f. As a result of harmful effects on competition, price transparency and trust in the market, dark patterns and manipulative personalisation practices are able to lead to financial harm, loss of autonomy and privacy, cognitive burdens, mental harm to consumers.
- g. In an indicative experiment that tested 120 consumers' neurophysiological and psychological reactions to unfair practices in Italy, Germany, and Spain, it was concluded that, though dark patterns can alter consumer decision-making, no sufficient evidence suggests that there are significant neurophysiological effects on consumers.
- h. In an online experiment that tested the impacts of unfair practices on 7430 consumers' decision-making in Bulgaria, Germany, Italy, Poland, Spain, Sweden, it was concluded that "hidden information", "toying with emotions", and "toying with emotions combined with personalisation" had influence on consumers' transactional decision and led to discrepancy with their preferences, indicating that they made choices that they would not have made otherwise.
- i. In general, vulnerable consumers (with time restrictions) are more likely to make inconsistent choices than average consumers.
- j. In the online context both average and vulnerable consumers are susceptible to unfair practices.
- k. Older participants and those with lower education levels (structural vulnerability) were more affected.
- l. There are inadequacies in fundamental concepts of EU consumer protection legislation, namely the definition of the average and vulnerable consumer.
- m. In the digital environment, even when consumers are informed and given enough time to take a transactional decision, their choices are still frequently inconsistent with their preferences, which can signify a universal state of powerlessness and susceptibility that affects all consumers (digital asymmetry).
- n. Various dark patterns and manipulative practices are already prohibited in all Member States through the blacklist Annex I of the UCPD. Articles 5 to 9 of the UCPD provide a starting point for assessing the fairness of most business-to-consumer practices on a case-by-case basis.
- o. The use of personalisation practices may be considered lawful as long as they comply with relevant EU legislation.
- p. The use of information about specific consumers or a group of consumers' vulnerabilities for commercial purposes is probable to have an effect on the consumers' transactional

decision and to form a kind of manipulation, resulting in an aggressive commercial practice prohibited under the UCPD.

- q. Despite a strong EU legal framework, including the UCPD which is flexible enough to deal with most unfair commercial practices, some legislative adjustments may be necessary to better respond to dark patterns and manipulative personalisation.
- r. There may be legal uncertainty regarding the exact obligations that traders have under the professional diligence requirement.
- s. The effectiveness of the existing EU legal framework may be damaged by insufficient public and private enforcement, which should be improved by developing the resources and powers of enforcement authorities and by the use of collective redress with the entry into application of Directive (EU) 2020/1828 on representative actions.
- t. The study has established evidence of consumer detriment, which justifies the need for developing additional remedies to address the problem.
- u. Dark patterns may slightly affect an individual consumer but may significantly impact consumer welfare and society as a whole.
- v. The burden of proof may have to be shifted more on the trader to demonstrate that their commercial practice is fair and complies with the law.
- w. Transparency-based remedies are ineffective for countering dark patterns and manipulative personalisation practices.
- x. Remedies that have more potential for lowering consumer detriment include the prohibition of harmful practices which are not yet blacklisted in the Annex I of the UCPD or other EU legislation, and the imposition of a fair/neutral design obligation on traders.
- y. Businesses and interface designers should have guidelines and practical examples, which allow them to determine ex ante whether the practices that they are considering may be unfair.

As we can infer from this study, despite the EU's tendentially protective legal framework, these commercial practices pose potential hazards on consumers' welfare and new concerns arise in the digital environment. Additionally, aspects such as illiteracy, digital asymmetry, emotion, concept uncertainty and insufficient enforcement can be risk factors.

Hence the importance and the need for consumer protection measures regarding unfair commercial practices, thereby aligning with the objectives of the UCPD.

In practice, new measures must be taken to mitigate this type of unfair commercial practices, such as expanding the list of prohibited practices.

III - ANALYSIS OF *THE CHOICE FACTORY*

The Choice Factory is a quite short and practical guide intended for marketers and businesses that aim to sell more by taking advantage of human behavioural biases. Its title and cover (with a central figure consisting of the profile of a human head with a barcode strategically positioned in the area reserved for the brain) actually translate this very well and are very suggestive of this money-making goal.

The body of the book has 25 main chapters, one for each bias. In each of these chapters, the Author starts by explaining the bias and displaying the corresponding behavioural science findings. The chapters end by elucidating the readers on how to apply the effect described prior, when explaining the bias and its impacts.

In the following subchapters of this dissertation, I will briefly summarise four of the 25 biases and analyse them in light of the UCPD which provides consumer protection against unfair commercial practices.

3.1 - Analysis of “BIAS 5 - Habit, How to disrupt behaviour when most of it is unthinkingly habitual”

In this chapter, the Author begins to acknowledge that people have habits and those are hard to break. According to behavioural science findings⁷⁹ mentioned by Shotton, almost half of our actions is habitual. And, in conclusion, habits make it difficult for consumers to be open to new or different products⁸⁰.

Therefore, Shotton suggests four ways for marketers to apply these results: (a) find ways to push consumers out of their habitual and automatic behaviour, (b) target consumers

⁷⁹ Wendy Wood, Jeffrey M Quinn and Deborah A Kashy, ‘Habits in Everyday Life: Thought, Emotion, and Action’ (2002) 83 *Journal of Personality and Social Psychology* 1281.

⁸⁰The Author and his colleague Laura Weston conducted a survey before nearly 2400 consumers and concluded that consumers would more likely change brands of products when undergoing life events. Shotton (n 19).

who have undergone life events, (c) publicize at moments of internal reflection and (d) before habitual behaviour stabilises.

Just looking at these suggestions, a jurist can immediately sense that some of these measures can potentially be harmful to consumers, as I will intend to demonstrate ahead.

(a) Find ways to push consumers out of their habitual and automatic behaviour

*“The most direct approach is to draw consumers’ attention to a habit and jolt them out of their behaviour. The key to success is to target communications to the moment or place this automatic behaviour happens.”*⁸¹

In this first one, Shotton gives an example of a successful campaign by Sainsbury’s in 2004 that, by using recipe cards and Jamie Oliver for inspiration, made consumers “Try Something New Today”⁸².

This technique does not seem to be contrary to professional diligence⁸³. Nor is it misleading under Articles 6 and 7 of the UCPD or aggressive under Articles 8 and 9 of the UCPD. Also, this suggestion does not target consumers individual behaviour or invade their privacy. It simply takes into account that people, in general, usually behave in a certain way, for instance, sleep shopping⁸⁴, using information obtained from behavioural science, without gathering information in an unlawful way, and finds a way to expose consumers to new products to buy if they wish to.

Therefore, it does not seem to crystallize into an unfair commercial practice, which does not make it unlawful under the UCPD.

⁸¹ *ibid*, page 35.

⁸² Marketing Week, ‘AMV.BBDO Unleashes Sainsbury’s “Try Something New Today” Push’ (*Marketing Week*, 22 September 2005) <<https://www.marketingweek.com/amv-bbdo-unleashes-sainsburys-try-something-new-today-push/>>.

⁸³ “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” under Article 2, (h) of the UCPD.

⁸⁴ ‘Sleep Shopping’ refers to shoppers who habitually buy the same items week in, week out regardless of the quantity or variety of items available. (Marketing Dictionary, *Monash Business School*) <<https://www.monash.edu/business/marketing/marketing-dictionary/s/sleep-shopping>> accessed 23 February 2023.

(b) Target consumers who have undergone life events

“As habits are hard to break, brands should identify the rare moments when their grip becomes loosened, such as when consumers undergo life events. These moments are easier than even before to identify because of the wealth of targeting data available. Facebook, for example, captures when users move to a new house or end a relationship.”⁸⁵

The idea suggested herein by Shotton is for marketers to target consumers by gathering personal information about life events that they share on their Facebook page and feed them advertising accordingly. This not only poses a potential threat to consumers’ privacy but also can target specific consumers to make them make decisions that they would not otherwise make (Article 5, parag. 2, (b), of the UCPD).

It is not news that Meta (Facebook) has been having problems with privacy. For instance, in January of the present year (2023), the Irish Data Protection Commission (Meta’s core regulator in the EU) concluded two inquiries on Meta Ireland⁸⁶, fining the later in € 390 million for breaches of the GDPR in relation to Facebook and Instagram.

Meta was accused of including acceptance of personalised advertising in their long and extensive terms of service, hence inhibiting users from using the platform without automatically allowing their personal data to be used for those purposes. In short, Meta received permission from users to collect data for personalized advertising from its terms of service agreement that allows users to access Meta’s services.

The regulator concluded that blending the legal consent within the terms of service drove users to allow personalized advertising inadvertently, thus violating the GDPR. This obviously poses a problem to Meta, that will profit a lot less if users do not allow their data to be used for personalised advertising.

Consequently, even when there is explicit consent (Articles 4 (11) and 7, and Recital 32 of the GDPR), it is possible to be in an unlawful situation, if the consent is not given in accordance with what is set out by the GDPR (Recital 42 of the GDPR⁸⁷).

⁸⁵ Shotton (n 19), page 36.

⁸⁶ ‘Data Protection Commission announces conclusion of two inquiries into Meta Ireland’ (*Data Protection Commission*) <<https://www.dataprotection.ie/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland>>.

⁸⁷ “Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.” (Recital 42 of the GDPR).

The EU is well known for its privacy policies. In the EU, there is regulation that entities must follow regarding the gathering and processing of personal data, the GDPR. This regulation includes rules on such use of data for marketing, which impose, for instance, that consent from the data subject must be obtained in order to use their data for such purposes.

Therefore, all entities operating in the EU must comply, including Facebook, under penalty of being fined, which, in fact, happened. And businesses (or traders, as defined under Article 2 of the UCPD) that may gather information from a platform like Facebook, which in this case are unlawfully acquiring consent, to target and advertise, are also violating the GDPR.

As the 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 states, a violation of the GDPR does not per se mean that the commercial practice is unlawful under the UCPD. Nevertheless, those potential privacy and data protection breaches need to be taken into consideration when analysing the unfairness of the particular action under the UCPD, especially when the trader processes such data for marketing, profiling or personal pricing purposes⁸⁸.

Furthermore, this brings up transparency concerns on the commercial practice. Traders are prohibited from misleading consumers in a way that may impact their transactional decisions (Articles 6 and 7 of the UCPD).

Article 7, parag. 2 of the UCPD, prevents traders from hiding material information or the commercial intent behind the commercial practice (misleading omission) that causes or is likely to cause the average consumer to make a transactional decision that otherwise would not have taken place.

Furthermore, under Article 7, parag. 5 of the UCPD, the information requirements of the GDPR may be considered material information⁸⁹.

Accordingly, since personal data and consumer preferences are often being made available to third parties, under Article 7, parag. 2, and no. 22 of Annex I of the UCPD, the trader has to inform the consumer that their data will be used for commercial purposes,

⁸⁸ 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 (n 13).

⁸⁹ *ibid.*

under the penalty the commercial practice being considered a misleading omission of material information⁹⁰. Which is an unfair commercial practice under Article 5, parag. 4, (a) and Article 7, parag. 2 and 5, and no. 22 of Annex I of the UCPD⁹¹.

In this light, the suggestion from the Author, which does not contemplate consent concerns and simply envisions the use of such private data to target consumers and feed them advertising accordingly, may be misleading and thus unfair under the UCPD, for lack of transparency and data protection under the GDPR.

On a side note, marketers should also consider that this kind of practice may also take a psychological toll on consumers⁹² and, as stated before, the overall negative perception of consumers when faced with a high level of personalization.

Without prejudice to the above said, even if there had been valid consent according to the GDPR, this practice could be considered unfair for being aggressive under Article 5, paragraph 4, (b), Article 8 and Article 9, (c) of the UCPD.

Indeed, a commercial practice is considered aggressive if, taking account of all its circumstances, by undue influence, it significantly damages or is likely to significantly damage “*the average consumer's freedom of choice or conduct with regard to the product*”, causing or likely causing the consumer to take a transactional decision that he would not have taken otherwise⁹³.

According to Article 2 (j) of the UCPD, undue influence refers to “*exploiting a position of power in relation to the consumer so 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*”.

Moreover, a factor that helps determining if a certain commercial practice uses undue influence is the exploitation by the business of “*any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product*”⁹⁴.

⁹⁰ And a breach of transparency under Articles 12 to 14 of the GDPR.

⁹¹ 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 (Text with EEA relevance) (n 2).

⁹² Lisa Barnard, ‘The Cost of Creepiness: How Online Behavioral Advertising Affects Consumer Purchase Intention’ (University of North Carolina, 2014) < <https://core.ac.uk/download/pdf/210603295.pdf>>

⁹³ Article 8 of the UCPD.

⁹⁴ Article 9, (c) of the UCPD

In short, targeting a consumer who has undergone a life event can be considered an aggressive commercial practice, which is prohibited under the UCPD, if: (1) the trader is aware of the consumer's grave circumstance, (2) having that grave circumstance or misfortune in mind, (3) the trader exploits their position of power to apply pressure on the consumer (by using undue influence), (4) impairing or likely impairing the consumer's freedom of choice, (5) causing the consumer to take a transactional decision that he would not have taken otherwise.

These requisites allow for a case-by-case assessment, considering the specific strategies used, the vulnerability of the targeted consumers, and the impact on their freedom of choice, to determine whether the targeting involves undue influence and constitutes an aggressive commercial practice under the UCPD.

For instance, Shotton mentions divorce as a crucial circumstance in which consumers could be targeted to buy make up. According to the Author, in this situation, consumers "*might need a confidence boost or take the opportunity to forge a new look*"⁹⁵.

Well, if a business (1) targets recently divorced consumers and, (2) using that circumstance, in which individuals might feel poorly about themselves, (3) pressures or manipulates the consumers by taking advantage of their emotional state, (4) making them feel like they need to purchase that business's specific make up products (5) causing them to acquire goods that they might not otherwise buy, in order to feel better, the marketing strategy could be considered aggressive, thus unfair, therefore unlawful under the UCPD.

Similarly, if a trader (1) targets new parents and (2) uses fear-based advertising strategies (3) to convince them (4) that their product is the only solution to protect their child's health, (5) making them buy such product, it could be considered an aggressive commercial practice.

Indeed, according to the previously mentioned Commission's Guidance⁹⁶, "*using emotion to steer users away from making a certain choice (e.g. 'confirmshaming' the consumer into feeling guilty) could amount to an aggressive practice under Article 8 UCPD for using undue influence to impair the consumer's decision-making*". And in fact, toying

⁹⁵ Shotton (n 19), page 36.

⁹⁶ 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 (Text with EEA relevance) (n 2).

with emotions, especially combined with personalisation, has influence on consumers' transactional decisions and makes them take choices that they would not take otherwise as stated in section 2.2.1 h) of this dissertation.

In conclusion, the Author's suggestion could lead to unfair commercial practices, which are prohibited under the UCPD.

(c) Publicize at moments of internal reflection

“If you need to get consumers to reappraise their behaviours, nine-enders may be a particularly appropriate group to talk to.”⁹⁷

Following the idea mentioned in section 3.1 (b), that habitual behaviour needs to be broken in order for marketing to be effective, the Author identified a moment when people usually rethink their life decisions and, in line with that theory, might be susceptible to new products. And that moment is, according to a study conducted by two psychologists from NYU and UCLA, when consumers' age ends in nine⁹⁸.

Shotton points out that in ages ending in nine, people have a tendency to rethink their lives and take action. Which can be great if people find a new meaning to life, enter into a marathon or if they finally take a new job opportunity, for instance⁹⁹. The problem is that these actions, at times extreme, are not always positive (for instance, having an affair or committing suicide¹⁰⁰). This indicates that it can be a sensitive age, when people are more fragile and might be vulnerable to practices such as advertising that might lead them to make decisions they would not otherwise make. It takes us into the concept of vulnerable consumers under the UCPD.

Article 5 of the UCPD prohibits unfair commercial practices. Paragraph 3 of this article states that *“Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical*

⁹⁷ Shotton (n 19), page 38.

⁹⁸ Humans tend to divide life into decades, which entails that aging happens in 10-year periods. Where one decade ends, another begins. Adam L Alter and Hal E Hershfield, 'People Search for Meaning When They Approach a New Decade in Chronological Age' (2014) 111 Proceedings of the National Academy of Sciences 17066 <<https://www.pnas.org/doi/10.1073/pnas.1415086111>> accessed 24 February 2023.

⁹⁹ Shotton (n 19).

¹⁰⁰ By examining the number of suicides per 100,000 individuals between 25 and 64 years of age across the United States from 2000 to 2011, the authors concluded that the suicide rate was higher among 9-enders than among people whose ages ended in any other digit. Alter and Hershfield (n 98).

*infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.*¹⁰¹”

This is to say that vulnerable consumers must be ensured a higher level of protection than the average consumer mentioned in Article 5, parag. 2 of the UCPD.

According to a Study conducted on *Consumer vulnerability across key markets in the European Union*¹⁰², vulnerability is best viewed as a spectrum with several dimensions. It ends up defining vulnerable consumer as someone “*who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation, or market environment: Is at higher risk of experiencing negative outcomes in the market; Has limited ability to maximise their well-being; Has difficulty in obtaining or assimilating information; Is less able to buy, choose or access suitable products; or Is more susceptible to certain marketing practices.*”

Since, according to Shotton, behaviour science proved that ages ending in nine, people are more likely to take extreme measures (positive and negative) than in other ages, it seems that there is a higher probability of negative outcomes from decision-making, such as suicide, than in other ages. By this definition, this group of people should in theory be more protected than the average consumer and not exploited, since they are more susceptible to certain marketing practices.

In fact, other circumstances besides the ones in Article 5, parag. 3 can constitute vulnerability, such as context-dependent vulnerabilities¹⁰³ like socio-demographic, personal or psychological characteristics (e.g. interests, preferences, psychological profile and mood).

Moreover, having this behavioural science knowledge, marketers/businesses/traders can “*reasonably be expected to foresee*” that a certain commercial practice, such as target advertising to this group, can distort the economic behaviour of these consumers who

¹⁰¹ “*Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour 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.*” (Recital 19 of the UCPD).

¹⁰² European Commission, Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08), <http://ec.europa.eu/consumers/consumerevidence/marketstudies/vulnerability/indexen.htm>.

¹⁰³ 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 (Text with EEA relevance) (n 2).

might be vulnerable. Hence, being responsible for negative impacts of such commercial practices.

Additionally, when in presence of a fragile group where there is a probability of finding psychologically instable individuals, a commercial practice towards them could eventually be considered aggressive, thus unfair and prohibited, under Article 9, (c) of the UCPD, that states that *“In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of: (...) (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product; (...)”*.

However, as previously said, a commercial practice not included in Annex I of the UCPD cannot be deemed aggressive *“until a factual and case-specific assessment of its features has been carried out in the light of the criteria set out in Articles 8 and 9 of that directive”*¹⁰⁴.

And the same rules mentioned in the previous section apply. In other words, targeting a consumer or a group of consumers whose age ends in 9 can be considered an aggressive commercial practice, which is prohibited under Article 5, paragraph 4, (b), Article 8 and Article 9, (c) of the UCPD. This occurs if (1) the trader is aware of the consumer's circumstance – which is, in this case, the fact that the consumer's age ends in 9 and that there is a probable psychological instability that may arise from it, inducing therefore vulnerability – and (2) having that circumstance in mind, (3) the trader exploits its position of power to pressure the consumer (by using undue influence), (4) impairing or likely impairing the consumer's freedom of choice, (5) causing the consumer to take a transactional decision that he would not have taken otherwise.

Furthermore, Shotton suggests that data regarding consumers' birthdays could be exploited from digital providers such as Facebook to persuade new customers while they rethink their lives.¹⁰⁵ Which, as mentioned in the previous section, may be considered as an unfair commercial practice.

¹⁰⁴ Case C-628/17, Orange Polska, 12 June 2019, para. 31.

¹⁰⁵ Richard Shotton and Will Hanmer-Lloyd, 'Targeting "Nine-Enders": Why Age Is Much More than a Number' (*Marketing Week*, 13 January 2023) <<https://www.marketingweek.com/targeting-age-number/>> accessed 24 February 2023.

In conclusion, this suggestion should be taken by marketers with caution and with the necessary professional diligence under Article 5, parag. 2 of the UCPD.

(d) Communicate before habitual behaviour stabilises

*“An alternative approach is to focus on communications before habits become entrenched.”*¹⁰⁶

In this paragraph, the Author encourages marketers to target people before their habits are set, following the idea that, when they are set, it is difficult to introduce new products. For instance, Shotton suggests that it is a good idea to target to people who are shopping for themselves for the first time and advertise the products then.

This technique does not suggest a special vulnerability in this group of people and it does not suggest that the trader is exploiting any grave circumstance to pressure the consumer into taking a transactional decision that he would not have taken otherwise. In other words, this method does not seem to fulfil the requirements laid down in Article 8 and Article 9, (c) of the UCPD. Consequently, it does not constitute an aggressive commercial practice under the UCPD. Likewise, this practice does not in itself meet the requirements to constitute a misleading action or omission under Articles 6 and 7 of the UCPD.

Therefore, this suggestion is not an unfair commercial practice under Article 5, parag. 2 to 5 of the UCPD, which does not make it unlawful under Article 5, parag. 1 of the UCPD, which prohibits unfair commercial practices.

However, the expression used is, once more, “target”. This implies personal data collection. As mentioned before, if the data is collected lawfully, respecting consumers’ rights, this technique does not seem to be an unfair commercial practice in this regard. And, like the method explained in (a), it seems to be a way to use behavioural science to expose people to products and let them choose if they buy them or not.

¹⁰⁶ Shotton (n 19), page 38.

3.2 - Analysis of “BIAS 8, Mood, The benefit of targeting your ads according to the consumer’s mood”

In this chapter, the Author begins to recognize that people recall more ads and are more receptive to them when they are in a good mood. For instance, according to an experiment conducted by Shotton and Laura MacLean, happy consumers are more likely to like ads than unhappy ones.

The Author then cites Nigel Clarkson, Managing Director of Yahoo, who said that consumers should be reached at the right occasion, adding that it “*should be about more than the webpage they’re viewing at the moment. We should be striving to take a consumer’s emotions into account as well*”¹⁰⁷.

The explanation to this phenomenon is given by Nobel Prize winning psychologist Daniel Kahneman who states that it might be due to our evolution, since happiness or good mood generally mean absence of danger, thus removing the need to think with a critical view and in depth. What this also does, on the other hand, is increase the danger of errors of judgement and creating more biases¹⁰⁸ (that, as previously mentioned, are not always positive).

Therefore, Shotton suggests three ways for marketers to apply these results: (a) target consumers when they are probably in a good mood, (b) target consumers when they really are in a good mood and (c) adapt the communication to consumers’ mood.

(a) Target consumers when they are probably in a good mood

“*First, consider targeting consumers during enjoyable activities. (...) Second, identify particular times of day when consumers are at their happiest.*”¹⁰⁹

In this first method, Shotton suggests that marketers use behavioural science findings to identify moments when consumers are more likely to be happy. Considering that

¹⁰⁷ A study conducted by Yahoo, where 600 adults’ moods were tracked by filling a smartphone diary of their emotions, shows that when consumers are in a good mood, they are 24% more receptive to content. yahoo, ‘Emotional Context Could Make Digital Ads 40% More Effective, According to Yahoo Research’ (Yahoo) <<https://yahoo.tumblr.com/post/158393152734/emotional-context-could-make-digital-ads-40-more>> accessed 25 February 2023.

¹⁰⁸ Humans have two distinct thinking systems (System 1 and System 2). System 1 is quick, automatic, and instinctive, used when making short-cut decisions or react. System 2 contrasts because it is slower, intentional, and critical, demanding more attention and effort. Daniel Kahneman, *Thinking, Fast and Slow* (1st edition, Farrar, Straus and Giroux 2013).

¹⁰⁹ Shotton (n 19), page 59.

according to this science people are more open to content in those moments, it makes sense to advertise then.

Targeting consumers who are in a good mood to market products is not inherently an aggressive commercial practice under the UCPD. It depends, as previously mentioned, on the means used to apply pressure on the consumer, for instance, harassment or undue influence, and also on the consequences that arise from such practice such as impairing or likely impairing the average consumer's freedom of choice and cause him to take a transactional decision that he would not take otherwise.

However, as mentioned above, happiness or a good mood are emotions that mean, in an evolutionary perspective, absence of danger¹¹⁰. This safety alleviates the need to think critically, which increases the probability that the consumer will give in to the pressure exerted by the trader, for instance, by undue influence, making him/her take a transactional decision that he would not take otherwise.

As previously described, undue influence refers to the trader exerting pressure by exploiting a position of power in relation to the consumer to manipulate his/her decision-making process, limiting their ability to make an informed decision. Therefore, if a business targets consumers who are in a good mood and employs manipulative marketing strategies that exploit their positive emotional state in a way that significantly impairs or is likely to impair their freedom of choice, it could potentially be considered an aggressive commercial practice under the UCPD, due to undue influence.

For example, payday loans¹¹¹ are high-interest short-term loans that are usually targeted at individuals facing financial difficulties or cash flow problems. In the event that a business takes advantage of a consumer's good mood, which may make him/her more susceptible to impulsive or uninformed decisions, and advertises a payday loan as a solution to his/her problems, making the consumer take a transactional decision that he would not have taken otherwise, and perhaps not considering the consequences properly, it could be viewed as an aggressive commercial practice under the UCPD¹¹² since it meets the previously specified requirements in section 3.1, (b).

¹¹⁰ Daniel Kahneman (n 101)

¹¹¹ Matt Ryan Webber, 'What Is a Payday Loan? How It Works, How to Get One, and Legality' (*Investopedia*) <<https://www.investopedia.com/terms/p/payday-loans.asp>> accessed 30 May 2023.

¹¹² Article 5, paragraph 4, (b), Article 8 and Article 9, (c) of the UCPD.

However, a case-by-case evaluation of the specific strategy employed and its impact on the consumer's freedom of choice is crucial since not every marketing approach that targets consumers in a good mood would automatically meet the requisites of undue influence.

Marketing and advertising imply some level of persuasion and nudging¹¹³. Even in politics nudges are used, as an example, to encourage people into making better choices without restricting their choices.

However, when undue influence comes into the picture, freedom of choice and autonomy may be compromised¹¹⁴, and the consumer may fall victim to aggressive commercial practices which are unlawful under Article 5 of the UCPD.

(b) Target consumers when they really are in a good mood

*“One particularly interesting area of research relates to how websites can gauge our emotions from how we move our mouse.”*¹¹⁵

In this suggestion, the Author starts by classifying the previous one as unrefined, since there is already the possibility to target the individual consumer's mood. He also provides the Snickers advertising example, in which the company used Google's ad server DoubleClick to infer people's mood by analysing their clicks¹¹⁶.

Well, this can be problematic if, once again, it calls into question the transparency and the privacy of the consumers. Mouse tracking has proven to be efficient in collecting behavioural data from users to some extent but some emotions, such as stress, do not translate into mouse movements¹¹⁷, maybe due to the fact that stress behaviour does not necessarily translate into motor behaviour. Therefore, this technique may be prone to flaws on the behavioural side.

¹¹³ Daniel Hausman and Brynn Welch, 'Debate: To Nudge or Not to Nudge*' (2009) 18 Journal of Political Philosophy 123.

¹¹⁴ Sartor, Lagioia and Galli (n 10).

¹¹⁵ Shotton (n 19), page 60.

¹¹⁶ Martin Thomas Hibbeln and others, 'How Is Your User Feeling? Inferring Emotion Through Human-Computer Interaction Devices' (2017) <<https://papers.ssrn.com/abstract=2708108>> accessed 25 February 2023.

¹¹⁷ Paul Freihaut and others, 'Tracking Stress via the Computer Mouse? Promises and Challenges of a Potential Behavioral Stress Marker' (2021) 53 Behavior Research Methods 2281 <<https://doi.org/10.3758/s13428-021-01568-8>> accessed 7 March 2023.

According to Article 4 (1) of the GDPR, personal data is “*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*”.

Therefore, it is reasonable to conclude that mouse movement in itself does not directly identify or provide information on a specific individual's identity.

Nevertheless, if related to other data or identifying information that can be linked to a particular person, such as IP address¹¹⁸, log in information or other *cookie* data¹¹⁹, it could be considered personal data.

If that is the case, this collection of personal data must comply with the GDPR (Articles 4 (1) and 7, and Recital 32 of the GDPR) and with the ePrivacy Directive¹²⁰ (Articles 5, parag. 1), therefore consent must be provided from the consumer, for the collection of data and for its specific use.

As mentioned before, an eventual violation of instruments such as the GDPR does not per se that the commercial practice is unlawful under the UCPD. However, they can interfere on a commercial practice's unfairness under the UCPD, especially if said data is processed by the trader for tracking and advertising¹²¹.

Additionally, this tactic of using a consumer's good mood to target and advertise could be considered an aggressive commercial practice as laid down in the previous section, if after a case-by-case evaluation we can conclude that it meets the requisites of undue influence.

In conclusion, the commercial practice suggested by Shotton could be considered unfair by the misleading omission of material information - following the thought process mentioned in 3.1. (b) – under Article 5, parag. 4, (a) and Article 7, parag. 2 and 5, and no.

¹¹⁸ Recital 30 of the GDPR.

¹¹⁹ Cookies are small text files that are stored on an Internet user's computer used to identify said computer when entering a network. *Zuiderveen Borgesius* (n 6).

¹²⁰ 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) 2009.

¹²¹ 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 (n 13).

22 of Annex I of the UCPD¹²² or by the use of undue influence which constitutes an aggressive commercial practice under Article 5, parag. 4, (b), Article 8 and Article 9, (c) of the UCPD.

(c) Adapt the communication to consumers' mood

*“Mood targeting is more than just reaching consumers when they are buoyant. There is evidence that matching messages to a viewer's mood boosts effectiveness.”*¹²³

Shotton mentions an experiment¹²⁴ where people were shown a moderate clip and an intense one. After that, people were shown either a spirited ad or a mild one. The conclusion was that people paid more attention to the ads when they did not collide with their mood.

An important aspect of commercial practices and specifically advertising is persuading consumers to explore the trader's offers, both online and offline. Nevertheless, in the digital domain, traders are able to collect and utilize consumer data more effectively.

By using aggregated data about consumer behaviour, preferences and mood, obtained from various sources, traders can personalize their persuasive techniques. Additionally, they can continuously test and adjust their practices to enhance their effectiveness, learning more about consumer behaviour and taking advantage of their emotions, often without the consumer's full awareness¹²⁵.

As mentioned above in section 3.1 (b), employing emotional tactics to manipulate consumer to make a specific choice may be considered an aggressive commercial practice¹²⁶. This behaviour falls under the scope of Article 8 of the UCPD, as it involves exerting undue influence to hinder the consumer's ability to make a free and informed decision. Which is different from a highly persuasive advertising.

¹²² *ibid.*

¹²³ Shotton (n 19), page 60.

¹²⁴ Nancy M Puccinelli, Keith Wilcox and Dhruv Grewal, ‘Consumers’ Response to Commercials: When the Energy Level in the Commercial Conflicts with the Media Context’ (2015) 79 *Journal of Marketing* 1 <<https://doi.org/10.1509/jm.13.0026>> accessed 25 February 2023.

¹²⁵ 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 (Text with EEA relevance) (n 2).

¹²⁶ *ibid.*

Therefore, adapting a communication to the consumer's mood could be considered undue influence, especially if the mood in question leaves the consumer in a position of vulnerability. Hence, it could be considered an aggressive commercial practice, if after a case-by-case analysis we can conclude that the trader is aware of the consumer's circumstance, having that grave circumstance in mind, the trader exploits their position of power to apply pressure on the consumer (by using undue influence), impairing or likely impairing the consumer's freedom of choice, causing the consumer to take a transactional decision that he would not have taken otherwise.

In conclusion, the commercial practice suggested by Shotton could be considered unfair by the use of undue influence which constitutes an aggressive commercial practice under Article 5, parag. 4, (b), Article 8 and Article 9, (c) of the UCPD.

That being said, if this practice is suggested having in mind how people behave and thus adapting the message to their mood, without emotional manipulation to limit the consumer's freedom of choice, I believe that there is no harm that could be done to the average consumer.

3.3 - Analysis of "BIAS 9, Price relativity, Make your brand appear better value by changing the comparison set"

The Author starts this chapter by relating cognitive illusions to pricing of goods. The principle is that usually, consumers attribute value to things by comparing them to other items. And, furthermore, by performing an experiment on consumers, Shotton concluded that people are more likely to attribute good value to a product when comparing it to a higher priced one of the same kind, even if the first one is quite expensive¹²⁷.

Another experiment conducted by the Author concludes that willingness to pay also changes depending on the comparison made. If a product is presented alongside products with a higher price range, it is more likely that the consumer is willing to pay more for that product than if it were presented alongside items with a lower price range¹²⁸.

To apply this effect, Shotton suggests two methods: (a) altering the competitive set and (b) launching a higher-end line.

¹²⁷ Shotton (n 19).

¹²⁸ For instance, comparing a drink with a set of beers or comparing it with a set of wines, that are usually more expensive, changes the consumer's willingness to pay. *ibid.*

(a) Altering the comparative set

*“Brands should not accept that their ‘natural’ comparison set is fixed.”*¹²⁹

The Author suggests that marketers should encourage brands to change their product presentation (for instance, their packaging) in order to create in their own category, hence allowing a new price range rather than the one already set by comparison with competitors.

This, I believe, is another example of commercial practice that is not prone to mislead the consumer under the UCPD, in the sense that it does not fail to provide relevant material information to the consumer under Article 7 of the UCPD, it does not fill the requirements of Article 6, nor is it an aggressive commercial practice under Articles 8 and 9.

(b) Launching a higher-end line.

*“Introducing a higher-end offering establishes a new comparison benchmark and, therefore, makes your other lines seem better”*¹³⁰

In this recommendation, Shotton takes into account behavioural science findings¹³¹ and implies that there is a natural inclination for the middle alternative when consumers are presented with, for instance, three differently priced products of the same kind. This may occur due to people’s doubt about the products specificities, hence going for the safest option.

Thus, Shotton believes that brands should introduce a higher-end product to increase sales of the item immediately below, hereby changing the view of the consumer. Adding that, if this new product does not sell, it does not matter as long as the main goal of selling the (now) middle option is archived.

This seems to be a tactic that may lack transparency and might deceive consumers, making them take a transactional decision that they would not otherwise take.

¹²⁹ *ibid*, page 66.

¹³⁰ *ibid*, page 67.

¹³¹ When comparing two cameras, one priced at \$170 and one at \$240, consumers were nearly 50% split. When additionally introducing a new camera priced at \$470, 57% of consumers chose the middle one and only 22% chose the cheapest. Amos Tversky and Itamar Simonson, ‘Context-Dependent Preferences’ (1993) 39 *Management Science* 1179 <<https://www.jstor.org/stable/2632953>> accessed 25 February 2023.

Introducing a more expensive product per se may not be specifically illegal but the deception of the consumer in doing so and the manipulation to buy a certain product rather than another does not translate into a truthful, transparent and accurate way of communicating the characteristics and the price of a product, which is required by EU law¹³².

Once again, the relevant legal concept is undue influence. A commercial practice is considered aggressive if, according to Article 8 of the UCPD: (1) in its factual context, taking account of all its features and circumstances, (2) by undue influence the trader exploits a position of power in relation to the consumer to pressure in a way which significantly limits the consumer's ability to make an informed decision, and (3) it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and (4) causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

Launching a higher-end line to make consumers buy more of one specific product can be considered an aggressive commercial practice, which is prohibited under the UCPD, precisely because, taking into consideration the behavioural bias in question, the consumer is likely going to, for instance, buy a product that he/she would not have bought otherwise, if he/she was not manipulated to buy that specific product.

In conclusion, the Author's suggestion could lead to unfair commercial practices, which are prohibited under the UCPD.

Moreover, the UCPD establishes that misleading and deceptive commercial practices are forbidden. In this class of practices, we must include the practice of falsely introducing a new item at a certain price or suggest false characteristics of a product with the sole purpose of selling another product more¹³³.

Even in the case of the new and more expensive product being real – having the collateral result of selling it and still making profit – there is still an untransparent and forced consequence of making the consumer make a choice that he/she might not have made according to these behavioural findings. Hence, it could still be considered a misleading action under Article 6, (c) of the UCPD.

¹³² For instance, in Article 5 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights <http://data.europa.eu/eli/dir/2011/83/2022-05-28>.

¹³³ Article 6, parag. 1 (a) and Article 5, parag. 1 and 4 (a), and practice no. 6 of Annex I of the UCPD.

Thought it is recognised that, in a marketing perspective, practices such as the above mentioned may be effective since they take into account human behaviour, businesses must be wary of the approaches they undertake when it comes to pricing, since they must not be deceiving, manipulative or untransparent.

In conclusion, this practice should not be widely recommended to marketers without legal context, because, when performed in a way that might deceive and manipulate the consumer by undue influence, it may raise legal (and perhaps ethical) concerns under EU law.

3.4 - Analysis of “BIAS 25, Scarcity, The less there is, the more you want it”

In this chapter, Shotton firstly suggests that consumers usually attribute more value – either subjective (for instance, flavour wise) or objective (for instance, monetary) – to goods that are less available. To support this claim, the Author mentioned an experiment conducted by Stephen Worchel, Jerry Lee and Akanbi Adewole¹³⁴. In this experiment, the participants liked and were willing to pay more for a cookie taken from a jar with only two cookies rather than for an equal cookie taken from a jar with ten.

To apply these findings to marketing, the Author suggests four techniques: (a) restrict the number of goods that consumers can buy, (b) communicate anchors that increase sales, (c) emphasize that there is a limited time to buy the products and (d) advertise that the high demand provoked a short supply.

(a) Restrict the number of goods that consumers can buy

*“It seems counter-intuitive but restricting the number of items a consumer can buy boosts sales.”*¹³⁵

In this chapter, Shotton suggests that businesses should limit the amount of products that each consumer can buy, to appear that the good is scarce, hence boosting sales. The Author does not propose that this communication must be justified nor that the justification must be given to the consumer. And this may pose a problem of transparency.

¹³⁴ Stephen Worchel, Jerry Lee and Akanbi Adewole, ‘Effects of Supply and Demand on Ratings of Object Value’ (1975) 32 Journal of Personality and Social Psychology 906.

¹³⁵ Shotton (n 19), page 168.

Consumers have the right to buy goods without being a target of unfair commercial practices and have the right to be informed in a transparent, truthful (under Article 6, parag. 1, (b) of the UCPD) and accessible way in the invitation to purchase (according to Article 7, parag. 4 of UCPD) and before entering into a contract with a trader about the main characteristics of a good (under information requirements stated in Articles 5, parag. 1, (a), 6, parag. 1, (a), of the Consumer Rights Directive¹³⁶), such as availability.

Thus, they have the right to be informed about potential restrictions that might apply to its acquisition and the reason why such limitations are being enacted and if they are legally justified and proportionate.

Setting a limit to the quantity of goods a consumer can buy could be considered falsely informing the consumers about its availability (under Article 6, parag. 1, (b) of the UCPD). Otherwise, they could buy any quantity.

And in this case, behavioural findings stated by Shotton clearly prove that this practice causes the average consumer to take a transactional decision they would not have taken otherwise.

Therefore, this practice could be considered a misleading action under Article 6, parag. 1, (b) and (c) of the UCPD.

On a side note, there are, in fact, situations when this practice could be justified, depending on the context and the circumstances in which it is being applied. For instance, in times of scarcity or emergencies. Even in these cases, the actual limit would need to be proportionate, necessary and non-discriminatory¹³⁷ to safeguard the availability of essential goods and services to everyone who might need it. And consumers should be informed of the justification to said limitations.

¹³⁶ 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) Text with EEA relevance 2022.

¹³⁷ Quantitative restrictions are permitted if justified on grounds of public morality, public policy or public security under Article 36 of the TFEU for cross-border trade (COMMISSION NOTICE - Guide on Articles 34-36 of the TFEU) and must follow the Principle of Proportionality laid down in Article 5 (4) of the Treaty on European Union. For solely national restrictions, affecting only domestic goods, which fall outside the scope of Articles 34-36 of TFEU, national rules apply. For instance, in Portugal, restrictions are allowed during the emergency state foreseen in Article 138 of the Constitution, where rights can be suspended under Article 19 of the Constitution, and in accordance with the Constitutional Principle of Proportionality.

This was the case of the limitation of medicine, facemasks and sanitizer imposed during the initial period of the Covid-19 pandemic¹³⁸ to prevent hoarding¹³⁹.

The practice suggested by Shotton does not seem to be taking in consideration any specific situations of emergency in which it may be lawful to limit the amount of products to be sold to each consumer. The suggestion made seems rather to be that, in any circumstance, a restriction could be applied to make more profit, taking into account the behavioural finding that consumers tend to buy more when products are limited.

(b) Communicate anchors that increase sales

*“It suggests value is a slippery concept, only partially based on objective reality. If You work in professional services, it is delusional to think your clients weigh up your value dispassionately. Part of your perceived worth comes from the anchor, the initial price, you set.”*¹⁴⁰

In this chapter, the Author states that when presented with an initial number/value, a consumer will generally attribute value to a product around that anchor that has been set¹⁴¹.

Anew, the relevant legal concept is undue influence. By setting a value anchor, the trader may exploit a position of power in relation to the consumer to manipulate his perception in a way which significantly limits the consumer's ability to make an informed decision, potentially taking a transactional decision that he would not have taken otherwise. Which is considered an aggressive commercial practice under Article 8 of the UCPD.

In conclusion, the Author's suggestion could lead to unfair commercial practices, which are prohibited under Article 5, parag. 1 and 4 (b), the UCPD.

¹³⁸ Cooperation between companies, which normally is not allowed under EU competition law (Article 101 TFEU), was exceptionally permitted by the Commission as long as it was aimed at addressing pandemic related challenges. All while still monitoring the compliance with anti-competitive practices by undertakings that might seek to exploit the pandemic to that extent. ‘Official Journal C 116I/2020’ <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2020:116I:FULL&from=PT>> accessed 2 March 2023.

¹³⁹ ‘Antitrust (Articles 101 and 102 TFEU) - Free Core blog article - Read now’ (*Lexxion*) <<https://www.lexxion.eu/en/coreblogpost/corona-and-eu-economic-law-antitrust-articles-101-and-102-tfeu/>> accessed 2 March 2023.

¹⁴⁰ Shotton (n 19), page 170.

¹⁴¹ Amos Tversky and Daniel Kahneman, ‘Judgment under Uncertainty: Heuristics and Biases’ (1974) 185.

(c) Emphasize that there is a limited time to buy the products

*“A simple way to apply the bias is to announce that if the consumers don’t purchase soon they’ll miss out on the opportunity to do so. (...) One explanation for the appeal of scarce items is loss aversion – that people feel losses more powerfully than the same level of gains.”*¹⁴²

In this chapter, the Author suggests that sales will boost if consumers have a time limit to buy since people tend to be afraid to miss out on possible opportunities.

Shotton also mentions an example of this technique done by Ocado (an online supermarket), where they present flash sales before the checkout that last while the consumer is on the website, raising the attention on certain products. Interestingly enough, in a MullenLowe Profero¹⁴³ commissioned survey, Ocado was considered by the consumers one of the worst “digital experiences” of all UK supermarkets¹⁴⁴.

As previously mentioned, any manipulative practice that distorts or is likely to distort the transactional decision of an average or vulnerable consumer could consolidate in a violation the trader’s professional diligence requirement (under Article 5 of the UCPD), constitute a misleading practice (under Articles 6 and 7 of the UCPD) or an aggressive practice (under Articles 8 and 9 of the UCPD).

Under no. 7 of Annex I of the UCPD, *“Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.”* is considered to be a misleading commercial practice, which is unfair and prohibited.

This manipulative practice is included in the term ‘dark patterns’, which is a form of malicious nudging¹⁴⁵, integrated into digital interfaces. Dark patterns can be personalised

¹⁴² Shotton (n 19), page 171.

¹⁴³ A customer experience and digital marketing agency. ‘About Us’ (MullenLowe Profero, 14 July 2020) <<https://www.mullenloweprofero.com/about-us/>>

¹⁴⁴ George Nott 15 February 2021, ‘Ocado Delivering Worst “Digital Experience” of Major Supermarkets, Survey Finds’ (*The Grocer*) <<https://www.thegrocer.co.uk/ocado/ocado-delivering-worst-digital-experience-of-major-supermarkets-survey-finds/653166.article>> accessed 28 February 2023.

¹⁴⁵ 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 (Text with EEA relevance) (n 2).

or implemented on general way but the idea behind their implementation is usually to profit on behavioural biases¹⁴⁶.

Furthermore, under the requirements of professional diligence sated in Article 5 of the UCPD, based on principles of *good faith* and *honest market practice*, traders should guarantee that their interface's design does not mislead the consumers into making decisions they would not otherwise make.

Despite being an explicitly prohibited practice in the UCPD (no. 7 of Annex I), according to a previously mentioned “sweep” or assessment to 399 online retail traders’ websites, carried out by the Consumer Protection Cooperation¹⁴⁷, on a wide range of products, trying to uncover dark patterns that could manipulate consumers into making unwanted choices, whose results, released in the end of January 2023, 42 (more than 10%) used fake countdown timers¹⁴⁸.

In case the limited time to buy the article had some truthful and plausible justification (which could be considered material information), the trader fails to inform the consumer of such reason, and it still causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise, it could be considered a misleading commercial practice under Article 7 of the UCPD.

(d) Advertise that the high demand provoked a short supply

*“(...) explicitly mentioning the reason for scarcity is the ideal tactic for a brand.”*¹⁴⁹

Shotton mentions once again the cookie jar experiment¹⁵⁰, stating that when telling the participants that there were only two cookies in the jar due to their popularity, participants were likely to pay 43% more for the same cookie.

It seems that, under EU law, this practice of advertising a product is scarce due to its popularity, would not be considered unlawful per se.

However, as stated before, according to the UCPD, advertising claims that cause or are likely to cause consumers to take a transactional decision that they would not have taken

¹⁴⁶ *ibid.*

¹⁴⁷ ‘Manipulative Online Practices’ (n 34).

¹⁴⁸ *ibid.*

¹⁴⁹ Shotton (n 19), page 172.

¹⁵⁰ Worchel, Lee and Adewole (n 134).

otherwise, must not be false, misleading, or deceptive because this consists of an unfair commercial practice. False claims about the availability or popularity of a product are included in those practices, which can be unlawful under Article 6, parag. 1, (b) of the UCPD.

In conclusion, when adopting this practice, companies shall make certain that their allegations are true.

3.5 - Ethics

To justify these suggestions, the author sets a chapter dedicated to ethics, where he comments on statements from a peer, Lazar Dzamic, on the power of nudging and on the lack of transparency that could harm consumers (*“If cognitive biases are a sort of blindness, who wants to steal from the blind?”*).

To the claim that *“nudges are too powerful to be left in the hands of advertiser”*, Shotton responds that in his opinion the effectiveness of this suggestions is not 100%, and that they just increase the probability of effectiveness (*“Nudges aren’t occult magic”*). He adds that there are other sciences benefiting from behavioural science and that Dzamic should not worry about behavioural advertising regulation because it exists, mentioning the existence of the United Kingdom’s regulator for advertising, Advertising Standards Authority (ASA), which considers that ads should be *“legal, honest and truthful”*.

As for the lack of transparency, Shotton does not agree that it is malicious manipulation if people are unaware that these biases are operating.

Contrary to what the Author states (that if transparency were to operate, a taxi driver had to give the client every option for tip from 1% to 100% instead of only three options such as 20%, 25% and 30% and that *“communications that leave nothing out are futile”* and *“must be selective”*¹⁵¹), transparency goes beyond communicating every option in that specific case and beyond knowing that biases are being used.

The principle of transparency is present in several fields of EU law¹⁵², specifically in consumer law. The UCPD translates transparency in commercial practices as concerns in regards to lack of information provided to the consumer in B2C (business-to-consumer)

¹⁵¹ Shotton (n 19), page 176.

¹⁵² Anoeska Buijze, ‘The Principle of Transparency in EU Law’, 2013, ISBN 978-90-8891-579-6

transactions that could potentially mislead them and make them make uninformed decisions.

Another example is the information that must be provided to consumers, under the GDPR, related to the collection and processing their data for the purpose of advertising, hence respecting their privacy rights.

These are all valid concerns that traders/businesses/marketers/advertisers should have in mind and do not seem to be as complex and “bewildering” as the Author seems to believe.

And according to the examples analysed before, the eventual concerns of this research were not about the biases operating, but about the specific methods used to operate them that were often based on lack of information provided to consumers, raising the pressure to decide, absence of privacy and so forth. And as determined by the UCPD and other EU legal instruments, there are information obligations from businesses to consumers that must be followed to properly ensure consumers’ rights.

That does not mean that marketing and, specifically, advertising cannot still be original, intriguing, and emotional (“*That an audience is moved by emotional pleas doesn’t make them blind; it makes them human*”¹⁵³), and that biases cannot be used to nudge in a legal and ethical way. It just means that they cannot be used to deceive, commercially exploit, and misinform consumers in detriment of their rights.

Which can precisely accrue from the professional diligence¹⁵⁴ requirements¹⁵⁵ stated in Article 5, parag. 2 of the UCPD. This concept embraces ‘honest market practice’, ‘good faith’ and ‘good market practice’ principles that are very present in EU law¹⁵⁶ and should always be applied when conducting any business activity.

¹⁵³ Shotton (n 19), page 177.

¹⁵⁴ “(...) 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”, according to Article 2, (h) of the UCPD.

¹⁵⁵ Nill and Aalberts (n 11).

¹⁵⁶ 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 (Text with EEA relevance) (n 2).

IV - CONCLUSION

The aim of the present dissertation was to analyse behavioural marketing/advertising practices, suggested by Richard Shotton in *The Choice Factory*, that could constitute unfair commercial practices and thus potentially harm consumers.

Behavioural marketing entails scrutinising consumers' behaviour and using that information to tailor advertisements to their interests and preferences. It can be beneficial to businesses and, thus, to the development of the digital economy. And it can also be beneficial to consumers, since it can provide for more relevant advertising on the consumers' optic and enhance user experience, helping to avoid irrelevant proposals.

However, behavioural marketing/advertising can also involve some perils to consumers' rights.

Considering that the book has a high prevalence of consumer targeting suggestions, a key concern is consumer privacy. Behavioural marketing implies collecting and processing consumers' personal information, which sometimes is undertaken without their consent. Furthermore, it could potentially mean using that information for discriminatory purposes, for instance, targeting certain demographics.

Besides privacy concerns, these practices may induce consumers into taking transactional decisions that they would not have taken otherwise. Which is unfair to the consumer if they are undertaken without professional diligence or are in any way misleading or aggressive.

Though it is true that marketing and advertising imply some level of persuasion and nudging, indeed, consumers need protection on these matters, in a balanced non-paternalistic way that does not affect their critical thinking.

Despite the EU's best efforts to regulate and implement legal measures to protect consumers, which are the weaker party in a B2C relationship, against unfair commercial practices, in reality, these are still occurring and being promoted as ethical. And since it is difficult for a consumer to know when he/she is being monitored or manipulated, it will be difficult to enforce these rules in practice.

Hence the need for external evaluation from administrative authorities and the conduction of studies on specific businesses' practices.

As such, the analysis here provided aimed to offer a legal perspective on the potentially harmful suggestions made by Richard Shotton in *The Choice Factory*, contributing to the discussion on the control of behavioural marketing practices and the consumer protection under the UCPD.

Indeed, in this dissertation, it became demonstrated that some of the suggestions were considered abstractly unlawful under that instrument, as previously revealed, accounting that any kind of marketing and advertising, especially behavioural, should also consider, besides profit, consumer welfare.

In that regard, even though behavioural marketing is not unlawful per se, some practices relating to behaviour marketing might be. Overall, it is essential to balance the potential benefits and drawbacks of behavioural marketing and to ensure that the consumer is not harmed in the process.

Furthermore, some changes should be made to the legal framework, in order to clarify which practices are unlawful under the UCPD and efforts should be made to further enforce these rules.

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