

Protecting Vulnerable Consumers From Aggressive Commercial Practices

By

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In memory of my father Christos,
who lives on in my heart

Abstract

The Unfair Commercial Practices Directive has been one of the most significant developments in European Consumer Law. It introduced provisions on aggressive commercial practices for the first time on a European level and provides the key definition of consumer vulnerability in European Consumer Law. This thesis draws attention to the previously overlooked topics of aggressive commercial practices and vulnerable consumers. It shows that the UCPD fails to ensure a high level of protection from aggressive practices for vulnerable consumers. The main reason for that is that the system of the UCPD which focuses on information and the average consumer is not well suited for aggressive practices and vulnerable consumers, which require a broader consideration of factors. Furthermore, it is argued that the vulnerable consumer standard in the UCPD is too narrow to adequately protect vulnerable consumers. A conceptualisation of consumer vulnerability based on the understanding that vulnerability is universal and can be experienced by anyone is suggested. The aggressive practices provisions are analysed and it is argued that inequality of power is at their core. The aggressive practices provisions suffer from lack of clarity that makes their application difficult. A key problem is that the average consumer is unsuitable for aggressive practices. This can be addressed with the introduction of the concept of resilience to pressure. Finally, it is argued that the use of empirical evidence in interpreting the UCPD can be beneficial for the protection of vulnerable consumers.

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Introduction

The Unfair Commercial Practices Directive (hereafter UCPD) has been one of the most significant developments in EU consumer law.¹ As Wilhelmsson puts it, it was ‘designed to be important’.² The importance of the UCPD is signalled by its broad scope of application. It covers all business-to-consumer transactions, across all sectors of the economy.³ Furthermore, it covers commercial practices before, during and after a transaction.⁴

The aim of the Directive is to harmonise the law of the Member States on unfair commercial practices. Harmonisation is meant to contribute to the functioning of the internal market as well as achieve a high level of consumer protection.⁵ Another key aspect of the UCPD is its maximum harmonisation character. Before its introduction, EU consumer law consisted largely of minimum harmonisation measures, meaning that it was possible for Member States to introduce stricter protective measures. Clearly, the UCPD is an ambitious, far-reaching piece of legislation that has had a profound impact on European Consumer Law.

¹ Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22 (Unfair Commercial Practices Directive).

² Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006) 241.

³ For financial services and immovable property it is a minimum harmonisation measure, see UCPD, rec. 9.

⁴ UCPD, art.3.1.

⁵ UCPD, art.1.

One of the innovations of the UCPD was the introduction, for the first time on a European level, of provisions on aggressive commercial practices.⁶ Art. 8 UCPD introduces a general prohibition of aggressive practices, which has the potential to achieve a high level of protection. In 2006, shortly after the introduction of the UCPD, Howells referred to aggressive commercial practices as an underdeveloped concept in the UCPD.⁷ More than 10 years after these remarks not much has changed.

The main research question this thesis answers is: Does the UCPD adequately protect vulnerable consumers from aggressive commercial practices? For that purpose, focus is on whether the UCPD achieves the second of its aims, that of achieving a high level of consumer protection. Furthermore, this thesis argues for the benefits of the use of empirical evidence for informing the interpretation of the UCPD. While the UCPD has been the subject of extensive academic debate, there has so far not been an in-depth analysis of the meaning of the aggressive practices provisions, and this thesis aspires to fill that gap.⁸

This thesis scrutinises how successful the UCPD has been at protecting vulnerable consumers.⁹ The UCPD has offered the key definition of the vulnerable consumer in EU consumer law.¹⁰ In the UCPD, the vulnerable consumer co-exists with the benchmark of the average consumer who is ‘reasonably well-informed, reasonably

⁶ UCPD, art.8-9.

⁷ Geraint Howells, ‘Aggressive Commercial Practices’ in Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006) 170.

⁸ For a few examples of the literature on the UCPD see: Howells, Micklitz and Wilhelmsson (2006); Willem van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Pub Limited 2014); Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Bloomsbury Publishing 2007).

⁹ Please note that in this thesis male pronouns are used to refer to the consumer. This was a choice made for ease of reference and to reflect how the consumer as a legal subject and the rational consumer in particular, is associated with male traits. For more on this in the consumer law context see Iain Ramsay, *Advertising, Culture and the Law* (Sweet and Maxwell 1996) 71.

¹⁰ UCPD, art.5.3.

observant and circumspect'.¹¹ The inclusion of different standards in the UCPD has generated questions as to when it should be applied and how useful it is.¹²

Vulnerable consumers and aggressive practices are in the periphery of the UCPD, as they do not appear to work well within the system of the Directive. This is not reflective of their importance and frequency of occurrence. Still, that is not the only reason to examine them in conjunction. Not only are vulnerable consumers more susceptible to aggressive practices than typical consumers, they are also likely to suffer greater detriment from them. The connection between the two is made evident in art.9(c) UCPD which 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: *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; (emphasis added)

The mention of 'specific misfortune or circumstance' clearly suggests vulnerability. In fact, in earlier drafts of the Directive, vulnerability was included in art.9(c) UCPD.¹³

This thesis critically analyses the relevant provisions of the UCPD and evaluates whether they achieve a high level of consumer protection. Furthermore, it develops the meaning of consumer vulnerability and the aggressive practices provisions as well as their relation to the average consumer. Beyond a robust critique, it suggests ways that

¹¹ UCPD, rec.18.

¹² Bram B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer Publishing 2015) 26.

¹³ Art 9(c) read: the use by the trader of any specific misfortune or circumstance resulting in such *vulnerability* as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product save where the consumer is explicitly seeking the product in connection with the misfortune or circumstance; (emphasis added) in European Parliament, 'Position of the European Parliament adopted at first reading on 20 April 2004 with a view to the adoption of European Parliament and Council Directive 2004/.../EC concerning unfair business-to-consumer commercial practices in the Internal Market (the Unfair Commercial Practices Directive)' [2004] OJ C 104 E/261.

they can be improved to ensure protection. This work comes at the right moment, as the UCPD has been employed in the Member States for a decade meaning enough time has elapsed to be able to assess whether it has been achieving its goals.

Furthermore, it is a good time to re-evaluate the UCPD and suggest changes as currently the EU Commission is conducting a Review of EU Consumer Law (Fitness Check).¹⁴ The Fitness Check of EU Consumer Law is part of the European Commission's Regulatory Fitness and Performance Program (REFIT). REFIT aims at ensuring the EU laws achieve their objectives. The EU Consumer Law REFIT is driven by empirical studies and includes also the UCPD. This is an exciting time for EU Consumer Law as the wheels are in motion (albeit moving slowly) and the outcomes of the REFIT exercise are expected to influence EU Consumer Policy in the years to come.

To answer the research question, this thesis used the doctrinal method and reviewed the academic literature, policy documents and reports as well as CJEU case law and, where available, case law of the Member States. However, for aggressive practices the European case law is very limited, meaning it is imperative to search for their meaning outside a traditional doctrinal analysis. Similar remarks can be made for consumer vulnerability, which is an inherently interdisciplinary concept that has not been adequately developed in consumer law. Therefore, this thesis used insights from other disciplines, such as economics, marketing and psychology, to illuminate the meaning of the legal concepts in question, as well as how the law should be interpreted and reformed. In developing the notion of aggressive practices, legal theory provided useful insights.

This method was chosen as the most conducive to developing the meaning of the concepts as they are meant to be autonomous European Law concepts. The focus of this thesis is on European law at the substantive level. Both aggressive practices and vulnerability were underdeveloped and a theoretical analysis has to precede any efforts to look further into their application. Therefore, while this thesis on occasion references the situation in the Member States, e.g. by reviewing their case law, it does not cover how the UCPD has been transposed and is being implemented in the Member States.

¹⁴ For more information on the EU Consumer Law REFIT, see <http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm> accessed May 2017.

As mentioned, one of the strengths of the UCPD is its broad scope of application. This thesis refers to other EU legislation where necessary, yet it does not focus on any particular sector.

This thesis is divided in 4 substantive chapters. Chapter 1 reviews the rationales for consumer regulation. It sets out the main economic and non-economic rationales. It reviews the main assumptions on neo-classical economics as well as how they have been challenged by behavioural economics. Examining economic rationales is necessary for understanding their influence in European consumer policy. Furthermore, it examines non-economic rationales, namely distributive justice and paternalism which are key for assessing how the UCPD protects the vulnerable.

Chapter 2 examines consumer vulnerability. To gain a better understanding of vulnerability, this chapter looks at how the concept has been approached in a consumer law context and more broadly, where the concept of vulnerability has been better developed. It draws attention to vulnerability as inherent in the human condition. Also, it introduces the concept of resilience as the counterpart to vulnerability and suggests its use for aggressive practices. The chapter contrasts the two main conceptualisations of consumer vulnerability: the state-based approach that views vulnerability as a transient state that can only be measured after it happens and the class approach that identifies groups of consumers as vulnerable. It adopts the state approach but recognises that class approach may be useful to protect disadvantaged consumers, who experience heightened, lasting vulnerability.

This thesis views vulnerability as universal, dynamic and variable. In other words, we are all vulnerable to some degree, our vulnerability changes over time and comes in variable degrees. The chapter concludes with the four main dimensions of vulnerability which have been identified for this thesis: detriment, familiarity with the market, capabilities and freedom of choice. This chapter is a necessary foundation for the analysis of the law on vulnerable consumers.

Chapter 3 reviews the consumer standards in the UCPD. This is the chapter where the principal legal analysis begins. It offers a brief review of European Consumer Policy, which sets the developments that have influenced the UCPD. It introduces the Directive, as well as its aims. It examines the CJEU case law that developed the average consumer standard which was adopted as the benchmark of the UCPD. Then it

scrutinises the three consumer standards of the UCPD, the average consumer, the average targeted consumer and the average vulnerable consumer. The standards are assessed in relation to their suitability for aggressive practices. The average consumer is focused on information, rather than aggressive practices. The average targeted consumer serves to make the average consumer more flexible and has potential for protecting vulnerable consumers as well. The vulnerable consumer standard echoes a class based approach and is not consistent with the understanding of consumer vulnerability championed in this thesis. One of the main findings is that the consumer standards and in particular the average consumer, are not well suited for assessing aggressive commercial practices. The chapter suggests resilience can be incorporated in the average consumer standard to evaluate aggressive practices and that empirical evidence can play a role in interpreting the consumer standards.

Chapter 4 focuses on the aggressive commercial practices provisions in the UCPD. It sets out the background for regulating aggressive practices in the UCPD and exposes the links between aggressive practices and vulnerability. It is argued that the core element of aggressive practices is inequality of power and that should be made explicit. It discusses the aggressive practices provisions as featured in articles 8 and 9 UCPD, as well as in ANNEX I of the UCPD. It investigates the elements of the provisions, focusing on harassment, coercion and undue influence. For that purpose, it uses insights from private law theory, where related concepts are found. It comments on their meaning and the relationship between them and suggests a different taxonomy for aggressive practices. Freedom of choice of the consumer as the protected value in aggressive practices is discussed along with the transactional decision test. It also examines the relationship between art.8 and the factors of art.9 UCPD. It is argued that the lack of clarity of the provisions reduces their effectiveness.

Finally, the last chapter contains the conclusions of the thesis. It offers a summary of the thesis as well as the main findings from the analysis. It also includes suggestions for reform of the UCPD with the aim of achieving more effective regulation of aggressive practices to the benefit of vulnerable consumers. It also argues for the benefits of using empirical evidence and the use of codes of conduct. Finally, a brief overview of issues that arose during this research and would be worth pursuing in the future is included.

Chapter 1

Rationales for regulation

1. Introduction

To understand consumer law, it is essential first to examine its background. This analysis is necessary before moving on to examine the Unfair Commercial Practices Directive (hereafter UCPD). It is not possible to evaluate the role the UCPD plays in the European Consumer Law system, and more importantly the role it should play, without first understanding the different forces driving consumer protection law. The law is not stagnant, but a living organism that is affected by the way the consumer is viewed within a system. There are a variety of different rationales for consumer protection law; they are not always compatible and may often be at odds with each other. The rationales underpinning consumer law and the image of the consumer are interconnected. The rationales that are prioritized impact on how the concept of the consumer is approached.¹

The primary aim of consumer law is to protect consumers.² The protection is primarily achieved by granting them rights against producers and suppliers of goods

¹ Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate Pub Limited 2005) 5.

² In this thesis the terms consumer law and consumer protection law are used interchangeably. This reflects the author's view that protecting consumers should be the primary objective of regulating the consumer trader relationship. It has been argued, especially in the context of EU consumer policy that 'consumer protection' had a negative, defensive meaning which is why it was later replaced by consumer policy which was more positive and fitting better with the narrative of consumer empowerment. See Sidney Freedman, 'A Short History of Consumer Policy in the EU' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 448.

and services.³ But how necessary is consumer protection and to what extent? The answer to that question is largely dependent on which is the predominant view of the consumer.⁴ Different economic theories have exerted their influence on these issues, which is why the discussion of these fundamental issues surrounding consumer law tends to focus on economic debates. Despite their importance, economic rationales are not the only foundations of consumer law. On the contrary, in the beginnings of consumer law achieving fairness and justice seems to have been the primary consideration.⁵ After the end of the Second World War with the rise of the consumer society a movement of social justice in private law was developed.⁶ That movement was instrumental in the growth of consumer protection law.

Rationales for regulation matter since they provide the foundations of consumer law, but this is not the only reason why they are being examined here. Since rationales for regulation relate to the understanding of the concept of the consumer, they influence consumer vulnerability as well. Is the consumer viewed as vulnerable or as rational and empowered? It is important to understand that the influence of the rationales for regulation is not solely theoretical but that different rationales lead to very different policy choices which in their turn produce diverse results. As this thesis prioritizes the protection of vulnerable consumers, this is the desired outcome. Furthermore, each of these rationales and different schools is not necessarily mutually exclusive and they may often co-exist in a system, where they are given different priorities.

Consumer law does not operate in a vacuum, instead it operates for the better part to regulate exchanges taking place in a free market economy.⁷ JK Galbraith in his book *The Affluent Society* argues that despite the image of the sovereign consumer promoted by neoclassical economics, the picture closer to reality is that where the control of the consumer demand is in the hands of the producers and suppliers of goods

³ Colin Scott and Julia Black, *Cranston's Consumers and the Law* (Cambridge University Press 2010) 1.

⁴ Scott and Black (2010) 1.

⁵ Anthony Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (Hart Publishing 2006) 221.

⁶ Hans-W Micklitz, *The Many Concepts of Social Justice in European Private Law* (HW Micklitz ed., Edward Elgar Publishing Limited 2011) 4.

⁷ Russell Keat, Nigel Whiteley and Nicholas Abercrombie (eds), *The Authority of the Consumer* (Routledge 1994) 2.

and services.⁸ Advertising has multiple functions. While one of them is the provision of information to consumers, another is to manipulate their preferences.⁹ This is done primarily by artificially creating differences between products, a technique known as product differentiation.¹⁰ For the only way to keep increasing production is to keep inventing new needs.¹¹ Baudrillard goes a step further to argue that the concept of ‘artificial needs’ created by advertising presupposes the existence of ‘real needs’.¹² According to him ‘it is not the individual that expresses his needs in the economic system but instead it is the economics system that induces the individual function and the parallel functionality of objects and needs’.¹³

The critique on consumer capitalism is too extensive to cover here and goes beyond the scope of this thesis. It goes much further than criticising rationales for consumer protection or consumer law itself, into criticising an entire social structure. However, there are some points to be underlined. We live in a consumer society, and many of the criticisms towards it are well supported. Nevertheless, the role of consumer law is to protect the consumer. Consumer protection does not aspire in building an ideal society, but rather to improve the existing one and adopt realistic measures that fit in the current context. Also, it is important to recognise that there are limits to what the law can do to address these issues.¹⁴ To put this in context, consumer law can try to protect vulnerable consumers but cannot effectively address the broader societal inequalities that place someone in a vulnerable position in the first place.

In this section the following will be examined: first, the relationship between competition and consumer law will be examined. Secondly, economic rationales for regulation will be examined, focusing on two sub-disciplines: (a) neo-classical economics and (b) behavioural economics, which challenges the presumptions of free market economics. Next, some of the non-economic rationales for regulation will be

⁸ Mike Berry, *The Affluent Society Revisited* (Oxford University Press 2013) 89.

⁹ Iain Ramsay, *Advertising, Culture and the Law* (Sweet and Maxwell 1996) 11.

¹⁰ Ramsay (1996) 30.

¹¹ John Kenneth Galbraith, *The Affluent Society* (Houghton Mifflin Harcourt 1998) 131.

¹² Richard Smith, *The Baudrillard Dictionary* (Edinburgh University Press 2010) 40.

¹³ Smith (2010) 40.

¹⁴ Ramsay (1996) 3.

examined, with a focus on distributive justice and paternalism. Finally, the chapter concludes.

2. Competition and consumer law

Competition regulation and consumer law are closely connected. One of the objectives of competition law is to enhance consumer welfare.¹⁵ In a market where there is healthy competition and the market conditions approach those of the perfect market, the consumer should benefit. The close connection between competition and consumer policy is showcased by the fact that in many countries competition policy and consumer protection policy are incorporated in the same piece of legislation¹⁶. For example, the following Member States incorporated the UCPD in their Unfair Competition Acts: Germany, Austria, Denmark, Spain and Sweden.¹⁷ Furthermore, it is a frequent phenomenon that the same national authority is responsible for both competition and consumer policy¹⁸, as is the case in the UK where the Directive is applied, among others, by the Competition and Markets Authority (CMA). In fact, Directive 84/450 EEC on Misleading Advertising, one of the earliest EU consumer law Directives, stemmed from the European Commission's 60s project to harmonise unfair competition law.¹⁹ Does that mean that competition and consumer law share the same objectives and therefore are mutually beneficial? Not necessarily. As a rule of thumb, competition and consumer policy are compatible but that does not mean that there are not instances where they might conflict.

In the context of the European Union, there are commonalities between consumer law and competition law. One of the aims of EU competition law is to

¹⁵ Jones Alison and Brenda Sufrin, *EU Competition Law* (4th edn, Oxford University Press 2011) 13.

¹⁶ Scott and Black (2010) 23.

¹⁷ Commission, 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU, Part I', [2011], available online at: <http://ec.europa.eu/justice/consumer-marketing/files/ucpd_final_report_part_1_synthesis.pdf> accessed May 2017, 25.

¹⁸ Scott and Black (2010) 23.

¹⁹ JHV Stuyck, E Terryn and TV Dyck, 'Confidence through Fairness?: The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 Common Market Law Review 107, 110.

promote the internal market.²⁰ While this is not explicitly set out in art.101 and 102 TFEU, it can be seen in the case law of the CJEU.²¹ Internal market considerations are also central for European Consumer Law.²²

A distinction needs to be drawn between competition policies that aim at increasing economic efficiency, an aim that may not produce any benefit for consumers and those that seek to improve the position of the consumer²³. There is the assumption that what is good for competition is also good for consumers something that can be seen also in the context of EU consumer law.²⁴ While consumer welfare is within the objectives of EU competition law, attention needs to be drawn to the fact that ‘consumer’ may have a far broader meaning in this context. It includes not only final consumers but anyone on the buyer’s side, including intermediate buyers and generally businesses.²⁵ Where the line is to be drawn between businesses and consumers has been hard to define, with SMEs in particular, being granted protection similar to consumers, as is the case with Directive 2006/114/EC concerning misleading and comparative advertising.²⁶

Even if the discussion is limited to final consumers, the assumption remains that healthy competition is good for consumers. That assumption may be true on most occasions, yet it does not follow in all cases. For example, the increase of competition in a sector could lead to a reduction of number of outlets, as has happened with the closure of bank branches.²⁷ In this example even though the outcome is positive for competition, consumers are suffering losses as a result of that, since the access to banking services is made more difficult to them, perhaps to the detriment of the

²⁰ Albertina Albors-Llorens and Alison Jones, ‘Images of the “Consumer” in Competition Law’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 48.

²¹ See for example Joined Cases C-56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, [1966] ECR 299, 340.

²² See text to note 21 in Ch.3.

²³ Thomas Sharpe, ‘Refusal to Supply’ (1983) 96 Law Quarterly Review 36, 60.

²⁴ See for example UCPD, rec. 3.

²⁵ Albors-Llorens and Jones (2016) 56.

²⁶ For an analysis of the relationship between Directive 2006/114/EC and the UCPD see Bert Keirsbilck, *The New European Law on Unfair Commercial Practices and Competition Law* (Hart Publishing 2011).

²⁷ Scott and Black (2010) 26.

inhabitants of certain regions in particular.²⁸ However, such geographical exclusion may now be addressed by providing services to consumers online, provided they have internet access and are able to navigate the service. Of course, the online environment also presents its own challenges for consumer protection, such as how the lack of borders online makes it easier to deceive consumers, or the growing concerns over privacy online.²⁹

As seen above, there are many parallels to be drawn between competition law and consumer law, especially in the EU setting. Often, it is being taken for granted that enhancing competition is beneficial to consumers. For example, healthy competition in the market means consumers have more alternatives, which may increase their resilience to aggressive practices.³⁰ However, that is not always the case. In most instances the two co-exist with no problems but when it comes to taking measures and drafting a policy it is important to remember that consumer interests and ensuring competition may not always align. Sometimes there will need to be a careful weighing of the different objectives. That will be the case especially when the aim is to protect vulnerable consumers. In the UCPD there is a tension between promoting the market and ensuring fair competition and protecting vulnerable consumers.³¹ Ultimately, the reasoning behind enhancing competition is to improve the position of the consumer, so any measures taken that defeat that purpose should not be justified solely for serving the abstract construct of competition.

3. Economic rationales

3.1. Neo-classical economics

Neo-classical economics is used here to describe modern mainstream economics, which is more developed and nuanced compared to the historical neo-classical economics of 1830-1930.³² Neo-classical economics does not present an entirely homogeneous group

²⁸ Scott and Black (2010) 25.

²⁹ John Dickie, *Producers and Consumers in EU E-Commerce Law* (Hart Publishing 2005) 26,53.

³⁰ See text to note 195 in Ch.4.

³¹ See Ch.3, s.4.1., text to note 18 in Ch.4..

³² David Colander, 'The Death of Neoclassical Economics' (2000) 22 *Journal of the History of Economic Thought* 127, 130.

of economists; however, the main points of the theory are captured by the often cited ‘Chicago School’.³³ Neo-classical economics is founded upon the construct of the perfect market. Even though it is a theoretical construct that does not exist in reality, the perfect market is a useful starting point for examining the rationales behind consumer protection.³⁴

Ramsay sums up the main characteristics of the perfect market as follows:³⁵

- 1) There are numerous buyers and sellers in the market.
- 2) There are no barriers in entering and exiting the market.
- 3) There is a product homogeneity in the market, which means that essentially the same product is sold by every seller in that market and there are readily available substitutes and complements.
- 4) All economic actors in the market have perfect information about the nature and value of the commodities traded and the terms on which the product is sold.
- 5) All the costs of producing the commodity are borne by the producer and all the benefits of a commodity accrue to the consumer-that there is, there are no externalities.

The reality of the market is imperfect. Deviations from the characteristics identified above are seen as market failures. It is necessary to examine common failures, which prevent the market from functioning in the way anticipated by neo-classical theory.

3.1.1. Absence of competition

Under perfect competition conditions no one supplier would have the power to influence price, which would give consumers the ability to control prices. In real life however, perfect competition conditions are the exception rather than the rule.³⁶ Oligopolies and even natural monopolies may arise, but perfectly competitive markets

³³ Scott and Black (2010) 26.

³⁴ Peter Cartwright, *Consumer Protection and the Criminal Law : Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 26.

³⁵ Iain Ramsay, ‘Rationales for Intervention in the Consumer Marketplace’ (Office of Fair Trading 1984).

³⁶ Howells and Weatherill (2005) 2.

hardly ever do.³⁷ Nevertheless, the positive effects of healthy competition in the market are recognised and competition law aims at achieving economic efficiency and welfare.³⁸ The perfect market and perfect competition is not possible in the real world, and the goal of regulation will necessarily be more modest.³⁹ The EU has developed a large body of competition law and rich case law on art. 101 and 102 TFEU.⁴⁰

3.1.2. Barriers to entry

Governments are usually able to exercise control over who enters and who exits the market.⁴¹ That does not mean that there are no limits to state intervention; within the European Union, for instance, there are limits to the kind of measures the member states can take. The CJEU has a long line of case law striking down national protectionist measures.⁴² The banking sector is an example of a market where there are barriers to entry as banks are subject to a prior approval system.⁴³ This is deemed to be justified due to the risks that could arise for the consumer and for the economy at large. It is often said that banks are ‘too big to fail’ as a potential default could have catastrophic consequences, not only for the depositors but for the whole banking system, though regulation should ensure that we can afford to let banks fail.⁴⁴ It should not be forgotten that the global economic crisis that started in 2008 sparked from the banking sector.⁴⁵ Therefore governments are keen to exercise control in order to try and avoid such phenomena.

³⁷DW Carlton and GM Perloff, *Modern Industrial Organisation* (4th edn, Pearson Addison Wesley 2005) 84. as cited in Alison and Sufrin (2011) 11 note 42. Citing the New York Stock Exchange as the closest example to a real-life perfectly competitive market.

³⁸ Alison and Sufrin (2011) 4.

³⁹ Joan Robinson, ‘What Is Perfect Competition?’ (1934) 49 *The Quarterly Journal of Economics* 104, 119.

⁴⁰ For a detailed analysis see Alison and Sufrin (2011), Ch. 3,6 and 7.

⁴¹ Cartwright (2001) 19.

⁴² See for example the landmark case of C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, ECLI:EU:C:1979:42.

⁴³ Cartwright (2001) 19.

⁴⁴ E Ferran et al., *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press 2012) xiii.

⁴⁵ Jonathan Kirk and James Ross, *Modern Financial Regulation* (Jordans 2013) 1.

3.1.3. Product homogeneity

The issue of product homogeneity is directly connected to that of information. If the products in a market are different from each other, then the consumers are unable to effectively compare them with each other.⁴⁶ Product heterogeneity is necessary as on many occasions the desires of consumers are created as part of the production process.⁴⁷ Still consumers when faced with homogenous products they may seek to differentiate between them, going beyond price to consider other attributes of the product.⁴⁸ For example, a consumer searching for a book online will look beyond the first result showing the lowest price.

3.1.4. Information deficits

Under perfect market conditions, consumers would have perfect information about products and by assessing this information they would be able to make optimal decisions. In reality, consumers often have less information than the suppliers, resulting in information asymmetry.⁴⁹ Under such conditions where consumers have problems either obtaining or assessing information, or potentially both, they tend to make sub-optimal decisions. The underlying idea is of course that if consumers do have access to information, then they are able to avoid bad deals and make optimal decisions.⁵⁰ Rectifying problems related to information has long been a focus of consumer policy, and this is true also in the EU context.⁵¹ The focus on information has meant aggressive practices have not received enough attention.⁵²

This focus reflects also on consumer vulnerability. The concept of consumer vulnerability is often constructed in relation to the consumer's ability to obtain and

⁴⁶ Cartwright (2001) 20.

⁴⁷ Berry (2013) 90.

⁴⁸ Erik Brynjolfsson, Astrid A Dick and Michael D Smith, 'A Nearly Perfect Market?' (2010) 8 Quantitative Marketing and Economics 1, 8.

⁴⁹ Cartwright (2001) 20.

⁵⁰ Gillian K Hadfield, Robert Howse and Micheal J Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 Journal of Consumer Policy 131, 134.

⁵¹ Stephen Weatherill, 'The Role of the Informed Consumer in European Community Law and Policy' (1994) 2 Consumer Law Journal 49.

⁵² See text to note 207 in Ch.3., Ch.4, s.2.1.

assess information.⁵³ Obtaining and assessing information are not one and the same as a consumer may have the information needed even though he may lack the ability to make proper use of it. However, in the context of consumer vulnerability, focus lays on the fact that one or the other of these aspects of information asymmetry is a characteristic, if not a cause, of consumer vulnerability and therefore they are often grouped together. Consequently, if consumer vulnerability can be attributed to information deficits then the way to cope with it might be an informational remedy.

Returning to the more general picture it is worth considering why consumers may not have the information they need. A classic response from the free market economists would be that the suppliers of the products would provide all the information demanded. However, this is not always the case. Suppliers may not be willing to disclose the information for a variety of reasons. Information could be too complex for consumers to assimilate easily.⁵⁴ For instance, in the well-known example of the used car ‘market for lemons’, as communicating quality of the cars was difficult, focus was on the price.⁵⁵

Also, suppliers may not be willing to disclose information that would be bad for business.⁵⁶ If this applies for the characteristic of a product of a specific trader, then one could argue that competitors have a motive to provide that information. Still, it could be information that applies to all the products of the market. For example, airline companies refuse to disclose information about accidents, even though incidents would vary from company to company, this information is perceived as harmful to the market as a whole, causing consumers to lose their trust.⁵⁷ In other instances, suppliers may provide information that is unclear as with bundling of products.⁵⁸ Or traders may

⁵³ Debra Jones Ringold, ‘Vulnerability in the Marketplace: Concepts, Caveats, and Possible Solutions’ (2005) 25 *Journal of Macromarketing* 202, 202; Margaret K Hogg, Geraint Howells and David Milman, ‘Consumers in the Knowledge-Based Economy (KBE): What Creates And/or Constitutes Consumer Vulnerability in the KBE?’ (2007) 30 *Journal of Consumer Policy* 151, 152.

⁵⁴ Cartwright (2001) 24.

⁵⁵ George A Akerlof, ‘The Market For“ lemons”’: Quality Uncertainty and the Market Mechanism’ [1970] *The quarterly journal of economics* 488.

⁵⁶ Cartwright (2001) 23.

⁵⁷ Office of Fair Trading, ‘Consumer Detriment under Conditions of Imperfect Information’ (Research Paper 11, August 1997) 38.

⁵⁸ Office of Fair Trading (1997) 85.

simply not have all the information on the product as with e.g. an investment product, for which the trader cannot predict its development. So, if the expectation that suppliers will provide all the information needed by consumers is shown to be false, then there is need for a regulatory intervention.

Other issues to consider in relation to information would be whether consumers can assimilate all information given. Understanding which pieces of information are the most needed for consumers to make their decisions would allow for the focus to be on them.⁵⁹ Providing information does not have the same impact on all cases. Some products or services are only bought rarely, such as furniture or mortgages, meaning consumers do not have the chance to gain greater experience in the market. Furthermore, in some cases, due to the nature of the products, consumers are not willing to adopt a trial and error approach, such as medicine or safety equipment.⁶⁰ As Leff puts it:⁶¹

If one buys an automobile whose steering wheel is given to casual driver evisceration, one will learn. “I’m not going to buy that model again” you say, trying neatly to refold and repack the last 17 feet of dishevelled intestine. “If those guys at Pterodactyl Motors aren’t going to level with me, that’s the last they see of any of my money”

It may be impossible for the consumer to assess the quality of the product before the point of purchase as is the case with credence goods. Credence goods are a category of goods alongside experience goods and search goods. Search goods can be evaluated before purchase, experience goods can be evaluated cost-free post-purchase and finally, credence goods are costly to judge even after purchase.⁶² Credence qualities are those ‘which, although worthwhile, cannot be evaluated in normal use’.⁶³ Instead costly information is required to evaluate them. Examples of credence goods include legal services, as the client has no choice but to believe he received good legal advice, or

⁵⁹ Chris Guthrie, ‘Law, Information and Choice: Capitalising on Heuristic Habits of Thought’ in Gerd Gigerenzer and Christoph Engel (eds), *Heuristics and the Law* (MIT Press 2006).

⁶⁰ Scott and Black (2010) 33.

⁶¹ Arthur Allen Leff, ‘The Pontiac Prospectus’ (1974) 2 Consumer Journal 25, 34.

⁶² Michael R Darby and Edi Karni, ‘Free Competition and the Optimal Amount of Fraud’ (1973) 16 Journal of Law and Economics 67, 69.

⁶³ Darby and Karni (1973) 69.

purchasing a bio-degradable detergent, as the consumer has no way of knowing whether the product does indeed possess that attribute.

As useful as information may be, placing too much weight on it could end up having a negative effect on consumers as other policy alternatives would be excluded. Informational remedies have their limits, as consumers' abilities do and a realistic image of consumers' behaviour must be kept in mind when designing a policy. The focus on informational remedies in European consumer law, and in the UCPD in particular, has played a role in forming a system that is not well-suited for addressing aggressive commercial practices.⁶⁴

3.1.5. Externalities

One of the objectives of consumer law is to minimise externalities.⁶⁵ Externalities exist where some harm or benefit results from an activity which is not taken into account by the market price. Unless the cost of externalities is borne by the parties, there is a cost for the product that is not being considered in the price. Since parties are not immediately affected, there is a low incentive to internalise externalities. An example would be that of a consumer purchasing a car at a lower price due to its defective tyres. This car, since it is defective it imposes additional costs because it is a danger to third parties.⁶⁶ A common criticism of the approach of neoclassical economics to externalities, is that they are treated as an exception.⁶⁷ However, this does not reflect their practical importance and frequency of occurrence in real-life. Externalities such as pollution, have a profound effect in people's lives. The effectiveness of regulation in dealing with externalities will depend on acknowledging their importance, as well as the influence of political considerations in the formation of policy.⁶⁸

⁶⁴ See Ch.3, s.3.4.2., 4.2.1.

⁶⁵ Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2nd edn, Hart Publishing 2007) 57.

⁶⁶ Cartwright (2001) 26.

⁶⁷ Robert U Ayres and Allen V. Kneese, 'Production, Consumption and Externalities' (1969) 59 *The American Economic Review* 282, 282.

⁶⁸ Rod Hill and Tony Myatt, *The Economics Anti-Textbook* (Fernwood Publishing 2010) 154.

3.1.6. Neo-classical economics and the image of the consumer

In neoclassical economics, consumers are to be considered as rational maximisers of their own utility.⁶⁹ Economic analysis is guided by the assumption of rationality, the idea that humans are rational utility maximisers in all areas of life. However, rationality is merely an assumption that guides the analysis. Economists from all fields recognise that humans do not always behave rationally.⁷⁰ Furthermore, consumers are assumed to be sovereign, meaning that their choices influence the traders and ultimately shape the way the market functions. The sovereignty can be traced back to Adam Smith, often referred to as the father of neoclassical economics. According to Smith, each person has unique knowledge of their own situation, including their goals and desires, therefore they are the ones best situated to make decisions as to what course of action to take to achieve these goals.⁷¹

This notion of the consumer promotes the freedom of choice the consumer should enjoy and how the state should not interfere with these choices. These views have been mirrored in contract law with the freedom of contract doctrine and are characterised by the philosophical school of thought known as liberal individualism. Liberal individualism, reflects the idea that the individual is an ‘autonomous subject and independent moral agent’ that should be protected.⁷² Individuals should be allowed to pursue their own self-interest. The doctrine of freedom of contract was a product of its time, the 19th century, combining the main ideologies of the time, namely classical economics, Benthamite radicalism, liberal politics and the law.⁷³ Bentham’s view was

⁶⁹ Richard Posner, *Economic Analysis of Law* (8th ed, Wolters Kluwer 2011) 3.

⁷⁰ Posner (2011) 4.

⁷¹ As Smith put it: “What is the species of domestick industry which his capital can employ, and of which the produce is likely to be of the greatest value, every individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him” in Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (RH Campbell and Andrew Skinner eds., Clarendon Press 1976) IV.ii.10.

⁷² Michel Rosenfeld, ‘Contract and Justice : The Relation between Classical Contract Law and Social Contract Theory’ 70 Iowa Law Review 769, 778.

⁷³ PS Atiyah, *Essays on Contract* (Clarendon Press 1990) 11.

that man pursues happiness in everything he does.⁷⁴ Out of that comes the principle of maximising utility, or greatest-happiness principle that became so prevalent.⁷⁵

Going even further back this image of the citizen can be traced back to contract law. Freedom of contract and of the parties has had a fundamental influence in public and consumer law. However, there are differences to be noted between the traditional view of parties in contract law and the reality of consumer transactions; which is what consumer protection law has been founded upon. Freedom of contract has been a concept promoting individualism, according to which a bargain should be upheld in court if it was freely arrived at.⁷⁶ This means that the judge would not consider whether a deal was fair or not, or even if there was deception, but simply whether there was an agreed exchange, unless the deception would amount to fraud.⁷⁷ The rule of *caveat emptor*, meaning ‘let the buyer beware’ is based upon parties entering a contract take care to look out for their own interests. The basic themes of individualism, freedom of contract and judicial non-interventionism that were dominant in 19th century contract law, failed to correspond to the needs of 21st century consumer transactions.⁷⁸ Same as the assumptions of neoclassical economics, the doctrine of freedom of contract has been attacked for being unrealistic. As put playfully by James Gordon: ‘Contracts. Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879’⁷⁹

Power has been ignored in neoclassical economics, contrary to other social sciences.⁸⁰ This can be partially explained by the focus of neoclassical economics on voluntary exchanges, where power is not considered to play a role.⁸¹ The lack of

⁷⁴ Jeremy Bentham, ‘The Psychology of Economic Man’ in W Stark (ed), *Jeremy Bentham’s Economic Writings* (The Royal Economic Society 1954) 421.

⁷⁵ Ellen Frankel Paul, *Moral Revolution and Economic Science* (Greenwood Press 1979) 52.

⁷⁶ Howells and Weatherill (2005) 14.

⁷⁷ Howells and Weatherill (2005) 14.

⁷⁸ Atiyah (1990) 11.

⁷⁹ James D Gordon, ‘How Not to Succeed in Law School’ (1991) 100 Yale Law Journal 1679, 1696.

⁸⁰ Adam Ozanne, *Power and Neoclassical Economics* (Palgrave Macmillan 2016) 2.

⁸¹ Ozanne (2016) 3.

consideration of power in economics means that it cannot adequately address issues of inequality.⁸² These remarks are consistent with what is argued in this thesis, namely that aggressive practices revolve around inequality of power and that the UCPD does not provide the tools to adequately assess that.⁸³ In consumer transactions, there is usually no negotiation of the contract, while there is power disparity between the parties.⁸⁴ On the contrary, standard terms of business are the norm in consumer contracts.⁸⁵ These are some of the circumstances that lead to the decline of the caveat emptor principle in favour of consumer protection regulation. Even though the caveat emptor principle may be considered outdated, the protection of freedom of choice is not. The aggressive practices provisions in the UCPD are designed to protect consumers from impairment of their freedom of choice.⁸⁶ This shows that although the nature of transactions has changes, the liberal ideals continue to be influential.

One of the problems with the assumptions of neoclassical economics is not only what is included but more importantly what is excluded. There are two main stings of criticism towards neoclassical economics in modern times. One comes from behavioural economics, which seeks to use a breadth of empirical evidence to explain human behaviour. Behavioural economics is examined in the next section. The other growing tendency is to try to instil ethical thinking in a more explicit manner in neoclassical economics, especially following the financial crisis of 2007.⁸⁷

Neo-classical economics has been highly influential in the field of consumer protection. However, the theory of the perfect market upon which a big part of free market economics is based has been heavily criticised as unrealistic. That does not mean that correcting market failures is not a desirable policy target. However, focusing solely on that aspect is overly simplistic and not enough to adequately address the

⁸² Hill and Myatt (2010) 6.

⁸³ See text to note 23 in Ch.4.

⁸⁴ Howells and Weatherill (2005) 19.

⁸⁵ Friedrich Kessler, 'Contracts of Adhesion: Some Thoughts about Freedom of Contract' (1943) 43 Columbia Law Review 629; Arthur Allen Leff, 'Contract as Thing' (1970) 19 American University Law Review 131.

⁸⁶ See UCPD, art 8; Ch.4, s.4.2.5.1.

⁸⁷ Jennifer Baker and Mark White (eds), *Economics and the Virtues: Building a New Moral Foundation* (Oxford University Press 2016) 1.

problems faced by consumers. The image of the consumer as a sovereign rational maximiser of his own utility, as advocated by free market economists, conflicts with that of the vulnerable consumer. The fact that the image of the rational sovereign consumer has been dominant in consumer law for a long time has deterred policy makers from focusing on vulnerable consumers and taking measures that address their particular needs. The concept of the rational sovereign consumer is being challenged by behavioural economics which will be examined in the next section.

3.2. Behavioural economics

Behavioural economics presents a relatively recently developed branch of economics that criticises the main assumptions of neo-classical economics. Behavioural economists do that using the findings of cognitive psychologists and decision theorists to challenge the assumptions made by neo-classical economics and gain a better understanding of consumer behaviour.⁸⁸ Even though some of the pioneers of behavioural economics were psychologists by training, behavioural economics has developed into a discipline of its own.⁸⁹ The influence of behavioural economics is growing both in academia, in the field of economics and outside it, most notably in law, and in policy.

Behavioural economics as a sub-discipline of economics has developed greatly over the years and its influence on consumer policy is increasing. This can be seen in the founding of behavioural economics departments starting in the USA and spreading to the UK with the German government also expressing an interest in creating a similar unit.⁹⁰ Unfortunately, the future of the pioneering US behavioural team is uncertain, as their website is no longer maintained. The influence of behavioural economics is not limited to specific countries but has also spread to supra-national organisations, such as the EU and the OECD. The European Commission has a number of publications of

⁸⁸ Jon D Hanson and Douglas A Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation' (1999) 74 NYUL Rev. 630, 630.

⁸⁹ Notably, and recipient of the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel Daniel Kahneman and co- author Amos Tversky who sadly passed away before the award. See also the introduction of Daniel Kahneman, *Thinking Fast and Slow* (Penguin Books 2011).

⁹⁰ For the Social and Behavioural Sciences Team (SBST) in the US please see <<https://sbst.gov/>> accessed May 2017 and the Behavioural Insights Team in the UK, which now operates independently from the UK government, please see <<http://www.behaviouralinsights.co.uk>> accessed May 2017.

behavioural research and the Joint Research Centre of the Commission also has a behavioural unit.⁹¹ One of the most interesting studies of the European Commission for this thesis, is the recently published study on Consumer Vulnerability, which uses behavioural findings.⁹² However, the impact of behavioural economics research on legislation is not easy to assess.⁹³ Behavioural economics has also had an impact on the OECD, as its latest 'Consumer Policy Handbook' incorporates the learnings of behavioural economics.⁹⁴

Behavioural economics challenges the homo economicus of neoclassical economics, which has been influential for consumer law. Behavioural economists argue that the consumer in fact is characterised by bounded rationality, bounded willpower and bounded self-interest.⁹⁵ There are instances where more than one of these concepts influence human behaviour. Still, for systematic reasons, it is better if they are examined separately. Also not all behavioural findings can be included in one of these three broader categories. This section will review briefly some of the main findings of behavioural economics, grouped into the broader categories of bounded rationality, bounded willpower and bounded self-interest.

⁹¹ For a list of behavioural economics research of the European Commission please see <<https://ec.europa.eu/jrc/en/research/crosscutting-activities/behavioural-insights/publications>> accessed May 2017.

⁹² Commission, 'Consumer Vulnerability across key markets in the European Union' (2016) available at <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf> accessed May 2017.

⁹³ See for example the discussion in Anne-Lise Sibony and Gevenieve Helleringer, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015).

⁹⁴ OECD, 'Consumer Policy Toolkit', [2010], available online at <<http://www.oecd.org/sti/consumer/consumer-policy-toolkit-9789264079663-en.htm>>, accessed May 2017.

⁹⁵ Christine Jolls, Cass R Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford Law Review 1471.

3.2.1. Bounded Rationality

Bounded rationality refers to the fact that the cognitive abilities of human beings have limits.⁹⁶ Humans have limited computational skills and flawed memory.⁹⁷ They tend to make judgements and decisions that do not correspond to the neo-classical model of unbounded rationality.⁹⁸ This does not mean that people behave ‘irrationally’, meaning contrary to neoclassical assumptions; on the contrary, human behaviour can be predicted and it is possible to create economics models explaining actual decision-making.⁹⁹ This was made obvious even from the early ground-breaking works of Tversky and Kahneman¹⁰⁰, that set the foundations for behavioural economics and continues in today’s research where behavioural economists try to construct improved and more comprehensive models.

3.2.1.1. Availability

Consumers appear to not have the high competence in risk assessment attributed to them by neo-classical economics. Availability refers to the phenomenon where individuals estimate the probability of a risk by the ease with which a particular risk comes to mind.¹⁰¹ Most of the time, a person’s availability heuristic leads to a sound result; however, in other instances it biases the judgement.¹⁰² This leads to consumers underestimating certain risks while overestimating others. The availability heuristic exerts a powerful influence in everyday life decisions, as people will easily dismiss statistical information in favour of more ‘available’ evidence.¹⁰³ For example, a consumer is much more likely to be influenced by the story of someone they know that

⁹⁶ HA Simon, ‘A Behavioral Model of Rational Choice’ (1955) 69 (1) *The quarterly journal of economics* 99.

⁹⁷ Jolls, Sunstein and Thaler (1998) 1477.

⁹⁸ Sanjit Dhami, *The Foundations of Behavioral Economic Analysis* (Oxford University Press 2016) 1339.

⁹⁹ Dan Ariely makes that point in the very popular book: *Predictably Irrational* see Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (Harper Collins 2010).

¹⁰⁰ A Tversky and D Kahneman, ‘Judgment under Uncertainty: Heuristics and Biases’ (1974) 185 *Science* 1124.

¹⁰¹ Iain Ramsay, *Consumer Law and Policy : Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 59.

¹⁰² Tversky and Kahneman (1974).

¹⁰³ Hanson and Kysar (1999) 663.

had problems with a product or company than by the relevant statistics.¹⁰⁴ This impressionability of consumers reveals how they could be affected by the media and advertising or even how consumers may press for certain policy issues not due to their actual risk factor but according to the higher perceived one.¹⁰⁵

3.2.1.2. *Anchoring*

Anchoring is related to framing as it is considered to be a combination of both framing and adjustment.¹⁰⁶ Anchoring describes the phenomenon where individuals focus on a convenient or easily accessible number in decision making, which leads to judgements that are skewed towards that convenient number.¹⁰⁷ It is worth noting that the effect is still strong even when the anchor is random and the study subjects are well aware of that.¹⁰⁸ The anchoring phenomenon is particularly palpable in pricing practices used by suppliers. For example, an exceptionally high initial price of a product followed by a discount may have an effect on the consumer in reaching the ultimate selling price.

3.2.1.3. *Over-optimism*

Behavioural studies point to the fact that people are biased when making self-assessments as to their susceptibility to risk. People tend to be over-confident about their abilities and over-optimistic on their assessments of risks.¹⁰⁹ For example, participants in a study when asked for their own chances at divorce they estimated it at zero, even though they were well aware of the fact that 50% of marriages (in the USA where the study was conducted) end up in divorce.¹¹⁰ In another study, college students were six times more likely to believe they would have above average job satisfaction

¹⁰⁴ Matthew Rabin, 'Psychology and Economics' (1998) 36 *Journal of Economic Literature* 11.

¹⁰⁵ Anthony Ogus, 'Regulatory Paternalism: When Is It Justified?' in Klaus J Hopt et al. (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan and the US*, Oxford: OUP (Oxford University Press 2005).

¹⁰⁶ Hanson and Kysar (1999) 667.

¹⁰⁷ Tversky and Kahneman (1974) 1127.

¹⁰⁸ Tversky and Kahneman (1974) 1129.

¹⁰⁹ Hanson and Kysar (1999) 654.

¹¹⁰ Lynn A Baker and Robert E Emery, 'When Every Relationship Is Above Average' (1993) 17 *Law and Human Behavior* 439.

rather than below average and that they would own their own home and two times more likely to think they would have a mentally gifted child.¹¹¹

Studies such as this show that people tend to be over-optimistic, and information seems to not greatly dim that optimism. Most people will make over-optimistic predictions for future events, ignoring the actual probabilities of these events.¹¹² Optimistic biases are robust and widespread while pessimistic biases are rare'.¹¹³ An expression of over-optimism is that people tend to underestimate their own chances of suffering an adverse outcome, even though they are perfectly capable of correctly estimating, or even over-estimating for that matter, the chances of someone else's. This is referred to as the 'it can't happen to me' syndrome, or to be more precise, the 'it's less likely to happen to me than the average person' syndrome.¹¹⁴ For instance, people think of themselves as above-average drivers and believe they can avoid accidents more than the average driver.¹¹⁵

Being aware of this optimistic bias can influence policy, especially in the way information is provided. An example is the use of the slogan 'Drive defensively, watch out for the other guy' for a public campaign to promote safe driving, which hits the mark as most drivers who consider themselves above average would believe that a campaign for safe driving doesn't concern them.¹¹⁶

3.2.1.4. Framing effects

'The term 'decision frame' refers to the decision maker's conception of the acts, outcomes and contingencies associated with a particular choice.'¹¹⁷ In the well-known experiment of Tversky and Kahneman participants when asked to choose between two

¹¹¹ ND Weinstein, 'Unrealistic Optimism about Future Life Events' (1980) 39 *Journal of personality and social psychology* 806.

¹¹² Weinstein (1980) 806.

¹¹³ Weinstein (1980) 817.

¹¹⁴ Hanson and Kysar (1999) 656.

¹¹⁵ O Svenson, 'Are We All Less Risky and More Skillful than Our Fellow Drivers?' (1981) *Acta Psychologica* 143.

¹¹⁶ Cass R Sunstein, 'Behavioral Analysis of Law' (1997) 64 *The University of Chicago Law Review* 1175.

¹¹⁷ A Tversky and D Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 *Science* 453.

different programmes to combat the fictional outbreak of a disease choose the one framed in guaranteed lives saved and rejected the one framed in lives lost, even though the outcome in both cases was identical.¹¹⁸ Framing effects are perhaps the behavioural finding that can be most easy to exploit, as even minor changes in the terminology used and the presentation of the choice at hand can result in reversal of preferences.¹¹⁹

An example of how framing can have a profound effect on consumers' choices are default options. For example, if the default rule is enrolment in a healthcare plan (from which consumers are still allowed to opt out of), governments can save a lot of money on healthcare, as people tend to stick to the default option.¹²⁰ In the commercial world, companies spend huge amounts of money on advertising, trying to affect consumers and their choices. The same techniques can be applied to help promote consumer policy, or any government policy, and change people's behaviour. Whether influencing peoples' decisions is desirable is another issue, which is discussed below in the section on paternalism.¹²¹

3.2.1.5. Information overload

As mentioned above, neo-classical economics places weight on the information available to the consumer, arguing that if consumers have all the information they need then they would make optimal decisions. This view has been influential in consumer policy.¹²² However, behavioural findings do not support this theory, and indeed quite the opposite seems true.¹²³ When consumers are presented with a large amount of information, they tend to make worse decisions as they are not in a position to process all the information.¹²⁴ Consumers seem to be more satisfied when there is a smaller choice set. Consumer law has long focused on informational remedies, such as mandatory disclosure policies, for addressing informational asymmetry. The

¹¹⁸ Tversky and Kahneman (1981).

¹¹⁹ Hanson and Kysar (1999) 684.

¹²⁰ Cass R Sunstein, 'Nudging: A Very Short Guide' (2014) 37 *Journal of Consumer Policy* 583, 4.

¹²¹ Jolls, Sunstein and Thaler (1998) 1536.

¹²² Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349, 355.

¹²³ GA Miller, 'The Magical Number Seven, plus or Minus Two: Some Limits on Our Capacity for Processing Information.' (1956) 63 *Psychological review* 81.

¹²⁴ Jacob Jacoby, 'Perspectives on Information Overload' (1984) 10 *Journal of Consumer Research* 432.

effectiveness of such techniques has been the subject of critique, yet they continue to play an important role.¹²⁵ This thesis does not focus on informational remedies, yet the fact that their effectiveness is questionable, point to the fact that factors besides information need to be considered when designing consumer policy.

3.2.1.6. *Emotions*

An area of behavioural economic research that is relevant for this thesis is emotions and their role in economic decision making. Neoclassical assumptions have been instrumental not only in what the image of the consumer includes, but also in what is left out. Emotions are such an example, as the homo economicus is uninfluenced by emotions.¹²⁶ In consumer law, emotions play a limited role in assessing the impact of unfair practices. This thesis argues that aggressive practices have an emotional dimension as they may involve around using psychological pressure to make consumers take a decision.¹²⁷ Therefore, it is useful to provide an account of the role of emotions in economic theory.

Emotions are often viewed as primitive and impulsive which is why they have no place in rational decision making.¹²⁸ Decision making should be made according to reason and logic and humans should strive to control their emotions as they lead to sub-par results. The view that emotions lead to unpredictable reactions is not confirmed by evidence, which is why it has been argued that it is possible and desirable to include them in economic modelling.¹²⁹ Emotions are still a developing area of behavioural economics. Models of bounded rationality tend to center to the aspects examined above, such as knowledge and cognitive abilities.¹³⁰ However, emotional states also have a

¹²⁵ See for example, Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43 *Journal of Legal Studies* 1; O Ben-Shahar and Carl Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014).

¹²⁶ Dhami (2016) 1.

¹²⁷ See Ch.4, s.4.2.1.2.

¹²⁸ Albert O Hirschman, *The Passions and the Interests* (Princeton University Press 1977) 15.

¹²⁹ George Loewenstein, 'Emotions in Economic Theory and Economic Behavior' (2000) 90 *American Economic Review* 426, 427.

¹³⁰ Bruce E Kaufman, 'Integrating Emotions into Economic Theory' in Morris Altman (ed), *Handbook of Contemporary Behavioral Economics* (ME Sharp 2006) 90.

significant role to play in decision making.¹³¹ Often, that influence is portrayed as negative, for example making a bad decision under stress or when angry. However, the influence of emotions can also be positive. It has been argued that the impact of emotions depends on arousal.¹³² Too little arousal and the subject is uninvolved and disinterested, too much and they cannot think clearly or process information well.

3.2.2. Bounded Willpower

The term bounded willpower describes the phenomenon that ‘humans often take actions that conflict with their own long-term interests’.¹³³ On some occasions people recognise the effects of bounded willpower and attempt to mitigate them; for example, people join pension schemes, in recognition of their tendency to undersave.¹³⁴ In terms of policy, techniques such as cooling-off are in part based in bounded willpower.¹³⁵

3.2.2.1. *Hyperbolic discounting*

Hyperbolic discounting refers to the phenomenon that consumers may have present regarding preferences, and preferences are not consistent over time.¹³⁶ According to neo-classical economics consumers act rationally, meaning that they carefully weigh present and future costs and benefits in order to reach their decision.¹³⁷ However, this model is not supported by empirical evidence. For example, in a well-known study where participants were asked how much money they would require in one month, one year or ten years to make them indifferent to receiving 15\$ now, they would be willing to pay a higher discount rate to receive cash within a short period of time.¹³⁸ This shows that preferences of consumers are not consistent over time.

¹³¹ Antoine Bechara, Hanna Damasio and Antonio R Damasio, ‘Emotion, Decision Making and the Orbitofrontal Cortex’ (2000) 10 Cerebral cortex 295, 306.

¹³² Kaufman (2006) 91.

¹³³ Jolls, Sunstein and Thaler (1998) 1479.

¹³⁴ Jolls, Sunstein and Thaler (1998) 1479.

¹³⁵ Jolls, Sunstein and Thaler (1998) 1479.

¹³⁶ Dhami (2016) 584.

¹³⁷ Ramsay (2012) 57.

¹³⁸ Richard Thaler, ‘Some Empirical Evidence on Dynamic Inconsistency’ (1981) 8 Economics Letters 201.

3.2.3. Bounded Self-interest

The majority of people, in some circumstances, care or act as if they care about others, even if these others are strangers to them, a phenomenon described in economics as bounded self-interest.¹³⁹ In these situations, people want to be treated fairly, and reward other that behave fairly. Conversely, people wish to punish those who behave unfairly. Bounded self-interest is to be distinguished from the related term of altruism, as it takes place in a broad spectrum of settings and operates differently than altruism.¹⁴⁰ The UCPD recognises that consumers are not strictly self-regarding by considering that they will be influenced by the trader informing them their livelihood may be in danger.¹⁴¹

3.2.3.1. *Reciprocity and attribution*

According to the assumptions of the neo-classical model consumers' preferences are defined solely by the outcome and consumers exhibit an egoistic behaviour, basing their decisions on their self-interest. These assumptions however, are not being verified by behavioural studies. It seems that consumers are altruistic towards deserving people and indifferent towards to undeserving people.¹⁴² In other words consumers are reciprocal and tend to behave in a fair manner in their transactions.

The classic example where reciprocity is showcased is 'the ultimatum game'¹⁴³ where one player, the proposer, is asked to propose an allocation of a sum of money between herself and the other player, the Responder. The Responder then has a choice. He can either accept the amount offered to him by the Proposer, leaving the rest to the Proposer, or he can reject the offer, in which case both players get nothing. Neither player knows the identity of his or her counterpart and the players will play against each other only once, so reputations and future retaliation are eliminated as factors. According to neo-classical economics the Proposer will offer a penny, the minimum amount possible, and the Responder will accept since one penny is better than nothing. However, that was not what happened as Responders were only willing to accept offers

¹³⁹ Ernst Fehr and Simon Gächter, 'Fairness and Retaliation: The Economics of Reciprocity' (2000) 14 The Journal of Economic Perspectives 159.

¹⁴⁰ Jolls, Sunstein and Thaler (1998).1479

¹⁴¹ UCPD, ANNEX I, point 28.

¹⁴² Rabin (1998).

¹⁴³ C Camerer and RH Thaler, 'Anomalies: Ultimatums, Dictators and Manners' [1995] The Journal of Economic Perspectives.

between 20-30% or more and said they would reject lower offers. So responders are willing to punish others that they believe are behaving unfairly, even if it is to their own detriment.

A real-world example of that is a consumer boycott of a product or a company.¹⁴⁴ Turning back to the ultimatum game this reaction of the Responders seemed to be anticipated by the Proposers who in their turn offered a substantial sum, routinely around 40-50%. It seems that in many situations people will behave fairly even when it is against their financial interest and even when no one will know.¹⁴⁵ A better understanding of the mechanism of reciprocity and what is considered ‘fair’ would be invaluable in terms of policy as it could lead to less-regulation and help create norms that would solve problems of collective nature even without the need of state intervention.¹⁴⁶

3.2.4. The positive side of heuristics

The findings presented above may paint a picture of behavioural economics as a discipline that points out ‘biases’ and ‘heuristics’, that influence human behaviour leading to a sub-optimal result. ‘Biases’ implies something that needs to be rectified for people to make better choices or at least to be employed towards ‘nudging’ people to the desired direction.

However, that should not be the conclusion from behavioural findings. There is evidence to suggest that our heuristics and emotions often lead us to good choices, choices of equivalent value as those arising from a careful cost and benefit analysis.¹⁴⁷ For example, when a person is rushed to the hospital with a heart attack, the doctor has limited time to decide and cannot take all the variables into account. Yet, research has shown that a simple model of only three variables can serve to effectively classify a patient as low or high risk.¹⁴⁸ One could argue that if our fast, gut-feeling choices are

¹⁴⁴ Jolls, Sunstein and Thaler (1998) 1495.

¹⁴⁵ Jolls, Sunstein and Thaler (1998) 1492.

¹⁴⁶ Jolls, Sunstein and Thaler (1998) 1541.

¹⁴⁷ See for example Gerd Gigerenzer and Daniel Goldstein, ‘Reasoning the Fast and Frugal Way: Models of Bounded Rationality’ (1996) 103 *Psychological review* 650; Eyal Winter, *Feeling Smart: Why Our Emotions Are More Rational Than We Think* (PublicAffairs 2014).

¹⁴⁸ Gerd Gigerenzer, Peter M Todd and ABC Research Group, *Simple Heuristics That Make Us Smart* (Oxford University Press 1999) 3–4.

often optimal, then this contradicts other behavioural findings outlined above.¹⁴⁹ Nevertheless, these findings do not negate the need for legislative intervention. Instead, it creates the need for investigating the context under which decisions are made. In many cases, heuristics will provide for a good, even optimal result. This is exactly what they were designed to do. The need for legislative intervention occurs in instances where heuristics fail us.

One example would be unfamiliar settings or complex decisions. The same factors have also been identified as drivers of vulnerability. The view that people are able to make optimal decisions fast and considering only a few variables can also serve to inform the design of informational disclosure measures. It can mean that limited disclosures can be more effective than the full disclosure that a rational choice theory would suggest in helping consumers make better choices.¹⁵⁰

It is easy to notice the parallels between the remarks made here and those made below in Chapter 2 on consumer vulnerability.¹⁵¹ ‘Biases’ are presented as something negative, like vulnerability that is often considered a negative, stigmatising characterisation. This fails to take into account that in the same way that vulnerability also opens us to new experiences and allows us to forge relations, it should be recognised that in many cases heuristics work for us rather than against us.

3.2.5. Behavioural economics and consumer policy

The findings of behavioural economics are in no case limited to those mentioned here and as it is a developing discipline, new findings will surely continue to come to light. However, as two of the pioneers in the field of cognitive biases have concluded, ‘the deviations of actual behaviour from the normative model are too widespread to be ignored, too systematic to be dismissed as random error, and too fundamental to be accommodated by relaxing the normative system.’¹⁵² Jolls et al. set out that one of the common criticisms for behavioural economics has been that it does not offer a unified

¹⁴⁹ For the distinction between ‘System 1’ and ‘System 2’ as the two modes on thinking, see Kahneman (2011).

¹⁵⁰ Guthrie (2006).

¹⁵¹ See text to note 82 in Ch.2.

¹⁵² A Tversky and D Kahneman, ‘Rational Choice and the Framing of Decisions’ (1986) 59 *Journal of business* S251.

theory for consumer behaviour, contrary to neo-classical economics.¹⁵³ Neo-classical economics offer simplicity and parsimony, while behavioural economics on the other hand present an unruly, complex picture.¹⁵⁴ As attractive as a simple theory may be, when its predictions turn out to be plainly wrong in many occasions, it cannot form the basis for policymaking.¹⁵⁵ It would be desirable to have a unifying theory for behavioural economics yet so far the unifying element between the results of the many behavioural surveys is that they all point to the fact that human decision making is prone to non-rational tendencies, which however can be predicted.¹⁵⁶

The influence of behavioural economics is growing both in consumer policy, see the examples mentioned above, as well as in consumer law scholarship.¹⁵⁷ It would be fair to say that at this point most consumer law scholars are familiar with the main findings of behavioural economics, as presented above, make note of their influence in consumer law, and consider them when interpreting the law. The effect of behavioural economics has been two-fold. First, in strengthening with empirical evidence the critique of the liberal subject or the ‘homo economicus’ that has been approached also on a theoretical level.¹⁵⁸ It serves to dilute the myth of the rational consumer, the homo economicus. It calls for raising the question, if most people do not behave like the ‘homo economicus’, why should it continue to be the main influence?¹⁵⁹ Even if we accept that the average consumers of the UCPD is a standard more realistic and lenient

¹⁵³ Jolls, Sunstein and Thaler (1998) 1487.

¹⁵⁴ Jolls, Sunstein and Thaler (1998) 1488.

¹⁵⁵ Jolls, Sunstein and Thaler (1998) 1488.

¹⁵⁶ Hanson and Kysar (1999).

¹⁵⁷ See for example: Michael G Faure and Hanneke a Luth, ‘Behavioural Economics in Unfair Contract Terms’ (2011) 34 *Journal of Consumer Policy* 337; Sibony and Helleringer (2015); Jan Trzaskowski, ‘Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive’ (2011) 34 *Journal of Consumer Policy* 377.

¹⁵⁸ See for example Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251.

¹⁵⁹ Such criticisms have been raised for the average consumer standard in the UCPD. See for example R Incardona and C Poncibò, ‘The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution’ (2007) 30 *Journal of Consumer Policy* 21, 28. See also the discussion in Ch.3, s.4.2.1.

than that of the ‘homo economicus’, it remains at the base of its assumptions.¹⁶⁰ It can be argued that even though ‘homo economicus’ and the ‘average consumer’ are not the same thing, they are definitely related.

Secondly, in generating a stream of efforts for evidence-based policies; behavioural economics has been formulated into an alternative of the policies of the past. However, it is unclear whether that is indeed the case. As mentioned above, behavioural economics does not offer a unified theory. What it does offer, is a toolbox that will allow us to test the effectiveness of current assumptions and policy options. Behavioural economists caution against generalising behavioural findings for policy, as many experiments are conducted in lab settings, usually drawing from a pool of subjects consisting of undergraduate students, thus making them unrepresentative of the general population. Behavioural economics has the potential to offer tailored solutions that will be more effective, but not blanket ones. It means requiring research on specific policy problems, in a specific market and geographical context that would allow for identifying the most efficient solution. This is the approach taken in this thesis, which argues for the use of behavioural evidence, and empirical evidence generally, for supporting the interpretation of the law and the formation of policy.¹⁶¹

The term ‘psychological state’ has been used to describe the efforts to develop policies based on how people ‘actually’ think and behave. The term was coined by geographers Jones, Pykett and Whitehead in their book ‘Changing Behaviours’ which describes how behavioural economics, amongst other behavioural evidence, became more influential for UK policymaking.¹⁶² This simple description captures the essence of the contribution of behavioural economics in consumer policy; not to pre-empt not to assume but to look into what actually works in a specific context and use that knowledge to design policy. The growing influence of behavioural economics can be seen in the design of policy measures. However, it is unclear whether the same can be said for hard law measures. When it comes to going beyond default options or framing

¹⁶⁰ As argued in Stephen Weatherill, ‘Who Is the Average Consumer?’ in Stephen Weatherill and Bernitz Ulf (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart Publishing 2007).

¹⁶¹ See Ch.3, s.5.1. and Ch.5, s.4.1.3.

¹⁶² See Rhys Jones, Jessica Pykett and Mark Whitehead, *Changing Behaviours: On the Rise of the Psychological State* (Edward Elgar Publishing Limited 2013).

information to the reform of legal concepts, current legal norms may prove a lot more resilient. The UCPD which is the centre of the analysis in this thesis is a piece of legislation drafted prior to the rise to prominence of behavioural economics in consumer policy. If it were to be reformed, in light of the Consumer Law REFIT, perhaps the influence of behavioural economics would become evident.¹⁶³

4. Non-economic rationales

Economic rationales for regulation may be the more prominent ones; however, they are not the only ones. There are a variety of other reasons which could be described as social or ethical or reasons of public interest.¹⁶⁴ In fact, economic analysis of law has been criticised for focusing on efficiency and not on engaging with justice, and distributive justice in particular.¹⁶⁵ Posner has tried to answer that criticism by suggesting that instead of asking judges to maximise utility, their judgements should attempt to maximise wealth.¹⁶⁶ However, this argument that equates justice to wealth maximisation has also been the subject of critique, as it takes the distribution of wealth in society for granted and does not offer a mechanism for restructuring it.¹⁶⁷

The line between market and non-market rationales for regulation may prove to be quite blurred since they may use similar techniques and even aim at similar results though the justification behind them may differ.¹⁶⁸ Here, under the label of non-economic rationales, the concepts of distributive justice and paternalism will be briefly analysed as most relevant to consumer vulnerability. This discussion is not meant to be exhaustive; instead it offers an overview of these complex topics to be used for the purposes of this thesis.

¹⁶³ For an overview of the Fitness check of EU Consumer Law, see <http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm> accessed May 2017.

¹⁶⁴ Cartwright (2001) 27.

¹⁶⁵ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell 2014) 519.

¹⁶⁶ Richard Posner, *The Economics of Justice* (Harvard University Press 1983) 115.

¹⁶⁷ CG Veljanovski and Anthony Ogus, *Readings in the Economics of Law and Regulation* (Clarendon Press 1984) 22–23. As cited in Freeman (2014) 521.

¹⁶⁸ Cartwright (2001) 30.

4.1. Distributive justice

Achieving justice is one of the frequently cited goals of regulation; in this legal context, a distinction is usually made between corrective justice and distributive justice. Distributive and corrective justice are a dyad first conceived by Aristotle in his book *Nicomachean Ethics* and has dominated the legal and philosophical debate on justice ever since.¹⁶⁹ Distributive justice has dominated contemporary debates around justice.¹⁷⁰

Distributive justice relates to how benefits and burdens in society will be distributed in a fair manner and is closely related to social justice, which is considered a sub-category of distributive justice. Frequently, the two terms are used interchangeably.¹⁷¹ Corrective justice aims at ‘safeguarding a person and her existing holdings and entitlements against wrongful intervention from others’, reflecting the negative aspect of individualism.¹⁷² Distributive justice tends to be proportionate and examines the relationship between different groups, while corrective justice reflects strict equality and focuses on individuals.¹⁷³ However, distributive justice can also be used to assess relationships between individuals.¹⁷⁴

Corrective justice is not concerned with whether the pre-existing holdings of the parties were fair. It only ensures that no one will gain from another one’s loss. Corrective justice ensures that the parties return to the status quo before the harmful exchange.¹⁷⁵ It does not aim to ensure that everyone has the same. Distributive justice on the other hand, connects the links and benefits that all parties receive.¹⁷⁶ Distributive justice also requires defining the criteria according to which the distribution will be made.

¹⁶⁹ Aristotle, *Nicomachean Ethics* (David Ross and Lesley Brown eds., Oxford University Press 2009) Book V.

¹⁷⁰ Peter Benson, ‘The Basis of Corrective Justice and Its Relation to Distributive Justice’ (1992) 77 *Iowa Law Review* 515, 515.

¹⁷¹ David Miller, *Principles of Social Justice* (Harvard University Press 1999) 2.

¹⁷² R Bigwood, *Exploitative Contracts* (Oxford University Press 2003) 72.

¹⁷³ Wojciech Sadurski, ‘Social Justice and Legal Justice’ in Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing Limited 2011) 62.

¹⁷⁴ Rosenfeld 780.

¹⁷⁵ Sadurski (2011) 66.

¹⁷⁶ Bigwood (2003) 72.

Distributive justice has been connected to diverse ideologies, each of which offers a different interpretation of the concept.¹⁷⁷ Libertarians, such as Nozick, consider ‘distributions just so long as the process by which the resources were acquired was just’.¹⁷⁸ A just acquisition in these terms is one that was the subject of an exchange transaction for money, goods, or labour.¹⁷⁹ However, even within those who identify themselves as libertarians there is a disparity in opinions. For example, there are libertarians with more moderate views that accept distributional measures by the state to relieve extreme poverty.¹⁸⁰ Libertarians, in general, support the individual liberty and accept the distributions that are the result of market processes.¹⁸¹ Socialism has offered its own interpretations of distributive justice. Like libertarians, some more radical views are expressed, advocating abolishing private property and market processes in favour of state control of the means of production and distribution.¹⁸² This is argued to be the only way to achieve equality and abolish privileges. Others believe that private property and market processes have a role to play, but it is necessary to use regulation to achieve the desired results.¹⁸³

The relationship between distributive and corrective justice is not as clear-cut as it may first appear. Often, it is not easy to distinguish between them. Distributive and corrective justice may collide or they may be in conflict.¹⁸⁴ Sadurski argues that corrective justice is derivative to distributive justice.¹⁸⁵ Corrective justice is linked with private law. Contract and tort law are considered to be guided by corrective justice.¹⁸⁶ For consumer law, the situation is a bit different. Wilhelmsson points out that consumer

¹⁷⁷ Cartwright (2001) 28.

¹⁷⁸ Lester H Hunt, *Anarchy, State, and Utopia: An Advanced Guide* (John Wiley & Sons Inc 2015) 158.

¹⁷⁹ Hunt (2015) 159.

¹⁸⁰ FA Hayek and Legislation Law, *Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, Vol. 2: The Mirage of Social Justice* (The University of Chicago Press, Chicago 1976)

¹⁸¹ Anthony Ogus, *Regulation : Legal Form and Economic Theory* (Hart Publishing 2004) 47.

¹⁸² Ogus (2004) 47.

¹⁸³ David Miller, *Market, state, and community: Theoretical foundations of market socialism* (Clarendon Press 1990)

¹⁸⁴ Rosenfeld 781.

¹⁸⁵ Sadurski (2011) 76.

¹⁸⁶ Ginsberg Morris, *On Justice in Society* (Penguin 1965) 71–73. As cited in Sadurski (2011) note 2.

law may pursue both corrective justice aims, for its private law elements, as well as distributive justice aims.¹⁸⁷

During the first years of its development as a separate field of law and as an activism movement, consumer law was characterised by distributive justice objectives.¹⁸⁸ The desire for legal intervention that would prevent the powerful from exploiting the less powerful was common in other branches of law as well, notably in labour law, which shares common elements and development with consumer law, especially in the context of regulating the employer-employee relationship. Micklitz points out that the EU had a chance to play a key role in the development of consumer law, which was not yet settled in the Member States, in contrast to labour law.¹⁸⁹

There is the view that traders and consumers form an antithetic pair, where the latter are always the weaker part and therefore measures need to be taken in order to correct this inequality.¹⁹⁰ However, when taking such an approach, it is crucial to take into account not only the differences amongst traders and consumers but also the ones amongst consumers themselves.¹⁹¹ Otherwise, not considering the varying level of protection required by diverse consumer groups could lead to a perpetuation and possibly an entrenching of injustice rather than a mitigation.¹⁹² This view signifies that distribution policies should be aimed towards the vulnerable, taking into account that they are the ones that have the least power, even within the consumer class. In this thesis consumer vulnerability is construed broadly and can encompass a variety of different consumers in need of such redistribution of power.¹⁹³

4.2. Paternalism

Consumer sovereignty is one of the core values upon which a free-market-economy system is found, going up to the point of recognising the ‘right of the consumer to make

¹⁸⁷ Thomas Wilhelmsson, ‘Consumer Law and Social Justice’ in Iain Ramsay (ed), *Consumer law in the global economy* (Ashgate/Dartmouth 1997) 218.

¹⁸⁸ Ogus (2006) 221.

¹⁸⁹ Micklitz (2011) 5.

¹⁹⁰ This does not mean there are no instances where traders are in a weak position vis-à-vis the consumers, see for example *D & C Builders Ltd v Rees* [1965] EWCA Civ 3

¹⁹¹ Wilhelmsson (1997) 222.

¹⁹² Wilhelmsson (1997) 223.

¹⁹³ See Ch.2, s.6.

mistakes’¹⁹⁴ Conversely, paternalism can be defined as ‘the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced’.¹⁹⁵

From these descriptions it is made obvious that paternalism represents quite the opposite of the free market ideals of consumer sovereignty.¹⁹⁶ Therefore, in a consumer law context shaped largely by free market ideals, paternalistic views are bound to cause controversy. As mentioned above, it is becoming broadly accepted that consumers suffer from bounded rationality and there are limits to the amount of information they can process. Nevertheless, there is a reluctance to set aside the individual choice in favour of a more paternalistic approach.¹⁹⁷

One of the common criticisms of paternalism is that it impacts on autonomy. Freedom of choice is to be safeguarded against state intervention, as it is considered a key aspect of welfare. The individualistic defence of freedom of choice fails to consider the fact that there are many choices made for us. Sunstein draws attention to the fact that choice architecture can be very pervasive, so much so that it becomes invisible.¹⁹⁸ And people are not worse off because some choices are being made for them, in fact they are better off. Their autonomy does not diminish, instead it increases as they do not need to waste precious time making these decisions.¹⁹⁹

Paternalism needs to be distinguished from justifying controlling behaviour due to externalities, which is the impact of individual decisions on the welfare of others. The classic example of seatbelts can be used to demonstrate this.²⁰⁰ The measure of the obligatory use of seatbelts may be characterized as paternalistic, since it restricts the freedom of the individual in favor of the public interest. However, there is also an economic justification to it, as medical care costs would burden the tax payer, rather

¹⁹⁴ Thomas C Schelling, ‘Self-Command in Practice , in Policy , and in a Theory of Rational Choice’ (1984) 74 *The American Economic Review* 1, 5.

¹⁹⁵ Gerard Dworkin, ‘Paternalism’ in Richard A Wasserstrom (ed), *Morality and the Law* (Wadsworth Publishing Company 1971) 108.

¹⁹⁶ Cartwright (2001) 32.

¹⁹⁷ Ogus (2004) 51.

¹⁹⁸ Cass R Sunstein, *Why Nudge?* (Yale University Press 2014) 130.

¹⁹⁹ Sunstein (2014), *Why Nudge?* 129–130.

²⁰⁰ Cartwright (2001) 36.

than the individual and there would be externalities. This example showcases how economic and non-economic rationales may not be so easily discerned, as they may amount to the same result.

The advocates of paternalism have sought to justify it, albeit on different grounds. The two main groups are: the one that seeks to reconcile individualism with paternalism and the one that seeks the foundation of paternalism on anti-individualist ideals.²⁰¹ The first group argues that in certain cases where decision-making can prove to be too challenging, the consumer may choose to delegate choices to others.²⁰² This view argues that consumers act rationally when delegating, acknowledging the fact that their own rationality has limits and they may not always make the optimal choice; for example, drug prohibition could be justified in this way, in the sense that if consumers could recognize their best interest they would agree for such measures to be taken.²⁰³ It is important to note that paternalism has variations. Some forms of it will be easier to justify than others. One such distinction is the one between hard and soft paternalism. An example of hard paternalism would be administering a fine, while informational disclosure is soft paternalism.²⁰⁴ Soft paternalism, otherwise known as libertarian paternalism, preserves choice thus being easier to defend against the criticisms towards paternalism as limiting autonomy of individuals.²⁰⁵

Felden et al, seeking to find ways to minimally impact on autonomy when using nudges, found their participants to be more receptive to overt rather than covert decisional enhancement.²⁰⁶ That could be because participants recognised their weakness in achieving a certain objective they believe to be worthwhile and welcome a state intervention that makes it easier for them to make better decisions. Sunstein argues that could be the case for unfamiliar or complicated contexts.²⁰⁷ As mentioned

²⁰¹ Ogus (2004) 52.

²⁰² Graham Loomes and Robert Sugden, 'Regret Theory: An Alternative Theory of Rational Choice under Uncertainty' (1982) 92 *The Economic Journal* 805.

²⁰³ Ogus (2004) 52.

²⁰⁴ Sunstein (2014), *Why Nudge?* 20.

²⁰⁵ Sunstein (2014), *Why Nudge?* 19.

²⁰⁶ Gidon Felsen, Noah Castelo and Peter B Reiner, 'Decisional Enhancement and Autonomy: Public Attitudes towards Overt and Covert Nudges' (2013) 8 *Judgment and Decision Making* 202, 207.

²⁰⁷ Sunstein (2014), *Why Nudge?* 129.

above, unfamiliar and complex settings may also be when our ‘system 1’ heuristics fail us.²⁰⁸ For example, some consumers might welcome a default choice for certain mortgage terms that would assist them in making a choice. In cases like that, intervention could be justified. Even Ogus, who is a less of a proponent of paternalism than Sunstein who argues for ‘libertarian paternalism’, agrees that consumers may be willing to forgo their freedom of choice in some cases, in what he refers to as ‘rational delegation.’²⁰⁹ This kind of ‘rational delegation’ is in line with individualistic objectives and serves to increase welfare.²¹⁰ However, it is important to maintain the existence of a choice, rather than eliminate the alternatives.²¹¹

On the other hand, the anti-individualist approach of the second group would be that ‘experts’ within a society are more able to identify what would best serve the interest of the individual consumer.²¹² However, this notion is somewhat treacherous and could easily be used to excess and lead to authoritarianism.

The relationship between paternalism on the one hand and neo-classical and behavioural economics on the other hand is worth noting. Neo-classical economics are placed opposite paternalism. Paternalism is simply not compatible with the image of the sovereign consumer who can make his own informed decisions, being the best judge of his own welfare.²¹³ But what does behavioural economics, which challenges the rational consumer image, have to tell us about paternalism? It seems like from a behavioural perspective, there is neither an approval nor a rejection of paternalism.²¹⁴ Behavioural findings showcase that people are influenced by biases, a fact that allows for their judgment to be questioned. On the other hand, regulators themselves suffer from the same biases, and are therefore liable to similar effects.²¹⁵ As Sunstein suggests,

²⁰⁸ ‘System 1’ operates automatically and quickly, with little or no effort and no sense of voluntary control while ‘System 2’ allocates attention to the effortful mental activities that demand it, including complex computations. See Kahneman (2011) 20–21.

²⁰⁹ Ogus (2006) 234.

²¹⁰ Ogus (2006) 234.

²¹¹ Sunstein (2014), *Why Nudge?* 132.

²¹² Ogus (2004) 53.

²¹³ Jolls, Sunstein and Thaler (1998) 1541.

²¹⁴ Sunstein (1997) 1178.

²¹⁵ Kip W Viscusi, *Fatal Tradeoffs* (Oxford University Press 1992) 145.

behavioural research points to the fact that arguments against paternalism should be based on facts and supported by empirical findings, rather than an a priori rejection, based on philosophical grounds.²¹⁶

As far as consumer vulnerability is concerned, measures directed at vulnerable consumers are often being characterised as paternalistic, since they are founded on the premise that vulnerable consumers are not in a position to make optimal decisions on their own and therefore state intervention is required.²¹⁷ This reveals the clash of free-market values not only with the concept of paternalism but also, as an extension, with that of consumer vulnerability. Paternalism, as it allows for more intervention, appears to be for the benefit of the vulnerable consumer. In spite of that, surprisingly, paternalism may have negative effects for vulnerable consumers, the ones it should aim at protecting.²¹⁸ Measures could result in a price raise or in certain cheaper or low-quality products being removed from the market altogether due to heightened quality controls, something that would affect the less affluent consumers the most.²¹⁹

But should the effort to protect the vulnerable consumer and thus assist in providing an equal footing to all consumers, be characterised as paternalistic? If anything, such an effort would not be unlike that of achieving distributive justice, as seen above. Adding to the confusion is the fact that many of the measures criticised as being paternalistic, as for example, minimum standards or product safety laws can also be justified on economic grounds such as informational failure and externalities.

It is important to remember that consumer law is not limited to achieving market objectives. It is also able to pursue social goals, without the two becoming mutually exclusive but rather complimenting each other. The issue of consumer vulnerability in particular, sheds light on this perspective. Taking measures to tackle consumer vulnerability can be characterised as a social goal. Any measures taken for that purpose would aim at achieving distributive justice not only between traders and vulnerable consumers, but also amongst consumers themselves. Empowering vulnerable consumers, and in fact, all consumers, is a goal that would reap substantial benefits for

²¹⁶ Sunstein (1997) 1178.

²¹⁷ Cartwright (2001) 35–36.

²¹⁸ Ogus (2004) 53.

²¹⁹ Ogus (2004) 53.

society whose validity should not be put into question due to a one-sided focus on a traditional view of the functioning of the markets.

5. Conclusion

In conclusion, this part has provided an overview of the rationales for regulation. First, the relationship between competition and consumer law was examined. Competition law relates also to the UCPD, which aims, amongst others, at ensuring fair competition in the internal market. It is interesting to examine the relationship between promoting the internal market on the one hand, and protecting consumers on the other hand.

Next the economic rationales for regulation were examined, focusing on neo-classical economics and behavioural economics. Neo-classical economics is built upon the concept of the perfect market and champions a vision of a consumer who is rational and utility maximizing. Neoclassical economics is suspicious of government intervention that goes beyond the private law level. Behavioural economics challenges the assumptions made by neo-classical economics and its findings show that consumers are influenced by several biases.

Economic rationales, and neo-classical economics in particular have been influential in EU consumer policy. As will be seen in Chapter 3, the average consumer standard echoes neo-classical ideas and is meant to reflect rational behaviour.²²⁰ Furthermore, neoclassical economics is in the basis of the information paradigm that is pervasive in European consumer law.²²¹ The information paradigm which encourages transparency and provision of information to the consumer, is not suitable for protecting consumers from aggressive practices, which are the focus of this thesis.

Behavioural economics is gaining in importance in EU consumer policy and beyond. The main contribution of behavioural economics is questioning the rationality assumption and showing the variety of biases that influence most consumers. Such findings are in line with the idea of the universality of vulnerability, as seen in the next chapter. Also, behavioural findings can be useful in assessing the effect of aggressive practices on consumer behaviour.

²²⁰ See Ch.3, s.3.4.2.

²²¹ Faure and Luth (2011) 351.

Finally, the non-economic rationales for regulation of distributive justice and paternalism were examined. Non-economic rationales have been a powerful drive for consumer protection and their interaction with the beliefs of the economics schools paints an intriguing picture. Distributive justice is particularly relevant for vulnerable consumers, as their protection means distributing benefits from traders to consumers. Furthermore, when assessing the distributive effect of a consumer policy it is important to go beyond the trader-consumer relationship to also look at the distributive effect between different categories of consumers.

Chapter 2

Consumer Vulnerability

1. Introduction

In consumer law, the central relationship is that between consumer and trader.¹ A general and abstract notion of the consumer, tends to be used in legislation to represent all consumers. According to Wilhelmsson, in consumer law consumers are viewed in a uniform manner in relation to the trader: ‘Society consists of one consumer class formed by all citizens, from the millionaires to the homeless’.²

However, it is easy to see that placing all consumers in a single category simply does not correspond to reality. Consumers are a heterogeneous group whose members have divergent characteristics and behave in different ways.³ Consequently, consumers as a group tend to not have a strong collective identity, or an awareness of their role as consumers on an individual level.⁴ Since everyone is a consumer, the consumer interest is so diverse that a shared consumer interest is not easily identified or agreed upon; this points to the diversity of consumers as a group and consequently to the diversity of their interests and identities.⁵ Since all consumers do not have the same power in the marketplace or the same needs, it follows that some are more vulnerable than others.

¹ Wilhelmsson (1997) 222.

² Wilhelmsson (1997) 222.

³ Peter Cartwright, ‘The Vulnerable Consumer of Financial Services: Law, Policy and Regulation’ (Nottingham University Business School, Financial Services Research Forum 2011) 6.

⁴ Scott and Black (2010) 13.

⁵ Scott and Black (2010) 13.

Consequently, if consumers are a heterogeneous group facing different problems, then policy choices may not have the same level of effectiveness for everyone. This means that some consumers, those that find themselves in a vulnerable position, may not be adequately protected and thus are more likely to suffer harm. Understanding consumer vulnerability is vital for improving consumer policy so that the special circumstances of certain consumers are considered, something that would be to the benefit of consumers and traders alike.

The aim of this chapter is to explore the dimensions of vulnerability and offer a conceptualisation of consumer vulnerability that will guide the rest of the analysis. Exploring the meaning of ‘vulnerability’ is key before proceeding to examine the law, as it will offer the framework against which to assess whether the Unfair Commercial Practices Directive is effectively protecting vulnerable consumers. Often the term vulnerability is being used, even as a central concept in the work of academics, without further engaging with the term.⁶ Legal scholars that have engaged with consumer vulnerability often use the doctrinal method and search for the meaning of consumer vulnerability in legal texts and in the case law.⁷ A black letter analysis is an essential component of the analysis and one that offers valuable insights. However, to approach vulnerability in a well-rounded manner, a broader approach is indispensable. It is important to recognise that vulnerability is an interdisciplinary concept, one that relates to human behavior and its usage is not limited to legal scholarship.

This chapter engages with vulnerability as a term, as it has been used in different contexts in consumer law and outside of that, including both theoretical and empirical works on vulnerability. It does not aim to provide a comprehensive literature review of the uses of ‘vulnerability’. Instead, it grapples with different conceptions of vulnerability aiming at showcasing that it is important to narrow down what is meant by vulnerability in different contexts. Furthermore, the different approaches to

⁶ Kate Brown, “‘Vulnerability’: Handle with Care” (2011) 5 *Ethics and Social Welfare* 313, 315.

⁷ See for example: M Friant-Perrot, ‘The Vulnerable Consumer in the UCPD and Other Provisions of EU Law’ in Willem van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Publishing Group 2014); Norbert Reich, ‘Vulnerable Consumers in EU Law’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016).

vulnerability are engaged with to the extent that they are helpful for conceptualizing vulnerability in the context of this thesis.

Vulnerability is a term that is being used in a variety of different contexts. The term is not used in a singular manner by academics or by policymakers. The same applies for consumer vulnerability, albeit, to a lesser extent. This thesis engages with the current literature around vulnerability and contributes to a better understanding of consumer vulnerability. It is uncertain whether the goal of a single definition of consumer vulnerability is attainable or indeed desirable. Nevertheless, developing a more robust theory on ‘consumer vulnerability’ will help in assessing whether someone is in a vulnerable position and whether they are adequately protected by the law.

The structure of the chapter is as follows: first, a critical review of the literature on vulnerability will be offered in consumer law and beyond; secondly, the two main conceptualizations for vulnerability will be described. Next, the elements of consumer vulnerability will be examined, divided into vulnerability *sensu stricto*, drivers of vulnerability and manifestations of vulnerability. Following that the related concept of consumer disadvantage will be examined as will selected groups of disadvantaged consumers. Finally, the proposed system for classifying consumer vulnerability will be presented.

2. Defining vulnerability

2.1. Vulnerability in consumer law

Consumer law has often been criticized for employing methods better suited to more affluent consumers, by adopting measures that require a high level of consumer sophistication; thus, ignoring the ones in greater need of protection, the vulnerable.⁸ This policy focus is shown by the primacy of informational remedies.⁹ It may be argued that it is not possible to tailor policies to each consumer group’s needs. However, when the needs and problems of a significant portion of the population are not being considered, then there is a need for change. A consumer policy that is more inclusive

⁸ Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions* (Ashgate/Dartmouth 1997) 223.

⁹ Ramsay (2007) 120.

and able to respond to the needs of all consumers is a target worth pursuing and to achieve it, a better understanding of consumer vulnerability is vital.

But what is meant by the term consumer vulnerability? Academics have been commenting and raising awareness on the topic of consumer vulnerability since the 1970s, the decade that sparked the boom of consumer law.¹⁰ However, in terms of consumer law policy, it was not until later in the 1990s, when attention was drawn to taking the interests of groups of vulnerable consumers into account.¹¹ Currently, consideration of consumer vulnerability seems to be gaining momentum, as recently there have been a number of initiatives at both European and national level promoting the protection of the most vulnerable.¹²

Consumer vulnerability in EU law is often treated as a new phenomenon.¹³ Reich views ‘vulnerability’ as a term that ‘raises sympathy but lacks precision’.¹⁴ However, he does not offer a definition of consumer vulnerability. Instead, he identifies the three types of ‘consumer vulnerability’: (a) physical disability, (b) intellectual disability, (c) economic disability.¹⁵ Reich switches terms from vulnerability to disability, which may signify he treats them as interchangeable. This is indicative of the terminological issue surrounding vulnerability which is often not separated from other related terms.

Reich points out the different standards in EU consumer law as the ‘informed consumer’, the ‘weaker consumer’ and the emerging ‘vulnerable consumer’.¹⁶ This distinction serves to demonstrate the changing meaning of the ‘vulnerable consumer’ in consumer law. The foundation of consumer protection is the assumption that the

¹⁰ See for example: Alan R Andreasen, *The Disadvantaged Consumer* (Free Press New York 1975); D Caplovitz, *The Poor Pay More : Consumer Practices of Low-Income Families* (Free Press 1963).

¹¹ Ramsay (1997) 227.

¹² See for example: European Parliament and Committee on the Internal Market and Consumer Protection, ‘Report on a Strategy for Strengthening the Rights of Vulnerable Consumers’ (2011) OJ CE 264/11; Sharon Collard, Elaine Kempson and Claire Whyley, ‘Tackling Financial Exclusion’ (2011) The Policy Press.

¹³ Reich (2016); Friant-Perrot (2014).

¹⁴ Reich (2016) 139.

¹⁵ Reich (2016) 141.

¹⁶ Reich (2016) 146–152.

consumer is, as a rule, in a weaker position in relation to the trader and hence in need of special protection. In that sense, and especially in the earlier days of consumer law, all consumers were considered to be vulnerable. In contract law, and private law more generally, there were remedies for parties in a weaker position before the conception of consumer law and continued to exist in parallel with consumer law.¹⁷ Arguably, the concept of the weaker party relates to that of vulnerability and inequality of bargaining power relates to vulnerability. However, inequality of bargaining power is a narrower concept that takes into account only the relationship between two specific parties.

Conversely, ‘vulnerability’ as employed in consumer law, and in EU consumer law in particular, recognises that not all consumers are the same and some require a higher level of protection than others. If the creation of consumer law was the exception from private law, then the discussion of the ‘vulnerable consumer’ signifies the exception from general consumer law. Consumer vulnerability signifies a heightened sense of imbalance and susceptibility to harm that needs to be addressed. It is not that all consumers are vulnerable, but that some consumers are more vulnerable than others. In other words, consumer vulnerability draws a distinction within the body of consumers between those labelled as vulnerable and those that are not.¹⁸ This distinction is not quantitative, though it is presumed that vulnerable consumers are the minority; it is mostly qualitative, meaning that they are over a certain threshold of vulnerability. A threshold that is defined according to the circumstances.

The vulnerable consumer is rarely explicitly mentioned in EU legislation, with the UCPD providing one of the key definitions, especially in light of its horizontal character. However, consumer vulnerability is becoming more central in EU policy, as can be seen by the number of studies on consumer vulnerability published by European

¹⁷ For example the doctrine of unconscionability in the US see Richard A Epstein, ‘Unconscionability: A Critical Reappraisal’ (1975) 18 *Journal of Law and Economics* 293. or in an EU context, Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Contract Terms Directive).

¹⁸ Finding a word to use for non-vulnerable consumers is not an easy task. Words like invulnerable or impervious sound better suited to a super hero than a consumer. The UCPD chooses the word ‘average’, the meaning of ‘average’ consumer is discussed in Ch.3, s.3, 4.2.1.

Institutions.¹⁹ In EU policy documents, in contrast to legislation, the consensus is that vulnerability is variable. Furthermore, the recent study funded by the Commission on consumer vulnerability provides a definition that structures consumer vulnerability around certain dimensions:²⁰

A consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation, or market environment:

- 1) Is at higher risk of experiencing negative outcomes in the market;
- 2) Has limited ability to maximise their well-being;
- 3) Has difficulty in obtaining or assimilating information;
- 4) Is less able to buy, choose or access suitable products; or
- 5) Is more susceptible to certain marketing practices

As the focus of this chapter is on building a framework for vulnerability, more legal scholarship, especially on consumer vulnerability in the UCPD, will be reviewed in the next chapter.²¹

2.1.1. Access to basic services

In EU consumer law, the UCPD provides the main definition for consumer vulnerability, which limits vulnerability to the three criteria of age, infirmity and credulity and sets further requirements, such as that of foreseeability by the trader.²² However, there is one area where there is greater willingness to define and deal with vulnerability and that is in legislation designed to ensure access of consumers to basic

¹⁹ See Commission, ‘Consumer Vulnerability across key markets in the European Union’ (2016) <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf> accessed May 2017; European Parliament, ‘Compilation of Briefing Papers on Consumer Vulnerability’ (2012) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475082/IPOLIMCO_ET\(2012\)475082_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475082/IPOLIMCO_ET(2012)475082_EN.pdf)> accessed May 2017, Pete Lunn and Sean Lyons, ‘Behavioural Economics and “Vulnerable Consumers”: A Summary of Evidence’ (2010).

²⁰ Commission, ‘Consumer Vulnerability across key markets in the European Union’ (2016) <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf> accessed May 2017, 47.

²¹ See Ch.3, s.4.2.3.

²² UCPD, art.5.3.

services. Ensuring access became necessary as services that were previously provided by the state, such as energy and telecommunications, became gradually liberalised.²³

In the Energy sector, the two Directives comprising the third Energy Package may not provide a definition of ‘consumer vulnerability’ yet they contain provisions requiring Member States to define the term ‘vulnerable consumer’.²⁴ The two Directives point to aspects of vulnerability that may be included in the definitions in national law, such as energy poverty and consumers who live in remote areas.²⁵ The recent EU Commission Report on vulnerable consumers in the energy market points to a sophisticated understanding of vulnerability where four categories of factors present drivers of vulnerability: market conditions, individual circumstances, living arrangements and social or natural environment.²⁶

Even though no definition of vulnerability is included and the Working Group agrees with the European Commission that a unified definition is not appropriate at this stage in the energy market, the Working Group has worked with the stakeholders and the Member States to better develop the dimensions of vulnerability. Similar to vulnerability, while EU law refers to energy poverty in the Directives, and connects it to vulnerable consumers, it does not provide a definition.²⁷ Energy poverty can be described as ‘a situation where individuals or households are not able to adequately heat or provide other required energy services in their homes at affordable cost.’²⁸ The

²³ Angus Johnston, ‘Seeking the EU “Consumer” in Services of General Economic Interest’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Bloomsbury Publishing 2016) 97.

²⁴ Council Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L 211/94 (Gas Directive); Council Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L 211/55 (Electricity Directive).

²⁵ Gas Directive, art.3.3., Electricity Directive, art.3.7.

²⁶ Vulnerable Consumer Working Group, ‘Guidance Document on Vulnerable Consumers’ (November 2013) <http://ec.europa.eu/energy/sites/ener/files/documents/20140106_vulnerable_consumer_report_0.pdf> accessed May 2017, 16.

²⁷ Gas Directive, rec.50

²⁸ Steve Pye, Audrey Dobbins, ‘Energy poverty and vulnerable consumers in the energy sector across the EU: analysis of policies and measures’ (Insight_E May 2015) available online at <http://ec.europa.eu/energy/sites/ener/files/documents/INSIGHT_E_Energy%20Poverty-Main%20Report.pdf> accessed May 2017

approach taken in the energy market presents an alternative model, where, even though there is no desire for harmonisation, Member States and the European Union can work together for better defining vulnerability and ensure that those that need it the most are protected.

In the area of financial services, the Payment Accounts Directive that ensures access to a basic bank account, includes other potentially vulnerable groups that were not previously included in the consumer vulnerability conversation, though they were in general considered to be vulnerable.²⁹ These consumer categories are asylum seekers and the homeless (or other mobile consumers), both categories not featured explicitly in other consumer protection legislation.³⁰ However, the Payment Accounts Directive does not include a definition of vulnerable consumers as such. There have also been calls to extend the concept of vulnerable consumers, as seen in basic services to financial services as well, and in particular in credit and mortgage regulation.³¹ It remains to be seen whether things will go to this direction in the future.

There is a division in EU consumer policy between what are considered essential services, (universal services) to which access needs to be ensured and services without a universal character. In essential services, a more sophisticated version and understanding of vulnerability can be seen. However, in other legislative measures where the focus is not on accessibility, the image of the average consumer prevails and the room for taking vulnerability into account is limited. This can be justified to an extent due to the different aims of this legislation.

2.2. Vulnerability beyond Consumer Law

As mentioned above, there is no accepted definition of ‘vulnerability’. Furthermore, there are difficulties in distinguishing vulnerability from other related terms, such as disadvantage, risk or disability. Many of these terms are used interchangeably by

²⁹ Council Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257/214 (Payment Accounts Directive).

³⁰ Payment Accounts Directive, art.16.2

³¹ Irina Domurath, ‘The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law—An Inquiry into the Paradigms of Consumer Law’ (2013) 2 Journal of European Consumer and Market Law 124.

authors to describe the same phenomenon. For example, some authors use the term disadvantage but the concept they describe may not be easily distinct from that of vulnerability and vice versa.³² Note that this thesis uses both the terms vulnerability and disadvantage.³³

Due to this vagueness in terminology, this section also includes works that use the term disadvantage, to the extent that is synonymous with vulnerability. This section explores how different authors have approached vulnerability, even though they may not use the same term consistently or they may in fact deal only with a specific group of consumers believed to be vulnerable.³⁴

It can be argued that mentions of consumer vulnerability in general are avoided for reasons of brevity, as the focus of a research may be far narrower. However, many authors highlight the complexity of the concept, as well as the lack of clarity surrounding it and emphasise the need for further research on the topic.³⁵ Therefore it may be the case that many authors shy away from tackling the concept of consumer vulnerability because they are deterred by its complicated multi-dimensional nature, rather than because they consider it superfluous. Alternatively, it could be that they consider it impossible to define and prefer to leave it open-textured.

The tendency of some researchers to not feel the need to explain or justify how they came to identify certain categories of consumers as vulnerable could be the result of preconceptions and biases in their data framing. No researcher is immune to biases as all researchers are inclined towards certain perspectives or paradigms.³⁶ However, vulnerability researchers and scholars should be careful at applying the ‘vulnerability’

³² See for example Andreassen (1975).

³³ For more on disadvantage see s.5 below.

³⁴ Stacey Menzel Baker, James W Gentry and Terri L Rittenburg, ‘Building Understanding of the Domain of Consumer Vulnerability’ (2005) 25 *Journal of Macromarketing* 128, 128.

³⁵ See for example: Lucy Woodliffe, ‘Rethinking Consumer Disadvantage: The Importance of Qualitative Research’ (2004) 32 *International Journal of Retail & Distribution Management* 523; PM Mansfield and MB Pinto, ‘Consumer Vulnerability and Credit Card Knowledge among Developmentally Disabled Citizens’ (2008) 42 *Journal of Consumer Affairs* 425, 425.

³⁶ Stacey Menzel Baker and James W Gentry, ‘Framing the Research and Avoiding Harm: Representing the Vulnerability of Consumers’ in Russell W Belk (ed), *Handbook of Qualitative Research Methods in Marketing* (Edward Elgar Publishing Limited 2006) 322.

label to a group without exposing their thought process or the data that led to that conclusion. In other words, vulnerability should not be assumed, but justified and shown. That should apply both to empirical and theoretical works, as well as policy.

That being said, some of these works do provide an introduction of vulnerability in general to then proceed to analyse the group or market in question, rather than simply characterise certain consumers as vulnerable (or disadvantaged respectively). These, along with the latter category of scholarship attempting to paint a broader comprehensive picture of the matrix of vulnerability, will be presented here.

Furthermore, a lot of the previous research on the topic has employed quantitative analysis. However, it has been argued that the differences between vulnerable and non-vulnerable consumers are not only quantitative but also qualitative.³⁷ Academics have underlined the need for more qualitative research on consumer vulnerability, as it would assist in painting a more accurate picture.³⁸

Another point to draw attention to is the fact that some of the empirical evidence invoked in many of the works refers to small scale surveys³⁹ or to a specific type of product or industry.⁴⁰ Caution needs to be exercised in the works where the authors attempt to draw conclusions on the nature of vulnerable consumers from such empirical data, for their scope may be limited making them unsuitable for this kind of generalisations. What is more, for some of the older empirical works, there is the possibility that the situation has somewhat been altered.

2.2.1. Definitions of vulnerability

Even though the definition of consumer vulnerability has proved to be elusive, authors have engaged with it and provided definitions and taxonomies for vulnerability. Morgan, Schuler and Stoltman defined vulnerable consumers as those ‘whose idiosyncratic sensitivities have contributed to their product-related injuries, differently

³⁷ Andreasen (1975) 54.

³⁸ Woodliffe (2004) 524.

³⁹ For example Woodliffe (2004).

⁴⁰ For example Cartwright (2011), ‘The Vulnerable Consumer of Financial Services: Law, Policy and Regulation’.

from typical consumers’, also pointing out the need for a broader more inclusive definition.⁴¹

Ringold in one of her earlier works defined vulnerability, in relation to information: ‘Vulnerability, in the context of commercial information, implies that targeted groups exhibit a diminished capacity to understand the role of advertising, product effects, or both’⁴², while in her later works she adopted a different, somewhat broader definition, stating that ‘vulnerable consumers fail to understand their own preferences and/or lack the knowledge, skills or freedom (i.e. personal prerogatives and marketplace options) to act on them’.⁴³ What is interesting about these two definitions is that the second one focuses on the internal features of consumers. Furthermore, this definition describes vulnerable consumers as those that do not know what is best for them. Vulnerable consumers exhibit a behaviour going contrary to neoclassical rationality as they do not know their preferences and are not able to make the best decisions for themselves. Smith and Cooper-Martin define vulnerable consumers as ‘those who are more susceptible to economic, physical, or psychological harm in, or as a result of, economic transactions because of characteristics that limit their ability to maximise their utility and well-being.’⁴⁴ Note that both Ringold and Smith and Cooper-Martin link vulnerability to target marketing.

In one of the key pieces of scholarship on consumer vulnerability Baker, Gentry and Rittenburg define consumer vulnerability as:

‘a state of powerlessness that arises from an imbalance in marketplace interactions or from the consumption of marketing messages and products. It occurs when control is not in an individual’s hands, creating a dependence on external factors (e.g., marketers) to create fairness in the marketplace. The actual vulnerability arises from the interaction of individual states, individual characteristics, and external conditions within a context where consumption

⁴¹ FW Morgan, DK Schuler and JJ Stoltman, ‘A Framework for Examining the Legal Status of Vulnerable Consumers’ (1995) 14 (2) *Journal of Public Policy & Marketing* 267.

⁴² Debra Jones Ringold, ‘Social Criticisms of Target Marketing Process or Product?’ (1995) 38 *American Behavioral Scientist* 578, 584.

⁴³ Ringold (2005) 202.

⁴⁴ Craig N Smith and Elisabeth Cooper-Martin, ‘Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability’ (1997) 61 *The Journal of Marketing* 1, 4.

goals may be hindered and the experience affects personal and social perceptions of self'.⁴⁵

As far as policy publications are concerned, a very interesting analysis of the topic takes place in a paper for the Australian Consumer Affairs Victoria. In this paper consumer vulnerability is defined as 'exposure to the risk of detriment in consumption due to the interaction of market, product and supply characteristics and personal attributes and circumstances'.⁴⁶

Both the Baker, Gentry and Rittenburg definition and the one provided by Consumer Affairs Victoria have common elements, such as showcasing the multi-dimensional element of consumer vulnerability, since it occurs due to the interaction of different factors. Furthermore, they are in line with a contemporary, more sophisticated view of vulnerability that does not only apply the term in a limited context, but offers an all-purpose definition.

Moschis et al. argue for a broadening of the criteria used for vulnerability to include not only cognitive deficits but to be expanded to compensatory skills at the cognitive and behavioural levels.⁴⁷ For example, if an elderly person is under high stress which may impact on their information processing, they are more likely to use compensatory mechanisms, such as delegating decisions to others.⁴⁸ Decision making may become stressful and something to be avoided under stress, e.g. in the context of health-related decisions.⁴⁹ Moschis et al. argue that in vulnerability assessment there is a need to go beyond evaluating optimum decision making, e.g. how consumers process information, to include quality of life as a whole, including parameters such as the consequences of one's decisions or their priorities.⁵⁰

⁴⁵ Baker, Gentry and Rittenburg (2005) 134.

⁴⁶ Consumer Affairs Victoria, 'Discussion Paper: What Do We Mean by "Vulnerable" and "Disadvantaged" Consumers?' (Consumer Affairs Victoria ed., Consumer Affairs Victoria 2004) 3.

⁴⁷ George P Moschis, Jill Mosteller and Choong Kwai Fatt, 'Research Frontiers on Older Consumers' Vulnerability' (2011) 45 *Journal of Consumer Affairs* 467, 475.

⁴⁸ Corinna E Löckenhoff and Laura L Carstensen, 'Socioemotional Selectivity Theory, Aging, and Health: The Increasingly Delicate Balance between Regulating Emotions and Making Tough Choices' (2004) 72 *Journal of Personality* 1395, 1415.

⁴⁹ Löckenhoff and Carstensen (2004) 1415.

⁵⁰ Moschis, Mosteller and Fatt (2011) 475.

Kirby argues for the benefits of using vulnerability for conceptualizing and analyzing the impact of globalization. He relates vulnerability to risk and states that the common meaning of vulnerability is a combination of two factors: (a) frequency and nature of risks that impact on people's lives and (b) the ability of people to cope with those risks.⁵¹

The authors that offer a definition of vulnerability tend to perceive vulnerability not as something that only affects certain groups, but rather as a concept that is applicable in different contexts. The tendency is to avoid giving precise definitions of what vulnerability is, but rather to define its dimensions or the factors that influence it. It is argued, that is equally helpful, especially in a legal context where the weight is placed in being able to define the set of criteria that will be used for assessing whether someone is or was in a vulnerable position. As for the meaning of the state of vulnerability it is often associated with susceptibility to harm, with being high-risk, or with being in a weak position. This approach of identifying dimensions of vulnerability is followed in this thesis, as seen in s.6 below.

2.2.2. Universality of vulnerability

'Vulnerability' is also viewed as inherent and part of the human condition, one that is inevitable and enduring.⁵² The universality of vulnerability may be often linked with the possibility of bodily harm, as Turner has done, yet it is obvious it goes beyond that to include other types of harm.⁵³ The universality and inevitability of vulnerability provides the basis of articulating social and state responsibility, in other words why vulnerable should be protected.⁵⁴ This is the view adopted in this thesis. The starting point is that we are all vulnerable, in the sense that we are all exposed to risks, we are all exposed to harm. This does not negate the fact that the risk will be higher for some people and lower for others. Nor does it mean that everyone will in fact experience harm but simply that everyone is susceptible to harm.

⁵¹ Paedar Kirby, *Vulnerability and Violence: The Impact of Globalisation* (Pluto Press 2005).

⁵² Fineman (2010) 1.

⁵³ Bryan Turner, *Vulnerability and Human Rights* (The Pennsylvania State University Press 2006) 29.

⁵⁴ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1, 8.

The concept of ‘vulnerability’ has been linked with the pursuit of equality, especially by feminist theorists. Feminist theorists have offered a robust critique of the ‘liberal legal subject’. The ‘liberal subject’ is one enshrined in contract law. The liberal subject can negotiate terms, assess options and makes decisions in a rational manner.⁵⁵ Therefore he/she is able to consent to an agreement and be bound to it. Fineman argues for the benefits of replacing the liberal subject with the ‘vulnerable subject’.⁵⁶ She argues that the ‘vulnerable subject’ is better for reflecting the reality that abilities may vary in the course of a lifetime and the interdependence of humans.⁵⁷ The variable nature of human abilities can be seen vividly in relation to health, as anyone can potentially see their health (physical or mental) deteriorate. Yet, the recognition that ultimately, humans do not have control over their bodies and are open to suffering, inspires fear and is therefore best kept hidden.⁵⁸ The debate around the liberal subject and the vulnerable subject can be linked with the contrast between average and vulnerable consumer, as epitomized in the UCPD. This thesis does not argue for abolishing the average consumer standard. However, the universality of vulnerability should be a guiding principle for interpreting the ‘average consumer’ as well. The average consumer is also susceptible to harm and may find himself in a vulnerable position, which is why the average consumer is also in need of protection from unfair practices.

2.2.3. Resilience

Resilience is a concept that has been associated with vulnerability in various contexts. Resilience is the counterpart of vulnerability. The factors that increase resilience will be those that decrease vulnerability. In psychology, resilience refers to the ability of individuals to protect themselves from a negative or disruptive event in their lives.⁵⁹ Kirby showcases the connection between vulnerability and resilience. He argues that to effectively conceptualize vulnerability, a robust understanding of the factors that make people resilient to risks is needed. For that purpose, he adopts the system of the World

⁵⁵ Fineman (2008) 10.

⁵⁶ Fineman (2010) 274.

⁵⁷ Fineman (2008) 12.

⁵⁸ Susan Wendell, ‘Toward a Feminist Theory of Disability’ (1989) 4 *Hypatia* 104, 112.

⁵⁹ GA Bonanno, ‘Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive after Extremely Adverse Events?’ (2004) 59 *American Psychologist* 20, 20.

Bank for vulnerability which revolves around the concept of assets.⁶⁰ The World Bank relates the concept of vulnerability to poverty. In that context, vulnerability refers to the relationship between poverty, risk, and efforts to manage risk and vulnerability is measured in relation to the household and not the individual.⁶¹ According to Kirby vulnerability is influenced by: (a) physical assets, such as assets owned and levels of indebtedness; (b) human assets, such as education; (c) social assets, such as family, membership in trade unions or state created systems like social insurance; (c) environmental assets, such as access to water.⁶²

Kirby is not the only one that is interested in resilience as the other side of vulnerability. Fineman also develops the argument that the assets of each individual are created by systems of power and privilege that interact to produce advantages and disadvantages.⁶³ To the extent that some disadvantages are constructed by society, as argued for gender and disability, then societal institutions can play a role in minimizing this disadvantage.⁶⁴ This approach accounts for how some people can counteract characteristics that heighten their vulnerability. For example, how an individual may overcome poverty by getting a good education.

Resilience has also been employed in the context of consumer vulnerability where it can reflect the capacity of individuals to adjust to threats or change.⁶⁵ This

⁶⁰ Kilby (2005).

⁶¹ Jeffrey Alwang, Paul B. Siegel, Steen L. Jorgensen, 'Vulnerability: A view from different disciplines', (Social Protection: The world Bank, June 2001) <<http://documents.worldbank.org/curated/en/636921468765021121/pdf/multi0page.pdf>> accessed May 2017 2 The working definition featured in the report is: "A household is said to be vulnerable to future loss of welfare below socially accepted norms caused by risky events. The degree of vulnerability depends on the characteristics of the risk and the household's ability to respond to risk. Ability to respond to risk depends on household characteristics- notably their asset-base. The outcome is defined with respect to some benchmark- a socially accepted minimum reference level of welfare (e.g., a poverty line). Measurement of vulnerability will also depend on the time horizon: a household may be vulnerable to risks over the next month, year, etc."

⁶² Kilby (2005).

⁶³ Fineman (2010) 274.

⁶⁴ Wendell (1989) 109.

⁶⁵ Stacey Menzel Baker and Marlys Mason, 'Toward a Process Theory of Consumer Vulnerability and Resilience' in David Glen Mick et al. (eds), *Transformative Consumer Research: For Personal and Collective Wellbeing* (Routledge 2012) 550.

thesis suggests that resilience is a useful concept for aggressive practices to describe to what extent consumers are expected to be resilient to pressure from the trader.⁶⁶ Identifying the factors that contribute to consumer resilience is challenging, same as for vulnerability and requires considering a multitude of factors. Building resilience signifies that vulnerability is variable and it is possible for consumers to improve their situation.⁶⁷ However, building resilience is not an effort to achieve invulnerability and reducing vulnerability will not always be possible. In this thesis resilience is a term used to capture the reactions of consumers to aggressive practices, rather than a demand for them to build resilience. Care must be taken to not hold consumers to an unreasonable standard. The concept of ‘resilience’ as the other side of ‘vulnerability’ will be further elaborated on, in relation to aggressive practices and to what extent consumers are expected to be resilient to pressure.⁶⁸

3. Conceptualisations of vulnerability

During these decades of academic engagement with the topic of consumer vulnerability, there have been a few notable developments. There has been the shift from identifying certain categories of consumers (or people) as de facto vulnerable and focusing solely on them, to the development of theories on vulnerability. Consumer vulnerability has been approached by academics in different ways which can be broadly placed in two main categories, that of the state-based approach and that of the class approach. Per the state-based approach, as indicated by the name, consumer vulnerability is perceived as a transient state that all consumers may experience at one time.⁶⁹ The class approach is that in which certain categories of consumers e.g. the poor or the illiterate are identified as vulnerable.⁷⁰ The class approach, was the prevalent one in earlier works on vulnerable consumer groups. However, the state-based approach to vulnerability which came after, is gaining ground. Arguably, many works that deal with vulnerability, be it policy documents or academic works, recognize vulnerability as a

⁶⁶ See text to note 30 in Ch.3.

⁶⁷ Baker and Mason (2012) 546.

⁶⁸ See Ch.4, s. 4.2.5.2.

⁶⁹ Baker, Gentry and Rittenburg (2005) 183.

⁷⁰ S Commuri and A Ekici, ‘An Enlargement of the Notion of Consumer Vulnerability’ (2008) 28 *Journal of Macromarketing* 183, 184.

state.⁷¹ This thesis adopts the state-based approach, accepting that, depending on the circumstances it may be appropriate to take measures to protect certain groups.

3.1. Class approach

In studies that employ the class approach, certain groups of consumers are labelled as vulnerable. The focus is not on vulnerability as a general concept, how to describe it and how to measure it, but rather, it is on the behaviour of a certain group which possesses certain characteristics that are viewed as placing them at risk.⁷² Vulnerability in this context is not a transient state, but one that is assumed for certain categories. They answer the question ‘who is vulnerable’ rather than ‘what is vulnerability’.⁷³ The UCPD in its definition of the vulnerable consumers follows the class approach.⁷⁴

When it comes to the study of specific groups of consumers, a wide variety of groups have been identified as ‘vulnerable’ or ‘disadvantaged’ in the literature based on their individual characteristics. Examples include: black people living in ‘ghettos’ in the USA,⁷⁵ the disabled (both physically and mentally),⁷⁶ the elderly, the poor⁷⁷, the over-indebted, the recently bereaved⁷⁸, and mothers⁷⁹. Other works focus on specific markets or specific areas of the law, such as financial services⁸⁰, or the grocery retail

⁷¹ See also the literature review in Commission, ‘Consumer Vulnerability across key markets in the European Union’ (2016) <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf> accessed May 2017 39.

⁷² Baker, Gentry and Rittenburg (2005) 129.

⁷³ Baker, Gentry and Rittenburg (2005) 128.

⁷⁴ See text to note 313 in Ch.3.

⁷⁵ Andreasen (1975).

⁷⁶ TM Pavia and MJ Mason, ‘Vulnerability and Physical, Cognitive, and Behavioral Impairment: Model Extensions and Open Questions’ (2014) 34 *Journal of Macromarketing* 471.

⁷⁷ KL Hamilton and M Catterall, ‘Towards a Better Understanding of the Low Income Consumer’ (2005) 32 *Advances in Consumer Research* 627; Caplovitz (1963).

⁷⁸ JW Gentry et al., ‘The Vulnerability of Those Grieving the Death of a Loved One: Implications for Public Policy’ (1994) 13 *Journal of Public Policy & Marketing* 128.

⁷⁹ The Voice Group, ‘Motherhood, Marketization, and Consumer Vulnerability’ (2010) 30 *Journal of Macromarketing* 384.

⁸⁰ Cartwright (2011), ‘The Vulnerable Consumer of Financial Services: Law, Policy and Regulation’.

sector⁸¹, rather than engage solely in a more general discussion on consumer vulnerability.

These categories can be quite large and identifying these groups as vulnerable would be to characterise much of the consumer population as vulnerable. Singling out certain groups and labelling them as vulnerable in their entirety may have an adverse effect on them as the term vulnerability has negative connotations. Vulnerability has been criticised as a concept that is oppressive and paternalistic, and the vulnerable label serves to exclude and stigmatise certain groups.⁸² Also, a class approach often fails to consider the multiple factors contributing to consumer vulnerability, including factors related to the market.⁸³

A class approach should not be attributed to any study that engages with specific groups. There is great value in having studies that consider the behaviour and characteristics of specific groups. For example, the work of Moschis et al cited above, looks into elderly consumers, yet does not presuppose their vulnerability. It is crucial for researchers and policymakers alike to have an open mind when researching specific groups of consumers. As Baker, Gentry and Rittenburg point out one of the caveats of the class approach is ‘perceived vulnerability’ meaning that a person is perceived as vulnerable by other, but may not agree with that characterisation.⁸⁴ However, whether identifying as vulnerable should be the defining criterion for vulnerability is debatable.

The main benefit of a class approach is that there is clarity as to who is considered vulnerable.⁸⁵ Commuri and Ekici, with that benefit in mind, suggest that the two approaches can be successfully combined.⁸⁶ They argue that a class-approach can play a part in designing an effective policy for consumer vulnerability; as identifying certain classes of consumers as vulnerable allows for preventive measures to be taken for their protection.⁸⁷ That is desirable both for research and policy purposes, so long as it is based on an assessment made on specific criteria, rather than assumptions. As

⁸¹ Woodliffe (2004).

⁸² Brown (2011) 316.

⁸³ Commuri and Ekici (2008) 184.

⁸⁴ Baker, Gentry and Rittenburg (2005) 128.

⁸⁵ Baker and Mason (2012) 544.

⁸⁶ Commuri and Ekici (2008) 184.

⁸⁷ Commuri and Ekici (2008) 184.

mentioned above, this thesis recognises that measures to protect specific groups of consumers may be appropriate, provided they are targeted and based on robust empirical evidence.

3.2. State-based approach

Discussion on consumer vulnerability has long revolved around trying to identify who is a vulnerable consumer. Often, the question of who is a vulnerable consumer has been equated with that of what is consumer vulnerability.⁸⁸ Criticising this approach as inadequate is what led to the creation of the state-based approach. Therefore, the proposition that the vulnerable consumer label is not reserved for certain groups, regardless of their size, but is a state which potentially any consumer may find themselves in at one instance or the other, has been quite revolutionary.

According to this view, as championed in the article by Baker, Gentry and Rittenburg ‘Building Understanding of the domain of Consumer Vulnerability’, consumer vulnerability is defined as an interaction of a variety of factors, both external as well as individual states and characteristics.⁸⁹ The interaction of these factors results into a state of powerlessness for the consumer and it is this outcome that will determine whether the consumer was in a vulnerable position or not.⁹⁰ This approach of consumer vulnerability is the most relevant for this thesis and will be adopted, save for some clarifications that will be made clear on the proposed system section.

In this approach, no one is a priori vulnerable, nor does that vulnerability constitute a permanent state. This approach assists in moving past the stigmatisation of certain social groups into a more neutral approach to vulnerability. It allows policy makers to consider vulnerability against changing social conditions. The benefit of this approach is that it allows for a multitude of factors to be considered, as well as highlighting that it is possible for consumers to work through their vulnerability.⁹¹ This means that the state-based approach can accommodate resilience, as presented above in s.2.2.2.

⁸⁸ Baker, Gentry and Rittenburg (2005) 128.

⁸⁹ Baker, Gentry and Rittenburg (2005) 134.

⁹⁰ Baker, Gentry and Rittenburg (2005) 134.

⁹¹ Baker and Mason (2012) 545.

Pavia and Mason criticise the vulnerability model of Baker, Gentry and Rittenburg stating that though they argue that vulnerability is variable and may diminish over time they do not pay sufficient attention to the instances where vulnerability increases over time.⁹² For example, a person with a chronic illness which may mean his health and mobility reduces over time. It is important to maintain a balance between recognising that vulnerability can be addressed with proper interventions and acknowledging that for some consumers, vulnerability will be on-going and they will not be able to overcome it. Another drawback of the state-based approach is that the unit of analysis is the individual consumer, thus making it not conducive to bringing social change.⁹³ Still, this is not a problem for adopting the state-based approach in the context of the UCPD, as the aim does not extend to enacting social change; instead focus is on ensuring protection under the current social conditions.

4. What is consumer vulnerability?

When discussing the concept of consumer vulnerability and the different possibilities of its definition, it would be useful to first distinguish the elements that make up such definitions. First, there is the basic question of what is vulnerability, meaning only the description of what a vulnerable state is. This concept should be differentiated from that of the potential causes of vulnerability, or the factors that may contribute to vulnerability. In other words, what is vulnerability and what causes vulnerability are two different questions that demand different answers. Moreover, the state of vulnerability itself is distinct from the manifestations of vulnerability in the marketplace, meaning the ‘symptoms’ of vulnerability on consumers. This clarification may seem superfluous; however, it is a frequent cause of confusion. As has been mentioned above, many authors have substituted the question of what vulnerability is with that of who is vulnerable; yet to claim that e.g. the poor are vulnerable, without justification, is essentially identifying poverty as a cause of vulnerability.

In this part the state of vulnerability, the factors that contribute to it and the manifestations of vulnerability will be examined. For defining what consumer vulnerability is, the generic definition of vulnerability (outside of a legal context)

⁹² Pavia and Mason (2014) 472.

⁹³ Baker and Mason (2012) 546.

provides a useful start for understanding the meaning of the term. Oxford English dictionary defines vulnerable as ‘exposed to the possibility of being attacked or harmed, either physically or emotionally’.⁹⁴ Subsequently, vulnerability is the quality or state of being vulnerable. The concept of vulnerability has also been associated with risk, defining vulnerability as ‘the state of exposure to a chance of injury or loss’.⁹⁵

Consumer vulnerability has also been linked to loss of control. Consumption choices help people construct their identity and their possessions are being viewed as an extension of themselves.⁹⁶ Therefore, when consumers are vulnerable they experience a loss of control over their consumption choices and thus, their lives.⁹⁷ A notable feature of these definitions is that none of them requires the injury or the loss to take place, but rather note the heightened likelihood of that injury or loss occurring, or in other words, the risk of the detriment taking place. This approach could provide an argument when faced with the question of whether a consumer needs to have experienced detriment or harm to be identified as vulnerable. The UCPD adopts this approach as likelihood of distortion of economic behavior of the average consumer is sufficient to find a practice unfair.⁹⁸

Consumer vulnerability has certain characteristics. It can be viewed either as a relative or as an absolute concept. On the one hand, if consumer vulnerability is relative than that means that there are varying degrees of vulnerability and some consumers may be more vulnerable than others.⁹⁹ On the other hand, if consumer vulnerability is viewed as absolute than a consumer will either be vulnerable or not. For the purposes of this thesis consumer vulnerability will be viewed as relative, as this is also in line with the view that not all consumers are the same, or have the same needs. A relative concept of consumer vulnerability will help avoid any unjust outcomes that could arise from presuming every consumer’s abilities to navigate the marketplace, even if identified as vulnerable, is identical. Relativity of vulnerability is also consistent with

⁹⁴ Oxford English dictionary, < <https://en.oxforddictionaries.com/definition/vulnerable> > accessed May 2017.

⁹⁵ Consumer Affairs Victoria (2004) 4.

⁹⁶ R Belk, ‘Possessions and the Extended Self’ (1988) 15 *Journal of Consumer Research* 139.

⁹⁷ Baker and Gentry (2006) 327.

⁹⁸ UCPD, art.5.2(b), 5.3.

⁹⁹ Consumer Affairs Victoria (2004) 4.

the idea that vulnerability is inherent in the human condition, meaning we are all vulnerable, to variable degrees and no one can be characterized as non-vulnerable.¹⁰⁰

Another aspect to consider is whether consumer vulnerability is temporary or enduring. In other words, can a consumer be permanently vulnerable, or at least for prolonged periods of time, or is it only a ‘short-run phenomenon’?¹⁰¹ This aspect of consumer vulnerability is one that will be discussed further on, especially in relation to the distinction of the terms vulnerability and disadvantage. In any case, consumer vulnerability will be examined as a dynamic concept, meaning one that may alter over time. Also, vulnerability may vary not only across time but also across different markets and in different transactions.¹⁰²

Vulnerability is often equated with weakness. And as people do not wish to be characterized as weak, use of the term ‘vulnerability’ tends to generate a construction of the ‘other’. The ‘vulnerable’ is always someone else. As such, it tends to be a label that is unwanted and is considered stigmatizing. However, the power of ‘vulnerability’ as a term, and an important reason for using it, is the realization that vulnerability is inherent in the human condition. This becomes obvious even in the common language meaning of the word. If one is not vulnerable, then are they invulnerable? Surely, no one is.

Accepting the universal nature of vulnerability, as part of the human condition can contribute to eradicating the negative connotations often associated with the label of ‘vulnerability’. Gilson argues that there are positive dimensions to vulnerability. That vulnerability does not only limit us or exposes us to risks and dangers but also is what opens us to new experiences, learning and otherwise and human relations.¹⁰³

¹⁰⁰ See above s.2.2.3. on universality of vulnerability.

¹⁰¹ Baker, Gentry and Rittenburg (2005) 136.

¹⁰² See for example Carolyn Yoon, Catherine A Cole and Michelle P Lee, ‘Consumer Decision Making and Aging : Current Knowledge and Future Directions’ (2009) 19 *Journal of Consumer Psychology* 2. Their study identifies factors such as familiarity with the process as a factor that affects decision making in elderly consumers.

¹⁰³ Erinn Gilson, ‘Vulnerability, Ignorance and Oppression’ (2011) 26 *Hypatia* 308, 310.

However, it is important to recognize the link of ‘vulnerability’ with stigma even when attempts are being made to use the term in a more positive way.¹⁰⁴

There is some evidence pointing to the fact that vulnerability can lead to positive outcomes also in the marketplace.¹⁰⁵ Behavioural biases, such as the status quo bias are considered to produce sub-optimal results in the marketplace. Lunn and Lyons in an EU Report on vulnerable consumers and behavioural economics caution that it should not be assumed that ‘biases’ (to which they refer to as ‘behavioural deviations from traditional economic assumptions’) are necessarily ‘irrational’ or detrimental to consumers.¹⁰⁶ For example, consumers who are unlikely to switch providers, are often presumed to not be enhancing their welfare as they do not get the best deal. However, many consumers who switch may end up worse off than before, so the ‘vulnerable consumer’ who may be more affected by the status quo bias, may in fact be making the optimal choice, especially in complex markets where identifying the best deal is difficult.¹⁰⁷ Instead of assuming which behavior produces sub-optimal results, Lunn and Lyons urge that research in the specific market context would be required to decide whether the ‘bias’ has a detrimental effect or not. Otherwise, policies trying to encourage consumers towards one behavior may ‘backfire’.¹⁰⁸

Examples like these showcase how many popular assumptions around vulnerability or groups considered to be vulnerable may need re-evaluation and further research. Treating vulnerability as a term that can also have a positive dimension may be a useful device for challenging attitudes on who is vulnerable and on the stigma of vulnerability.

4.1. Drivers of consumer vulnerability

As mentioned above, vulnerability is a state that may be experienced by any consumer, and indeed by any person. It is important to differentiate the state of vulnerability from the factors that contribute to it. These factors are classified below as internal or external. Internal factors relate to characteristics or circumstances of the consumer while external

¹⁰⁴ Brown (2011) 319.

¹⁰⁵ See Ch.1, s.3.2.4.

¹⁰⁶ Lunn and Lyons (2010) 3.

¹⁰⁷ Lunn and Lyons (2010) 8.

¹⁰⁸ Lunn and Lyons (2010) 8.

factors relate to markets conditions and how society in general treats certain groups.¹⁰⁹ The division between these two categories of factors is not absolute. It is clear that some (or the majority of) personal characteristics such as gender or ethnicity do not inherently have an effect e.g. on a person's abilities in the marketplace yet in society they may be treated in a manner that places them in a position of heightened vulnerability. Also, the terms internal/external were chosen instead of e.g. personal/market factors to be more inclusive to a variety of factors and to showcase the fact that the marketplace and the relationship between traders and consumers does not exist in a vacuum, nor is it governed solely by economic rules. Instead it is part of a broader social environment that influences not only consumers but also traders.

4.1.1. External factors

Consumer vulnerability is frequently viewed solely in relation to the characteristics of the consumers. However, that view is limited as it does not consider the effect that external conditions may have on consumer vulnerability. There are a number of factors that are outside the sphere of control of the consumers, which nevertheless have a significant influence on their state. These factors stem from the social and economic environment and their common characteristic is that they are beyond the control of the consumers.¹¹⁰ Several factors could play such a role as for example political upheaval or even violence and natural disasters.¹¹¹ The stigmatization and repression that certain social groups have to face contributes significantly to their vulnerability as consumers.¹¹²

However out of these external factors the ones that are most pertinent here are those that refer to the characteristics and the structure of the market in relation to vulnerable consumers. To present these characteristics, the term market dimension as

¹⁰⁹ The distinction between internal and external factors used in this thesis is loosely adopted from the distinction between individual states and external conditions seen in Baker, Gentry and Rittenburg (2005) 130.

¹¹⁰ Baker, Gentry and Rittenburg (2005) 130.

¹¹¹ Stacey Menzel Baker, 'Vulnerability and Resilience in Natural Disasters: A Marketing and Public Policy Perspective' (2009) 28 *Journal of Public Policy & Marketing* 114, 115.

¹¹² Baker, Gentry and Rittenburg (2005) 130.

presented in 2005 Consumer Affairs Victoria Discussion Paper on consumer vulnerability will be adopted.¹¹³

The market dimension refers to the nature of markets in general and the nature of a particular market and how their characteristics influence consumer vulnerability.¹¹⁴ Some of the main market failures were examined above; the most relevant ones in relation to consumer vulnerability are market power and informational asymmetries. Market characteristics have greater influence on consumer vulnerability than is usually attributed to them. Therefore, it is not possible to speak of market characteristics in general, but it is critical to examine different markets separately, or at least the ones that exhibit certain characteristics that differentiate them, thus making their consumers more prone to being vulnerable. An example of such a sector is financial services, where some of the products offered are inherently complicated and the prospective harm to the consumer can be grave.

Some of the market-related issues that increase the likelihood of vulnerability would be: a) the lack of access to wider choice of products and especially those with the most favorable prices, b) the lack of flexibility as to the frequency of shopping and c) the inconvenience caused when taking a shopping trip.¹¹⁵ Of course, these restrictions are geographical and will not apply in instances when the population that experiences vulnerability is scattered rather than concentrated in a specific area.¹¹⁶ Different environments will pose diverse challenges. For example, the EU Commission points out some of the challenges of the mobile e-commerce environment which include security of mobile payments or even the difficulty of reading terms and conditions on a small screen.¹¹⁷

The role of the market lies in targeting certain market characteristics or tactics employed that allow for the exploitation of consumer vulnerability. It has been

¹¹³ Consumer Affairs Victoria (2004) 7.

¹¹⁴ Consumer Affairs Victoria (2004) 6.

¹¹⁵ Rosemary DF Bromley and Colin J Thomas, 'The Retail Revolution, the Carless Shopper and Disadvantage' (1993) 18 Transactions of the Institute of British Geographers 222, 225.

¹¹⁶ Andreasen (1975) 107.

¹¹⁷ Commission, 'Consumer market study on the functioning of e-commerce and Internet marketing and selling techniques in the retail of goods' (2011) <http://ec.europa.eu/consumers/archive/consumer_research/market_studies/docs/study_ecommerce_goods_en.pdf> accessed May 2017 17

underlined in the literature how target marketing could be harmful to vulnerable consumers.¹¹⁸ Traders may be actively targeting consumers in vulnerable circumstances, attempting to take advantage of them. The UCPD recognizes that, as one of the factors for assessing aggressive practices is the exploitation by the trader of a specific misfortune of the consumer.¹¹⁹ Another aspect would be that of the trader employing the same practice to the general population, yet it has a negative effect only on vulnerable consumers. Furthermore, in certain markets, as is frequently the case with financial services, where there are complex products or transactions, this complexity is a factor for vulnerability.¹²⁰

Despite its importance, the market dimension of vulnerability has not played an important part for policy makers and academics alike. The exception to that is universal services, and the energy market in particular, as discussed above.¹²¹ In the literature, with few exceptions the causes of consumer vulnerability are limited to those related to the consumers rather than the markets. Certainly, rectifying market characteristics alone is not enough to address consumer vulnerability, yet it is an aspect that needs to be considered and allows for new possibilities especially in mitigating consumer vulnerability. A first necessary step would be to promote research in that field to be able to better understand the market characteristics and the effect they bear on consumer vulnerability. As mentioned above, such an undertaking would be more effective if targeted at specific markets as one of the most important considerations for the market dimension is that markets have different characteristics and most likely one size does not fit all.

Having, to an extent, clarified the relationship between the market and the traders with that of the vulnerable consumers then that knowledge should be utilized for designing a policy to target the market failures detrimental to vulnerable consumers. A notable advantage of such a market policy is that it would have greater potential for preventing the harm to consumers resulting from their vulnerability. Prevention should be highly regarded as a policy target and would be preferable than restorative action.

¹¹⁸ Smith and Cooper-Martin (1997).

¹¹⁹ UCPD, art. 9(c).

¹²⁰ Consumer Affairs Victoria (2004) 15.

¹²¹ See above, s.2.1.1

A useful tool for preventing detriment of vulnerable consumers could be the use of codes of conduct. If there is the willingness of traders to sign up to a code, it could help raise the standards of protection and thus ensure that vulnerable consumers are protected.¹²² Sometimes awareness amongst traders of the issues faced by vulnerable consumers may be low. Educating the traders and changing their attitudes should not be underestimated as a tool to achieve optimal effectiveness of a consumer policy

The market dimension of consumer vulnerability is concerned with the market characteristics that bear an effect on vulnerability. It is a parameter which often does not receive enough attention in the discussion on consumer vulnerability. Nevertheless, considering the problems in the market is essential for any policy seeking to tackle consumer vulnerability. As for the other external factors, even though their influence is undoubtedly significant, examining them in detail would fall outside the scope of this thesis. It is important to highlight that some of the unfavorable market conditions are heavily influenced by the discrimination and the stigmatization that certain consumers have to endure.

4.1.2. Internal factors

Internal factors refer to ‘the attributes and circumstances of individual consumers that affect how purchase decisions are made and how a consumer is positioned in transactions relative to sellers’¹²³. These attributes can influence several aspects, the most prominent being: the formation of needs to be satisfied, the information requirements for effective purchases and access to particular product markets.¹²⁴

Internal factors relate to characteristics of the individual consumer, such as age, education level, income level as well as circumstances such as illness, bereavement, relationship breakdown. Individual states on the other hand, could involve changes in family structure such as divorce or grief due to the death of a loved one, or psychological states such as severe stress, or even other financial circumstances such as poverty.¹²⁵ They may also include circumstances that do not relate directly to the individual, such as caring responsibilities. For example, being a carer, may be a long or

¹²² See Ch.5, s.4.2.1.

¹²³ Consumer Affairs Victoria (2004) 1.

¹²⁴ Consumer Affairs Victoria (2004) 9.

¹²⁵ Baker and Gentry (2006) 130.

short-term responsibility that impacts on the carer on both a financial and personal and emotional level.¹²⁶ A further distinction to make amongst internal factors would be that of duration as they could either be temporary or enduring.

Cognitive and behavioural biases may also be included in internal characteristics. Lunn and Peters explore the connection between consumers having a strong tendency towards some behavioural biases in the market and their vulnerability. While there is no conclusive evidence, it appears as though such tendencies combined with other factors may contribute to vulnerability.¹²⁷ Also, the personal preferences and goals of the consumers may vary. For example, a consumer who is more interested in photography may be more competent in that market than in others. While preferences and goals may not contribute to vulnerability they are perceived as such, because they are likely to produce sub-optimal results in the market.¹²⁸ There is no point in trying to address a perceived vulnerability that may in fact be attributed to the priorities that consumer is setting for themselves.

4.1.3. Interplay between internal and external factors

After having examined the different factors that contribute to vulnerability, the next step is to look at the interaction between these factors. It is submitted that the existence of only one of these factors is not enough on its own to cause vulnerability.

It needs to be taken into account that not all instances will be the same. Each market operates under different conditions and geographical restrictions and will appeal to a different set of consumers.¹²⁹ It is the distinct combinations that come out of this interaction between external and internal factors that lend consumer vulnerability its relative and dynamic aspect. It is thus worth underlining that a consumer may be vulnerable in one market, or even one transaction and not in another one. Or may be vulnerable for a limited period of time.

The argument that stresses the effect of a disabling environment (or indeed a market) rather than that of individual characteristics on vulnerability, and would even go as far as to say that consumer vulnerability could be caused exclusively by market

¹²⁶ Pavia and Mason (2014) 476.

¹²⁷ Lunn and Lyons (2010).

¹²⁸ Yoon, Cole and Lee (2009); Bromley and Thomas (1993).

¹²⁹ Consumer Affairs Victoria (2004) 16.

conditions¹³⁰ is intriguing. However, accepting such a thesis to its entirety, could have negative consequences. Both from a social and a policy perspective, focusing solely on the market could fail to target certain aspects of vulnerability and could even undermine the social need for an improvement of certain circumstances, such as poverty for example. Even though this line of social model would be suitable for certain types, such as physical disability, it may not be suitable for generalisation in the whole spectrum of vulnerability.

The interplay between the different drivers of vulnerability may work to either mitigate or exacerbate vulnerability. This is supported also by empirical findings. Behavioural research has shown that individuals that show the same tendency towards a bias, may produce different results due to the influence of their environment, their individual situation.¹³¹ For example, a consumer from a higher socio-economic background may exhibit a tendency e.g. towards status quo bias which may be counteracted by advice he receives or examples in his environment that prompt him to put in the effort required to counteract this bias. A consumer from a lower socio-economic background may not have the same opportunities and thus be more likely to make decisions according to this bias.

These empirical findings are also in line with the argument of Kilby that vulnerability does not result in detriment when individuals have the resources to withstand them.¹³² These resources could be both human and physical and social. This shows that in the other side of vulnerability is the concept of resilience. The factors that influence vulnerability, including membership in institutions can also serve to counteract the adverse effects of vulnerability. For example, financial crisis may have an effect on all consumers but those with a low income may be more adversely affected while consumers with a higher income are more able to withstand the shock; they are more resilient.

¹³⁰ Commuri and Ekici (2008) 184.

¹³¹ Lunn and Lyons (2010) 8.

¹³² Kilby (2005).

4.2. Manifestations of consumer vulnerability

Next, some of the main manifestations of consumer vulnerability will be examined. These are not the only potential manifestations of consumer vulnerability but they are the ones most highlighted in the literature and the ones that are deemed most relevant for the purposes of this research.

4.2.1. Information

Information has been a focal point in consumer policy and consumer vulnerability has been no exception. Consumer vulnerability has been defined in relation to information. Consequently, an informational aspect of consumer vulnerability is the difficulty in obtaining information as well as the difficulty in processing information.¹³³ Other aspects relating to information is the ability of the consumer to seek out information and persist when the information provided is deemed as non-satisfactory, as well as being able to retrieve information by third parties and meeting any search costs that might incur in the process.¹³⁴ These requirements would be hard to meet for the most consumers and even more so for the vulnerable ones. The average consumer of the UCPD, which is a relatively high standard, is also defined in relation to information.¹³⁵

Issues connected to information are undoubtedly faced by vulnerable consumers, and the next step would be to look at how these informational asymmetries could be rectified. The obvious answer, and the one in line with neoclassical economics would be to provide vulnerable consumers with more information. Nevertheless, this tactic would most likely not yield the desirable results as consumers are information processing abilities are limited.¹³⁶ Therefore providing consumers with more information is not always the most efficient solution in tackling information asymmetry.¹³⁷

Especially in the case of vulnerable consumers where, difficulties in finding and processing information may be an issue, bombarding vulnerable consumers with more

¹³³ Consumer Affairs Victoria (2004) 9.

¹³⁴ Consumer Affairs Victoria (2004) 9.

¹³⁵ See Ch.3, s.4.2.1.

¹³⁶ Howells (2005). Miller (1956).

¹³⁷ Office of Fair Trading, 'Vulnerable Consumers and Financial Services: The Report of the Director General's Inquiry' (Crown 1999) 9.

information does not seem like an appropriate policy choice. Furthermore, even if information is at hand and the consumer can process it, it does not make a difference in the cases where vulnerable consumers lack alternatives.¹³⁸ For example, informing a trader places barriers to switching, the consumer may be aware the practice is illegal, yet he still must dedicate time and resources to address it. The limits of informational remedies and the importance of alternatives can be seen in the context of aggressive practices.¹³⁹

It has been argued that simplifying information is a way to circumvent the issues associated with informational disclosure; however, simplification may cause other problems as some information will be omitted or distorted.¹⁴⁰ The benefits of simplification appear to be limited as in experiments where consumers were provided with short and user-friendly forms that drew attention to the problematic provision, they were still vulnerable to entering into detrimental agreements, succumbing to deception, pressure and communication rituals.¹⁴¹ This points to the fact that there are other factors besides information that have a bearing on consumer vulnerability. Arguably, susceptibility to pressure can be one of them, even though, surprisingly, it is rarely mentioned as an aspect of consumer vulnerability.¹⁴²

Difficulties with using information constitute an important part of consumer vulnerability, yet the weight that has been placed on them may well have been on the expense of other aspects that have not been explored at an adequate level, such as pressure. This is the point made also in this thesis, that even though information is an aspect of vulnerability it is not the only one and a broad consultation of factors is required. In any case, attention needs to be drawn to the emphasis on consumer information so that the measures employed are of help to the vulnerable consumer and do not simply entrench the injustice.¹⁴³

¹³⁸ Ramsay (1997) 223.

¹³⁹ See for example note 190 in Ch.4.

¹⁴⁰ Ben-Shahar and Schneider (2014) 121.

¹⁴¹ Jessica M Choplin, Debra Pogrud Stark and Jasmine N Ahmad, 'Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implication, A' (2011) 35 Law & Psychol. Rev. 61, 81.

¹⁴² Cartwright (2011), 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' 2.

¹⁴³ Ramsay (1997) 222.

4.2.2. Redress

Redress is another concept frequently connected with that of vulnerability, as vulnerable consumers face difficulties in obtaining redress. These difficulties could encompass the ability to voice complaints in case of an unsatisfactory transaction and the inclination to seek redress and to pursue the claim.¹⁴⁴ No doubt this is a problem closely connected with that of informational asymmetry, as one of the obstacles for getting redress is the lack of information on the rights of the consumer as well as the available avenues for redress. And there is no denying that other factors influence consumers' access to justice, such as level of education and level of income.

In the case of the vulnerable consumers, the problem may even be traced a step back as surveys have pointed to the fact that consumers who may be identified as vulnerable tend to perceive fewer problems than more affluent consumers, and tend to complain less.¹⁴⁵ This lower problem perception could be attributed to a number of factors from having lower expectations, or having lowered them due to their circumstances, to being less observant or less sophisticated.¹⁴⁶ Nevertheless there appear to be no conclusive evidence to explain this phenomenon, which points to the fact that further research is required.

The paradox of vulnerable consumers is that even though they are more affected by a transaction gone wrong (hence their vulnerability), they seem to be less willing to act. Potential reasons for not doing so could be: attributing fault to themselves rather than a trader, not being well-informed of the possibilities for redress and being discouraged from previous negative experiences or not being willing to pursue a low-value claim.¹⁴⁷ Once again further research would be needed to identify all the factors and which are most relevant.

If vulnerable consumers underestimate their problems and do not voice their complaints, identifying who is experiencing vulnerability may be difficult. Therefore, a policy that would be based on the consumers' perception of their issues may not be

¹⁴⁴ Consumer Affairs Victoria (2004) 9.

¹⁴⁵ Alan R Andreasen et al., 'The Dissatisfaction and Complaining Behaviour of Vulnerable Consumers' (1990) 3 *Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behaviour* 12, 14.

¹⁴⁶ Andreasen et al. (1990) 16.

¹⁴⁷ Andreasen et al. (1990) 17.

able to adequately protect vulnerable consumers to the extent that they may be unable to perceive the problems and may not seek redress. In this case, action may be required to raise awareness of consumer rights as well as make redress mechanisms more accessible to the vulnerable consumers. Awareness of rights can play a limited role in making consumers more resilient to aggressive practices, yet as noted above, that will not be the case, when there are no available alternatives.

Yet, this raises the broader question of whether assessment of vulnerability should be subjective or objective. On the one hand, labelling consumers who do not consider themselves vulnerable may be problematic.¹⁴⁸ On the other hand, as pointed out here, taking only self-assessment of consumers into account, may mean discounting important aspects of vulnerability. There are no easy answers as to how the assessment is to be made, as both approaches have advantages and disadvantages. It is a decision that should be made according to the context and, as argued also by Commuri and Ekici, an approach combining state and class approach might be beneficial, especially for policymaking.¹⁴⁹

4.2.3. Consumer Detriment

The extent of the experienced detriment is also of the essence in many of the definitions, as vulnerable consumers are identified as experiencing a higher level of detriment in comparison to non-vulnerable consumers.¹⁵⁰

Consumer Detriment is treated here as a broader sense that does not include only monetary loss or physical harm, but could also mean that the consumer's expectations were not met, leaving him less satisfied or that a transaction sought by the consumer has been denied or met with a different product/service from the one desired.¹⁵¹ Detriment in the case of vulnerable consumers in particular may be expanded to include 'provision deficit' meaning the detriment resulting from the mismatch between the product supply and the consumer's own vulnerability factors.¹⁵² An example from

¹⁴⁸ See also above, s. 3.1. on class approach

¹⁴⁹ Commuri and Ekici (2008) 186.

¹⁵⁰ Ramil Burden, 'Vulnerable Consumer Groups: Quantification and Analysis' (Office of Fair Trading 1998) 5.

¹⁵¹ Consumer Affairs Victoria (2004) 7.

¹⁵² Consumer Affairs Victoria (2004) 20.

the financial services field would be a case where a bank customer who either does not have access to or does not know how to use a computer cannot take advantage of certain privileges of e-banking such as no fees transactions, thus suffering a detriment given that he has to pay more. The UCPD is concerned with detriment to the economic behaviour of vulnerable consumers.¹⁵³ This is an approach that is appropriate for the aims of the UCPD and economic behaviour is a term broad enough to allow for different dimensions to be considered, such as the ones highlighted in this section.

5. Consumer disadvantage

At this point it would be useful to distinguish between the related concepts of consumer vulnerability and consumer disadvantage. As mentioned, the term ‘consumer disadvantage’ is used by many authors interchangeably with that of the vulnerable consumer.

The Consumer Affairs Victoria Report provides a comprehensive definition of consumer disadvantage according to which:¹⁵⁴

A disadvantaged consumer is a person in persistent circumstances and/or with on-going attributes which adversely affect consumption thereby causing a continuing susceptibility to detriment in consumption. As a result, a disadvantaged consumer repeatedly suffers consumer detriments or, alternatively expressed, generally obtains below-average satisfaction from consumption.

This definition could be adopted for the purposes of this thesis with one modification. It is preferable to substitute detriment with a term such as risk of detriment or susceptibility to detriment, since, especially when it comes to designing a policy, it is necessary to be able to take preventive measures and take action before detriment occurs when there is a high likelihood of it occurring. The UCPD also favours prevention, as the likelihood that the consumer takes a transactional decision he would not have taken otherwise is enough to find a practice to be unfair.¹⁵⁵ This allows national authorities to ban a practice without having to prove actual harm to consumers.

¹⁵³ UCPD, art.5.3.

¹⁵⁴ Consumer Affairs Victoria (2004) 3.

¹⁵⁵ UCPD, art. 5.2(b), 5.3.

Consumer disadvantage shares many common elements with consumer vulnerability and is best conceptualised as a sub-category of vulnerability, rather than an autonomous concept. In that sense, everyone who is disadvantaged is vulnerable, but not everyone who is vulnerable will be disadvantaged.¹⁵⁶ The main element that distinguishes disadvantage from vulnerability is the persistency of the adverse circumstances which either cannot ever change, or cannot easily change.¹⁵⁷ Still, like vulnerability, disadvantage is a relative and dynamic concept meaning that there are degrees of disadvantage and what is a disadvantage now may not be considered as one in the future.¹⁵⁸

These kind of consumers, where their situation may change would also fall into the category of disadvantage. For example, an illiterate consumer would still be considered disadvantaged, even though it is possible to learn how to read in the future. This reflects the fact that illiteracy is an obstacle which is not easily surpassed and has a severe effect in many areas of life, including transactions. However, evaluating what kind of circumstances or characteristics will amount to disadvantage requires further elaboration. Pavia and Mason offer a useful taxonomy for that purpose. They identify 3 dimensions of disadvantage: (a) ability to remediate, (b) duration, (c) dynamism.¹⁵⁹ Ability to remediate might vary; from inability to remediate, as in the case of e.g. dementia, to possible remediation through significant effort e.g. unemployment. Duration refers to whether there is an end in sight for the challenge, e.g. bereavement or pregnancy or whether it is a standing condition like disability or chronic illness. Dynamism refers to whether the challenges change over time or not, e.g. the difference between a loss of an eye and progressive loss of sight or alternatively the improvement of a condition. These criteria can be helpful for assessing when vulnerability will amount to the kind of heightened, enduring vulnerability that is referred to as ‘disadvantage’ in this thesis. This is also consistent with the approach advocated for vulnerability in general. In the same manner that no one, and in particular no large

¹⁵⁶ Consumer Affairs Victoria (2004) 17.

¹⁵⁷ Consumer Affairs Victoria (2004) 5.

¹⁵⁸ Consumer Affairs Victoria (2004) 5.

¹⁵⁹ Pavia and Mason (2014) 473.

groups should be considered de facto vulnerable, the same ought to be true for ‘disadvantage’.

5.1. Groups of disadvantaged consumers

As mentioned above, the aim of this chapter is to develop a theoretical framework for consumer vulnerability. In that context, it adopts the view that vulnerability is inherent in the human condition and that anyone may experience it. This does not mean that there will not be certain people that will experience heightened vulnerability or enduring/long-term vulnerability. It is important to both recognise the universality of vulnerability without overlooking the fact that certain characteristics of consumers (or citizens in general), will increase their vulnerability.

It is also important to acknowledge that in practice, in policy design or enforcement, there may be the need to take measures that protect or target certain groups. This is not a goal that is contrary to the view of vulnerability employed in this thesis. This thesis would argue it is possible and perhaps in some cases desirable, to have a differing treatment in designing policy or soft law measures and hard law requirements and enforcement of the law. There is a point in having policy measures that ensure the heightened visibility and protection of certain groups that have specific requirements. However, it would be important for law enforcers whether that is public authorities or courts, to try to let go of their preconceived notions on certain groups being de-facto vulnerable, and making an assessment as to their vulnerability in the specific context. It is argued that for achieving that aim in the context of the UCPD, it would be desirable to have a definition of vulnerability that is not tied in to any specific groups of vulnerable consumers, as well as use empirical evidence where appropriate to identify vulnerability.¹⁶⁰

This section examines certain groups that are commonly labelled as vulnerable, and to the extent that consumer vulnerability is considered in EU consumer law, they are central to the current understanding of vulnerability. Any remarks made for these groups are made under the implicit assumption that not everyone that belongs to these groups will experience a heightened vulnerability in all markets, but that they possess characteristics that can be linked to such heightened vulnerability.

¹⁶⁰ See Ch.3, s.4.2.3.7., 5.1.

As mentioned above, characterising someone as vulnerable may be perceived as stigmatising and the term is seen by many as having negative connotations. This thesis adopts the view that vulnerability should not be viewed as a sign of weakness that is characteristic of some categories of persons but as a characteristic of all humans. However, this does not mean that everyone is vulnerable to the same degree. It is important to acknowledge that some categories of consumers, or consumers bearing certain characteristics will be more vulnerable than others.

For the purposes of this chapter and this thesis the following categories have been selected: (a) disabled consumers, (b) elderly consumers, (c) poor consumers. They have been chosen as the ones that are more pertinent to vulnerable consumers as they are portrayed in the UCPD. Art. 5.3 UCPD states three criteria for vulnerability: mental or physical infirmity, age and credulity. Infirmity covers disability amongst others while age covers the elderly and children.¹⁶¹ In the UCPD, credulous consumers are presented as a group of consumers with distinct characteristics that are ‘clearly identifiable’.¹⁶² Credulity is not analysed here as it is argued that it is a vague term that, in fact, does not point to any specific group of consumers.¹⁶³ Poverty was chosen as it is one of the most relevant characteristics for consumers and for the marketplace. It is also a characteristic that frequently intersects with other factors that influence vulnerability such as level of education or disability. Furthermore, as is elaborated elsewhere in the thesis, it is one of the more serious omissions of vulnerability in the context of the UCPD.

5.1.1. Disabled consumers

Disability and the rights of disabled persons have been discussed primarily in the context of human rights.¹⁶⁴ Disabled consumers and their protection and rights in the marketplace, is an under-researched topic that calls for further exploration. In EU

¹⁶¹ See Ch.3, s.4.2.3.2., 4.2.3.3.

¹⁶² See UCPD, art.5.3.

¹⁶³ The meaning and the difficulties created by the criterion of ‘credulity’ are analysed further in Ch.3, s.4.2.3.4.

¹⁶⁴ See in particular one of most notable developments in the field: UN Convention on the Rights of Persons with Disabilities, (24 January 2007) A/RES/61/106 (hereafter: CRPD) Disability rights have been established also in national law, in particular in employment law. See for example the Disability Discrimination Act 1995 in the UK (now replaced by Equality Act 2010)

Consumer Protection law, the term disability is not used. Instead the term ‘infirmity’ can be seen both in the UCPD as well as in the newer Consumer Rights Directive (CRD).¹⁶⁵ Both the UCPD and the CRD are horizontal protection measures.¹⁶⁶ It is worth noting that only in the UCPD concepts like infirmity or indeed vulnerability, made it into the articles of the Directive, instead of being limited only in the preamble as in the CRD. ‘Infirmity’ is a broader term than disability as it encompasses also the frailty that is a result of ageing or in fact childhood as well as illness. The inclusion of both mental and physical infirmity, allows the consideration of both mental and physical disability (or illness).

In the context of the UCPD, the protection of vulnerable consumers is limited to considering whether a practice has been unfair towards them, if the trader could reasonably foresee that vulnerable consumers would be adversely influenced.¹⁶⁷ It is a protection that ensures the removal of unfair practices from the market, yet it does not place any requirements on traders to take positive measures to ensure e.g. accessibility or non-discrimination. This does not exclude the possibility of national legislation setting such requirements, as is the case in the UK with the Equality Act.¹⁶⁸

The rights of disabled persons in the marketplace are becoming ever more important in the European Union. This trend can be seen also in the 2015 Proposal for a European Accessibility Act.¹⁶⁹ If the Proposal is accepted it will ensure the accessibility of disabled consumers to a range of products and services, in accordance with the obligations of the EU stemming from art.9 CRPD. The European Commission points out that accessibility benefits not only the 80 million people in the EU impacted by disability, but also benefits other groups such as the elderly and the consumer population in general.¹⁷⁰ This is consistent with the view expressed in this thesis that

¹⁶⁵ Council Directive 2011/83/EU of the European Parliament and of The Council on Consumer Rights, [2011], OJ L 304/64 (Consumer Rights Directive).

¹⁶⁶ See UCPD, art.5.3; CRD, rec.34.

¹⁶⁷ See Ch.3, s.4.2.3.

¹⁶⁸ See Equality Act 2010, s.29

¹⁶⁹ Commission, ‘Proposal for a Directive of the European Parliament and the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services’ COM(2015) 615 final.

¹⁷⁰ COM(2015) 615 final, art.3.4.

‘vulnerability’ should not serve as a label that creates barriers between the ‘vulnerable’ and the ‘non-vulnerable’ but that it can be unifying. Even though the overlap between issues of accessibility and unfair practices is limited, the European Accessibility Act serves to demonstrate a welcome shift of attitudes in EU law and a willingness to protect the rights of disabled consumers in the internal market.

5.1.2. Elderly Consumers

Policymakers tend to assume that elderly consumers are being targeted by marketing practices and that has an adverse impact on their welfare. Being targeted by traders is not the only problem elderly consumers face in the marketplace. They tend to face the exact opposite problem that they are an often-ignored group of consumers.¹⁷¹ Furthermore, the negative stereotypes prevalent in market communications to the elderly may have a negative effect on their consumer welfare increasing their vulnerability.¹⁷²

Vulnerability of the elderly is framed in two main aspects: (a) a decline in processing abilities related to aging as a biological process, and (b) social aging, relating to the roles society assigns to people in different phases of their lives.¹⁷³ Moschis et al. point out that the assumption that the elderly are vulnerable stems from the underlying assumption that they were less vulnerable earlier in life.¹⁷⁴ However, that may not necessarily be the case, as the elderly are a diverse group.

Yoon et al present a framework for vulnerability of elderly consumers that takes many factors into account from individual factors such as health and memory and factors relating to the context of the decision making such as familiarity with the sector and time pressure.¹⁷⁵ Their approach is consistent with the view presented above of vulnerability being the result of the interplay between internal and external factors. This example shows that the view of vulnerability presented here does not exclude the possibility of taking the needs of specific groups into account. Instead, it calls for

¹⁷¹ Yoon, Cole and Lee (2009).

¹⁷² Tom Robinson and Mark Popovich, ‘Older Adults’ Perceptions of Offensive Senior Stereotypes in Magazine Advertisements: Results of a Q Method Analysis’ (2003) 29 Educational Gerontology 503.

¹⁷³ Moschis, Mosteller and Fatt (2011) 469–470.

¹⁷⁴ Moschis, Mosteller and Fatt (2011) 476.

¹⁷⁵ Yoon, Cole and Lee (2009).

conceptualising the abilities and needs of a group in a marketplace in a more nuanced manner, instead of making blanket assumptions.

Moschis et al. point out the lack of studies on elderly consumers as well as the methodological limitations of the current studies and the need for further research.¹⁷⁶ Lunn and Peters also state that the current evidence does not provide a clear picture of vulnerability of elderly consumers and whether they are more prone to behavioural biases.¹⁷⁷ However, in spite of the inconclusive evidence, the elderly continue to be treated as a group with uniform capabilities and one that has an inherent vulnerability to many practices.

5.1.3. Poor Consumers

Poverty is a characteristic frequently associated with consumer vulnerability. The classic work of Caplovitz 'Why the poor pay more' showed that poor consumers in US ghettos in the 1960s were being exploited as they paid higher prices and often were forced to resort to the use of high interest credit.¹⁷⁸ Not much has changed since Caplovitz's study, as more recent evidence shows that poor consumers continue to pay more than more affluent consumers.¹⁷⁹ Vulnerability of poor consumers can be explained by a multitude of factors. Some relate to the structure of the market, as poor neighbourhoods may not attract e.g. big chain stores that offer better prices.¹⁸⁰ This shows the importance of consumers having alternatives, which is especially important for aggressive practices.¹⁸¹ In other cases, poor consumers are actively targeted by traders that seek to exploit them, as is the case with predatory lending practices.¹⁸² Poor consumers are especially disadvantaged in the financial services where they may be

¹⁷⁶ Moschis, Mosteller and Fatt (2011) 478.

¹⁷⁷ Lunn and Lyons (2010).

¹⁷⁸ Caplovitz (1963).

¹⁷⁹ Coskun A Samli, 'The Consumer Price Index and Consumer Well-Being: Developing a Fair Measure' (2003) 23 *Journal of Macromarketing* 105, 107.

¹⁸⁰ Alan R Andreasen, Marvin E Goldberg and Joseph M Sirgy, 'Foundational Research on Consumer Welfare' in David Glen Mick et al. (eds), *Transformative Consumer Research: For Personal and Collective Wellbeing* (Routledge 2012) 27.

¹⁸¹ See text to note 195 in Ch.4.

¹⁸² Ronald Paul Hill, 'Stalking the Poverty Consumer: A Retrospective Examination of Modern Ethical Dilemmas' (2002) 37 *Journal of Business Ethics* 209, 216.

excluded from mainstream lenders and, as noted above, have to turn to predatory lenders instead.¹⁸³

Poverty co-relates with other factors contributing to vulnerability such as, but not limited to, level of education, over-indebtedness, disability and ethnicity.¹⁸⁴ Therefore the discrimination poor consumers face in the marketplace may be the outcome of the intersection of difference factors, such as income and race.¹⁸⁵ Finally, it is important to note that in spite of what is commonly assumed, poor consumers develop consumption strategies that allow them to use their income in the most efficient manner.¹⁸⁶ This suggests that external factors play a bigger part to the disadvantage of poor consumers than personal characteristics.

5.1.4. Remarks

Having reviewed certain categories, it is important to bear in mind that these are not the only potentially vulnerable categories. Some other examples of groups that have been identified as vulnerable in marketing literature include those with low literacy skills ¹⁸⁷, mothers ¹⁸⁸, the bereaved ¹⁸⁹ and consumers not proficient in the language of the country of their marketplace ¹⁹⁰, to name a few. It is impossible to examine them all here. In any case, this thesis argues for the benefits of broadening the legal criteria for vulnerability to include more consumers who may find themselves in a vulnerable position due to a variety of reasons. It does not center on pointing out all the different categories of

¹⁸³ James F Devlin, 'A Detailed Study of Financial Exclusion in the UK' (2005) 28 *Journal of Consumer Policy* 75, 76.

¹⁸⁴ Burden (1998) 21.

¹⁸⁵ Jerome D Williams and Gerardine Rosa Henderson, 'Discrimination and Injustice in the Marketplace' in David Glen Mick et al. (eds), *Transformative Consumer Research: For Personal and Collective Wellbeing* (Routledge 2012) 175.

¹⁸⁶ Hill (2002) 212.

¹⁸⁷ Natalie Ross Adkins and Julie L Ozanne, 'The Low Literate Consumer' (2005) 32 *Journal of Consumer Research* 93.

¹⁸⁸ The Voice Group (2010).

¹⁸⁹ Gentry et al. (1994).

¹⁹⁰ NR Adkins and H Jae, 'Marketplace Vulnerability of Limited English Proficient Consumers: Opportunities to Increase Knowledge in Macromarketing' (2009) 30 *Journal of Macromarketing* 93.

potentially vulnerable consumers, nor does it focus on any one in particular, but instead argues for the universality of vulnerability.

6. The proposed system

The system presented here is just the vision for vulnerability adopted in this thesis. It will be useful for assessing the law, yet it is acknowledged that a definition in a legal instrument may look different. Vulnerability as a legal term may serve a different purpose and need to balance between legal certainty and flexibility to allow for a variety of instances to be caught.

For the purposes of this thesis, vulnerability is viewed as a state, one that is inherent in the human condition. It is also dynamic, meaning it varies across time and in different circumstances. In this thesis, the vulnerable consumer is the one who experiences a heightened susceptibility to harm in the marketplace as a result of actions or omissions of the trader.

This thesis adopts a flexible approach to vulnerability, one that is not limited to a singular definition, but rather sets out different dimensions of vulnerability. These dimensions are to be considered when assessing whether someone has been in a vulnerable position in relation to the trader. This is the preferred approach as it offers criteria to approximate vulnerability but is open-textured enough to take a multitude of relevant parameters into account.

The dimensions of vulnerability are set out here in broad terms and would require further clarification if they were to be used for addressing specific issues. Still, it is envisioned they provide useful guidelines for assessing vulnerability. The dimensions are as follows:

6.1. Detriment

This refers to the likelihood of suffering detriment in the marketplace, as well as the extent of detriment suffered. Detriment can refer to both financial and emotional detriment. Emotional detriment has an impact on consumer behaviour and should not be discounted.¹⁹¹ As for economic harm, it is more likely to be significant in high value transactions, as well as long-term contracts. Economic detriment should be seen in

¹⁹¹ See Ch.1, s 3.2.1.6. , Ch.4, s.4.1.1.2.

relative terms. What is significant detriment for a poor consumer, may be negligible for a more affluent consumer. Another important aspect would be the ability to withstand and recover from the detriment suffered. For economic detriment, it would refer to the extent to which a consumer can suffer a financial shock without it spiralling to other adverse consequences.

6.2. Familiarity with the market

Familiarity with the market refers to how the consumer performs in a certain context. Indicators to the familiarity with a market are how often the consumer has engaged in the market. E.g. does the consumer frequently buy these kinds of products or services? The level of experience in the market will also depend on the kind of goods in question, whether they are credence, experience or search goods.¹⁹²

Familiarity will not only relate to prior experience in the market but also to knowledge. How much and what kind of information is available to the consumer about the market? How much time did he invest in researching this market? Knowledge about consumer rights, traders' obligations and avenues for redress would also fall under this category.

6.3. Capabilities

This general category includes characteristics of the consumer. Cognitive abilities would fall under this category, as would physical and mental health. Temporary circumstances would be included as well. For example, being under stress can impact a consumer's performance in the marketplace as well as their decision-making abilities.¹⁹³ Education can be an important indicator of the consumer's abilities, yet it should not be used as a proxy for assuming a level of understanding. If a consumer is highly educated it does not mean they will perform well in all kinds of markets. For example, a doctor is not necessarily able to understand a complex investment product.¹⁹⁴ As the role of technology becomes more central, access to and ability to navigate technology will also be important.

¹⁹² See note 62 in Ch.3.

¹⁹³ See note 288 in Ch.3.

¹⁹⁴ See note 257 in Ch.3.

6.4. Freedom of choice

Freedom of choice is never absolute.¹⁹⁵ To the extent that consumers cannot produce what they need on their own, they will be dependent on the market. Freedom of choice will be diminished e.g. in utilities, where consumers need to have access to some essential services.¹⁹⁶ To be able to exercise freedom of choice, the consumer needs to have viable alternatives. If the consumer has alternatives and can easily walk away from a transaction, the power of the trader vis-à-vis the consumer is reduced. Freedom of choice is particularly relevant for aggressive practices, as will be seen in Chapter 4.¹⁹⁷

The dimensions identified above are not completely separate and there is a degree of overlap between them. What is important is to view vulnerability holistically and be able to take multiple factors into account when assessing whether a consumer has been in a vulnerable position. One issue with this open-textured approach is that it is open to the criticism of obscuring the interests of specific groups in need of protection, as it does not refer to them. However, as will be seen in the next chapter, the issue in the UCPD is that the approach to vulnerability is too narrow, rather than too broad.¹⁹⁸

Utilising this view of vulnerability in a legal text is, as highlighted above, challenging. On the one hand, a definition of vulnerability as could be provided in a piece of legislation would allow for a precise yet flexible view of vulnerability under which different instances would be caught. Providing a more generic definition would possibly promote fairness as it would act as a safety net for any instances that would not be caught under more specific legislation. It would promote a better understanding of the criteria for vulnerability, while allowing for several different categories to be included. As such a definition would mostly facilitate action taken after vulnerability has been detected, it would be helpful particularly for achieving redress.

On the other hand, identifying certain groups of disadvantaged consumers would permit a more targeted policy to help those in greater need and would leave room for pre-emptive measures and even soft law measures tailored to the needs of specific

¹⁹⁵ John Dalzell, 'Duress by Economic Pressure II' 20 North Carolina Law Review 341, 238–240.

¹⁹⁶ See above, s.2.1.1.

¹⁹⁷ See Ch.4, s.4.2.5.

¹⁹⁸ See text to note 310 in Ch.3.

groups, such as codes of conduct.¹⁹⁹ The approach taken in this thesis is that a state-based definition of vulnerability in the UCPD would be beneficial, supported by other measures, whether sectoral Directives or soft law measures.²⁰⁰

As with all policy options, identifying specific groups of disadvantaged consumers has advantages as well as disadvantages. Focusing on groups identified as disadvantaged could mean that there will be other groups that may need special protection as well but will not be receiving it.²⁰¹ It is doubtful that this will result in a deterioration of their situation, as they will be in the same place as before, but rather in a feeling of neglect. Nevertheless, for budgeting and resources reasons, it is not possible to identify all potentially disadvantaged groups, regardless of their size and importance, and introduce distinct measures for all. The best strategy to avoid negative effects would be a careful choice on which consumer groups to identify, a choice that must be made on extensive empirical evidence. So, it seems that there is no need to choose some of these elements to the expense of the others. On the contrary, it is imperative to combine them to achieve optimal results.

7. Conclusion

This chapter analysed the concept of vulnerability and developed the framework for consumer vulnerability adopted in this thesis. It critically reviewed how vulnerability has been defined in the literature both in consumer law and beyond it. Consumer vulnerability is gaining in importance in consumer law, yet it is limited to certain sectors, like universal services. There is no accepted definition of vulnerability and the term has been used in a variety of contexts. This thesis adopts the view that vulnerability is universal, meaning everyone is susceptible to harm. Also, the concept of resilience is introduced as the ability to withstand pressure, and a term which is the counterpart of vulnerability.

There are two main ways for conceptualising consumer vulnerability. The class approach, where certain categories of consumers are identified as vulnerable and the state-based approach where vulnerability is a state that can be experienced by anyone.

¹⁹⁹ See Ch.5, s.4.2.1.

²⁰⁰ See text to note 48 in Ch.5.

²⁰¹ Fineman (2010) 253.

This thesis adopts the state approach, yet accepts that the class approach may be appropriate at times to protect certain groups. Vulnerability is viewed as a state that is caused by of the interplay between external and internal factors. External factors refer to factors outside the influence of the consumer, such as market conditions, while internal factors refer to the characteristics and circumstances of the consumer. It is important to differentiate vulnerability as a state from its possible manifestations. Three important manifestations of vulnerability were reviewed, namely those relating to information, redress and detriment.

It is accepted that some consumers will experience heightened and lasting vulnerability, described here with the term disadvantaged consumers. All the disadvantaged consumers are vulnerable, but not all vulnerable consumers will be disadvantaged. It would be appropriate to use specific measures to protect disadvantaged consumers. Three disadvantaged groups were examined, namely disabled consumers, elderly consumers and poor consumers.

The vulnerability system for this thesis was presented. According to that, vulnerability refers to susceptibility to harm and is dynamic meaning it varies in intensity and can change over time. Yet, it is recognised that vulnerability cannot be eradicated and is inherent in the human condition. Four dimensions for conceptualising vulnerability were identified, namely detriment, familiarity with the market, capabilities and freedom of choice. Following the analysis of consumer vulnerability as a general concept, and the presentation of a taxonomy for vulnerability, the next chapter will examine the consumer standards in the UCPD, including the vulnerable consumer standard.

Chapter 3

Consumer Standards in the UCPD

1. Introduction

The Unfair Commercial Practices Directive is one of the most important pieces of legislation for European Consumer Law. Having a broad field of application covering business-to-consumer transactions, it serves to harmonise the laws of the different Member States and achieve a uniform level of protection in the European Union, in relation to unfair commercial practices.¹

The image of the consumer is one of the key issues in consumer protection law. Therefore, how the consumer is defined in the UCPD has a significant influence on the development of consumer protection in Europe. The Directive has adopted the concept of the average consumer, which is the benchmark consumer for European consumer law. However, the average consumer is not the sole definition in the Directive, as it co-exists with other provisions, namely those aimed at the protection of vulnerable consumers. The relevant provisions of the UCPD have been subjected to a lot of academic comment, and the average consumer construct in particular, has been the object of criticism, as to its suitability for protecting consumers and the level of protection granted to vulnerable consumers in the Directive.

This chapter will examine the different consumer standards that co-exist in the UCPD. In order to do that, it is necessary to consider the background to the UCPD. This includes how EU consumer policy has evolved over the years, and how the CJEU has

¹ With the exception of financial services and immovable property for which it is a minimum harmonisation measure. See UCPD, rec.9.

approached the issue of the consumer image in its case law. Furthermore, it will introduce the UCPD, its structure and its aims. These are important to bear in mind, also for chapter 4 on aggressive practices. Then, it proceeds to look at the different consumer standards in the Directive; what are they, when they should be applied, how they work together, what is the level of protection they ensure and if they leave something to be desired. This thesis focuses on aggressive practices and vulnerable consumers in particular; therefore this chapter will focus on these two topics in particular and examine how they are affected by the current legal regime and how well suited the current consumer standards are to them.

The structure of the chapter is as follows: First, the evolution of the consumer policy of the European Union will be discussed, as this will help shed light on the legislative choices made as well as looking at how different objectives of EU policy co-exist. Second, the key cases of the Court of Justice of the European Union that formulated the concepts codified in the Directive will be examined. Then the Directive itself will be scrutinised, its background, its goals and its structure. Following that is the analysis of the provisions on consumer standards which will be divided into three different standards, namely the average consumer, the average targeted consumer and the average vulnerable consumer. Next, the scope and benefits of using empirical evidence to interpret the consumer standards is assessed and finally the chapter concludes.

2. EU consumer policy

This section examines the development of consumer policy in the EU.² It does not offer an exhaustive analysis of the history of European consumer policy.³ Instead, it focuses on some important developments and key aspects for this thesis and this chapter in particular. More specifically, this section looks at how market integration has been the driving force behind consumer policy in the EU and how harmonisation has been the main regulatory technique for achieving market integration. It points out how the

² This section does not distinguish between European Economic Communities and European Union and uses the term European Union (EU) throughout, for ease of reference, as one is the continuation of the other.

³ For more in depth consideration, see Stephen Weatherill, 'Consumer Policy' in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law* (2nd ed, Oxford University Press 2011).

provision of information has become a key aspect of EU consumer policy, which has impacted on both consumer vulnerability and aggressive practices. Furthermore, it examines what the place of social objectives, which favour the protection of vulnerable consumers, is in European consumer policy. This is relevant for the chapter as it reveals the developments and ideas that influenced the UCPD, and in particular the choice of consumer standards in the UCPD.

2.1. The initial phase (1975-1985)

Consumer Policy may now play an important part in the European Union, which has adopted a number of legislation on consumer protection, but that was not the case from the start. The Treaty of Rome established the common market.⁴ The ‘consumer’ is hardly mentioned in the Treaty, a surprise given the important role of consumers in the marketplace, forming the demand side of the supply/demand duo of the market. One explanation for this is the view of the consumer at the time, who was seen merely as the beneficiary of the measures taken for the realisation of the common market.⁵ The rhetoric on the role of the consumer in the internal market would later change, as seen further in this section.

The absence of consumer protection from the Treaty did not prevent the EU from taking measures relating to consumer protection and putting forward the first policy documents that shaped an early consumer policy. It was a slow process as the first preliminary programme on consumer protection was published in 1975, 18 years after the Treaty of Rome.⁶ Yet that preliminary programme did not establish any legal basis for consumer policy; its role being mostly to show political willingness on the topic.⁷ The Council Resolution of 14 April 1975 presented a Preliminary Programme for a consumer protection and information policy.⁸ In the Annex of the above resolution a new image of the consumer was presented along with five consumer rights:⁹

⁴ Treaty establishing the European Economic Community, [1957], CELEX number 11957E/TXT

⁵ Weatherill (2011) 837.

⁶ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ 1975 C92/1 (Council Resolution 1975).

⁷ Freedman (2016) 447.

⁸ Council Resolution 1975.

⁹ Council Resolution 1975, Annex para 3.

The consumer is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which may affect him either directly or indirectly as a consumer. Consumer interest may be summed up by a statement of five basic rights:

- (a) the right to protection of health and safety,
- (b) the right to protection of economic interests,
- (c) the right of redress,
- (d) the right to information and education,
- (e) the right of representation (the right to be heard).

The inclusion of the right to information is indicative of the importance of information in EU consumer policy. The provision of information to consumers is a key aspect to addressing the imbalance of power between consumers and traders and allowing consumers to make better decisions. What is more surprising is the mention of aggressive practices in that early policy document. The 1975 Preliminary Programme recognises the need to protect consumers against ‘the abuse of power by the trader...and against high-pressure selling methods’.¹⁰ However, it was a lot later before aggressive practices were regulated in a European level with the UCPD.¹¹ Two more Council Resolutions, one in 1981 and one in 1986 followed that of 1975 and continued to pursue the goals identified in the preliminary program. However, during that time few measures were adopted mostly focusing on technical issues for products such as cosmetics or foodstuffs.¹²

The European Commission in its Paper ‘A New Impetus for Consumer Protection Policy’ recognised the lack of progress on the consumer policy front and made suggestions as to how to regain momentum.¹³ In this Paper the five consumer rights that were featured in the previous Council Resolutions were abandoned for the

¹⁰ Council Resolution 1975, para 19 (i).

¹¹ See chapter 4, s.1.

¹² Commission, ‘A New Impetus for Consumer Protection Policy Communication from the Commission to the Council’ COM (85) 314 final, available online at <<http://aei.pitt.edu/3811/1/3811.pdf>> accessed May 2017 3.

¹³ COM (85) 314 final

sake of three new objectives.¹⁴ These objectives were: (a) products traded should conform to acceptable safety and health standards, (b) consumers must be able to benefit from the common market, and (c) consumer interests should be taken more into account in other EU policies.¹⁵

The above Paper signified a potential change in EU consumer policy as it underlined the need for harmonisation of national laws in order to achieve greater consumer protection.¹⁶ It also followed the familiar for the EU path of arguing for consumer policy as being highly important for the realisation of the internal market, particularly when it came to building consumer confidence for purchases within the at the time European Community.¹⁷ On the other hand, it also stated that the internal market was merely the means to an end which was the well-being of the consumers and at the same time citizens of Europe.¹⁸

In spite of the lack of competence at this stage, the EU regulated to achieve consumer protection. Many of the rules adopted concerned harmonisation of standards, for example in foodstuffs.¹⁹ Also, Directives were adopted during that time, including such as Directive 85/577/EEC on contracts concluded away from business premises and Directive 87/102/EEC on consumer credit. Directive 85/577/EC will be examined further in the section on the social dimension of EU consumer policy.

In this initial stage, consumer policy in the EU was not very developed and lacked competence, nevertheless, the narrative of EU consumer policy on the common market and the right to information was beginning to develop. Also, harmonisation of national laws was the preferred regulatory technique, a tendency that continued down the line as consumer policy was strengthened.

¹⁴ (a) The right to protection of health and safety, (b) the right to protection of economic interests, (c) the right of redress, (d) the right to information and education, (e) the right of representation (the right to be heard), Council Resolution 1975, Annex point 3

¹⁵ COM (85) 314 final, 9

¹⁶ COM (85) 314 final, para 21

¹⁷ COM (85) 314 final, para 16

¹⁸ COM (85) 314 final, para 14

¹⁹ For a list of some the relevant Directives, see Preliminary Consumer Programme 1975, Appendix 2

2.2. The internal market phase (1986-2001)

In this era the internal market takes centre stage and European consumer policy comes of age. Consumer protection is included in the Treaties. Harmonisation becomes the vehicle for the realisation of the internal market and consumer confidence becomes a key point in policy. From the middle of the 1980s and onwards the EU was focusing on the completion of the internal market, a target that was to be reached by the end of 1992.

²⁰ Given that the functioning of the internal market is still the main justification for consumer law directives, including the UCPD, it is clear that the internal market is an ongoing objective for the European Union, rather than a project with an expiration date.²¹

In 1990 the European Commission issued a White Paper with its three year action plan for consumer policy.²² This White Paper underlined the need for further action in consumer issues in light of the then imminent 1992 deadline for the internal market. However, the aspects of consumer policy addressed on a European level were limited to areas most relevant to the completion of the internal market.²³ Once more it became obvious that consumer policy was being viewed as a vehicle for promoting the agenda of the internal market, which was the top priority of the Union, especially at that time. By the end of 1992, the right to free movement within the union had been established and it was clear that there was a shift from the consumer as a passive beneficiary of the internal market to a more active role.²⁴

In 1993 with the Maastricht Treaty consumer protection was finally included as an official objective in its own right, rather than as a by-product of market integration.²⁵

²⁰ Commission, 'Completing the internal market, White Paper from the Commission to the European Council' COM (85) 310, 4

²¹ See for example UCPD, art.1.

²² Commission, 'Three year action plan of consumer policy in the EEC(1990-1992)' COM (90) 98 final

²³ COM (90) 98 final 3

²⁴ Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Elgar European Law 2013) 10.

²⁵ See art.3, 129a of the Maastricht Treaty:

Art 3. states that "For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the time-table set out therein... s) a contribution to the strengthening of consumer protection;"

Art. 129a states that "1. The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of the completion of the

The reason that consumer protection was not a part of the earlier Treaties was that it was simply assumed, in a very free-market economy approach, that whatever is good for the market and enhances competition is also good for the consumer, who reaps the benefits of the heightened market competition.²⁶

What is today art.169 TFEU states that:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
 - (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
 - (b) measures which support, supplement and monitor the policy pursued by the Member States.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).
4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

Through article 169(1) it was ascertained that consumer protection became an autonomous area of the European Community.²⁷ The phrasing of art. 169(1) echoes the

internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers. 2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b). 3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.”

²⁶ Weatherill (2013) 4.

²⁷ Hans-W Micklitz, Norbert Reich and Peter Rott, *Understanding EU Consumer Law* (Intersentia 2009) 20.

five consumer rights listed above which were included in the Preliminary Consumer Programme 1975. This shows the continuity of EU consumer policy. According to art. 169(1) TFEU the Union ‘contributes’ which means that it did not possess exclusive jurisdiction over the area of consumer policy and furthermore its contribution aimed at achieving a high level of consumer protection. This means that if a maximum harmonisation measure, such as the UCPD, were to be introduced it could not go through art.169 TFEU, but would need to go through art.114 TFEU.

Two alternatives were put forward in art. 169 TFEU for attaining consumer protection objectives: the first was through harmonisation, as per art.114 TFEU; the other was limited to ‘measures which support, supplement and monitor the policy pursued by the Member States’ (art.169(2)(b)). This meant that harmonisation remained the main regulatory technique. The Treaty of Maastricht and the inclusion of consumer policy did not have a big impact on the techniques used as soft law and harmonisation remained central to EU consumer policy.²⁸ There were both advantages and disadvantages to harmonisation as a regulatory technique. On the one hand, using article 114 TFEU and the functioning of the internal market meant greater stability as the resulting Directive was less likely to be challenged in front of the CJEU.²⁹ On the other hand, unanimity amongst Member States was required for the enactment of a Directive, which most of the time translated in lengthy negotiations to reach a compromise.³⁰

Harmonising measures have to be connected to the internal market as per art.114 TFEU. The measures that can be taken after that connection has been established are not limited to low level protection; on the contrary in relation to consumer policy a high level of protection was to be pursued, according to art. 114(3) TFEU.³¹ The use of art.114 TFEU as the basis for the majority of EU consumer law meant that harmonisation of national laws would take precedence over free-standing EU consumer

²⁸ Weatherill (2013) 4.

²⁹ Micklitz, Reich and Rott (2009) 30.

³⁰ Micklitz, Reich and Rott (2009) 30.

³¹ 114(3) TFEU states that: The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

rules.³² Harmonising national laws has been the main driving force behind European consumer policy.³³ The harmonised rules applied to domestic and cross-border consumer transactions without distinction.³⁴ Directives were the preferred option for realising EU consumer policy and in the period from 1985 to 2002 a number of Directives were adopted on doorstep selling (85/577/EEC), package travel (90/314/EEC), unfair terms (93/13/EEC), timeshare (94/47/EC), distance selling (97/7/EC), sale of consumer goods and guarantees (99/44/EC) and the distance marketing of financial services (2002/65/EC).

Harmonisation yields a positive effect for consumers to the extent that it makes the market function more efficiently. Harmonising national laws means establishing common rules within the Union. However, it also implies that there is a choice to be made over which will be the appropriate choice of common standard as well as how it will be achieved.³⁵ All of the above directives, with the exception of the distance marketing of financial services directive, were minimum harmonisation directives. Minimum harmonisation meant that the directive would set minimum standards of protection which the Member States had to implement but it was still possible for them to adopt measures that would increase the level and the extent of the protection.³⁶

On the enforcement front an important development was the establishment of by the European Commission of a separate Directorate General for Health and Consumers (SANCO) in 1995. Ramsay argues that the start of the DG was slow and it was only later, in 1997 when it had enough staff to be able to make a difference.³⁷ DG SANCO shared responsibilities for consumer policy with both DG Internal Market and Services and DG Justice.³⁸ Currently there are two departments in the European

³² Christian Twigg-Flesner, 'Comment: The Future of EU Consumer Law-the End of Harmonisation?' in James Devenney and Mel Kenny (eds), *European consumer protection: theory and practice* (Cambridge University Press 2012) 8.

³³ Weatherill (2013) 2.

³⁴ Twigg-Flesner (2012) 8.

³⁵ Weatherill EU 12.

³⁶ Norbert Reich, 'From Minimal to Full to "Half" Harmonisation' in James Devenney and Mel Kenny (eds), *European consumer protection: theory and practice* (Cambridge University Press 2012) 3.

³⁷ Ramsay (2007).

³⁸ Weatherill (2011) 845.

Commission that are responsible for consumer issues. The first is the Consumers, Health, Agriculture and Food Executive Agency (CHAFEA) and the second is the Directorate-General for Justice and Consumers (DG JUST). CHAFEA is responsible for 1) implementing the EU health programme, consumer programme and Better Training for Safer Food initiative and 2) managing relations with 2800 beneficiaries and contractors involved in 400 projects/service contracts in the fields of health, consumer protection and food safety.³⁹ DG JUST took over the consumer responsibilities from DG SANCO. DG JUST is responsible for implementing the EU Consumer Agenda.

The redistribution of the functions of DG SANCO may signify a diminished importance of consumer law. Conversely, it may simply be part of the Commission's efforts to streamline its resources. Howells argues that the move of the responsibilities of DG SANCO to DG JUST, mirrors the academic trend of the study of consumer protection law being rebranded as European private law.⁴⁰ These two departments are not the only ones working on consumers in the European Union, but the list of the all the relevant bodies and their responsibilities are too numerous to examine here.⁴¹ As far as the UCPD is concerned, which is the focus of this thesis, DG JUST is responsible.

2.3. The maximum harmonisation phase (2002-present)

This is the third phase of EU consumer policy, where the European Commission shifted from minimum harmonisation to maximum harmonisation. This shift has caused a lot of debate and has been in general viewed unfavourably in the literature.⁴² Still, maximum harmonisation has not become the rule as there are still many directives which are minimum harmonisation.⁴³ The UCPD is representative of this stage as it was

³⁹ See <http://ec.europa.eu/info/departments/consumers-health-agriculture-and-food_en#responsibilities> accessed May 2017.

⁴⁰ Geraint Howells, 'Europe's (Lack of) Vision on Consumer Protection' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 433.

⁴¹ For a list of the EU institutions and bodies relevant for consumers please see <https://europa.eu/european-union/topics/consumers_en> accessed May 2017.

⁴² Howells, Micklitz and Wilhelmsson (2006) 1.

⁴³ See for example the recent Council Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] OJ L60/34 (Mortgage Credit Directive), which follows a mixed approach.

one of the first pieces of legislation that adopted the maximum harmonisation approach.⁴⁴

For a long time, minimum harmonisation was the rule in EU consumer protection as this was the approach that had the support of both the European Commission and the Member States.⁴⁵ This was the case also for the regulation on unfair practices as the Misleading Advertising Directive was minimum harmonisation.⁴⁶ The policy change was reflected in the Commission Communication document on the internal market strategy priorities 2003-2006.⁴⁷ As the target became the smoothing out of the differences between national laws the preferred technique was no longer the setting of minimum standards but maximum harmonisation.⁴⁸ Maximum or full harmonisation meant that Member States would no longer be able to adopt measures that would set a stricter standard of protection than that dictated in the directive. According to the Commission, the change from minimum to maximum harmonisation was necessary to the extent that minimum harmonisation had led to a fragmentation rather than convergence of standards in Europe.⁴⁹ The culmination of this announced change was the adoption of the UCPD.

Maximum harmonisation is meant to provide legal certainty, promote cross-border trade and consumer confidence along with it.⁵⁰ It is also meant to facilitate the enforcement of consumer law making it simpler and less costly.⁵¹ Yet, it has been questionable whether that has indeed been the case. Maximum harmonisation has been

⁴⁴ UCPD, art. 4.

⁴⁵ Hans-W Micklitz, 'Minimum/maximum Harmonisation and the Internal Market Clause' in Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006) 28.

⁴⁶ Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/0017 (Misleading Advertising Directive).

⁴⁷ Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions Internal Market Strategy Priorities 2003-2006' COM(2003) 238 final.

⁴⁸ Weatherill (2013) 25.

⁴⁹ Reich (2012) 3.

⁵⁰ Iris Benohr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 33.

⁵¹ Micklitz (2006), 'Minimum/maximum Harmonisation and the Internal Market Clause' 35.

criticised also in the context of the UCPD, as an approach that has failed to achieve uniform application and one has instead led to a lowering of the level of protection for some countries.⁵² Conversely, for other Member States maximum harmonisation has brought a rise in the level of protection.⁵³ It is seen as giving the impression that the European Commission is more committed to the internal market than consumer protection, even though that may not necessarily be the case.⁵⁴

2.4. Consumer empowerment

The image of the consumer in EU consumer law developed to serve the vision of consumer policy described above, where the internal market is a central consideration and where harmonisation is the main vehicle for consumer law. The image of the consumer is not uniform in all areas of consumer law, yet the prevalent image is that of the empowered, confident consumer. That image is consistent with the average consumer standard used in the UCPD, which will be examined below.

The foundation of the narrative around empowerment can be traced back to the Sutherland report of 1992.⁵⁵ There it is stressed that for the success of the internal market, consumers should have confidence in the rules of the EU as that will allow them to enjoy the benefits of a market without borders.⁵⁶ What will allow them to be confident is better information as well as simplification of the rule-making procedure in the EU. Since then consumer empowerment has been pushed further to the forefront by the European Commission. In the most recent Consumer Policy the same message is repeated: Empowered consumers that can rely on a robust framework are able to participate in the market and thus contribute to economic growth.⁵⁷ This image of confident, informed and empowered consumers sharply contrasts with the origins of consumer protection, where the reason for protecting consumers and deviating from the

⁵² Duivenvoorde (2015) 222–223.

⁵³ Thomas Wilhelmsson, 'Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions' (2006) 44 *Osgoode Hall Law Journal* 461, 470.

⁵⁴ Howells (2016) 438–439.

⁵⁵ High Level Group on the Operation of the Internal Market, 'Report to the EEC Commission 'The Internal Market After 1992: Meeting the Challenge' SEC (92) 2044.

⁵⁶ SEC (92) 2044, 5.

⁵⁷ Commission, 'A European Consumer Agenda - Boosting confidence and growth', (Communication), COM(2012) 225 final.

principle of contractual freedom was that the consumer was in a weak position compared to the seller both in relation to bargaining position as well as information.⁵⁸ It has been argued that the focus on consumer empowerment is shifting attention away from other important considerations of European consumer policy.⁵⁹ Chief among them is the idea of consumer protection and especially the protection of vulnerable consumers. This thesis agrees with this position. While protection of vulnerable consumers is a consideration in European consumer policy it is in the periphery as empowerment dominates the debate.

Who is the empowered consumer? While empowerment contains the word power, in fact it primarily refers to only one aspect of power asymmetry which is informational asymmetry.⁶⁰ Empowered consumers are those that are able to make informed choices, know their rights and can complain when necessary.⁶¹ The empowered consumer is able to take advantage of informational disclosure, confidently shop across borders and generally reap the benefits of the internal market.⁶² The idea that consumers are empowered by harmonisation to shop across borders goes against empirical evidence as to how consumers behave, since consumers often do not have a good knowledge of their own legal system, yet that does not discourage them from shopping in their native countries.⁶³

The issue empowerment creates for vulnerable consumers is that they are viewed as atypical, they need protection as they cannot protect themselves.⁶⁴ In other words, they cannot empower themselves, and that makes them vulnerable. This

⁵⁸ Schuler Bastian, 'The Definition of Consumers in EU Consumer Law' in James Devenney and Mel Kenny (eds), *European consumer protection : theory and practice* (Cambridge University Press 2012) 125.

⁵⁹ Stephen Weatherill, 'Empowerment Is Not the Only Fruit' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 204.

⁶⁰ Vanessa Mak, 'The Myth of the "Empowered Consumer": Lessons from Financial Literacy Studies' (2012) 1 *Journal of European Consumer and Market Law* 254, 256.

⁶¹ Howells (2005) 350.

⁶² Weatherill (2016) 211.

⁶³ Thomas Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27 *Journal of Consumer Policy* 317, 328.

⁶⁴ Jules Stuyck, 'European Consumer Law After the Treaty of Amsterdam Consumer Policy in or Beyond the Internal Market' [2000] *Common Market Law Review* 367, 375.

narrative constructs the vulnerable consumer as ‘the other’ and does not recognise the fact that vulnerable consumers are not a minority of inadequate persons, but that all consumers can find themselves in a vulnerable position. It also has the implication that if empowered consumers are good for the internal market, then vulnerable consumers have to be harmful for the market. This antithesis is lost on the European Commission which aims both at fostering growth by empowering consumers to make informed decisions and take the needs of all consumers into account.⁶⁵ However, as can be seen in the average vulnerable consumer of the UCPD, as examined below in the UCPD, protecting vulnerable consumers is desirable only in so far it does not conflict with the goal of the internal market and this necessarily means that the protection will be more limited.

2.5. Social Dimension of EU consumer policy

The previous section demonstrates the profound effect market considerations have had on European consumer policy. More specifically, it illustrates how the aim of promoting the functioning of the internal market has been the driving force behind consumer law initiatives in the European Union, an effect that continues today. The internal market and cross-border trade are meant to benefit consumers e.g. by increasing consumer choice and bringing down prices.⁶⁶

This section will focus on a different dimension of consumer policy, going beyond economic objectives. This dimension is construed broadly to include the developments which did not have an immediate economic rationale, but instead pursued social justice objectives and focused on the protection of the consumer, rather than his empowerment. In other words, policy developments with a prevailing distributive justice goal.⁶⁷ These aspects are particularly relevant for assessing the scope for taking the needs of vulnerable consumers into account in EU consumer law.

In the development of European consumer policy, the internal market has been a key influence, as noted above. However, in the early stages of European consumer policy, before the dominance of the concept of the internal market, things were different. Micklitz argues that during this initial phase of EU consumer policy from

⁶⁵ COM(2012) 225 final, para 1

⁶⁶ See also Ch.1, s.2.

⁶⁷ See also Ch.1, s.4.1.

1975-1985 social justice considerations prevailed and European initiatives co-ordinated the differing social justice models in the Member States where there was a tendency to pursue distributive justice objectives through private law.⁶⁸ The influence of the Member States which viewed the consumer as a weaker party in need of protection can be seen in the Directives adopted in that period, such as Directive 85/577/EEC on contracts concluded away from business premises and Directive 87/102/EEC on consumer credit.⁶⁹

Viewing the consumer as a weaker party in relation to the trader, which is sometimes also described as the consumer being vulnerable, is different from consumer vulnerability in this thesis, which refers to certain consumers as being more vulnerable than other consumers. In other words, there is a difference between all consumers being viewed as ‘vulnerable’ and differentiating between classes of consumers, some of which may be more vulnerable than others, depending on the circumstances.⁷⁰ In this initial stage of European Consumer policy described in the paragraph above, all consumers were treated as being in a weaker or ‘vulnerable’ position in relation to the trader, without singling out specific categories of consumers.

There have also been instances of measures which were adopted on the basis of promoting the functioning of the internal market; yet they appeared to serve distributive aims. Such an example is Directive 85/577/EEC (hereafter: Doorstep Selling Directive).⁷¹ The legal basis of the Doorstep Selling Directive was art.100 EEC (art.114 TFEU) on adopting harmonising measures for the establishment or functioning of the internal market. However, there have been reactions questioning that the internal market provided justification for this measure. Weatherill finds that the need to harmonise legislation in this area was not sufficiently explained or justified and cites it as an example where the EU may have lacked competence.⁷² Similarly, the need for a

⁶⁸Micklitz (2011) 31–33.

⁶⁹ Micklitz (2011) 31.

⁷⁰ See text to note 70 in Ch. 2.

⁷¹ Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985], OJ L 372/31(Doorstep Selling Directive).

⁷² Weatherill (2013) 73–74.

Doorstep Selling Directive was also questioned in the debate in the House of Commons where the existence of a cross-border element was questioned.⁷³

There are potential explanations for the need for the Directive, for example, to address problems in mail order trade of clothes, which were prevalent at the time.⁷⁴ It goes beyond the scope of the thesis to explore the EU's competence in this instance; yet there is no doubt that there was a strong consumer protection element in the Doorstep Sales Directive. This can be seen also in the Preamble of the Doorstep Sales Directive mentioning the two Programmes for Consumer Protection, adopted in 1975 and 1981 respectively. The example of the Doorstep Sales Directive is important for this thesis, as doorstep selling is often considered to be aggressive. There is no direct mention of an aggressive character in the Doorstep Sales Directive, however, it does mention in the preamble that one of the special characteristics of contracts on the doorstep is the element of surprise and the fact that consumers are often unprepared. Also, the main measure of the Doorstep Selling Directive is not an informational remedy, instead it is a cooling off period.⁷⁵ The Doorstep Selling Directive showcases that aggressive practices are more closely connected to consumer protection objectives rather than the internal market and cross-border trade. Another such example from the case law is *Buet* which will be examined in the next section.⁷⁶

Vulnerable consumers begin to become visible in the later stages of EU consumer policy, albeit limited to certain sectors. In the Consumer Policy Strategy 2002-2006, vulnerable consumers are mentioned in relation to the energy sector.⁷⁷ Vulnerable consumers are to be protected in the energy market and ensured access to universal service. As was mentioned in chapter 2, the most established notion of consumer vulnerability in EU consumer law is found in the field of universal services.⁷⁸

⁷³ Freedman (2016) 453.

⁷⁴ Freedman (2016) 453.

⁷⁵ Doorstep Selling Directive, art.5.

⁷⁶ C-382/87, *Ministere Public v Buet*, [1989] ECR 1235

⁷⁷ Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Consumer Policy Strategy 2002-2006' COM(2002) 208 final, s.3.1.5.2.

⁷⁸ See Ch.2, s.2.1.1.

In the next Consumer Policy Strategy 2007-2013, there is already greater visibility of vulnerability than before. There is the recognition, that the model of the confident consumer projected in EU consumer law does not benefit everyone equally and the more vulnerable consumers, especially elderly consumers, may be left behind.⁷⁹ Yet at this stage this recognition did not translate to any concrete measures, with the exception of the energy market, as mentioned above.

Another key development for the social dimension of EU consumer law in that period was the inclusion of consumer protection in the Charter of Fundamental Human Rights (hereafter: 'Charter'). Art 38 of the Charter states that: 'Union policies shall ensure a high level of consumer protection.' The Charter became legally binding for EU institutions and national governments with the entry into force of the Treaty of Lisbon in 2009. The importance of the inclusion of consumer protection in the Charter is in highlighting the connection between consumer protection and human rights and the importance of solidarity.⁸⁰ Even though the Charter could have had a more tangible effect on consumer law, this potential has not materialised and the Charter has not so far led to specific rights for consumers.⁸¹ Its most important effect continues to be the increased visibility of the social dimension of consumer law.⁸²

In the latest Consumer Agenda 2012, there is a noticeable shift in attitude, with consumer vulnerability becoming more central to the Commission's objectives.⁸³ This shift can be explained by the different context of this paper as the European Union is going through a financial crisis, which has an impact on its consumers. Social exclusion as a result of the financial crisis is identified as a key challenge, as well as the challenge of ensuring accessibility to technology, especially for elderly consumers.⁸⁴ This time

⁷⁹ Commission, 'Communication from the Commission to the Council the European Parliament and the European economic and social committee, EU Consumer Policy Strategy 2007-2013 Empowering consumers, enhancing their welfare, effectively protecting them', COM (2007) 99 final, 3

⁸⁰ Benohr (2013) 1.

⁸¹ Benohr (2013) 76.

⁸² Benohr (2013) 76.

⁸³ Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A European Consumer Agenda-Boosting Confidence and Growth', COM(2012) 225 final.

⁸⁴ COM(2012) 225 final, s.3.2

there is action planned, especially in the financial services where current legislation including the UCPD and the Consumer Credit Directive should be evaluated as to how well they protect vulnerable consumers.⁸⁵

In conclusion, despite the focus of EU Consumer Policy on the internal market, there is also space for a social dimension. The impact of social justice considerations has remained limited and often may not translate to concrete measures. Especially in relation to consumer vulnerability, there may be at present enough consensus to take further measures.

3. The average consumer in CJEU case law

The section above detailed some of the key developments of consumer policy in the EU, focusing on legislative and policy developments. The Court of Justice of the European Union (CJEU) also promoted the internal market and consumer protection through its judgments. The CJEU has also long engaged with the issue of the image of the consumer. This section will review the case law of the CJEU in order to illuminate how the court has approached the issue of employing a consumer benchmark and in particular, how the CJEU developed the concept of the average consumer. The average consumer as developed by the CJEU, has been adopted in the UCPD. This section will also look at the few exceptions where the CJEU has dealt with vulnerable consumers.

This critical review of the case law provides a necessary background for evaluating the average consumer and the vulnerable consumer standard in the UCPD. The case law reviewed here is particularly important as there has been no CJEU case law on the UCPD that elaborates on how the average consumer or the vulnerable consumer are to be interpreted. This is not an exhaustive review of the case law, which is extensive; instead the most relevant cases for understanding the consumer standard have been selected. The case law has been divided into three categories: (a) free movement, (b) misleading advertising, and (c) trademarks. Following these is a thematic analysis of the case law.

⁸⁵ Consumer Agenda 2012, s.4.4

3.1. Free Movement

Consumer protection has been justified and advanced by the Court through the free movement of goods and services provisions in the Treaty, not least because until the Maastricht Treaty there was no other legal basis for consumer protection in the Treaty. However, the relationship between free movement and consumer protection is interactive. Consumer protection on a European level could not have been promoted without the use of the free movement provisions but, at the same time, free movement of goods and services could not have been made possible without establishing common rules for consumers.⁸⁶

3.1.1. Cassis de Dijon

Cassis de Dijon has been one of the most influential cases in EU law, and particularly important for consumer law.⁸⁷ Rewe Zentral wanted to import the French liqueur ‘Cassis de Dijon’ to the German market. The German authority ‘Bundesmonopolverwaltung’ (Federal Monopoly Administration for Spirits) rejected the application based on the German law on monopoly in spirits which required that fruit liqueurs, such as Cassis de Dijon have a minimum alcohol content of 25%. Cassis de Dijon did not fulfil that requirement as it only had a 15-20% alcohol content.

Rewe Zentral argued that the prohibition of import of Cassis de Dijon, which was successfully marketed and sold in other Member States, such as France, contravened what is now art.34 TFEU on freedom of movement of goods. The preliminary questions referred to the CJEU by the German Court were: (a) whether the minimum alcohol content for liqueurs set by the German authority constituted a quantitative restriction to trade according to art.37 TFEU⁸⁸, and (b) whether the alcohol content restriction contravened art. 37 TFEU.

The German government claimed the rule in question was for the protection of consumers from unfair commercial practices as well as for the protection of public health. It argued that less alcoholic drinks could increase tolerance to alcohol compared

⁸⁶ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Consumer policy strategy 2002-2006’ [2002] COM 208 final, 2.

⁸⁷ Case C-120/78 *REWE-Zentral-AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

⁸⁸ For ease of reference the numbering in the TFEU will be used.

to the more highly alcoholic ones. The German government also argued that allowing for lower alcohol content would give the companies with the lower alcohol content an unfair advantage in the market. This last statement over the unfair advantage in the market was an argument justified under protection of consumers from unfair commercial practices. Yet it is easy to see that it was not so much the consumers that would be harmed, but rather the national industry. The Court was not convinced by the arguments of the German government and ruled that the minimum alcohol requirement did not serve a purpose of general interest that would overrun the fundamental rule of freedom of movement.⁸⁹ Prohibition was not necessary as the same effect could have been achieved by the less intrusive measure of providing proper labelling, so that the consumer had all the relevant information on alcohol content.⁹⁰

The judgement in *Cassis de Dijon* is important for two main reasons. The first one is that it laid down the standard for compatibility of national law provisions with the free movement of goods, saying that they should be ‘necessary in order to satisfy mandatory requirements’. Consumer protection was included as one of these mandatory requirements, thus including consumer protection to the objectives of the then European Community, even though it was not yet included in the Treaty as such. Before *Cassis de Dijon* the only way to take consumer protection into account would be via art.36 TFEU which allowed prohibitions or restrictions to import ‘for the protection of health and life of humans, animals or plants’, while this judgement expanded it to include the economic interests of the consumer.⁹¹ Secondly, *Cassis de Dijon* provided an interesting insight to the image of the consumer according to the Court. The Court considered that the equivalent, less intrusive measure of labelling would be more appropriate than prohibition. The consumer that is adequately protected by the provision of suitable information is a consumer able to process information given and take care of their own interests.⁹²

⁸⁹ *Cassis de Dijon*, para 14.

⁹⁰ *Cassis de Dijon*, para 13.

⁹¹ R Schulze, H Schulte-Nölke and JM Jones (eds), *A Casebook on European Consumer Law* (Hart Publishing 2002) 37.

⁹² Schulze, Schulte-Nölke and Jones (2002) 37.

3.1.2. Commission of the European Communities v Federal Republic of Germany (Beer Purity)

Case C-178/84 concerned the German law on beer duty set out the ingredients and manufacturing rules for a beverage to be able to be named beer.⁹³ German law enacted a total ban on the marketing and on the use of the term ‘beer’ for beverages that were not brewed in accordance with the German law. The German government tried to justify this rule on grounds of consumer protection, stating that the aim of the German law was the protection of the health of consumers, since it did not allow additives in beer. Following the judgement in *Cassis de Dijon*, the Court decided that the German law was incompatible with freedom of movement of goods. In relation to consumer behaviour, the judgement pointed out that:⁹⁴

Consumers’ conceptions which vary from one Member State to the other, are also likely to evolve in the course of time within a Member State. The establishment of a common market is, it should be added, one of the factors that may play a major contributory role in that development

The fact that consumers of different Member States may have divergent conceptions should not become a justification for measures that perpetuate such divergence. Ultimately, the internal market and the legislative framework that supports it would foster greater uniformity in attitudes of consumers. Today, that market integration has progressed, it may become increasingly difficult to argue for differences in conceptions of consumers of different Member States. This is important for assessing the effect of ‘social, cultural and linguistic factors’ that were introduced in the *Estée Lauder* case examined below.

3.1.3. Drei Glocken

Another such free movement case was the *Drei Glocken* case.⁹⁵ Drei Glocken, a German pasta manufacturer exported its products to Italy, which were made from a mixture of common wheat and durum wheat. Drei Glocken received a penalty from the Italian

⁹³ C-178/84 *Commission of the European Communities v. Federal Republic of Germany* [1987] ECR 1227

⁹⁴ *Beer Purity*, para 32.

⁹⁵ Case C-407/85 *3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECR 4233.

authority Unita Sanitaria Locale, since Italian law required that only durum wheat would be used for the manufacturing of pasta. The Court was asked whether the restrictions on the import of pasta contravened art.36 and art.42 TFEU. The Court decided that the Italian law was incompatible with the above articles of the Treaty, since there was an available measure that was less restrictive to trade, which was using the label ‘pasta made from durum wheat meal’ to signify the difference between the two kinds of pasta. The Court assumed that the consumer will benefit from more choice and is in fact able to easily distinguish amongst the different kinds if provided with the right kind of information.

It is interesting to look at the opinion of the Advocate-General Mancini on the case, where he cautioned against the application of a ‘recipe’ in all instances, as at the time the *Drei Glocken* case was compared to the *Commission v. Germany beer purity law* case.⁹⁶ He argued that allowing the import of pasta not exclusively made from durum wheat could have severe consequences for agriculture and subsequently the European economy. However, what is most interesting was that the AG argues for the consideration of ‘cultural reasons’ as durum wheat is the only one that allows for ‘al dente’ pasta, and therefore served an aesthetic function and allowed for the production of a superior product, whose quality was taken for granted amongst Italians and was spreading across Europe.⁹⁷ Even though the view of the AG was not followed by the Court it showcased the counter-argument against the deregulation advocated by the Court as well as the Commission.

3.2. Misleading Advertising

The following cases have been classified here as misleading advertising cases mainly due to their facts. Their legal basis has been freedom of movement of goods, the Misleading Advertising Directive or a combination thereof.

3.2.1. Yves Rocher

In the Yves Rocher case, Yves Rocher a French cosmetics company distributed a prospectus in Germany using the heading ‘Save up to 50% and more on 99 of your

⁹⁶ Case C-407/85 *3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECLI:EU:C:1988:197, Opinion of AG Mancini, 4246, 4248.

⁹⁷ *3 Glocken* Opinion of AG Mancini, 4255.

favourite Yves Rocher products’.⁹⁸ The German first degree court found Yves Rocher to breach para. 6e (2)(1) of the German UWG that prohibited price comparison advertising when the display was eye-catching. The appeal court send a preliminary reference asking whether the German rule on prohibiting ‘advertisements relating to prices in which there is an eye-catching display of then new price and reference is made to a higher price shown in an earlier catalogue or sales brochure’ contravened art. 36 TFEU.

What is interesting about the German rule is that the emphasis was placed on the display being ‘eye-catching’. Price comparisons in general were allowed but not the ones that were designed to draw the attention of the consumer. This shows that the German law did consider that consumers can be influenced not only by the information itself but also by how is was framed. This is consistent also with the behavioural findings on the ‘framing’ effect.⁹⁹

The Court stated that consumer protection or fair trading can be used to justify national measures that present obstacles to free movement of goods, provided that they are proportionate. Price comparison advertisements were seen as detrimental to the consumer, as ‘it is particularly easy to deceive consumers, since they are generally not in a position to verify the comparison between the old and the new prices’.¹⁰⁰ The Court predictably found the measure to be precluded by art. 36 TFEU because ‘information and protection of the consumer can be ensured by measures which are less restrictive of intra-community trade’.¹⁰¹ This outcome comes as no surprise as once again the CJEU asserted that consumer protection has to be weighed against any restriction to the internal market. The Court, correctly, recognised that it cannot be expected for the consumer to verify the prices featured in a price comparison advertisement.

⁹⁸ Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH* [1993] ECR I 2384.

⁹⁹ For a review of the framing effect see Ch.1, s. 3.2.1.4.

¹⁰⁰ *Yves Rocher*, para 14.

¹⁰¹ *Yves Rocher*, para 18.

3.2.2. Commission v Germany (Hollandaise)

This case concerns Directive 79/112 on the labelling of foodstuff, as does Adolf Darbo featured below. It showcases how the CJEU has defined which behaviour the consumer is expected to exhibit.

In *Hollandaise*, German law required that, in order to be marketed in Germany, foodstuffs containing an ingredient which is not in conformity with the traditional German recipe must carry a trade description with an additional statement indicating that the substance in question has been used, even if that substance is already included in the list of ingredients.¹⁰² The Commission argued that this law breached art.36 TFEU. The CJEU in its judgement adopted the view of the Advocate General that:

Consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 6 of the Directive. Even though consumers may sometimes be misled, that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue.

The Court found that consumers were sufficiently protected without the need to include an additional statement, if the substances were included in the list of ingredients. The German law was found to breach art.36 TFEU

Here the CJEU revealed the image of the consumer as one that is diligent in reading the information provided on the labels. There is no need to draw attention to it, as the expectation is that the consumer will read the label and is able to understand the information provided. The focus of the judgement was not in the abilities of consumers to locate and understand information, but rather to show that there was no real risk of harm to the consumer, certainly not to the extent of justifying a barrier to trade. This case follows the stance of the Court in *Cassis de Dijon*, *Beer Purity* and *Drei Glocken*. What might have made the scale tip towards the internal market, rather than consumer protection was that there was in fact minimal risk to consumers, unless one would consider the use of a different recipe sufficient harm. When there was greater risk for

¹⁰² Case C-51/94 *Commission of the European Communities v Federal Republic of Germany* [1995] ECR I-03599.

the consumer, as in *Buet* examined below, the CJEU was receptive to consumer protection.

3.2.3. Clinique

The *Clinique* case revolved around the use of the name ‘Clinique’ for the marketing of cosmetic products in Germany.¹⁰³ Cosmetic company Clinique had marketed its products under the name ‘Clinique’ for years, except in Germany, where the name ‘Linique’ was used, as it was considered that under German competition law the use of the name ‘Clinique’ would mislead consumers into thinking these were medicinal products.

The Court ruled that the national law that precluded the use of the name ‘Clinique’ was incompatible with free movement of goods and could not be justified in light of protecting consumers or the health of humans.¹⁰⁴ The CJEU considered that the products in question were sold only in cosmetics departments and were marketed as cosmetic products and as such, did not pose a danger to consumer health. The court ruled that any medical connotations of the word were not sufficient to mislead consumers to the extent that would justify prohibition.¹⁰⁵ The CJEU commented again on the possible differences, linguistic or otherwise, between the consumers of different Member States in *Estée Lauder* examined below.

3.2.4. Mars

The Mars case revealed the standard of the expectations of the consumer in the case law of the CJEU.¹⁰⁶ In that case Mars ice cream bars were marketed in Germany (and all over Europe) with wrappers marked ‘+10%’ The plaintiff argued that consumers were led to believe that the increase in the size of the product corresponded to the coloured part of the wrapper and not to the 10% stated, and therefore the practice was misleading.¹⁰⁷

¹⁰³ Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*, [1994] ECR I 3A.

¹⁰⁴ *Clinique*, para 20.

¹⁰⁵ *Clinique*, para 23.

¹⁰⁶ Case C-470/93 *Verein gegen Umweltschaden in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I-1923.

¹⁰⁷ *Mars*, para. 8.

The Court disagreed stating that ‘the reasonably circumspect consumer may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase.’¹⁰⁸ The Court did not deny the possibility that some consumers would be misled by this packaging, but it argued that the ‘reasonably circumspect’ consumer would not be.

It seems like the Court was not willing to accept limitations in freedom of movement of goods for what it considers to be the possible misleading of a minority of ‘careless’ consumers.¹⁰⁹ Therefore the interests of the few are sacrificed for the interests of the many, as forwarding the internal market is assumed to be beneficial for the majority of consumers. The ‘reasonably circumspect’ consumer foreshadowed the average consumer formula that the Court would adopt later on in *Gut Springenheide*, which would include the characteristic of circumspection.

3.2.5. *Gut Springenheide*

Gut Springenheide has been an influential case for the image of the consumer in European consumer policy, as it is the one where the ‘average consumer’ made his first appearance.¹¹⁰ *Gut Springenheide* was a company that marketed eggs under the description ‘6 Korn-10 frische Eier’ (six grain-10 fresh eggs). Each pack of eggs came with a note explaining the benefits of this feed on the quality of the eggs. The case centred around whether the inscription ‘six grain-10 fresh eggs’ could mislead a significant proportion of consumers to think that this was the only feed of the hens and that the eggs had particular characteristics because of that.¹¹¹

The questions referred to the Court are indicative of the debate around the consumer standard:¹¹²

1. In order to assess whether, for the purposes of Article 10(2)(e) of Regulation (EEC) No 1907/90, statements designed to promote sales are likely to mislead the purchaser, must the actual expectations of the consumers to whom they

¹⁰⁸ *Mars*, para.24.

¹⁰⁹ Weatherill (2007) 127.

¹¹⁰ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung* [1998] ECR I-04657.

¹¹¹ *Gut Springenheide*, para.10.

¹¹² *Gut Springenheide*, para.15.

are addressed be determined, or is the aforesaid provision based on a criterion of an objectified concept of a purchaser, open only to legal interpretation?

2. If it is consumers' actual expectations which matter, the following questions arise: (a) Which is the proper test: the view of the informed average consumer or that of the casual consumer?, (b) Can the proportion of consumers needed to prove a crucial consumer expectation be determined in percentage terms?

3. If an objectified concept of a purchaser open only to legal interpretation is the right test, how is the concept to be defined.

The referring German court in essence asked whether the consumer standard was a normative, purely legal standard that could be assessed without the use of empirical evidence, or a standard based on actual expectations of consumers, that would need to be verified empirically. The latter was the practice in German courts that would accept empirical evidence to establish whether a practice was misleading. A practice would usually be found to be misleading if it would mislead around 10-20% of consumers.¹¹³

In the debate between a normative and an empirical standard the CJEU gave a balanced response. The Court stated that the average consumer is one 'who is reasonably well-informed and reasonably observant and circumspect'.¹¹⁴ This definition of the average consumer was repeated by the Court in later case law and then went on to be adopted verbatim in recital 18 of the UCPD as the test for average consumer.¹¹⁵

The Court went on to elaborate on how the test is to be applied stating that in most cases the national Courts will be able to assess the presumed expectation of a consumer without ordering an expert's report or a consumer research poll.¹¹⁶ From this it seems like the average consumer is a normative standard that can be assessed by judges without the assistance of empirical evidence. After all, it is about the 'presumed' expectations of the average consumer rather than the actual expectations.

¹¹³ For an explanation of the German Court practice see Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*, [1994] ECLI:EU:C:1993:823, Opinion of AG Gulman, para 2.

¹¹⁴ *Gut Springenheide*, para 37.

¹¹⁵ UCPD, rec.18.

¹¹⁶ *Gut Springenheide* para 31.

However, the CJEU did leave the possibility open for national courts to seek guidance in particularly difficult cases by using consumer research polls or expert's reports.¹¹⁷ National courts have the discretion to decide when to employ empirical evidence, as well as decide what percentage of misled consumers is 'sufficiently significant' to decide to prohibit the practice.¹¹⁸ Yet, according to the CJEU, the empirical evidence is made to be used only as guidance for the national court to decide, meaning that a case should not be decided only on the grounds of empirical evidence.

So the nature of the average consumer standard remains ambivalent. While it is primarily a normative standard, it is up to the national courts to decide, when and to what extent to use empirical evidence. It was significant that the door for using empirical evidence stayed open. This is true especially for vulnerable consumers and aggressive practices. Empirical evidence allows for considering dimensions and parameters that are not part of the image of the consumer as developed by the CJEU, such as the consumer's reaction to pressure. *Gut Springenheide* is quoted for providing the definition of the average consumer; what is equally important is that it provided the method for assessing consumer behaviour. That method is for judges to assess the behaviour of the average consumer by themselves, and only use empirical evidence when necessary. This might look like a victory for the normative consumer standard, but it is a window of opportunity for introducing empirical evidence for assessing consumer behaviour, not to replace the judges' opinion but to inform it. This is the approach taken in this thesis.

3.2.6. Adolf Darbo

Adolf Darbo is similar to *Hollandaise* featured above in s.3.2.2., the main difference between them is that *Adolf Darbo* refers to the average consumer, as identified in *Gut Springenheide*, while the earlier *Hollandaise* case mentioned only the 'consumer'. Yet the difference is only in name, as the expected behaviour remains the same even after the introduction of the 'average consumer'.

In *Adolf Darbo*, an Austrian jam company, Darbo, produced strawberry jam using the gelling agent pectin. The German Regional Court of Köln held that Darbo should not be allowed to use the term 'naturrein' ('naturally pure') as it contained

¹¹⁷ *Gut Springenheide* para 35.

¹¹⁸ *Gut Springenheide* para 36.

pectin, which is an additive.¹¹⁹ The use of the term ‘naturrein’ was considered likely to mislead consumers as pectin was used and there were traces of some other substances, namely lead, cadmium and pesticides.

The question referred to the court was whether art.2(1)(a)(i) of Directive 79/112/EC on labelling of foodstuffs precluded the use of the term ‘naturally pure’ to describe a jam that contains pectin and other residues. This time the CJEU made use of the term average consumer, which was already established in *Gut Springenheide*. The Court decided that:¹²⁰

an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term ‘naturally pure’ used on the label simply because the jam contains pectin gelling agent whose presence is duly indicated on the list of its ingredients.

So the average consumer is one that will not merely glance at the label of a product, but one who will make the effort to read the list of ingredients and will be aware of the fact that there might be claims made on the label that do not necessarily correspond to the list of ingredients. What is interesting is that there is also a de minimis principle. Even if the consumers would be misled by the use of the term ‘naturrein’ the risk would be minimal and one that would not suffice to justify a barrier to the free movement of goods.¹²¹ It is not enough that the consumers may be given information, but there also has to exist a possibility of detriment to them (in this case a detriment to their health from the use of the additives.)

Adolf Darbo shows the continuity of the image of the consumer in the CJEU case law. The average consumer in this case, is not different from the consumer in *Hollandaise* or indeed, in *Cassis de Dijon*. This is a consumer that is active and able to protect his own interests, one that is not easily misled. Still, the CJEU deals with low-risk cases, so even if real life consumers would be less attentive than the average consumer, they do not risk any harm to their health and a very minor one to their economic interests.

¹¹⁹ Case C-465/98 *Verein gegen Unwesen in Handel und Gewerbe Köln Ev v Adolf Darbo AG* [2000] ECR I-2321.

¹²⁰ *Adolf Darbo*, para 22.

¹²¹ *Adolf Darbo*, para. 28.

3.2.7. Estée Lauder

In the German *Estée Lauder* case, the cosmetics company Estée Lauder took action against Lancaster, a competing cosmetics company, arguing that the use of the word ‘lifting’ in a face cream of the latter was misleading.¹²² The question was whether, according to EU law, the import and marketing of a cosmetic product using the word ‘lifting’ in its name, could be prohibited as the word could be misleading to the consumers of that Member State, keeping in mind that the same product was lawfully marketed in other Member States.¹²³

The Court stated that the average consumer would not be misled by the use of the term ‘lifting’ for a cream as he ought to not expect such a cream to have lasting effects.¹²⁴ However, the CJEU left it to the national court to decide if that was the case. The most important innovation of this case is that the court recognised that ‘social, cultural and linguistic factors’ could be used to justify that the term ‘lifting’ can mean something different to German consumers than consumers from other Member States.¹²⁵ The same phrasing was incorporated in the UCPD in rec.18 for assessing the behaviour of the average consumer and will be examined in greater detail in s. 4.1.1.

3.2.8. Buet

It appears that the Court in most cases has struck down national protectionist measures for the benefit of the internal market. However, there have been instances where the Court has allowed national measures that may restrict freedom of movement of goods. These exceptions show that the Court is not as rigid as some may have feared and can be convinced to accept national measures provided that convincing arguments are put forward.¹²⁶

Buet and *A-Punkt Schmuckhandels* share some common elements: a) they concern aggressive practices, and b) their outcome was that the measure was justified in order to protect consumers. These two cases are particularly important for this thesis

¹²² Case C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] ECR I-117.

¹²³ *Estée Lauder*, para 22.

¹²⁴ *Estée Lauder*, para 30.

¹²⁵ *Estée Lauder*, para 29.

¹²⁶ Weatherill (2007) 133.

as it examines the consumer standards in relation to aggressive commercial practices. They allow the examination of the view of the CJEU towards aggressive commercial practices. They also serve as exceptions to the mainstream approach of the CJEU as seen in the cases above. This is why they are examined here one after the other and not according to their chronological order, as the rest of the case law featured here.

The *Buet* case concerned door-to-door selling of educational material in France.¹²⁷ French law prohibited canvassing specifically for the sale of educational material. The Court ruled that the prohibition of canvassing in private dwellings in relation to educational material in French law was justified for protecting consumers.

Even though the measure was a total ban on canvassing for sale of educational material, the Court found it to be proportionate, as there was no other measure that would be less restrictive to trade for obtaining the same goal of consumer protection. This decision signified a departure of the Court from its usual stance of striking down national measures that restrict trade. It is worth looking at the reasoning of the Court for deciding that the measure was justified and proportionate.

The Court described the practice of canvassing at private dwellings as one that ‘exposes the potential customer to the risk of making an ill-considered purchase’.¹²⁸ Interestingly, the term ‘informed decision’ which was adopted for the UCPD was not used in this case.¹²⁹ Without wishing to attribute too much importance on the choice of the term, it better reflects the element of surprise involved in door-to-door selling, which is not focused on information.

AG Tesouro in his opinion offers a very helpful explanation of the problems arising from canvassing at private dwellings as a selling technique.¹³⁰

A typical *effect of surprise* by such an approach can be exploited with great success by a skilful and experienced salesman and furthermore the consumer is exposed to a serious risk of fraud for he is taken quite unawares and is often led, especially if he is *one of those who for various reasons may be more open to influence*, such as the elderly, housewives or immigrant daughters, to sign

¹²⁷ Case C-382/87 *Ministere Public v Buet* [1989] ECR 1235.

¹²⁸ *Buet*, para 12.

¹²⁹ UCPD, art.2(e).

¹³⁰ Case C-382/87 *Ministere Public v Buet*, [1989] ECR I 1240, Opinion of AG Tesouro, para 1.

undertakings, the real scope of which eludes him, for goods or services which are often insignificant or in any event much less interesting than he was led to believe. Not infrequently, moreover, *the consumer, while appreciating the disadvantageous nature of the transaction proposed* by the salesman who arrives unexpectedly at his home, *enters out of timidity into undertakings which he would not accept in other circumstances.* (emphasis added)

This paragraph captures several of the characteristics typical of aggressive commercial practices, such as canvassing. It recognises that vulnerability is contextual and depends on a number of factors, some of which relate to characteristics of the consumers. Some categories of consumers are singled out, namely the elderly, housewives and immigrant daughters.

It is not clear why these categories are more vulnerable to the practice. It could be merely because they are more likely to be at home, and thus exposed to the practice.¹³¹ If that is the case, then would e.g. a self-employed person working from home also be considered vulnerable? The answer is not clear, though it seems the person working from home would be considered to be closer to the ideal of the average consumer. The choice of consumer categories reveals a view guided by certain stereotypes. What is it that makes immigrant daughters more vulnerable than immigrant sons? Housewives more vulnerable than househusbands?

To avoid such connotations, it would be best to consider the underlying factors of vulnerability and phrase them in a neutral manner. In this case, it could be the likelihood to be home or in some cases the lack of social contact e.g. a person who does not often receive visitors may be more tempted to answer the door. This is an example showing that a shift of attitudes towards vulnerability is necessary in order to move away from stigmatising stereotypes and identify the factors that make certain consumer more vulnerable.

Another important point for aggressive practices, is that it is made clear that this is not a problem relating to information. On many occasions, consumers may be aware of the fact that they are entering a transaction that is not favourable to them, and one that they would not otherwise have entered, save for the pressure applied as a result of the practice. Timidity of consumers is put forward by the AG as a reason for falling

¹³¹ Duivenvoorde (2015) 179.

prey to the practice. This shows a recognition of the special character of some aggressive practices. Canvassing traders exploit the social convention of being polite with people of avoiding confrontation, especially in one's house to put pressure on consumers. This is telling of the emotional dimension of aggressive practices which is further analysed on the chapter on aggressive commercial practices.¹³²

The Court pointed out that normally there is no need for a total ban on canvassing, as consumers can be adequately protected by the less restrictive mean of having the right to cancel a contract.¹³³ What made the difference in this case was that the canvassing was for the sale of educational material. More specifically, because of the particularly vulnerable target audience for educational material, which are 'people who are behind with their education and are seeking to catch up'¹³⁴ This is neutral phrasing which relates to the type of goods sold rather than the type of practice and is preferable to the one used by AG Tesauro above.

Consumers that are behind with their education were considered particularly vulnerable for the following reasons: (a) it was difficult for them to assess the quality of the product, as it is not a 'consumer product in daily use' and (b) there was a high potential of harm, harm that would be not only financial and harm that would be long-lasting as their chances of obtaining further training would be harmed.¹³⁵ The first reason does not appear to be limited to consumers that are behind with their education. It depends on the type of good and any consumer would face the same problem of not being able to inspect the quality of the product beforehand. The difference with consumers who are not behind with their education is that they would simple not be interested in purchasing the product in question.

In the second reason, the Court recognises that consumer detriment is an important aspect of vulnerability. The harm that comes to consumers from the practice goes beyond the immediate financial harm of the value of the product. It extends to the impact of the practice to their education and even their employment prospects. One might doubt that one purchase would have such far-reaching consequences, but

¹³² See Ch.4, s.4.2.1.2.

¹³³ *Buet*, para.12.

¹³⁴ *Buet*, para 13.

¹³⁵ *Buet*, para 14.

certainly, were it not for the practice, consumers could have spent their limited resources better. As has been highlighted in Chapter 2, detriment is an important manifestation of vulnerability.¹³⁶ Unfortunately, this assessment of vulnerability that considers the potential harm, both economic and non-economic to the consumer, was not incorporated to the vulnerable consumer standard of the Directive, as will be seen below.

Buet showcases that the Court is willing to make exceptions to bringing down barriers to trade when it comes to the protection of vulnerable consumers, as it found the general right to cancellation justified. The Court considered the type of goods, the nature of the practice, the characteristics of the target consumer and the potential detriment for the consumer. It is encouraging that the Court assessed a range of factors for assessing consumer vulnerability and placed consumer protection over internal market considerations.

3.2.9. A-Punkt Schmuckhandels

A case similar to *Buet* is the Austrian *A-Punkt Schmuckhandels v Claudia Schmidt* which once again concerned door-to-door selling, this time of jewellery.¹³⁷ Austrian law prohibited the sale of jewellery in private dwellings as well as promotional parties in private homes. Claudia Schmidt a jewellery trader from Germany canvassing in private dwellings in Austria was sued by a competitor A-Punkt Schmuckhandels for breach of the Austrian law. The question to the Court was whether the Austrian law that prohibited the sale of jewellery by way of calling was a restriction to free movement of goods.

The Court decided that a provision such as the one in question that applied to all traders and to all products both domestic and foreign was not prohibited as contrary to freedom of movement of goods provisions. It did leave it to the national Court to determine whether the measure was justified and proportionate and whether it limited access to the market for products from other Member States. The Court allowed this measure since it recognised that it was put in place to protect consumers from a specific marketing practice such as door-to-door selling and did not aim to restrict trade from

¹³⁶ See Ch.2, s.4.2.3.

¹³⁷ Case C-441/04 *A-Punkt Schmuckshandels v Claudia Schmidt* [2006] ECR I-2095.

other Member States.¹³⁸ The special circumstances of the practice of door-to door selling were considered as the judgement mentions that in these circumstances there is a higher risk of the consumer being cheated due to lack of information as well as psychological pressure.¹³⁹

In contrast to *Buet*, in *A-Punkt Schmuckhandels*, there was no mention of vulnerable consumers being targeted. Instead, the focus was on the nature of the practice of canvassing at private homes, that justifies the potential need for additional protection to consumers. This means that the practice would have an effect on the average consumer and there was no need to invoke vulnerable consumers. *A- Punkt Schmuckhandels* also does not mention the average consumer standard either as it leaves it up to the national court to decide whether the measure in question prevents access to the market of products from other Member States.

3.3. Trademark law

As shown above the average consumer test was first created in the context of free movement and misleading advertising cases. Then the Court employed it in trademark cases as well, and it is in these cases where the characteristics of the average consumer were further elaborated on by the Court.¹⁴⁰ Consumer protection is one of the objectives of trademark law.¹⁴¹ A common criticism of modern trademark law is that it has departed from its consumer protection roots.¹⁴² However, McKenna doubts that consumer protection was ever a core objective of trademark law and draws a distinction between trademark law ultimately benefitting consumers and consumers being beneficiaries of trademark law.¹⁴³

¹³⁸ *A-Punkt Schmuckhandels*, para 31.

¹³⁹ *A-Punkt Schmuckhandels*, para 29.

¹⁴⁰ Jennifer Davis, 'Locating the Average Consumer : His Judicial Origins , Intellectual Influences and Current Role in European Trade Mark Law' [2005] *Intellectual Property Quarterly* 183.

¹⁴¹ Graeme B Dinwoodie and Dev S Gangjee, 'Image of the Consumer in EU Trade Mark Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 370.

¹⁴² McKenna engages with these criticisms, see Mark P McKenna, 'The Normative Foundations of Trademark Law' (2007) 82 *Notre Dame Law Review* 1839 part IV.

¹⁴³ McKenna (2007) 1898–1899.

It goes beyond the scope of this thesis to set out all the commonalities and differences between trademark law and consumer law. What is important is to bear in mind that even though the average consumer standard is employed also in trademark law, the conclusions drawn from trademark case law and commentary may not always be transferable to consumer law, due to the at times divergent objectives. That being said, trademark cases have been used to illustrate the meaning of the average consumer in the context of the UCPD, as misleading advertising cases have been used in the context of trademark.¹⁴⁴ This reinforces the idea that the average consumer is a uniform concept, whether it is being applied in the context of misleading advertising, trademark law or unfair practices law.

This section examines some of the key cases that show how the average consumer has been interpreted in trademark law. In trademark law, the level of knowledge and attentiveness of the average consumer varies, according to context. The context refers to the type of goods, as well as the target audience of different types of goods. It seems like the average consumer is approached differently depending on whether the subject is distinctiveness of the trademark or infringement. According to Dinwoodie and Gangjee this can be partially attributed to lawyers who argue according to their interest: in distinctiveness cases the average consumer is argued to be particularly astute while in infringement cases the average consumer is inattentive.¹⁴⁵

3.3.1. Lloyd Schuhfabrik

The *Lloyd* case was about the likelihood of confusion for consumers between the trademarks of two shoe companies.¹⁴⁶ In *Lloyd* the Court commented on the use of surveys as evidence stating that referring to percentages on the degree of recognition of a mark from specific parts of the public (aka the targeted consumers of the product) is not enough to determine whether a mark has distinctive character. The Court made this remark in light of the use of statistics in German case law which readily accepted surveys as proof of the consumers' view, a tactic criticised on an EU level and

¹⁴⁴ See for example, Incardona and Poncibò (2007); Christian Twigg-Flesner et al., 'An Analysis of the Application and Scope of the Unfair Commercial Practices Directive' (2005); Davis (2005).

¹⁴⁵ Dinwoodie and Gangjee (2016) 368.

¹⁴⁶ Case C-342/97 *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel* [1999] ECR I-3830.

discouraged in the text of the UCPD.¹⁴⁷ The Court adopted the view of the average consumer provided in the earlier case of *SABEL v Puma* that ‘the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.’¹⁴⁸ Furthermore, ‘the average consumer only rarely has a chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in mind.’¹⁴⁹

These remarks reveal the CJEU’s view of the average consumer as someone who cannot retain all information provided and has varied degrees of attention, in other words the average consumer is not perfect. This provides an image of the consumer that contrasts with the Court’s ruling in *Mars*, where it was considered that the ‘circumspect’ consumer would not be misled by the larger than 10% wrapper of the candy bar into thinking it was increased more than 10%. This could be attributed to the different objectives between trademark law and consumer policy. For free movement of goods cases, such as the *Mars*, it can be argued that the main focus was the promotion of the internal market rather than the protection of consumers.

3.3.2. Vitaly Lissotschenko

The level of attention of the average consumer is variable and in certain contexts expectations of the ‘average consumer can be quite high. *Vitaly Lissotschenko v OHIM* answers the question whether the average consumer can refer to a group which has specialised knowledge.¹⁵⁰ The case concerned the possibility of registering the term ‘LIMO’ as a trademark for lasers for medical and non-medical purposes, the term ‘LIMO’ being short for Laser Intensity Modulation.

The Court had to decide on which was the relevant public; was it specialist consumers or the average consumer. The applicants argued that the relevant public will not make the connection between the term ‘LIMO’ and Laser Intensity Modulation’

¹⁴⁷ Hans-W Micklitz, ‘The General Clause on Unfair Practices’ in Geraint Howells, Thomas Wilhelmsson and Hans-W Micklitz (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006) 111.

¹⁴⁸ Case C-251/95 *SABEL BV v Puma AG* [1997] ECLI:EU:C:1997:528.

¹⁴⁹ *Lloyd Schuhfabrik Meyer*, para 26.

¹⁵⁰ Case T-311/02 *Vitaly Lissotschenko and Joachim Hentze v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2004] ECLI:EU:T:2004:245.

and therefore there was no need to leave the sign free.¹⁵¹ The Court found that the relevant public in this case consisted of professionals, which as specialist consumers were considered to be ‘well-informed, observant and circumspect’.¹⁵²

Subsequently, the target consumer would be able to recognise the term ‘LIMO’ as an abbreviation for Laser Intensity Modulation and consider it as a term describing the purpose of the goods.¹⁵³ It is interesting that the Court of First Instance attributes the characteristics of the average consumer as seen in *Gut Springenheide*, to the specialist consumer. This shows that less is expected of the average consumer, a consumer with no specialised knowledge on the product.

3.3.3. Madaus

While *Vitaly Lissotschenko* concerned specialist consumers; in *Madaus AG v OHIM*, there was the opposite issue of whether the average consumer could be ‘inattentive’.¹⁵⁴ The case concerned pharmaceutical products, more specifically whether there was likelihood of confusion for the average consumer between the word sign ‘ECHINAID’ and the word ‘Echinacea’, the latin term for a plant used for pharmaceutical purposes. The applicant argued that the level of attention of the average consumer was not very high when buying non-prescription medicine for mild disorders.¹⁵⁵

The Court differentiated the behaviour of the average consumer, according to the category of goods, agreeing with OHIM.¹⁵⁶ For pharmaceutical products, consumers are assisted in their choice by highly qualified professionals. For herbal medicinal products, the Court adopted the average consumer who is ‘reasonably well-informed, observant and circumspect’. It even went a step further to clarify that consumers that are interested in herbal medicinal products can be assumed are taking ‘particular care of their health’ and are displaying a ‘high degree of awareness and attention’ and are thus less likely to be confused or make a mistaken choice.¹⁵⁷ The Court considered the

¹⁵¹ *Vitaly Lissotschenko*, para 15.

¹⁵² *Vitaly Lissotschenko*, para 28.

¹⁵³ *Vitaly Lissotschenko*, para 41.

¹⁵⁴ T-202/04 *Madaus AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2006] ECLI:EU:T:2006:106.

¹⁵⁵ *Madaus AG v OHIM*, para 19.

¹⁵⁶ *Madaus AG v OHIM*, para 33.

¹⁵⁷ *Madaus AG v OHIM*, para 33.

group of consumers targeted by the practice. This possibility exists also in the UCPD with the average targeted consumer standard.¹⁵⁸

This case shows that even though in trademark case law it is accepted that the level of attention of the consumer varies according to the product, in practice, the standard that applies is high and the Court of First Instance will not easily accept that the average consumer is not displaying a high level of attention. These remarks relate to the likelihood of confusion for a trademark and not to unfair practices. One could argue that the average consumer would behave differently in relation to unfair commercial practices. However, seen also in conjunction with the case law on free movement and misleading advertising, it is clear that the average consumer is a high standard. The average consumer is expected to exhibit a high level of attention as a default.

3.3.4. Procter and Gamble

Even if a product is aimed at the general population it is not easy to decipher what is expected of the average consumer. In the *Procter and Gamble* case concerning distinguishing trademarks of tablets for washing machines and dishwasher machines, the Court of First Instance employed the familiar average consumer test.¹⁵⁹ It accepted that the level of attention of the consumers varies according to the products, and for everyday goods, such as the cleaning products in question, was not high.¹⁶⁰ The question of the level of attention of the consumer was a question of fact.¹⁶¹ Consequently, the average consumer was not likely to perceive the slightly rounded corners of a square dishwasher tablet as distinctive.¹⁶²

3.3.5. New Look

New Look Ltd v OHIM was a case concerning the clothing sector, another everyday good as the dishwasher tablets but more varied.¹⁶³ The applicant in *New Look Ltd v*

¹⁵⁸ See s.4.2.2. below.

¹⁵⁹ Case C-468/01 *Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2004] ECR I-5141.

¹⁶⁰ *Procter & Gamble Co v OHIM*, para 58.

¹⁶¹ *Procter & Gamble Co v OHIM*, para 53.

¹⁶² *Procter & Gamble Co v OHIM*, para 60.

¹⁶³ Joined Cases T-117/03 to T-119/03 and T-171/03, *New Look Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2004] ECLI:EU:T:2004:293.

OHIM argued that the average consumer in the clothing sector is particularly attentive to trademarks when buying clothes so it is difficult to be misled.¹⁶⁴ The Court of First Instance underlined that indeed the level of attention of the consumer varies according to the goods or service, as noted in *Lloyd Schuhfabrik*, but refused to accept the statement of the applicant on the average consumer being ‘particularly attentive’ in the clothing sector, without further evidence.

The Court mentioned that in the clothing sector, where the goods vary greatly in quality and price, making a blanket assessment is difficult. While the Court accepted that the consumer may be more attentive when buying higher value goods, the same cannot be presumed without evidence for the entire sector.¹⁶⁵ It is interesting that the court considered that an assessment of the level of attention exhibited by the average consumer could not be made without support by facts or evidence, especially as there was a claim on an above average level of attention.

3.3.6. Google France v Louis Vuitton

An interesting development has been that the CJEU has adjusted the average consumer for the online environment. In *Google France v Louis Vuitton* the CJEU referred to the ‘average internet user’.¹⁶⁶ In that case, Google offered a service where advertisers could reserve keywords and buy sponsored ads to be displayed after the results. Louis Vuitton claimed that the sponsored links displayed below the search results for ‘Louis Vuitton’ were infringing their trademark as the links were to counterfeit products. The Court found that an ‘ad does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark’ infringed the trademark.¹⁶⁷ It is not yet clear how the CJEU will develop the concept of the ‘average internet user’ and how he is different from the average consumer.¹⁶⁸ It will be interesting to see whether there will be similar development in unfair commercial practices, meaning whether there will be a need to

¹⁶⁴ *New Look Ltd v OHIM*, para.18.

¹⁶⁵ *New Look Ltd v OHIM*, para 43.

¹⁶⁶ Joined Cases C-236/08 to C-238/08, *Google France SARL v Louis Vuitton Malletier SA*, [2010], ECLI:EU:C:2010:159

¹⁶⁷ *Google France SARL v Louis Vuitton Malletier SA*, para 99

¹⁶⁸ Jennifer Davis, ‘Revisiting the Average Consumer: An Uncertain Presence in European Trade Mark Law’ (2015) 1 Intellectual Property Quarterly 15, 15.

differentiate consumer behaviour in the online context. So far, the CJEU case law on the UCPD has provided very little insight on the interpretation of the average consumer. It remains to be seen whether the CJEU will depart from its current case law when interpreting the average consumer in the context of the UCPD.

3.4. Remarks

This section draws together the main themes arising from the case law examined above. This analysis is done with the purpose of assessing the case law in relation to its impact for aggressive practices and vulnerable consumers.

3.4.1. Varying objectives

The average consumer standard was not developed in the context of legislation designed to protect the consumer. The cases examined above did not have consumer protection as their primary objective. The earlier cases were concerned solely with freedom of movement of goods. Even later, in the misleading advertising cases, usually a case was not brought solely on the basis of e.g. the Misleading Advertising Directive, but also on freedom of movement of goods, as for example in the *Estée Lauder* case.

This can be partially explained by the fact that consumer protection was not an official objective in the Treaties until 1993, however, even in the cases after the Amsterdam Treaty, focus remained on freedom of movement of goods. Consumer protection was a claim brought forward by the Member States to justify a national measure that may have been a restriction to trade, rather than an objective of the law. In other words, the questions referred to the CJEU were not about how to protect consumers, but about whether a national measure inhibited trade in the internal market and whether it could be justified on consumer protection grounds. The promotion of the internal market has been intertwined with EU consumer policy, however, it is not the only consideration.

In trademark law cases, while protecting consumers is one of the objectives, the fact remains that these are cases brought either by competitors that wish to protect their trademark or companies that argue for the distinctiveness of their trademark. Consumer protection may be present, but it is on the periphery. The fact that the internal market was the main consideration for the freedom of movement cases can explain how these cases were decided. Employing a consumer standard that is quite high, opens the way for outlawing measures that are barriers to trade. Conversely, using a consumer who is

inattentive and easily misled as a standard, would mean that stricter national measures would be justified.

The consumer standard employed by the CJEU, both before and after the introduction of the average consumer, allowed the Court to strike down national measures that may have been presented by the Member States as consumer protection measures, while they protected national industry more than consumers.¹⁶⁹ Given this context, where consumer protection has been a secondary consideration in the development of the average consumer, it has been criticised as a consumer standard not well suited to the UCPD.¹⁷⁰ Concerns have also been raised on the use of the average consumer in trademark law, as the different rationales of trademark law are not taken into account.¹⁷¹

3.4.2. Expectations from the average consumer

The cases examined above reveal what kind of behaviour is expected of the average consumer. The UCPD does not protect the consumer who is uninformed and inattentive.¹⁷² The average consumer is a consumer who is active in the marketplace and does not need extensive protection. The case law provides a largely uniform picture of the average consumer. *Buet* and *A-Punkt* that depart from this picture are examined separately below.

The average consumer is expected to read labels (*Adolf Darbo*). If the label contains the relevant information, then the consumer is adequately protected. The CJEU finds labelling to be the preferred option compared to prohibition either of a product or of a practice, as it is less intrusive and poses less of a barrier to trade. The CJEU, on more than one occasions, found that prohibitions of certain practices or use of terms was not proportionate for achieving the aim of consumer protection, as argued by the Member States. The CJEU has consistently held that view from cases dating before the introduction of the average consumer (*Cassis de Dijon*, *Beer Purity*, *Drei Glocken*) as well as after (*Gut Springenheide*, *Adolf Darbo*). The average consumer benefits from greater choice available in the market.

¹⁶⁹ Weatherill (2007) 129.

¹⁷⁰ Howells (2016) 438.

¹⁷¹ Dinwoodie and Gangjee (2016) 365.

¹⁷² Incardona and Poncibò (2007) 27.

Looking at the case law examined above, one might be tempted to think that there are few problems faced by consumers that cannot be resolved with the provision of clear and relevant information. However, that is not the case for aggressive practices. The case law offers little help as to what is to be expected of the consumer when faced with aggressive practices.

There can be many explanations as to why that is the case. It could be because aggressive practices were not regulated on an EU level until the UCPD. It could also point to the fact that aggressive practices pose less of a barrier to cross-border trade, and consequently to freedom of movement of goods. Regardless of the factors that contributed to the lack of cases on aggressive practices, the fact remains, that the case law does not reveal how the average consumer would react to aggressive practices or what is to be expected from him. For this thesis, that focuses on aggressive practices, this is a key issue.

Another issue is the reaction of the average consumer to claims made by the trader. Does he question them and treat them with suspicion or does he readily accept them? The case law reveals the average consumer is expected to exhibit a degree of caution and to examine the information provided in context. The average consumer will not be misled by the use of the word ‘Lifting’ in a face cream to believe the cream has a lasting effect (*Estée Lauder*). Also, the consumer will not think that the coloured part of a wrapper shows the amount of extra product, he will focus on the indicated percentage instead (*Mars*). The average consumer does not take all claims at face value and is able to distinguish hyperbole in advertising.¹⁷³

The level of trust the consumer exhibits towards the trader is relevant for aggressive practices and especially for undue influence.¹⁷⁴ However, it is not clear whether the insights from the case law in this issue are easily transferable to aggressive practices. The case law focuses on how a consumer reacts to information about the product, whether that is a name or a trademark or a label. The cases revolve around how consumers process what they see. It does not offer any guidance on how the average

¹⁷³ This can be seen also in UCPD, art.5.3.

¹⁷⁴ See Ch.4, s.4.1.3.3.

consumer would react e.g. in an interaction with a salesperson or even when faced with more complex documents than a label or a trademark.

Trademark law has provided a more nuanced version of the average consumer. The average consumer is not expected to be able to perfectly recall an image, but must place his trust to the imperfect picture in his mind (*Lloyd Schuhfabrik*). Furthermore, the level of attention of the average consumer varies according to the product. It may be lower for everyday goods (*Procter&Gamble*) and higher for more specialised products (*Madaus*). If the average consumer has specialist knowledge, then more is expected of him (*Vitaly*). These cases show that what should be expected of the average consumer is contextual and there is not one behaviour that can be applied in all instances. This is particularly relevant for the average targeted consumer standard that will be examined below. However, trademark, with its focus on visual impression and distinctiveness can be of little help for aggressive practices.

3.4.3. The exceptions to the rule

As noted above, there are two cases that depart from the mainstream view of the average consumer in the case law of the CJEU. These two exceptions are: *Buet* and *A-Punkt Schmuckhandels*. As they are the only ones that refer to aggressive practices they are very important for this thesis. They share a few common elements: (a) the fact that they refer to aggressive practices, more specifically door-to-door selling which is often associated with pressure selling, and (b) the aggressive practices impact on consumers which were characterised as vulnerable. It is telling that these are the two instances where the CJEU found that the national law measures were justified for achieving the aim of consumer protection.

What differentiated these cases was the fact that the CJEU could not use its familiar recipe of labelling. The remedy of providing information (e.g. via clear labelling) does not work for aggressive practices as they cannot be effectively addressed with the provision of information. Similarly, the average consumer concept was not well-suited for these cases as there is little these consumers could have done to improve their position. The average consumer can seek to be better informed, but for *Buet* *Ministere* and *A-Punkt Schmuckhandels* that would be of little help. The court also recognised that it would be vulnerable consumers that would be more adversely

influenced by these practices and Member States should be allowed to protect them. That is not something that goes against the principles of the internal market.

Buet and *A-Punkt Schmuckhandels* did not indicate that the Court expects consumers to withstand aggressive practices, in the name of cross-border trade. In these cases, the scale between freedom of movement of goods and consumer protection was tipped in favour of consumer protection. This shows how the rationale behind regulating aggressive practices is predominantly, consumer protection.

3.4.4. Normative v empirical

A crucial debate around the standard of the average consumer is whether the average consumer is a purely legal construct or whether it is a real world consumer. This is closely related to the question of whether the average consumer is a normative standard, meaning it relates to how a consumer should behave or whether it is an empirical consumer, whose behaviour can be assessed using empirical evidence.¹⁷⁵ As seen above in *Gut Springenheide* it was stated that the average consumer is not a statistical test. *Gut Springenheide* limited the possibility for taking statistical evidence into account, yet left it to the discretion of Member States to decide when they might be necessary. This thesis argues for the use of empirical evidence, as is further analysed below in s.5.1. The term empirical evidence is used here as more appropriate than statistical evidence, which usually refers to the mathematical analysis of data. The use of empirical evidence has the potential to transform the interpretation of the average consumer and of the, central for this thesis, vulnerable consumer.

4. The Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive harmonises the law on unfair commercial practices in business-to-consumer transactions.¹⁷⁶ The 2001 Green Paper on EU consumer protection argued for further harmonisation with respect to unfair commercial practices and put forward two options: a specific approach and a mixed approach.¹⁷⁷ The specific approach involved the adoption of a number of specific directives, while the mixed approach would consist of a framework directive, combined

¹⁷⁵ Dinwoodie and Gangjee (2016) 345.

¹⁷⁶ UCPD, art.3(1).

¹⁷⁷ Commission, 'Green Paper on European Union Consumer Protection' COM(2001) 531 final.

with targeted directives where necessary. The follow-up 2002 Communication showed that the option of the framework directive was supported by the majority of stakeholders.¹⁷⁸ The first proposal for a directive came in 2003.¹⁷⁹ Finally the proposal passed on 11 May 2005.

The Unfair Commercial Practices Directive is based on full harmonisation. That means that it provides both the floor and the ceiling of the measure of protection when it comes to unfair commercial practices, except for financial services and immovable property. As seen above in section 2, the move of the European Commission towards maximum harmonisation has been the subject of debate. The maximum harmonisation of the Directive has been one of its most controversial aspects.¹⁸⁰ Duivenvoorde suggests that it may be time to reconsider maximum harmonisation, as it may not be as effective as previously thought.¹⁸¹ He also argues that a lower level of harmonisation would be beneficial for vulnerable consumers as the Member States would have the chance to introduce further measures for their protection in national law.¹⁸²

This thesis does not focus on the maximum harmonisation character of the UCPD. The problem with aggressive practices and consumer vulnerability is not one that is caused by the maximum harmonisation character of the Directive. While it would be helpful, to an extent, if Member States could take stricter measures for the protection of consumers, it does not address the issue of how the UCPD has conceptualised these terms. The maximum harmonisation character of the UCPD can also be mitigated by sectoral Directives where necessary, which take precedence over the UCPD. In an increasingly interconnected and globalised marketplace and with digital economy becoming ever more prevalent it is sensible to address these challenges on a European level. That being said, maximum harmonisation will not be suited for all legislative

¹⁷⁸ Commission, 'Communication from the Commission, Follow-up Communication to the Green Paper on EU consumer protection', COM (2002) 289 final.

¹⁷⁹ Commission, 'Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)' COM (2003) 356 final.

¹⁸⁰ Howells, Micklitz and Wilhelmsson (2006) 1.

¹⁸¹ Duivenvoorde (2015) 224.

¹⁸² Duivenvoorde (2015) 223.

interventions and in most cases it would be difficult to gather the consensus for measures as ambitious as the UCPD.

The legislative choices made in the Directive, including the choice of consumer standard, reflect the tension between flexibility and predictability.¹⁸³ The Directive aims at striking the right balance between these two opposing objectives and the question is whether it has been successful in doing so. On the one hand, flexibility allows for more instances to be caught under the definitions and means that the standards adopted are not in need of frequent revisions to be suitable for recent developments.¹⁸⁴ On the other hand, legal certainty is to an extent sacrificed, as a less detailed definition means less predictability for all stakeholders and particularly businesses.¹⁸⁵ In relation to consumer standards, the definitions given in the UCPD seem to favour flexibility, an argument that is strengthened by the UCPD highlighting that these concepts are to be ultimately interpreted by the courts of the Member States and the CJEU.¹⁸⁶ Therefore, the true meaning of the terms on a European level will be determined by case law. However, so far, there has been no CJEU case law interpreting the average or the vulnerable consumer standard in the UCPD.

Prior to the introduction of the UCPD, each Member State had its own consumer rules, which were quite divergent. For example, the consumer standard in German case law was severely criticised as being so low as to presume that all consumers are ‘stupid’ and unable to spot the misleading message in advertising.¹⁸⁷ When it started becoming clear that the UCPD would adopt the average consumer standard it was not without resistance from some Member States including Germany and the Scandinavian countries which were concerned that it would undermine the protection of vulnerable groups such as children or the elderly.¹⁸⁸ The vulnerable consumer standard as will be analysed below was the product of a political compromise, to partially pursue social objectives in the UCPD.

¹⁸³ Trzaskowski (2011) 380.

¹⁸⁴ Trzaskowski (2011) 380.

¹⁸⁵ Trzaskowski (2011) 380.

¹⁸⁶ See UCPD, rec.18.

¹⁸⁷ Micklitz (2006), ‘The General Clause on Unfair Practices’ 111.

¹⁸⁸ Micklitz (2006), ‘The General Clause on Unfair Practices’ 111.

4.1 Aims of the Directive

The tensions that exist within the UCPD mirror the tensions of EU consumer policy in general, as seen above. On the one hand, the desire for economic growth which is supported by confident and able consumers that can navigate the internal market and on the other hand, a willingness to not leave behind those in need of protection. The aims of the UCPD can be found in art.1 UCPD which states that:

The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.

The UCPD has two main aims: (a) contributing to the proper functioning of the internal market, and (b) achieving a high level of consumer protection. The Directive does not appear to prioritise one of these two aims. This is consistent with the prevalent rhetoric in European consumer policy that what is good for the internal market is also good for the consumer. This will be true in many occasions, but not always. There may be occasions where what is good for the internal market may not contribute to a high level of consumer protection.

The protection of vulnerable consumers is one such issue. Protecting vulnerable consumers will mean a higher level of protection for consumers (at least some of them) but may also mean increased obligations for traders, thus creating barriers for accessing the internal market. As seen above, *Buet* was such a case where the protection of vulnerable consumers from aggressive practices was found to be a justification for legislation that hindered access to the internal market.¹⁸⁹

For the purposes of this thesis, the objective that is prioritised is achieving a high level of consumer protection. This choice relates to the focus of this thesis on protecting vulnerable consumers from aggressive practices, an objective more aligned with consumer protection than with the internal market. However, this does not mean it is incompatible with promoting the functioning of the internal market. What it means

¹⁸⁹ See above s.3.2

is that in some cases, such as when harm may come to vulnerable consumers, their protection should be prioritised over encouraging cross-border trade.

Prioritising consumer protection can serve to promote another objective, that of bringing EU citizens closer to the EU. The UCPD has been criticised for placing internal market concerns over consumer protection thus creating doubts as to the importance the European Commission places on consumer protection.¹⁹⁰ If the European Commission is interested in showing that the European Union is not only for the benefit of businesses and trade, there is no better way to show it than to ensure the effective protection of its vulnerable citizens.¹⁹¹

Harmonisation of the law on unfair commercial practices is meant to enhance the consumers' confidence in the internal market as well as ensure legal certainty both for consumers and for businesses.¹⁹² Yet confidence in the marketplace appears to be reserved for the consumers that live up to the average consumer standard. Is it possible for vulnerable consumers to also gain confidence? The answer is yes, but they may require regulatory techniques that go beyond the provision of information.¹⁹³ That is the case also with aggressive practices. It is not possible to eliminate vulnerability, yet steps can be made that allow vulnerable consumers to benefit from a high level of protection. Vulnerable consumers are not a minority made out of the weakest that hinders cross-border trade, it is potentially all of us.¹⁹⁴

4.2. The consumer image matrix

Before proceeding to look at the consumer standards in the UCPD, it is necessary to set out the structure of the Directive. The UCPD is organised in three levels: (a) a general clause, (b) two small general clauses for misleading and aggressive practices, and (c) a list of practices always to be considered unfair. First, article 5 UCPD contains a general prohibition of unfair commercial practices. A practice is considered unfair when (a) it

¹⁹⁰ Howells (2016) 438.

¹⁹¹ The willingness to show that the EU is beneficial not only for traders but also for consumers is indicated by the inclusion of consumer protection in art.38 of the Charter of Fundamental Rights of the European Union.

¹⁹² UCPD, rec.4, 12.

¹⁹³ For example, Wilhelmsson stresses the importance of access to justice in increasing consumer confidence, see Wilhelmsson (2004) 329.

¹⁹⁴ See Ch.2, s.2.2.2.

is contrary to the requirements of professional diligence, and (b) it distorts or is likely to materially distort the economic behaviour of the average consumer. The two conditions need to apply cumulatively for the practice to be characterised as unfair. The general prohibition of article 5 also acts as a safety net that catches unfair practices that do not fall under the more specific provisions governing misleading and aggressive advertising. Civil law countries are familiar with general prohibitions, while they are unusual for common law regimes.

The general clause is in article 5 UCPD which contains a general prohibition of unfair practices stating that:

1. Unfair commercial practices shall be prohibited.
2. A commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers

Article 5.2 contains two conditions; namely that a practice (a) is contrary to professional diligence and (b) materially distorts the economic behaviour of the average consumer. These two conditions need to be satisfied cumulatively.¹⁹⁵ Secondly, the Directive contains two smaller general clauses on misleading and aggressive commercial practices respectively. Article 6 UCPD prohibits misleading actions, while art.7 prohibits misleading omissions. Aggressive practices are regulated by article 8 and article 9 sets the factors that decided whether a practice is considered to use harassment, coercion or undue influence and therefore is aggressive. Articles 8 and 9 UCPD are examined in detail in the next chapter.¹⁹⁶

Thirdly, ANNEX I of the UCPD contains a list of both misleading and aggressive practices which are considered unfair in all circumstances, the so-called black list of the Directive. The practices mentioned there do not need to be assessed in relation to the average consumer as do the ones in articles 5-8 UCPD. The Annex contains 31 practices out of which 23 are classified as misleading and the remaining 8

¹⁹⁵ Micklitz (2006), 'The General Clause on Unfair Practices' 85.

¹⁹⁶ See Ch.4, s.4.

as aggressive. The existence of a list of prohibited provisions has also been a novelty for some Member States.¹⁹⁷ However, that distinction is not as clear-cut as one might think.¹⁹⁸ The inclusion of a blacklist of practices in the Directive is meant to ensure legal certainty. However, the blacklist has been criticised for lack of clarity as it uses terms that are open to interpretation. The vagueness of some of the phrasing in ANNEX I means that problems could arise in their application by the courts, so the desire for legal certainty may backfire causing problems in the application of the blacklist.¹⁹⁹ The aggressive practices included in ANNEX I will be analysed in Chapter 4, s.3.

There is limited guidance in the text of the Directive as to the relationship between the above provisions. What appears to be the most logical approach would be to follow the following procedure when examining whether a practice is unfair:

- A. Is it included in the Annex as one of the black-listed practices?
- B. If not, could it be classified either a misleading or an aggressive practice? As mentioned in art.5.4 UCPD commercial practices will be considered unfair particularly if they are misleading according to art.6-7 UCPD or aggressive pursuant to art.8-9 UCPD,
- C. If they are not caught under articles 6-9 UCPD only then should art.5 UCPD be applied.

Consequently, the general clause of art.5 is the last resort, aimed at acting as a safety net for commercial practices that are not caught by the other provisions.²⁰⁰ The general clause also serves another function; that of future-proofing the Directive, allowing for practices that have not yet been used and cannot fit under the labels of misleading or aggressive to be caught by the Directive.²⁰¹

¹⁹⁷ Micklitz (2006), 'The General Clause on Unfair Practices' 86.

¹⁹⁸ See Case C-428/11 *Purely Creative Ltd v Office of Fair Trading* [2012] ECLI:EU:C:2012:651.

¹⁹⁹ Stuyck, Terryn and Dyck (2006) 131.

²⁰⁰ Micklitz (2006), 'The General Clause on Unfair Practices' 86.

²⁰¹ Giuseppe Abbamonte, 'The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach' 12 *Columbia Journal of European Law* 695, 704.

4.2.1. The average consumer

As mentioned above, the average consumer is a central concept for the Directive, as it is the benchmark against which to judge, whether a practice is misleading or aggressive or whether it is unfair according to the general clause of art.5 UCPD. Whether a practice will be found to be misleading or aggressive depends largely on whether it would cause the average consumer to take a transactional decision he would not have taken otherwise. Transactional decision has quite a broad meaning in the context of the Directive and is defined in art.2(k) UCPD as:

any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or refrain from acting.

In spite of the importance of the average consumer for the UCPD, there is no definition of the term in the articles of the Directive. In earlier drafts of the Directive that was not the case, as a definition of the average consumer was included in art.2(b).²⁰² However, by the time of the second reading of the proposal by the European Parliament, that definition had been removed.²⁰³ It appears there was not the necessary consensus to keep the definition in the articles of the Directive. The average consumer definition was left out of the final text as it was met with opposition from Scandinavian countries which considered the ‘average consumer’ standard to clash with their own consumer protection standard which was more social justice-orientated.²⁰⁴ Micklitz has suggested that the absence of the definition of the average consumer from the articles of the UCPD

²⁰² European Parliament, ‘Position of the European Parliament adopted at first reading on 20 April 2004 with a view to the adoption of European Parliament and Council Directive 2004/.../EC concerning unfair business-to-consumer commercial practices in the Internal Market (the Unfair Commercial Practices Directive) [2004] OJ C 104 E/261 (First Reading Parliament Position).

Art. 2(b) read: “‘average consumer’ means the consumer who is reasonably well informed and reasonably observant and circumspect, taking account of social, cultural and linguistic circumstances”

²⁰³ European Parliament, ‘Legislative resolution on the Council common position for adopting a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (‘Unfair Commercial Practices Directive’)(11630/2/2004 — C6-0190/2004 — 2003/0134(COD)) [2005] OJ C 304 E/351.

²⁰⁴ Micklitz (2006), ‘The General Clause on Unfair Practices’ 112.

may signify a change of paradigm.²⁰⁵ These remarks were made relatively soon after the introduction of the Directive; however time has not shown that to be the case.²⁰⁶

Instead of a definition in the articles, recital 18 UCPD provides guidance as to the meaning of the term, essentially repeating earlier case law of the CJEU, and in particular, as seen above, the *Gut Springenheide* case. According to rec.18 the average consumer is:

reasonably well-informed, reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice.

The CJEU interpretation on the characteristics of the average consumer has been examined above in s.3 and will not be repeated here. Still, it is worth noting what each of these characteristics covers, especially in relation to aggressive practices. Being well-informed refers to the how much the consumer knows about the product. Information is not central for aggressive practices as a consumer can fall prey to an aggressive practice, even though they are informed. Information about consumer rights rather than the product itself can provide only very limited protection. For example, the consumer may be aware of his right to terminate a contract and that the trader should not place disproportionate barriers to that. Yet that does not mean he will not be affected by the barriers or that he can avoid them.

According to Duivenvoorde, observant refers to the intensity of observations and absorption of information.²⁰⁷ So it refers to two things, the level of attention of the consumer (towards the information provided) and his ability to process information. This characteristic is not relevant for aggressive practices. Circumspection, as seen in *Mars* refers to the degree of caution with which the average consumer approaches the information provided about a product or communications of the trader.²⁰⁸ Circumspection, when not limited to information but encompassing communication with the trader in general, is relevant for undue influence. The degree of caution the

²⁰⁵ Micklitz (2006), ‘The General Clause on Unfair Practices’ 112.

²⁰⁶ Duivenvoorde (2015) 21.

²⁰⁷ Duivenvoorde (2015) 68.

²⁰⁸ See also s.3.2 above

average consumer is expected to exhibit will define when the consumer is likely to fall prey to a practice using undue influence.²⁰⁹

In short, the three characteristics focus on defining the relationship of the average consumer to information. How much does he have from before (well-informed), how much can he gather and process (observant) and how critical he is in relation to the information provided (circumspect). The problem with this is that there is no word on how the average consumer would react to aggression or to pressure, yet this is the standard that is applied also to aggressive practices.

One of the challenges with the application of the average consumer standard is that the reaction to a practice is not pre-determined. The absence of the definition of the average consumer from the articles of the UCPD also points to the fact that there is some degree of flexibility. The CJEU in its case law has put forward an image of the average consumer, however that image is not 'set in stone'.²¹⁰ This means there is some room for the Member States to downplay the Gut Springenheide formula in an effort to moderate the standard.²¹¹ Could this be good news for the application of aggressive practices, as there is no robust body of case law or definition in the UCPD? Does it mean that Member States are granted further discretion in the interpretation of the average consumer meaning it can be interpreted in a way that is more protective of consumers than the CJEU case law suggests?

That will not necessarily be the case. Firstly, when there is no helpful guideline as to the expectations of the average consumer in the face of aggressive practices, it will be an arduous task for the Member States to develop it and may result in divergent interpretations which will undermine the goal of the UCPD to ensure legal certainty. It has been argued that national authorities may be biased and conduct an evaluative judgement of the average consumer.²¹² What appears to have happened instead, is that the aggressive practices provisions are not widely used or commented upon. The

²⁰⁹ See text to note 177 in Ch.4.

²¹⁰ Twigg-Flesner et al. (2005) para. 2.59.

²¹¹ Thomas Wilhelmsson, 'The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law- A Comment' in Geraint Howells et al. (eds), *The Yearbook of Consumer Law* (Ashgate Publishing Group 2007) 220.

²¹² Incardona and Poncibò (2007) 28.

average consumer may not be the decisive influence to that, yet its lack of suitability certainly has a role to play in making the application of the provisions more complicated.

The choice of the average consumer as the benchmark means that not everyone is protected. The UCPD has certain expectations of consumers, for them to be granted protection against unfair practices. The UCPD does not protect the consumer who is uninformed and inattentive.²¹³ There is no reason to believe the same will not be true also for aggressive practices, meaning that consumers will not be expected to always fall prey to aggressive practices. Instead, the average consumer will be expected to take some steps to shield himself from aggressive practices. For misleading practices the average consumer needs to be ‘well-informed, observant and circumspect’, but the answer as to what shields the consumer from aggressive practices is less obvious.

A common criticism of the average consumer is that it is a high, unrealistic standard. The UCPD follows the ideal of the empowered and informed consumer, as championed in EU consumer law. This is problematic both because it is based on assumptions of consumer behaviour which do not correspond to empirical evidence and because it undermines vulnerable consumers, as only the more sophisticated consumers can benefit from the average consumer standard.²¹⁴ The perceived threat the average consumer posed to the potential for protecting vulnerable consumers was the reason for the strong opposition it faced during the debate of the UCPD, especially by Scandinavian countries.²¹⁵

It is not clear what the average consumer standard represents. The average consumer is not necessarily the average of all consumers, but can be so when the product is directed at all consumers.²¹⁶ However, as seen below in the average targeted standard, very often the product will be directed at a specific audience. A common theme among the trademark case law is that the average consumer is equated to the

²¹³ Incardona and Poncibò (2007) 27.

²¹⁴ Wilhelmsson (2007) 219.

²¹⁵ Stuyck, Terry and Dyck (2006) 111.

²¹⁶ Jules Stuyck, ‘The Notion of the Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable Under Such a Regime’ in Geraint Howells et al. (eds), *The Yearbook of Consumer Law* (Ashgate Publishing Group 2007) 169.

median consumer, the average of all consumers. For example, in T-360/03 *Frischpack GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, the average consumer represents the average of all consumers, of the general public, as opposed to the targeted public.²¹⁷

However, it has been argued that the average consumer seems more often than not to not be equated with the median consumer, but rather with an ideal of how consumers should behave which does not correspond to the behaviour of real consumers.²¹⁸ This approach is good for competition as it means that the standard applied is not as strict as e.g. the vulnerable consumer would be.²¹⁹ It paves the way for harmonisation.

The average consumer as a high standard of desired consumer behaviour assumes that consumers are rational.²²⁰ This can be seen also in the CJEU case law which has been based on neoclassical assumptions on the rationality of the consumer.²²¹ The rational consumer, when provided with the right information will make an optimal decision in accordance with his preferences. The informed rational consumer benefits from the internal market and also helps realise it.²²² The average consumer is presumed to have an active role as shown in the opinion of Advocate General Fennely in the *Estée Lauder* case stating that ‘the presumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices’²²³

²¹⁷ T-360/03 *Frischpack GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, [2003] ECLI:EU:T:2004:340, para 42,43.

²¹⁸ Willem H Van Boom, ‘Unfair Commercial Practices’ in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing Limited 2016) 392.

²¹⁹ Ulf Bernitz, ‘The Unfair Commercial Practices Directive: Its Scope, Ambitions and Relation to the Law of Unfair Competition’ in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart Publishing 2007) 39.

²²⁰ van Boom, Garde and Akseli (2014) 6.

²²¹ Incardona and Poncibò (2007) 30.

²²² Cristoph Busch, ‘The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data’ in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 223.

²²³ Case C- 220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] ECR I-119, Opinion of AG Fennely, para.25.

It has been argued that upon closer inspection the average consumer is not so unrealistic and the CJEU has been open to accepting genuine concerns over consumer protection, as was the case in *Buet*.²²⁴ The average consumer may not be the homo economicus, but they are certainly related and this is enough to create a number of issues, especially for aggressive practices. For example, it has been pointed out that it is an unrealistic standard as it fails to consider the emotions, circumstances or even patience of the consumer.²²⁵ Taking into account power asymmetries, which are at the centre of aggressive practices, is limited under the average consumer. That is because the UCPD follows the information paradigm, which means a focus on providing information and little else.²²⁶ For example, informational remedies are not helpful when the consumer lacks alternatives or faces barriers to switching.²²⁷

This thesis does not aim to expose all the failures of informational remedies which have been analysed elsewhere in detail.²²⁸ Information does have an important role to play. Instead, it wishes to highlight the need to go beyond the informational aspect to allow for the multitude of factors that influence consumer behaviour to be taken into account. One way to achieve that is to encourage the use of empirical evidence in interpreting the average consumer, a point that has been made by several authors.²²⁹ This point is examined below in section 5 as it is relevant both for the average and the vulnerable consumer. However, in the case of aggressive practices, a more flexible interpretation of the average consumer will not suffice.

There is the need for a characteristic that corresponds to aggressive practices as information does to misleading practices. It is argued that resilience can play that role. In Chapter 2 resilience was seen as the counterpart of vulnerability.²³⁰ In this context resilience refers to resilience to pressure. Resilience is an open-textured, flexible term that allows for taking the different factors that influence the circumstances of the consumer into account. It refers to the expectations of the average consumer in the face

²²⁴ Weatherill (2007) 138.

²²⁵ Incardona and Poncibò (2007) 28.

²²⁶ van Boom, Garde and Akseli (2014) 5.

²²⁷ Howells (2005) 358.

²²⁸ See for example Ben-Shahar and Schneider (2014).

²²⁹ Weatherill (2007) 138; Incardona and Poncibò (2007) 36; Stuyck, Terryn and Dyck (2006) 147.

²³⁰ See Ch.2, s.2.2.3.

of aggressive practices. What the average consumer is expected to withstand and to what extent he is expected to protect himself. Similar to the level of attention of the average consumer being variable, resilience will also vary. Chapter 4 will cover how resilience relates to aggressive practices.²³¹

4.2.1.1. Proportionality

As mentioned also in recital 18 of the Directive, the average consumer test is in line with the principle of proportionality, as it assists the Court in deciding whether a measure taken is indeed necessary.²³² Proportionality is also mentioned in recital 6 UCPD where it is stated that: ‘In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible.’ Is the negligible impact a quantitative assessment, meaning that only a small percentage of consumers are affected and does that mean that it would be the most vulnerable consumers that would be the ones left behind? Or does it mean that a practice has a negligible impact on consumers in general? This is not clear from the wording. According to the *de minimis* principle stated in Adolf Darbo, it would mean a negligible impact on consumers in general.²³³

Proportionality is an important guiding principle for interpreting the consumer standards in the UCPD. There is always a weighing of different objectives that needs to be made between the interests of traders and the interests of consumers. This weighing reflects also the different aims of the Directive explained above. The average consumer should not be a standard that is too high so as to hinder trade and not one that is too low so as to not be able to protect consumers. While the characteristics of ‘reasonably well-informed, observant and circumspect’ help in approaching the average consumer it remains a significant challenge for the Member States as it is not clear what is to be expected of the average consumer in different scenarios.²³⁴

²³¹ See Ch.4, s.4.1.5.2.

²³² See for example *Cassis de Dijon*, *Gut Springenheide*, *Clinique*, as cited above in 3.1, 3.2

²³³ See note 121.

²³⁴ Incardona and Poncibò (2007) 28.

4.2.1.2. Social, cultural and linguistic factors

The average consumer is meant to be assessed ‘taking into account social, cultural and linguistic factors’, as stated in rec.18 UCPD. As seen above, the consideration of ‘social, cultural and linguistic factors’ was first employed by the CJEU in *Estée Lauder*.²³⁵ Though the CJEU recognised these are factors that can be taken into account, it did not accept them in that particular case, as it was left up to the national court to decide whether the term ‘lifting’ for a cream is misleading.²³⁶ The inclusion of ‘social, cultural and linguistic factors’ presents a crack in the maximum harmonisation policy, as it could allow for the expectations of local consumers to be taken into account, a consideration that EU experience has shown is useful in a harmonisation process.²³⁷ But what exactly would fall under ‘social, cultural and linguistic factors’?

Linguistic and cultural factors are easier to conceptualise than social factors, as they refer to how a term is being perceived in one Member State over the other. These were the relevant factors in *Estée Lauder* where the question was whether the term ‘lifting’ used for a firming cream could mean something different to German consumers, making it more likely that they would be misled into thinking the effects of a cream were comparable to that of plastic surgery.

Social factors are less straightforward; they could point to differences in education and wealth.²³⁸ If that is the case, then they could even be used to protect vulnerable consumers.²³⁹ Even if that is possible in theory it is difficult to imagine it being applied in practice, as it would require arguing that e.g. Slovak consumers are more vulnerable than Danish consumers due to social factors relating to wealth. That would serve to create tensions between Member States. It could be more useful if ‘social, cultural or linguistic factors’ could be used to differentiate between consumers

²³⁵ See note 125.

²³⁶ *Estée Lauder*, para 29, 32.

²³⁷ Wilhelmsson (2006), ‘Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions’ 464.

²³⁸ Duivenvoorde (2015) 73.

²³⁹ Jan Trzaskowski, ‘The Unfair Commercial Practices Directive and Vulnerable Consumers’, *Conference of the International Association of Consumer Law in Sydney* (2013) 15. As cited in Duivenvoorde (2015) 73 note 47.

in the same Member State, however that does not seem to be the case, as *Estée Lauder* only refers to differences between Member States.²⁴⁰

It is doubtful that the three factors can be used for consumers in the same Member State, but the answer may differ for differences of groups that spread beyond a specific Member State, as there a cross-border element exists. This is the case particularly for cultural factors, depending on how culture is defined. For example, there is a growing market for products directed at Muslims. Islam is a religion, practised by diverse people in a number of nations, yet has defining cultural aspects. For marketing purposes, Muslims present a specific homogeneous market.²⁴¹ Cultural factors could be used to argue that expectations of e.g. Muslim consumers differ and that should be considered when assessing the average consumer.²⁴²

‘Social, cultural and linguistic factors’ can be particularly relevant for aggressive practices. It has been suggested that they can prove useful for taking the emotional dimension of commercial practices.²⁴³ Emotional dimension is particularly relevant for aggressive practices, as traders may use psychological pressure on consumers and appeal to their visceral emotions.²⁴⁴ Another factor that can defer between different cultures is trust towards the trader, as pointed out by Wilhelmsson.²⁴⁵ The level of trust towards the trader may be particularly relevant for undue influence which may mean the consumer is less likely to doubt the claims of the trader.

Furthermore, ‘social, cultural and linguistic factors’ in the context of aggressive practices can be relevant for assessing what level of pressure consumers in a certain Member State are accustomed to. For example, a trader may be actively calling

²⁴⁰ *Estée Lauder*, para 29 and see also Duivenvoorde (2015) 73.

²⁴¹ Baker Ahmad Alserhan and Zeid Ahmad Alserhan, ‘Researching Muslim Consumers: Do They Represent the Fourth-Billion Consumer Segment?’ (2012) 3 *Journal of Islamic Marketing* 121, 130.

²⁴² There is some evidence to suggest that the behaviour of Muslim consumers living in non-Muslim countries may differ from that of non-Muslims, especially for food or hygiene products, see Mohammed Abdur Razzaque and Sadia Nosheen Saudry, ‘Religiosity and Muslim Consumers’ Decision-making Process in a non-Muslim Society’ (2013) 4 *Journal of Islamic Marketing* 198.

²⁴³ Incardona and Poncibò (2007) 33.

²⁴⁴ See Ch.4, s.4.2.1.2.

²⁴⁵ Wilhelmsson (2006), ‘Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions’ 486.

consumers to enter his shop, subsequently asking follow them around the shop asking many questions. If this is not common practice e.g. in Germany, then it may be perceived as aggressive for German consumers. Perhaps the same behaviour would not be deemed aggressive in a Member State where the majority of traders exhibit this behaviour, because consumers will be expecting this behaviour. There are a number of signifiers for what is perceived as aggressive in a specific context, such as body language, tone of voice or violation of personal space that consumers from different cultures may perceive differently. The fact that what is perceived as aggressive varies in different cultural settings makes it easier to make the case for the use of ‘social, cultural and linguistic’ factors in aggressive practices.

It would be desirable to use the three factors for protecting consumers, and vulnerable consumers in particular, from aggressive practices as it would allow for the consideration of a broader range of factors than the formula of ‘well-informed, observant and circumspect’ average consumers suggests. However, their scope is limited. For example, Wilhelmsson has argued for a framework for taking social and cultural factors into account, one that includes also broader considerations such as rationality patterns of the consumer.²⁴⁶ It is doubtful whether such a broad conception of social, cultural and linguistic factors is possible within the system of the UCPD. If that was the case, then it would undermine the average consumer as the benchmark and would open the door for introducing a multitude of factors. Furthermore, as seen above, the factors are unlikely to be useful for differences within the same Member State, which would be useful for vulnerable consumers.

Despite their seeming potential to transform the average consumer, the factors appear to have had a limited impact in practice, as the CJEU has not accepted them in any case since introducing them in *Estée Lauder*. There is not a clear picture on whether the Member States are making use of the factors in the enforcement of the UCPD. Still, if the factors are relevant primarily for assessing differences between consumers of different Member States, rather than consumers of the same Member State, then their use in national case law may be more limited.

²⁴⁶ Wilhelmsson (2006), ‘Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions’ 488.

The limited use of ‘social, cultural and linguistic’ factors, at least in the context of the CJEU case law, is unlikely to change. If the CJEU did not accept these factors in *Estée Lauder*, it would be even more difficult to make the case for them today, as there is supposed to be a convergence in the internal market, due to harmonisation of the legal regime but also due to technological advancements that mean the markets are more interconnected. So, while the three factors could be very useful in theory, in practice they do not seem to have had a decisive effect in making the average consumer more nuanced.

4.2.2. The average targeted consumer

The average consumer as described above can be qualified. This variation of the average consumer is described in this thesis as the average targeted consumer. The average targeted consumer is found in art 5(2)(b) UCPD which states that a practice is unfair if (amongst others) it is likely to distort the economic behaviour 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.

The average targeted standard is hinted at rec.18 UCPD where it states that:

Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group

The average targeted consumer does not appear to be a different standard from the average consumer, unlike the average vulnerable consumer examined below. It is the same standard and the only thing that changes is the set where that standard is being applied. This is consistent with the view that the behaviour of the average consumer varies according to context, as seen in *Procter and Gamble* where the CJEU accepted that the level of attention of the average consumer varies according to the product.²⁴⁷

The distinction between average consumer and average targeted consumer suggests that the average consumer will apply when the practice is aimed at the general population, while in all other cases where the target group is narrower, the average targeted consumer will apply. It is not clear what the average targeted standard is; still

²⁴⁷ See above s.3.3.

it is expected that it bears similarities with the average consumer. The average consumer is a primarily normative standard, and the same must be true also for the average targeted consumer. Also, the average targeted consumer should be proportionate, in line with rec.18 UCPD.

The average consumer, as seen also above, is designed to be a relatively high standard. It is not clear whether the same can be said for the average targeted consumer, as it is more flexible and can also be used to protect vulnerable. The average targeted consumer combines the high average consumer standard with that of the vulnerable consumer, thus bridging the gap between these two conflicting concepts of the UCPD.

Defining the group that a practice is directed at makes a big difference on how that standard is to be interpreted. The average targeted standard recognises the widespread practice of market segmentation in marketing. Market segmentation is an important aspect of marketing and refers to recognising the differences amongst customers and targeting a segment of them that has similar needs.²⁴⁸ The UCPD does not offer any guidance as to when that standard is to be employed in the place of the average consumer so it remains a question of fact to be judged by the courts on a case-to case basis. However, there are some factors that can assist in determining towards whom a practice or product is targeted, the first and foremost being advertising.²⁴⁹

For example, if an advertisement is in Croatian then the target consumer is the Croatian consumer. However, if an advertisement is in a language more widely understood, such as English, the target consumer could be broader than English native speakers.²⁵⁰ The medium used can also play a role. An online advertisement in English will reach a wider range of consumers than an advertisement in a newspaper. An example of the average targeted standard from the case law of the Member States is a case from Sweden concerning misleading advertising of children's diapers. The advertisement in question hinted at a connection between allergies and the trader's

²⁴⁸ Smith and Cooper-Martin (1997) 1.

²⁴⁹ Twigg-Flesner et al. (2005).

²⁵⁰ Thomas Wilhelmsson, 'Misleading Practices' in Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006) 135.

diapers. The Swedish market court decided that in this case the ‘average consumer’ was a parent with small children without any special knowledge about allergies.²⁵¹

Advertising can provide useful insights as to what the target audience of a product or a practice is. Still, the target group should be defined by taking a variety of factors into consideration, instead of solely the view of the company, as otherwise it may be too restrictive. Following only the advertising may mean a highly segmented market. For example, who is the target audience for gluten free bread? Is it those that suffer from a gluten intolerance? Is it those that follow a gluten free diet, even though there are no medical reasons, or is it everyone as bread is an everyday good? There are challenges that arise from modern target marketing techniques, especially when targeting is done at the individual level.²⁵² Targeting at the individual level is especially relevant in the online environment where data is collected on the preferences of the user allowing them to tailor advertising, a practice that is becoming increasingly invasive and aggressive.²⁵³ Who is the target audience when a practice is tailored to such a micro-level? Can then the average targeted consumer be a single individual? That might conflict with the idea of the UCPD protecting collective interests of consumers.

Social, cultural and linguistic factors were examined above in relation to the average consumer standard. They are viewed as a way to make the average consumer standard more nuanced. These factors can be relevant also for assessing when a practice is directed at a certain group. For example, when an advertisement is targeted at a particular group within a country the social, cultural and linguistic factors of that group should be taken into account, e.g. an advert targeted at polish nationals in the UK.

The flexibility of the average targeted standard means that the level of protection granted will vary. The average targeted standard could be interpreted to mean a higher standard than the general ‘average consumer’. The same would be suggested by the *Vitaly Lissotschenko* case examined above in s.3.3 suggesting that if the target audience is made up by specialist consumers, then a higher standard would be applied.

²⁵¹ Decision of 4 July 2012 of the Marknadsdomstolen, as cited in Second Guidance Document, note 105.

²⁵² Smith and Cooper-Martin (1997) 1.

²⁵³ Chris Jay CJ Hoofnagle et al., ‘Behavioral Advertising: The Offer You Cannot Refuse’ (2012) 6 Harvard Law & Policy Review 273.

The European Commission has issued two Staff Working Documents, one in 2009 and one in 2016, to provide guidance on the UCPD. The First Guidance Document also suggests that the average targeted standard could be used both to decrease the standard of the average consumer, as well as to raise it by stating that:²⁵⁴

when the practice is addressed at a specific group of consumers, be they children or rocket scientists, national authorities and courts must assess its impact from the perspective of the average member of the relevant group.

In the Second Guidance Document, there is no reference to the possibility of the average targeted standard being used to raise the average consumer standard. Instead, the Second Guidance is limited in saying that the average consumer is contextual and depends on the situation the consumer finds himself.²⁵⁵ This could point to a shift in attitude by the European Commission as the average consumer can be more nuanced and context-specific but not necessarily held to a higher standard.

Cartwright argues that increasing the standard should be treated with caution. For example, if someone is highly educated, does not mean they would be able to understand a product outside their field of expertise.²⁵⁶ This was the approach of the Greek courts that found that a doctor who was misled into buying Euribor bonds, was not considered to have specialist knowledge, even though he had a high level of education, as it was unrelated to the product.²⁵⁷ It is important to not raise the standard without sufficient evidence and without reviewing the context.

The issue with raising the average consumer standard mirrors that of assessing consumer vulnerability. Focusing on one characteristic, in this case level of education, is not enough to indicate whether a higher standard should be applied. Similarly, it is not sufficient to only examine e.g. age to label a consumer or a group of consumers as vulnerable.²⁵⁸ The vulnerability, or indeed the resilience, of the consumer to unfair

²⁵⁴ Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (First Guidance document) SEC(2009) 1666, 28.

²⁵⁵ Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (Second Guidance Document) COM(2016) 320, 45.

²⁵⁶ Peter Cartwright, 'The Consumer Image within EU Law' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2014) 209.

²⁵⁷ Decision no. 35/2015, Court of first instance of Larissa.

²⁵⁸ This is the approach taken in the UCPD, as will be examined next in s.4.2.3.

practices should be assessed taking into account a broad range of circumstances and characteristics and the relationship between them. This is in line with how consumer vulnerability in this thesis is viewed as the outcome of the interplay between internal and external factors.²⁵⁹

Returning to the example with the doctor, it was appropriate for the Court to find that the high level of education was not sufficient to find that the consumer in that instance was in less need of protection. A high level of education in medicine does not ensure understanding of a complex financial product. Conversely, if the case concerned a medicinal product targeted at doctors, it would be appropriate to treat them as specialist consumers with a higher level of knowledge on the product than the average consumer.

It has been argued that the average targeted standard can be used for protecting vulnerable consumers.²⁶⁰ This is indeed the case as can be seen also from recital 19 which refers to children, a vulnerable group in the UCPD. The targeted standard is free from many of the limitations of the average vulnerable standard and can allow for more vulnerable groups to be considered. However, it does not mean that it should replace the average vulnerable consumer, as is examined below.

4.2.3. The average vulnerable consumer

The average consumer may be the benchmark of the Directive; however, the UCPD also contains provisions for the protection of vulnerable consumers. The average vulnerable standard is designed to be employed for protecting vulnerable consumers in instances where a product is aimed at the general population of consumers, but is only harmful or particularly harmful to vulnerable consumers.²⁶¹ The average vulnerable consumer standard presents a completely different consumer image compared to the average consumer.²⁶² However, such an interpretation could undermine the benchmark of the average consumer as in that case a commercial practice would need to be judged against the (lower) average vulnerable standard rather than the average consumer

²⁵⁹ See Ch.2, s.4.1.3.

²⁶⁰ Duivenvoorde (2015) 178; Cartwright (2014), 'The Consumer Image within EU Law' 208.

²⁶¹ Cartwright (2014), 'The Consumer Image within EU Law' 12.

²⁶² Micklitz (2006), 'The General Clause on Unfair Practices' 113.

standard. The accepted approach is to view the average vulnerable standard as the exception to the rule of the average consumer.²⁶³

Art. 5.3 UCPD states:

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 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. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

Also relevant for the average vulnerable consumer is recital 19 UCPD which reads:

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.

While the list in recital 19 as indicated by the use of ‘such as’ is indicative, the criteria listed in art.5.3 seem to be exhaustive. In that case, it is the phrasing of art. 5.3 UCPD that prevails, as it is the substantive part of the Directive. It has been argued that the indicative list in rec.19 suggests that the criteria in art.5.3 are also indicative.²⁶⁴ It would be desirable to have the list of criteria as indicative, as this would address some of the issues of the average vulnerable standard. However, this is not the case at the moment and suggesting otherwise appears to be too much of a creative interpretation. Art.5.3 is clear and unambiguous. Unfortunately, broadening the criteria would require a reform of art.5.3 UCPD.

²⁶³ Micklitz (2006), ‘The General Clause on Unfair Practices’ 113.

²⁶⁴ Duivenvoorde (2015) 24.

It seems like the average targeted consumer and the average vulnerable consumer are closely connected, to the extent that confusion can be caused as to which one should be applied. Arguably, the average targeted standard is more general and allows for specific groups of consumers to be caught regardless of whether they can be characterised as vulnerable in the UCPD or not. There seems to be a fair deal of overlap between the two, to the extent that it has been suggested that there is no example where it would not be possible to use the average targeted consumer and would have to use the average vulnerable standard.²⁶⁵

However, there is still a case to be made for including a vulnerable consumer standard in the UCPD, flawed as it may be. The explicit mention of vulnerable consumers in the UCPD is useful in bringing attention to the fact that not all consumers, if any, live up to the average consumer standard. The average targeted standard allows for considering different groups but does not offer any insight as to what is it that makes them more aggressive or how that is to be assessed. Furthermore, the average vulnerable standard is useful for cases where a practice may be addressed to the general public, for which it is not unfair, but has adverse effects for the general population.

The inclusion of the average vulnerable consumer in the UCPD was contested, same as the choice of the average consumer standard. Looking at the previous drafts of the Directive reveals a more complete and nuanced version of the vulnerable consumer than the diluted version of the UCPD. In the version after the first reading by the European Parliament rec.15 read:²⁶⁶

Since the most vulnerable consumers are those most likely to be the victims of the unfair commercial practices covered by this Directive, it is appropriate that their interests as consumers be protected, due regard being had, according to the circumstances of the case, to factors such as age (for example minors and the elderly), particular physical or mental conditions (for example maternity or bereavement) and level of literacy. To this end, it is necessary to prevent undue exploitation of the vulnerable characteristics of a particular group of consumers. In addition, personal characteristics which make individuals particularly vulnerable, such as physical or mental disabilities,

²⁶⁵ Duivenvoorde (2015) 26.

²⁶⁶ First Reading Parliament Position.

ought to be taken into account in cases of direct relations with individual consumers, such as door-to-door sales or solicitations or harassment directed towards individual consumers before, during and after the conclusion of a contract.

This recital shows a more sophisticated notion of consumer vulnerability than the one currently included in the UCPD. It includes temporary conditions, such as bereavement and maternity. Not only does it draw attention to personal characteristics of consumers, but also to certain practices that may place consumers in a vulnerable situation, such as door-to-door sales or harassment. This view is consistent with the one expressed in Chapter 2, according to which consumer vulnerability results from the interplay between internal and external factors.²⁶⁷ Furthermore, the mention of door-to-door sales and harassment underlines the connection between aggressive practices and consumer vulnerability.

Vulnerable consumers were also defined in the articles of the draft Directive, which interestingly included two versions of a ‘particular group of consumers’, one being vulnerable consumers, which are considered below average and one for knowledgeable consumers which are considered above average. Art. 2(c)(i) reads: ²⁶⁸

(c) ‘particular group of consumers’ means a group of consumers who have distinct characteristics of a non-economic nature, such as:

(i) consumers who are vulnerable as a result of various factors, such as age, disability, physical or mental conditions (including temporary ones) or level of literacy, which influence their assessment and/or reaction capacities;

This definition is quite similar to the one of art. 5.3 UCPD, still it is an improvement. This is due to the fact that it includes level of literacy as another category and, more importantly, the list of the factors is indicative and not exhaustive as in art.5.3 UCPD. Having an indicative list of factors is an easy way to allow for a variety of factors to be taken into account, ensuring flexibility of the definition. The mention of vulnerable consumers in the UCPD and the level of protection offered to them through

²⁶⁷ See Ch.2, s. 4.1.3.

²⁶⁸First Reading Parliament Position.

these provisions has been criticised as being a compromise that has not managed to ensure a high level of protection for the vulnerable.²⁶⁹

There is little case law concerning vulnerable consumers, specifically only two cases, one in Greece and one in the UK. The vulnerable consumers in question were children and elderly people respectively. This does not come as a surprise as age is one of the criteria in the definition of vulnerable consumer in the Directive, and also, traditionally children and the elderly have been treated as more vulnerable and in need of greater protection.

In the Greek case 926/2007 the claimant, a consumer organisation complained that a newspaper giving out pornographic material as a gift was an unfair commercial practice, especially against minors.²⁷⁰ The court ruled that it was an unfair commercial practice and ordered the implicated parties to take all measures necessary to eliminate negative consequences for minors. This case invites questions as to its basis, since it does not seem to be a misleading or an aggressive practice. Perhaps, the general clause of art.5 UCPD was used as the legal basis. Given the lack of case law it is puzzling that the European Commission in its report on the application of the UCPD signals that there do not seem to be significant problems in the application of the provisions on vulnerable consumers, following the consultation with the Member States, aside from the UK and Denmark calling for extra measures aimed at protecting the elderly and children respectively.²⁷¹

The average vulnerable consumer standard of art.5.3 UCPD, can be broken down to the following elements: (a) clearly identifiable group, (b) vulnerability due to age, mental or physical infirmity and credulity, and (c) foreseeability by the trader. Art.5.3 also sets out the effect the practice should have on the group of vulnerable consumers which is the ‘material distortion of economic behaviour’. It also includes an

²⁶⁹ Stuyck (2007) 178.

²⁷⁰ For a note of the case in English see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=103&articleID=>> accessed May 2017.

²⁷¹ Commission, ‘First report on the application of Directive 2005/29/EC’, COM (2013) 139 final 13.

exception from the standard for exaggerated statements made in advertising. These elements will be examined below.²⁷²

4.2.3.1. *Clearly identifiable group*

Clarifying what qualifies as a ‘clearly identifiable group’ of consumers may be problematic. Assessing when a clearly identifiable group is particularly vulnerable to the practice or measure includes a normative element that requires the assessment of the measure.²⁷³ The requirement for a ‘clearly identifiable group’ has been criticised for limiting the potential of the provision to achieve its aim.²⁷⁴

The restrictive nature of this requirement can be seen also in the case law of the Member States. In a Bulgarian case concerning distance sales of telecommunications services, the Court found that consumers over 75 form a clearly identifiable group.²⁷⁵ It was indicative that the Court had to be that specific to ensure the ‘clearly identifiable group’ condition is fulfilled. It is true that cognitive abilities may vary within the broader group defined as ‘elderly’. However, it should not disadvantage consumers to the extent where a 75-year-old will be vulnerable, but a 74-year-old will not.

Finding a balance between legal certainty and flexibility is not an easy task. Twigg-Flesner et al. in their Report also point out the issues associated with having these broad criteria. That not every e.g. elderly person will be vulnerable and that age in itself is not enough to show that someone has become somehow less observant or circumspect. The same issues were highlighted in the chapter on vulnerability on how making blanket statements on the abilities and behaviour of large segments of the population can be problematic.²⁷⁶

4.2.3.2. *Age*

The meaning of age is clear as it refers either to children or the elderly. What is not clear however is how these terms are to be defined. Up to what age does a child remain

²⁷² See also the discussion on disadvantaged consumers in Ch.2, s.5.1 which includes elderly and disabled consumers.

²⁷³ Micklitz, Reich and Rott (2009) 94.

²⁷⁴ Stuyck, Terryn and Dyck (2006) 151.

²⁷⁵ Case 1483/2012, *Bulgarian Consumer Protection Commission v Bulgarian Telecommunication Company*, [2012], Supreme Administrative Court.

²⁷⁶ See text to note 82 in Ch.2.

a child and in what age does someone become an elderly person? ²⁷⁷ It seems like this is something that is left to the discretion of the Member States and can be decided according to the context. The UCPD pays special attention to the protection of children as beside their mention in the recital and the age criterion they are also included in some of the blacklisted practices.²⁷⁸

While the elderly are a group that is often cited as being vulnerable there is evidence to suggest that in fact the issues surrounding vulnerable consumers are more complicated.²⁷⁹ The market behaviour of each consumer is the combination of a number of different characteristics and circumstances. Utilising the findings of the vulnerability study, the Second Guidance Document states that the consumers that are best off are middle aged consumers as both younger and elderly consumers can find themselves in a detrimental position.²⁸⁰

For younger consumers, this is attributed to either being less likely to take action when facing a problem or to being excluded from using certain payment methods that are cheaper. For elderly consumers, it is an issue of having problems with comparing offers and finding the best offer. It is also highlighted that aggressive door-to-door selling is more of a problem for the elderly, while it is not a practice that affects the average consumer. What is not explored is what exactly is supposed to make elderly people more susceptible to door-to-door practices? Is it, for example, their willingness to trust strangers? This could be a generational problem more than an age problem. If previous generations were more inclined to trust generations and then current e.g. middle aged consumers, this means that when the middle-aged of today are elderly they would be less willing to trust traders.

Often vulnerability to a certain practice due to age may be attributed to other factors. For example, elderly consumers may be considered as less familiar with technology, rendering them more vulnerable in the context of e-commerce. Yet there may be significant differences from Member State to Member State as to the pervasiveness of the practice. In Ireland where e-sales represent 30% of total sales it is

²⁷⁷ Micklitz (2006), 'The General Clause on Unfair Practices' 113.

²⁷⁸ See UCPD, ANNEX I, point 18.

²⁷⁹ Moschis, Mosteller and Fatt (2011).

²⁸⁰ Second Guidance Document, 48.

likely that elderly consumers are more familiar with e-commerce than say the elderly Romanian consumers, where e-sales are only 7% of the total sales.²⁸¹ In such a case, the average targeted standard may allow for defining the target group beyond age that is if the practice targets only the elderly and not the broader public.

In relation to younger people, some of the characteristics that single out teenagers as a potentially vulnerable group as they are more likely to take risks, less likely to pay attention and they can also be credulous.²⁸² Similar to what was mentioned above for elderly consumers, an aspect that is not taken into account when discussing vulnerability (or even the abilities of the average consumer is that consumers do not have the same level of sophistication and do not pay the same level of attention to all markets, to all products and services. For example, teenagers may be quite sophisticated consumers in some markets e.g. videogames but more vulnerable in others. Also, there is a point to be made in differentiating between being vulnerable to different aspects of a practice. E.g. a teenager may be well versed in using new technologies to locate information about a product, but may be more susceptible to marketing practices using emotional pressure.

4.2.3.3. Infirmary

Infirmary can refer either to physical or mental infirmity. In relation to the UCPD, it is important to remember that it is meant to be without prejudice to national contract law. For that reason, mental capacity issues will be covered by national law and not by the UCPD. However, this leaves a large group of people who may be facing mental health or developmental challenges that will not be covered by the rules on capacity.

One in six EU citizens has a disability, with that proportion bound to rise as a result of the ageing population.²⁸³ Disabled consumers may, amongst others, face

²⁸¹ See the Eurostat E-Commerce statistics, Figure 2: E-Sales 2015, available online at <[http://ec.europa.eu/eurostat/statistics-explained/index.php/File:E-sales,_2015_\(%25_enterprises\)_V2.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:E-sales,_2015_(%25_enterprises)_V2.png)> accessed May 2017.

²⁸² Second Guidance Document, 49.

²⁸³ Commission, 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens rights' COM(2010) 603 final, 11

significant access problems both in the physical as well as the digital market.²⁸⁴ However, infirmity is a concept broader than that of disability as it may include infirmity that is temporary e.g. due to (not chronic) illness or infirmity that owes itself to the process of ageing. Infirmity due to aging shows the overlap between infirmity and age. Vulnerability of the elderly can be partially attributed to a decline of their cognitive abilities and general health due to ageing, which of course affects people in various degrees.²⁸⁵ If this aspect of elderly vulnerability is caught by infirmity, then age can be used for protecting the elderly from the market dimension of vulnerability. This refers to how the elderly are perceived in the marketplace and in society in general, making them targets for certain practices such as door-to-door selling, or as seen above, for phone sales.

A Czech case confirms the view that infirmity includes illness.²⁸⁶ That case concerned an advertisement for nutritional supplements that claimed to boost the immune system. The Supreme Administrative Court found that the advertisement targeted people that had the flu and the fact they were sick, meant they were less critical and more likely to believe the claims than a healthy consumer. This case shows that infirmity can include common and not particularly serious conditions, like the flu. This was a product that could be of interest also to healthy consumers, but it was only the ill consumers that were more inclined to fall prey to the misleading claims made in the advertisement. This explains why the average vulnerable standard was used, while it would be possible to also use the average targeted consumer standard.

It has been argued that vulnerability due to a temporary circumstance cannot be included in the average vulnerable standard.²⁸⁷ Indeed, at first glance this would appear to be the case. However, the choice of term of infirmity has the potential to include categories of consumers, such as the bereaved. Bereavement is a state that can have a profound effect on the health of person experiencing it. Grief has been closely linked

²⁸⁴ Commission, 'Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe' COM(2010)245 final, 2592013.

²⁸⁵ See also Ch.2, s.5.1.2.

²⁸⁶ Case 4 As 98/2013 – 88, *Rada pro rozhlasové a televizní vysílání v Omega Pharma*, (2013) Nejvyšší správní soud

²⁸⁷ Wilhelmsson (2007) 218.

with a number of conditions, such as depression, anxiety disorder and post-traumatic stress disorder.²⁸⁸ Any person suffering from these conditions would qualify as mentally infirm and that should not be any different if these conditions have their root at a serious life event, such as bereavement. This is not to suggest that every bereaved person will suffer from such conditions, but to show that bereavement has serious consequences that can place it under the rubric of infirmity.

This broader conception of infirmity has the potential to broaden vulnerable consumer standard. Infirmity does not have to amount to a diagnosis of a mental condition, in the same way that illness can be included under infirmity without amounting to a chronic illness or a disability. An event that places the consumer under a situation of heightened stress, having an impact on their health that increases their vulnerability can be included. Such events could include a family member getting diagnosed with cancer or the breakdown of a relationship.²⁸⁹ Whether in such circumstances the other conditions for the application of the average vulnerable standard, notably foreseeability by the trader, would be fulfilled depends on the context of the practice or the product.

Including circumstances that make the consumer emotionally vulnerable, such as bereavement, under infirmity is relevant particularly for aggressive practices, where the fragile emotional or mental state of the consumer may increase their vulnerability to practices that use psychological pressure, including undue influence. The aggressive practices provisions recognise that in art.9(c) UCPD, where the exploitation by the trader of any specific misfortune or circumstance of the consumer is recognised as a factor for assessing whether a practice has used harassment, coercion or undue influence.²⁹⁰ Leaving such circumstances out of the scope of art.5.3 UCPD would mean that they would be taken into account for aggressive practices via art.9 UCPD, but not for misleading or unfair practices.

²⁸⁸ Warwick Middleton et al., 'Pathological Grief Reactions' in Margaret S Stroebe, Wolfgang Stroebe and Robert O Hansson (eds), *Handbook of Bereavement* (Cambridge University Press 1993) 52–55.

²⁸⁹ See for example Ben Edwards and Valerie Clarke, 'The Psychological Impact of a Cancer Diagnosis on Families: The Influence of Family Functioning and Patients' Illness Characteristics on Depression and Anxiety' (2004) 13 *Psycho-Oncology* 562.

²⁹⁰ See text to note 48 in Ch.4.

Infirmity is a characteristic that showcases the social justice aspect of the UCPD, as it relates to non-discrimination of disabled consumers. In fact, consumer vulnerability more broadly serves social justice objectives.²⁹¹ There is legislation dedicated to the disability rights, yet it is beneficial that the UCPD also reiterates and defends those rights in relation to consumer protection law. Ensuring the rights of disabled consumers, especially in relation to accessibility is a key issue in the EU.²⁹² The protection of disabled consumers in particular, is a topic that requires further research.²⁹³

The Second Guidance document includes some examples of case law from the Member States applying the average consumer test. Two of these examples are puzzling and show how the potential for confusion between average and vulnerable consumer. It is mentioned that:²⁹⁴

In Germany, the Oberlandesgericht Karlsruhe found that people with impaired eyesight can also be considered average consumers and printing information in a very small font can be considered a misleading commercial practice. A similar decision was taken by the Slovak Trade inspection

Given that the concern was over consumers with visual impairment, why was the average consumer standard used instead of the vulnerable consumer? If the practice was targeting visually impaired consumers, then the average targeted consumer could be used, yet that does not seem to be the case. The phrasing used that ‘people with impaired eyesight can also be considered average consumers’, appears to suggest that while one might assume that the average consumer is able-bodied and is expected to read information provided in very small font. Also, it appears to echo the view that the

²⁹¹ Micklitz (2006), ‘The General Clause on Unfair Practices’ 111.

²⁹² Commission, ‘Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe’ COM(2010)245 final, 25; Commission, ‘EU Citizenship Report 2010: Dismantling the obstacles to EU citizens rights’ COM(2010) 603 final, 11.

²⁹³ See for example Lynden Griggs, ‘The Consumer with an Intellectual Disability -- Do We Respond, If So, How?’ (2013) 21 Competition & Consumer Law Journal 1, calling for traders to exhibit reasonable care when dealing with intellectually disabled consumers, allowing them to play a more active role in the marketplace.

²⁹⁴ First Guidance Document, 43

label of ‘vulnerable’ is stigmatising to disabled consumers and what is appropriate instead is to characterise them as ‘average’, meaning ‘normal’ in this context. Alternatively, it could be a way to ensure protection of this group without having to go through the conditions of the average vulnerable consumer, such as the foreseeability requirement.

4.2.3.4. *Credulity*

Credulity is the most ambiguous of the criteria used in the definition of the vulnerable consumer. It is not clear who is meant to fall under the rubric of the credulous consumer. The dictionary definition of the term can be a useful starting point in defining its meaning as a legal term. According to the Oxford English dictionary, the usual sense now is ‘too ready or willing to believe; inclined to believe on weak or insufficient grounds’.²⁹⁵

Micklitz argues that the credulity could point to the legally ignorant consumer in which case three terms would need to be defined, namely credulity, commercial inexperience and ignorance of the law.²⁹⁶ This suggestion creates more problems than it answers. Under what circumstances legal ignorance would be justified? One possibility would be for people who have developmental difficulties or reduced cognitive abilities. This would create an overlap with ‘infirmity’. It is argued that credulity can fill a very specific gap not covered by infirmity. It would be consumers who have contractual capacity and are not suffering from a learning disability, yet they are close to that spectrum. This makes them more inclined to believe claims made by traders without examining them critically. This could allow for national authorities or courts to step in to protect consumers who are in a vulnerable position yet may not quite cross the threshold of an intellectual disability.

Twigg-Flesner et al. mention tourists or asylum seekers as potentially credulous categories due to their language skills, but generally think that it is difficult to find groups that are clearly identifiable as vulnerable.²⁹⁷ However, language skills and a general lack of familiarity with the market and mechanisms of a Member State are

²⁹⁵ Oxford English Dictionary, 3rd ed March 2013, <<http://www.oed.com/view/Entry/44135?redirectedFrom=credulous#eid>> accessed May 2017.

²⁹⁶ Micklitz (2006), ‘The General Clause on Unfair Practices’ 114.

²⁹⁷ Twigg-Flesner et al. (2005) para 2.65.

reason enough in themselves to increase vulnerability, without implying that consumers are somehow naïve and credulous. Conversely, credulity could cover consumers who are more inclined to accept certain claims due to their beliefs. This could include religious consumers or new age beliefs, such as astrology. An example would be the practice of televangelists charging tickets for their sermons performing ‘healing rituals’ on stage. Or a medium charging several visits to lift a curse. Some of these examples may amount to fraud or in the televangelist example there may be conflicts between consumer law and freedom of religion. Yet, they are worth considering, especially in the context of aggressive practices, as the relationship between a religious consumer and a trader of products related to religion may amount to undue influence.²⁹⁸

The difficulty with defining credulity showcases how, unlike the other two criteria, this does not point to any particular group of consumers. This makes it difficult to compromise with the ‘clearly identifiable group’ requirement. It is argued that where there are other factors at play that can explain the behaviour of the consumer, such as language skills or infirmity, credulity is not the best choice. It can be a stigmatising term as it is associated with naivety and gullibility. Credulity has been used in the past as a synonym for vulnerability, as credulous and vulnerable consumers were the ones who momentarily needed consumer protection, as opposed to the more rational consumer.²⁹⁹ The credulous consumer, as the consumer who readily believes every claim, is not a realistic version of the consumer. It appears inspired by the standards previously employed by European Member States which aimed at establishing a high level of consumer protection.

The European Commission in its guidance sees credulity as an open term that refers to the tendency to more readily believe certain claims. They state that, unlike the previous criteria, any consumer can be credulous. They suggest that ‘credulity’ can cover consumers that for any reason are particularly influenced by a specific practice.³⁰⁰ The same argument is made by Weatherill who sees credulity as the category of vulnerable consumers that can be broadened to include other groups.³⁰¹ Same for

²⁹⁸ Peter W Edge, ‘Believer Beware: The Challenges of Commercial Religion’ (2013) 33 *Legal Studies* 382, 395.

²⁹⁹ Ramsay (1996) 70.

³⁰⁰ Second Guidance Document, 50

³⁰¹ Weatherill (2016) 216.

Duivenvoorde who also sees credulity as an open-textured term that can include any cause for vulnerability.³⁰² This presents a shift from previous attitudes to credulity where it was treated as a narrow concept.³⁰³ This attempt to broaden credulity presents a number of problems.

The Second Guidance Document offers an example of this revamped credulity concept coming from a Finnish case.³⁰⁴ In that case, a trader advertised that for every product sold they would plant a tree. However, they had already agreed to plant a set number of trees. The Finnish market court found that the trader took advantage of the credulity of the consumers that were concerned about the environment.

This is a surprising outcome that served to showcase the gaps of the Directive. This was a claim made by a trader that does not appear to be mere puffery or a claim not designed to be taken literally. To call a group of consumers credulous simply because they are interested in protecting the environment, is far removed from the common meaning of the term, and is stigmatising. Attempting to interpret the meaning of credulity in such a broad manner is an indirect recognition of the fact that the definition of vulnerability in the UCPD does not work very well to cover instances of vulnerability. However, it is doubtful whether simply claiming that credulity is an umbrella term that covers all types of vulnerability is a well-suited solution. If that is to be believed, then why not do away also with the criterion of age that could also be included in that *lato sensu* ‘credulity’? Credulity is not a term that can and should be equated with vulnerability.

4.2.3.5. Foreseeability by the trader

Art.5.3 UCPD requires that the clearly identifiable group of consumers is vulnerable in a way ‘which the trader could reasonably be expected to foresee’. It is meant to ensure that the average vulnerable standard is interpreted in a way that is proportionate. However, the foreseeability requirement has been criticised as being overly restrictive.³⁰⁵ Foreseeability adds to the conditions that limit the scope of consumer

³⁰² Duivenvoorde (2015) 189.

³⁰³ For example Micklitz has argued that ‘credulity’ points to the legally ignorant consumer, in Micklitz (2006), ‘The General Clause on Unfair Practices’ 113.

³⁰⁴ Second Guidance Document, 50.

³⁰⁵ Stuyck, Terryn and Dyck (2006) 151.

vulnerability, along with ‘clearly identifiable group’ and being ‘particularly vulnerable’. How the foreseeability requirement will be interpreted will be crucial in defining the scope of the provision.

For example, traders in most occasions should expect that their product will reach disabled consumers. Whether the disabled consumer will be particularly vulnerable in this instance is another issue. Foreseeability should not become an excuse for traders to neglect their duties towards vulnerable consumers and should be interpreted in a proportionate manner. It is intriguing to consider the possibility for foreseeability being more than a condition to limit the scope of vulnerability. It could mean that when the trader can reasonably foresee the impact on vulnerable consumers, then there is a duty to modify the practice in order to mitigate its effect on vulnerable consumers. For example, by offering alternative formats for disabled consumers. Proportionality is important to ensure that this kind of indirect duty does not place a big burden on the trader.

Also, the foreseeability requirement appears to envision a practice such as an advertising campaign that will be designed and then reach the consumer, without the consumer interacting with it. However, what happens when the trader did not foresee vulnerability, yet that became obvious to him to a later stage? E.g. when the consumer is about to sign a contract or even in the post-contractual stage. Is the trader expected to not alter his behaviour, as they could not have reasonably foreseen the vulnerability? Perhaps at that stage the general clause would provide a solution as it would be behaviour contrary to professional diligence.

4.2.3.6. Puffery

The last sentence of art. 5.3 UCPD includes a disclaimer that the provision is meant to be without prejudice to the common practice of making exaggerated statements or statements that are not meant to be taken literally. The point of this disclaimer is to ensure that the practice of puffery or exaggeration in marketing remains legitimate. Otherwise, it would always be possible for someone to make the claim that a consumer would take the statement literally and would be misled. For example, someone could claim that an advertisement states that ‘drink x gives you wings’ is misleading as he did not in fact get wings after consuming it.

The disclaimer is fits in with the proportionality requirements of the Directive and the need to balance the interest of the traders and the interests of the consumers. However, it is possible that a vulnerable consumer belonging to the categories above, in particular a mentally infirm or credulous consumer may indeed not be able to distinguish which statements are meant to be taken literally. Nevertheless, this would be a matter better resolved for the national rules on mental capacity, which as mentioned above, fall outside the scope of the UCPD.

4.2.3.7. Remarks

The average vulnerable consumer standard is not considered particularly successful. It has been criticised as a standard that is ‘paternalistic and ‘superfluous’ and one that makes the Directive more confusing rather than protective.³⁰⁶ It has been criticised for failing to include other characteristics that, as supported by empirical evidence, are likely to cause vulnerability such as education, ethnicity or level of income.³⁰⁷ The omission of the consumer’s financial situation is puzzling as it is the characteristic which exerts the biggest influence on how consumers evaluate market performance.³⁰⁸ The choice of these factors appears quite arbitrary.³⁰⁹ Furthermore, by treating the average vulnerable standard as an exception, the UCPD does not consider the fact that vulnerability may concern large parts of the consumer population or the notion that anyone may experience vulnerability at one point.³¹⁰

The average vulnerable consumer was introduced with good intentions, but the overly narrow scope and restrictive conditions do not allow it to sufficiently protect vulnerable consumers. As will be seen in the next chapter, aggressive practices are connected to consumer vulnerability.³¹¹ While the average vulnerable consumer is

³⁰⁶ Incardona and Poncibò (2007) 29.

³⁰⁷ Stuyck, Terryn and Dyck (2006) 122.

³⁰⁸ European Commission, ‘Consumer Markets Scoreboard’, [2016], available online at <http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/12_edition/index_en.htm> accessed May 2017 30.

³⁰⁹ Stuyck, Terryn and Dyck (2006) 122.

³¹⁰ Wilhelmsson (2006), ‘Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions’ 487.

³¹¹ See Ch.4, s.2.2.

different to the average consumer and does not reflect the information paradigm, it remains not well-suited to aggressive practices.

How does the average vulnerable consumer measure up to the vulnerability framework presented in chapter 2? ³¹² It is clear that the average vulnerable consumer of the UCPD follows the class approach.³¹³ While it is understandable that the class approach may be useful in policy, the criteria listed in the UCPD are too narrow and restrictive. This means that in the UCPD vulnerability is not universal, but can only refer to certain groups. It is questionable how much scope there is for assessing the role of the consumers' knowledge or capabilities in mitigating or increasing their vulnerability, which would make it more nuanced. On the positive side, it does view vulnerability as an interplay between the market (in this case the practice or product) and the characteristics of the consumer. Furthermore, it considers the detriment to the consumer, though limited to economic interests.

It is argued that the average vulnerable consumer needs reform, a reform that would bring it closer to a state-based approach. Given that the UCPD is a horizontal and maximum harmonisation measure, it has the potential to become a flexible standard that protects all consumers in a vulnerable position. What may be sacrificed in terms of legal certainty by a more flexible definition can be supplemented by sectoral legislation or codes of conduct. These suggestions are developed more fully in section 4 of the conclusions.

5. Suggestions for reform

5.1. Scope for behavioural evidence

As seen above one of the frequent criticisms of the average consumer standard is that it is an unrealistic standard that is not representative of consumers and has high expectations of them. A standard that reflects neoclassical assumptions on the rationality of the consumer. The remedy suggested to address that is to shift from the, in essence normative, standard of the average consumer to an average consumer that is informed by empirical evidence.

³¹² See Ch.2, s. 6

³¹³ See Ch.2, s. 3.1.

Gut Springenheide, as examined above, leaves the possibility open for national courts to decide when they might think it necessary to order the use of statistical evidence.³¹⁴ That being said, it is clear that the CJEU considers that most cases can be decided without the use of statistical evidence. Even if one thinks that the average consumer is more nuanced than he seems at first glance there is a case to be made for considering empirical evidence when interpreting the standard.

There is concern that moving away from the more normative view of the average consumer would mean sacrificing legal certainty, which is one of the goals of the Directive.³¹⁵ First, this assumes that the average consumer achieves this goal now. Given the criticism on the uncertainty caused by the standard, this does not seem to be the case. There are also issues with a more normative average consumer. For example, in trademark law, the case law shows that the UK judges, a quite uniform group especially in the past, seem to be influenced by their own views and expectations and inadvertently presenting them as those of the average consumer.³¹⁶ Also, in the UCPD context, Duivenvoorde concludes from his study of the application of the UCPD in Germany, England and Italy, that the national courts of all three countries interpret the average consumer to reflect actual rather than desired behaviour.³¹⁷

Using empirical evidence does not have to mean not having legal certainty. It is possible to achieve a balance that will allow for a more realistic standard, informed by empirical evidence, without going too far and adopting a purely empirical standard. The view taken in this thesis is that the average consumer as well as the other standards of the Directive would benefit from an interpretation that would take into account empirical evidence. The preferred option would be allowing for the use of empirical evidence for assessing the behaviour of the average consumer without the empirical evidence dictating the behaviour of the average consumer. Instead, empirical evidence would be a factor that would assist the court in making a decision.³¹⁸ Even though this argument was made in the context of trademark law, this view is argued also in this

³¹⁴ See note 116.

³¹⁵ UCPD, rec. 12.

³¹⁶ Davis (2005).

³¹⁷ Duivenvoorde (2015) 153.

³¹⁸ Dinwoodie and Gangjee (2016) 371.

thesis and is consistent with the judgement in *Gut Springenheide*, which may discourage but does not exclude the use of empirical evidence.

When discussing a more empirical average consumer or average vulnerable consumer, the question arises as to what kind of evidence can be taken into account. *Gut Springenheide* referred specifically to expert's report or a consumer research poll. A consumer research poll would be particularly useful when assessing the average targeted consumer. What is frequently mentioned is the possibility for taking behavioural evidence into account. Behavioural findings could also be of use in order to identify which consumer characteristics make them more vulnerable to certain practices. The need for such empirical research has been underlined in the literature.³¹⁹

As seen above, the average consumer reflects neoclassic assumptions of rationality. Behavioural evidence can be used to bring these assumptions into question.³²⁰ Furthermore, they can be used to introduce new factors that influence consumer behaviour. This can be particularly relevant for aggressive practices where, as mentioned above, the average consumer standard as has been developed so far, does not offer any meaningful guidance as to what is to be expected in the face of aggressive practices.³²¹ For example, empirical evidence could be useful for determining the reaction of the average consumer in certain emotional states, such as anger or stress. The same is true for determining consumer vulnerability. While behavioural economics can offer useful insights, they are not a panacea and need to be applied with caution.³²² For example, it needs to be taken into account that behavioural economics are descriptive, while the judges make normative judgements on a case.³²³

The European Commission have been becoming more and more receptive to the use of empirical evidence for informing consumer policy, and especially behavioural evidence.³²⁴ For example, the European Commission has recently published

³¹⁹ Stuyck, Terryn and Dyck (2006) 107.

³²⁰ See Ch.1, s.3.2.

³²¹ For more on aggressive practices see Ch.4, s.4

³²² For guidelines on how to use behavioural economics in policy making see René Van Bavel and others, 'Applying Behavioural Sciences to EU Policy-Making' (2013) European Commission Joint Research Center.

³²³ Trzaskowski (2011) 387.

³²⁴ See Ch.2, s.2.1.

a study on Consumer Vulnerability which was also quoted in the Second Guidance Document.³²⁵

Another recent development is that now the data collected for the Consumer Scoreboard are analysed also according to demographic characteristics, such as age. This could prove to be a useful resource for assessing the needs of different groups and their market behaviour. This change in the Consumer Scoreboard has been adopted following the recommendation of the European Parliament for vulnerable consumers.³²⁶ This is a welcome move as it will allow for richer data to be collected. Also, it showcases the move towards a more sophisticated understanding of consumer behaviour where not all consumers behave in the same manner and not in all markets.

This turn of the European Commission towards empirical evidence could have an influence on how the consumer standards are interpreted, for example through the Guidance issued by the Commission. However, the CJEU has not exhibited any shift in its attitude yet and the position remains one in favour of a normative standard.³²⁷ It remains to be seen whether that will change in the future. Perhaps a case regarding new technologies could signify a departure from the current case law on the average consumer, as has been the case in trademark law with *Google France*.³²⁸ Ultimately, national courts have the discretion to use empirical evidence for interpreting the consumer standards. There are no data pointing to how often that occurs, yet it is argued it would be desirable for national courts to do so, especially in cases involving vulnerable consumers.

6. Conclusion

To sum up, this chapter has looked at the different standards of the consumer in the UCPD. First, it examined the evolution of EU consumer policy noting how free

³²⁵ Commission, 'Consumer Vulnerability across key markets in the European Union' [2016] available at <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf> accessed May 2017.

³²⁶ European Parliament, 'Resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers', [2012] P7_TA(2012)0209, available online at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012IP0209>> accessed May 2017 para.18.

³²⁷ Duivenvoorde (2015) 67.

³²⁸ See above, s.3.3.6.

movement provisions and harmonisation were and in many ways continue to be the main driving force behind EU consumer policy. Secondly, the case law of the CJEU in the period that preceded the Directive was examined. Out of landmark cases such as *Gut Springenheide*, the image of the average consumer, which was later to be codified in the UCPD emerged. Next, the system introduced by the UCPD was examined where there are three different consumer standards namely the average consumer, the average targeted consumer and the average vulnerable consumer.

The average consumer is the benchmark of the UCPD, while the average targeted consumer is a variation and the average vulnerable standard is viewed as the exception to the rule of the average consumer. The three standards are not easily combined as it is difficult to distinguish when to apply the average targeted and when the average vulnerable standard. Also, the average consumer and the average vulnerable consumer seem to pursue different objectives as the first was designed to assist free movement of goods while the second one serves social objectives.

The average consumer standard is unsuitable for aggressive practices as it adheres to the information paradigm. The average vulnerable consumer, even though an entirely different standard, is not very helpful for addressing aggressive practices, or indeed, for protecting vulnerable consumers. It presents a narrow view of vulnerability, one that is far away from the broad and flexible consumer vulnerability envisioned in this thesis in Chapter 2.

Finally, some remarks were made on the potential for using empirical evidence and in particular behavioural evidence. It is submitted that it would be desirable for courts to use behavioural evidence where appropriate when interpreting the standards as that would give them a more realistic view.

Chapter 4

Aggressive practices in the UCPD

1. Introduction

The Unfair Commercial Practices Directive (hereafter the Directive) is one of the most important developments in EU consumer law. It was the Directive that introduced the regulation of aggressive commercial practices at a European level. For some Member States this was a novelty as they did not previously have specific provisions on aggressive commercial practices, or may have not addressed them specifically in the consumer context.¹ It was relatively easy to ensure the consent of the Member States to the principle of regulating aggressive commercial practices as it is common ground that they should not be accepted.² The introduction of provisions on aggressive commercial practices has been welcomed as European consumer policy has long focused on information and as a result misleading practices.³ Collins refers to the prohibition of aggressive practices as the greatest innovation brought by the Directive for the UK.⁴ Nevertheless, the provisions have been criticised for being vague and not providing a clear rationale on why aggressive practices are regulated.⁵

¹ Keirbilck (2011).

² Micklitz, Reich and Rott (2009) 107.

³ Peter Cartwright, 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' (2011) 1 Lloyd's Maritime and Commercial Law Quarterly 123, 124.

⁴ H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73 The Modern Law Review 89, 108.

⁵ Howells (2006), 'Aggressive Commercial Practices' 169; Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 125.

The provisions on aggressive commercial practices have received very little comment so far from the academic community, with some notable exceptions.⁶ However, the fact that there has not been a great deal of academic comment on aggressive practices should not imply their lack of importance. There are many legitimate advertising and marketing techniques that involve a degree of pressure and the question is where the line is to be drawn between those practices and what should be deemed an aggressive commercial practice to be prohibited.⁷ This will be a difficult task especially in borderline cases as according to rec.6 UCPD the Directive does not affect accepted advertising and marketing practices. There are difficulties in defining what should constitute an aggressive practice; this is shown in the great variety of commercial practices identified as aggressive ranging from rules on lotteries to pyramid schemes and ‘bait and switch’ tactics.⁸ The classic example of an aggressive practice of a trader using physical force to make a consumer sign a contract may be the most straightforward, but perhaps it is not representative of the subtleties of different pressures consumers face in the marketplace today.

This chapter focuses on the aggressive commercial practices provisions of the Unfair Commercial Practices Directive. It aims at providing an in-depth analysis and critique of these provisions. This chapter conceptualises aggressive practices using insights from contract and private law theory to illuminate how the aggressive practices provisions are to be interpreted. It aims to not only provide an abstraction of the concept but also offer examples of its real-life application. Part 2 will look at the background for regulating aggressive practices in the UCPD and how the provisions on aggressive practices fit in the system of the UCPD. Part 2 also examines the relationship between aggressive practices and vulnerability pointing out the common elements as well as how vulnerable consumers may be affected by aggressive practices. Part 3 examines the aggressive practices section of ANNEX I UCPD using examples from the case law

⁶ For works on aggressive practices see Howells (2006), ‘Aggressive Commercial Practices’; Cartwright (2011), ‘Under Pressure: Regulating Aggressive Commercial Practices in the UK’; Pablo Fernández Carballo-Calero, ‘Aggressive Commercial Practices in the Case Law of the EU Member States’ (2016) 5 Journal of European Consumer and Market Law 255; Keirsbilck (2011), *The New European Law on Unfair Commercial Practices and Competition Law*, Ch.10.

⁷ Micklitz, Reich and Rott (2009) 107.

⁸ European Commission, “Green Paper on European Union Consumer Protection”, COM (2001) 531, 7

of the Member States. Part 4 analyses art.8-9 UCPD which form the aggressive practices provisions of the Directive. Focus is placed on the three concepts of harassment, coercion and undue influence, which are central to aggressive practices. Part 5 concludes.

2. Aggressive practices in the UCPD

2.1. Background for aggressive practices

The Unfair Commercial Practices Directive has played a key role in the regulation of aggressive practices, as it introduced provisions for aggressive commercial practices for the first time on a European level. The inclusion of aggressive practices in the UCPD presents an unprecedented opportunity to broaden the scope of aggressive practices regulation.

Prior to the introduction of the UCPD, the Member States adopted diverse approaches in the regulation of aggressive practices. A study conducted by Schulze and Schulte-Nölke on the law on unfair practices of 9 Member States, prior to the introduction of the UCPD shows that there was divergence both in regulatory techniques as well as scope of application.⁹ Germany, Finland and Austria used general clauses while France and Belgium has specific statutory provisions. Member States regulated emotional advertising, with Austria being strict towards advertising that appeals to the compassion of the consumer as was France which prohibited advertising that exploited the compassion of the consumer. As will be seen below, the emotional aspect of aggressive practices plays a key role. Member States also regulated specific marketing techniques, such as marketing via phone and direct sales, that are relevant for aggressive as they may be harassing or coercive.¹⁰

The UCPD has harmonised these diverse approaches using maximum harmonisation. For some Member States this has meant lowering their level of protection, while for others the level of protection increased. Still, the main advantage of the UCPD is the introduction of a general prohibition of unfair practices thus creating aggressive practices as a separate category of unfair practices; whereas the Member

⁹ Reiner Schulze and Hans Schulte-Nölke, 'Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices' (2003) 37–39.

¹⁰ Schulze and Schulte-Nölke (2003) 36.

States appear to have regulated aggressive practices in a more fragmented manner. For example, the UCPD raised the level of protection against aggressive practices in the UK due to the general prohibition and broad scope, extending to practices before, during and after a transaction.¹¹

Aggression also has a strong cultural element that should not be ignored.¹² For example, for door-to-door selling, Scandinavian countries are negative towards door-to-door selling.¹³ Luxembourg went a step further and in 1987 passed a law banning door step selling entirely.¹⁴ The UCPD recognises these cultural differences and leaves matters related to taste and decency up to the Member States.¹⁵ So, for certain practices that do not satisfy the requirements of the provisions on aggressive practices there may still be a way to outlaw them for reasons relating to taste and decency or using the general clause of art.5 UCPD.¹⁶ Also, the average consumer is interpreted taking into account ‘social, cultural and linguistic factors’, although they may not be as broad as has been suggested.¹⁷

The aim of the Directive is two-fold: it is meant to promote the internal market, while at the same time ensuring a high level of protection for consumers.¹⁸ Aggressive practices do not appear to have a strong role in cross-border trade and are likely to cover vulnerable consumers, as with advertising to children. Therefore, aggressive practices appear to be closer related to ensuring a high level of protection for consumers rather than promotion of the internal market. However, with the rapid development of the online market, aggressive practices may become more central to cross-border trade.

Unfair practices in the Directive are divided into two broad categories: misleading practices and aggressive practices. Misleading practices address the

¹¹ Chris Willett, ‘Unfairness under the Consumer Protection from Unfair Trading Regulations 2008’ in Mel Kenny, James Devenney and Lorna Fox O’Mahony (eds), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge University Press 2010) 359.

¹² Micklitz, Reich and Rott (2009) 108.

¹³ Micklitz, Reich and Rott (2009) 108.

¹⁴ Abbamonte 697.

¹⁵ UCPD, rec.7.

¹⁶ UCPD, rec.2.

¹⁷ See Ch.3, s.4.2.1.2.

¹⁸ UCPD, art.1, See also Ch.3, s.4.

informational asymmetry between traders and consumers while aggressive practices address the power asymmetry between the parties. Information may have a role to play in aggressive practices as well, for example in undue influence, and in real life a practice may have both an aggressive and a misleading character. However, it is important to remember that aggressive practices cannot be adequately addressed by the provision of information and require different remedies.

When comparing the misleading and the aggressive practices provisions in the Directive one cannot help but notice that the misleading practices provisions (art.6-7 UCPD) are a lot longer and more detailed. The same motif exists in the recitals too where there is an extensive mention of misleading practices while for aggressive practices there is a short paragraph which merely repeats what is stated in art.8 UCPD, namely that aggressive practices use harassment, coercion and undue influence.¹⁹ This does not come as a surprise as regulation of misleading practices has a longer history in EU law. The UCPD replaces previous Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising. The Green Paper of the Commission on European Union Consumer Protection which preceded the proposal for the UCPD included an option for a framework covering only misleading and deceptive practices.²⁰ The advantage of the option for a framework for aggressive practices (which was adopted in the end) was the possibility to cover more unfair practices, including those that employ undue influence.²¹

Even after the adoption of the Directive, the First Guidance Document hardly touched on the topic of aggressive practices and certainly did not offer sufficient information on how the articles and the concepts they feature are to be interpreted and applied. While the recent Second Guidance Document offers more detail on aggressive practices, it is easy to see how a lot more space is devoted to misleading practices.²² So it can be seen that aggressive practices in the UCPD have not received the attention they deserve. This is by no means a reflection of their lack of frequency or importance

¹⁹ For misleading practices see rec.14 UCPD and for aggressive practices see UCPD, rec.16.

²⁰ European Commission, *Green Paper on European Union Consumer Protection* [2001] COM(2001) 531 final 13.

²¹ European Commission, *Green Paper on European Union Consumer Protection* [2001] COM(2001) 531 final 14.

²² Second Guidance Document, s.3.5.

and the lack of clarity surrounding them can have a negative impact on their application, resulting to lower protection for consumers.

Aggressive practices centre on the power asymmetry between the parties, which in consumer law are the trader and the consumer. But what is meant by power? Power is a complex and dynamic phenomenon that may manifest itself in several ways.²³ Even though power has been extensively studied in philosophy, political and social theory, it remains difficult to define. Given the fundamental importance of power, its systematic study started later than expected.²⁴ Dahl's intuitive notion of power is that: 'A has power over B to the extent that he can get B to do something that B would not otherwise do'²⁵ Not all relationships of power are relevant for this chapter, nor can they all be examined. In the aggressive practices context, it would be the trader having power over the consumer to cause him to take a transactional decision he would not have taken otherwise. The approach taken in contract law for assessing power has been criticised for being limited only to specific aspects of power and only in a specific point in the contractual relationship.²⁶

Next, some remarks on the relationship between aggressive practices and consumer vulnerability will be made, as the purpose of this thesis is view them in conjunction. Reference to consumer vulnerability will also be made in part 4 where relevant.

2.2. Aggressive practices and consumer vulnerability

Inequality of power is at the core of aggressive practices and the way it has been conceptualised in private law reveals parallels between inequality of power and vulnerability. Barnhizer, discussing how bargaining power disparity has been assessed by the courts, finds two approaches. The first is the status-based approach according to which some groups are labelled as the weaker party, such as consumers or the poor or the uneducated, which allows them to use contract defences aiming at rectifying this

²³ Daniel Barnhizer, 'Inequality of Bargaining Power' (2005) 76 University of Colorado Law Review 139, 140.

²⁴ Robert Dahl, 'The Concept of Power' (1957) 2 Behavioral Science 201, 201. See also Ch.1 s.3.1.6 on the absence of power from neoclassical economics

²⁵ Dahl (1957) 203.

²⁶ Barnhizer (2005) 141.

power imbalance.²⁷ The second is the process-based approach where the court assesses the level of bargaining power of one party by examining whether it ‘lacked meaningful alternatives’ or ‘had no opportunity to negotiate terms.’²⁸ Assessing the lack of meaningful alternatives or the opportunity to negotiate terms poses many challenges. Often the courts would use characteristics of the parties as indicators, such as level of income and level of education or even adopt a ‘we know it when we see it approach’ not elaborating on the standard used.²⁹

Inequality of power and vulnerability appear to use a common language. As seen in Chapter 2, the two broad conceptualisations of consumer vulnerability are the class approach and the state-based approach.³⁰ The class approach which labels entire categories of consumers as vulnerable due to their personal characteristics is similar to the status based approach of Barnhizer. Conversely, the state based approach of vulnerability, where anyone may experience vulnerability is closer to the process-based approach seen here that tries to introduce objective criteria for assessing inequality of bargaining power.

Vulnerability is difficult to define and conceptualising bargaining power disparity and formulating criteria for assessing it has proven equally elusive.³¹ In the context of inequality of bargaining power in private law the stronger party exploits the weaker party to enforce their will. If inequality of bargaining power, albeit in a broader context is central for aggressive practices, then the weaker party of contract law closely resembles the vulnerable consumer, making him integral for aggressive practices. Still, consumer vulnerability in consumer law is a more specific concept than that of a party in a weaker bargaining position in contract law. Vulnerable consumers will be more likely to fall prey to an aggressive practice and any consumer may experience vulnerability. Yet, aggressive practices also influence the average consumer.

²⁷ Barnhizer (2005) 150.

²⁸ Barnhizer (2005) 150.

²⁹ Barnhizer (2005) 200.

³⁰ See Ch.2, s.3.

³¹ For the vision for vulnerability suggested in this thesis see Ch.2, s.6.; for an attempt for a formula to compare power relations see Dahl (1957) 208.

The UCPD alludes to the relationship between consumer vulnerability and aggressive practices but the narrow concept of vulnerability in the Directive does not allow for it to be considered adequately. Art.5.3 UCPD limits the criteria of vulnerability to age, infirmity and credulity.³² The emphasis on protection of children as vulnerable consumers can be seen in point 28 of ANNEX I UCPD which prohibits direct exhortation to children to buy advertised products or persuade their parents to buy them for them. Children are considered to be vulnerable according to the Directive that lists age as one of the characteristics of a particularly vulnerable consumer.³³ Protection of children was particularly important to Member States like Sweden, who had banned all advertising addressed to children under the age of sixteen via a decision of the Swedish Market Court under art.4 of their Marketing Act.³⁴

Another vulnerable, according to the UCPD, group that is likely to be affected by aggressive commercial practices is the elderly. The elderly is likely to be targeted in door-to-door selling techniques which are in many instances aggressive.³⁵ The blacklist contains two practices that refer to door-to-door selling however it does not single out the group of elderly consumers and rightfully so, as they may be a frequent target of such practices but they are not limited to them.³⁶ The OFT conducted a study on the mobility aids market, where the elderly were the target group. In this case many of the consumers were vulnerable not solely due to their age, but also due to their mobility problems and other cognitive difficulties. Also, a lot of the consumers were unable to access the internet to get the information they needed and frequently they were under time pressure to obtain a mobility aid.³⁷ The study found that a minority of traders of mobility aids engage in high-pressure selling.³⁸ Some of the tactics employed as part of the door-to-door selling were extended sales pitches that lasted for hours, refusing to leave when the consumer requested it and offering time-limited offers which had to be

³² See Ch.3, s.4.2.3.2.-4.2.3.5.

³³ See UCPD, art.5.3.

³⁴ Abbamonte 697.

³⁵ Law Commission and Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices*, (Law Com No 332, Scot Law Com No 226, 2012) 43.

³⁶ See UCPD, ANNEX I, point 24,25.

³⁷ Office of Fair Trading, *Mobility Aids: An OFT Market Study*, (OFT 1374, 2011) 20.

³⁸ Office of Fair Trading (2011).

taken up immediately.³⁹ These aggressive practices were usually combined with misleading practices.⁴⁰

Door-to-door selling to the elderly can be observed in other industries besides mobility aids such as will-writing.⁴¹ Traders would use ‘click and bait’ techniques quoting a price to consumers that was a lot lower than the one they ended up paying, taking advantage of the fact that consumers did not have time to compare offers.⁴² Also the consumers reported that the emotional nature of the topic (e.g. seller playing on the fact the consumer would have to sell their house to pay for long-term care) along with the pressure selling made it difficult for them to say no.⁴³

Going beyond specific vulnerable groups, the link between aggressive practices and vulnerability can be seen in art.9 UCPD, where one of the factors for determining whether a practice has used harassment, coercion or undue influence is:⁴⁴

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.

A circumstance of this type could be a temporary life event such as bereavement which may make consumer more susceptible to being exploited by traders.⁴⁵ For example, bereaved consumers of funeral services have been found to be unwilling to engage in the market process e.g. by comparing prices.⁴⁶ Similarly, people who face financial difficulties may find themselves in a difficult position vis-à-vis the trader, especially in connection to debt collection services. Almost by accident, art. 9 gives a better conceptualisation of vulnerability than elsewhere in the Directive, and one that is more in line with what is advocated in this thesis. For example, credulity has been

³⁹ Office of Fair Trading (2011).

⁴⁰ Office of Fair Trading (2011).

⁴¹ Legal Services Consumer Panel, ‘Regulating Will-Writing’ (2011). <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf> accessed May 2017 (Regulating Will-Writing).

⁴² Regulating Will-Writing, para 5.16.

⁴³ Regulating Will-Writing, para 1.5.

⁴⁴ UCPD, art.9(c).

⁴⁵ Ramsay (2007).

⁴⁶ Gentry et al. (1994) 138–139.

argued to be a more general term in the average vulnerable consumer standard, yet art.9 offers a more suitable concept.⁴⁷

The term ‘specific misfortune or circumstance’ may have been used with bereavement or illness in mind, yet has the potential to be interpreted more broadly. For example, a carer who has power of attorney and third-party access to another person’s account. A report of the then FCA on consumer vulnerability in financial services relates the story of a 22 year old woman who had third-party access to her mother’s bank account and was encouraged by the bank to take out credit card and loans on her mother’s account.⁴⁸ Other circumstances could include relationship breakdown or unemployment. They could even refer to circumstances such as being a tourist or being an asylum seeker.

Article 9(c) UCPD is consistent with the view on vulnerability advocated in this thesis as the result of an interplay between internal and external factors.⁴⁹ It does not only focus on the misfortune or circumstance of the consumer but also requires that the trader attempts to exploit this circumstance. This provision is very helpful for covering the protection gaps arising from the vulnerability criteria of ‘age, infirmity or credulity’ at least in the context of aggressive practices.

The average vulnerable consumer standard of the UCPD has been analysed in detail elsewhere in this thesis.⁵⁰ Here, it suffices to point out that the issues with the average vulnerable consumer standard and aggressive practices extend beyond the narrow criteria for vulnerability. It has been argued that an aspect of consumer vulnerability could be vulnerability to pressure.⁵¹ Certain consumers may be more susceptible to pressure than others. It is unclear to what extent vulnerability to pressure can be considered in art.5.3. UCPD. Pressure vulnerability may often be overlooked in favour of the informational aspect of vulnerability, namely the ability to obtain and process information on the product. Aggressive practices also relate to exploiting the

⁴⁷ See Ch.3, s.4.2.3.5.

⁴⁸ Financial Conduct Authority, ‘*Vulnerability Exposed: The consumer experience of vulnerability in the financial services*’, (December 2014), 12

⁴⁹ See Ch.2, s.4.1.3.

⁵⁰ See Ch.3, s.4.2.3.

⁵¹ Cartwright (2011), ‘The Vulnerable Consumer of Financial Services: Law, Policy and Regulation’ 30.

consumer's emotional state.⁵² Marketing is not new to the concept of emotional exploitation as it is one of the tactics traders employ.⁵³ Yet, the scope of art.5.3. UCPD for considering circumstances of the consumer that impact on emotional reactions is limited.⁵⁴

2.3. Structure of the Directive

The structure of the Directive has been examined in detail in Chapter 3.⁵⁵ But before analysing the aggressive practices provisions in detail, a short reminder would be useful. Aggressive practices are featured in two parts of the Directive, in art.8-9 UCPD and in ANNEX I, under the 'aggressive commercial practices' heading. Next, these provisions will be examined in greater detail. Similarly, the aggressive practices featured in ANNEX I will be examined first to then proceed to the small general clause of articles 8 and 9 UCPD.

3. Blacklisted aggressive practices

ANNEX I contains a list of 31 practices that are always to be considered unfair out of which 23 are classified as misleading and the remaining 8 as aggressive. However, that distinction is not as clear-cut as one might think.⁵⁶ According to Cartwright, there are common themes that run through the blacklist. Points 28 and 30 relate to emotional pressure.⁵⁷ Emotional state and its exploitation is one of the key characteristics of aggressive practices. Points 24-26 are linked to harassment.⁵⁸ Harassment is also featured in art.8-9 UCPD but the role of the blacklist is to make sure that some blatantly aggressive practices are prohibited. Points 24, 27, 29 are prohibited because they obstruct consumer choice with unreasonable contractual barriers.⁵⁹ The practices listed in ANNEX I present the most commonly occurring practices as well as the most clear-

⁵² Schulze and Schulte-Nölke (2003) 37.

⁵³ Ramsay (2007) 322.

⁵⁴ See text to note 288 in Ch.3.

⁵⁵ See Ch.3, s.4.2.

⁵⁶ See Case C-428/11, *Purely Creative Ltd v Office of Fair Trading*, [2013] Bus. L. R. 985

⁵⁷ Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 127.

⁵⁸ Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 127.

⁵⁹ Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 127.

cut examples of aggressive practices and can therefore serve to showcase what is in the core of aggressive practices.

Point 24 states:

Creating the impression that the consumer cannot leave the premises until a contract is formed

While point 25 states:

Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.

These two practices are essentially two sides of the same coin as in both the trader insists that the consumer signs a contract only that in point 24 this takes place in the trader's premises, while in point 25 it takes place in the consumer's home. The issue with these practices is that a consumer is pressured into feeling that there is no other alternative for them but to enter the contract. What is not specified and is less easy to define are the ways that the trader puts pressure on the consumer. The most obvious would of course be the trader spelling it out; or in the case of point 24 e.g. locking the door of the premises. Point 25 is more specific as the practice will be aggressive if the trader ignores the consumer's request to leave or to not return. It seems that the Directive focuses more on the result, in this case the consumer feeling pressured to decide, rather than the actual practices used by the trader.

Point 25 of the ANNEX prohibits 'personal visits to the consumer's home ignoring the consumer's request to leave or not to return except to enforce a contractual obligation.' It is not the visit itself that is illegal, but ignoring the consumer's request to leave or not return. Does that require the consumer to accept the first visit, for example by answering the door, to ask the trader to leave and not return? Or would a general notice, such as a sign at the entrance with the inscription 'Doorstep sellers not welcome' be sufficient? If the issue is that consumers often feel pressured by someone intruding their private sphere, in this case their home, perhaps it would demand too much of consumers to have to open their door and then ask a trader to leave and not return. Many consumers may find it difficult to be so direct and behave in a manner that may be considered impolite, even though they are well within their rights to do so.

Cultural differences may have a role to play here as it could be argued that in some Member States it may be more impolite to ask someone to leave (even if that someone is a trader) than in others.⁶⁰ Furthermore, is a single request to leave sufficient, so that if the trader does not immediately leave, it will constitute an unfair practice? The answer to that seems positive, considering the recent CJEU decision in *UPC Magyarország Kft*, stating that a single communication to a single consumer can constitute an aggressive practice, as the Directive ‘does not establish a threshold, whether in terms of frequency or the number of consumers concerned, beyond which an act or omission must come within the scope of that directive.’⁶¹

Points 24-26 relate to harassment. It is worth noting that both points 25 and 26 have an exception for enforcing contractual obligations. It is clear why this exception was adopted, as the above actions can be a necessary part of enforcing a contractual obligation, which is a lawful act rather than an unfair practice. As stated in rec.9 UCPD, the Directive is without prejudice to national contract law. However, that does not mean that enforcing a legal obligation cannot amount to an aggressive practice if it goes beyond ‘the extent necessary’ to enforce them.

There will be instances when the Directive will place limitations not on whether but on how is a contractual obligation to be enforced. The factors of art.9 UCPD can be helpful for pointing out when that would occur. For example, a debt collection agency can make telephone calls to consumers informing them that they are behind with their payments and that they need to pay as soon as possible; however, if during these calls they use abusive language as per art.9(b) UCPD, then it will be an aggressive practice, according to art.8-9 UCPD. Still, it may be possible for such practices to be caught by the blacklist without resulting to art.8-9 UCPD, since it can be argued that e.g. the use of abusive language goes beyond the extent justified by national law.

However, following this view would mean that to decide whether a practice is caught by the blacklist one would have to first look at the national contract law. This would go against the aim of the blacklist which is achieving legal certainty and the general aim of the Directive to harmonise national (consumer) laws. It would be best to

⁶⁰ See text to note 245 in Ch.3.

⁶¹ Case C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország Kft* [2015] ECLI:EU:C:2015:225, paras 41-46.

interpret the contractual obligation narrowly, and to use art.8-9 UCPD as legal basis to avoid these problems. This shows that even though the Directive is not meant to change national contract law, in fact there is a degree of inevitable intersection between them.⁶²

Point 26 prohibits:

Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC (1) and 2002/58/EC.

An Austrian Supreme Court case provides an example of point 26 of ANNEX I.⁶³ In that case, an insurance adviser searched for accident victims in the news and if he could identify them would then proceed to send a letter offering his services and state that should they require legal representation qualified lawyers would be available to deal with the case. The adviser was not a lawyer or in contractual agreement with lawyers and only suggested names of lawyers he thought were specialised in the field.

The question in Court was whether the sending of letters was an aggressive practice per point 26 of ANNEX I and if the part of the letter referring to legal services constituted a misleading practice. The Court decided that even though sending letters to victims could be covered by point 26, in this case where only one letter was sent out it did not satisfy the ‘persistent and unwanted solicitations’ requirement. Moreover, the Court did find the content of the letter to be misleading, as it could significantly impair the consumer’s ability to make an informed decision. Contrary to what was decided in the Austrian case, in a German case concerning a gravestone dealer sending letters to the recently bereaved relatives of the deceased, it was found that even one communication can be a persistent and unwanted solicitation according to point 26.⁶⁴

⁶² For a detailed analysis of the overlap between the UCPD and contract law see Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016).

⁶³ For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=91&articleID=>> accessed May 2017.

⁶⁴ For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=62&articleID=>> accessed May 2017.

These differences can be attributed to the different facts in each of the cases or to divergent attitudes in the Member States.

Per point 27 it is aggressive:

requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.

Point 27 would fall under art. 9(d) UCPD on placing disproportionate barriers for the consumer to exercise rights under the contract; only that it refers to the insurance industry. The reason behind choosing to include a practice specifically from the insurance sector may relate to frequency of occurrence.

Point 28 refers to advertising aimed at children containing direct exhortations at children to buy a certain product or to convince their parents or other adults to buy the advertised product. It prohibits:

‘Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.’

It is not only adults that might be influenced from such advertising but also other children. For example, an advertisement containing the phrase: ‘Kids tell your friends about toy X! All the cool kids have it!’ Would that be caught by the blacklist? Following the letter of point 28, the answer would be no. Still, if children are to be considered more susceptible to advertising as a rule, then they would also be influenced by exhortations to their peers. It is not illegal to sell products that are aimed at children, nor is it illegal to advertise those products. Rather, it is considered an aggressive practice to directly address the children and ask them to buy a product or ask adults to buy them a product. This has been deemed necessary as children are considered particularly vulnerable consumers due to their age according to art.5.3 UCPD.

A Latvian case reported in the UCP database provides an example of point 28 of ANNEX involving children as vulnerable consumers. In that case a telecommunications company handed out SIM cards with a credit balance to first-

graders in schools in Latvia along with a note inciting the children to use the services. The court found that to be an aggressive practice, pursuant to point 28 of ANNEX I.⁶⁵ The Court considered that children were particularly vulnerable, as they could be easily influenced and did not have a sufficient level of knowledge on the topic. Furthermore, even though part of the leaflet was addressed to parents it was clear that it was directly aimed at children. Another case concerning point 28 of the ANNEX came from Germany. It concerned an advertisement in a magazine for children with the statement ‘YOUR EXTRA COOL WE-RADIO WITH HEADPHONES’ and ‘DO NOT MISS - FROM 15 OF APRIL AT YOUR KIOSK’. The court decided that it was a direct exhortation, given that it was not possible to inspect the magazine at the kiosk without buying it, meaning it did not merely provide information.⁶⁶ Similarly, in Sweden a gaming community sending out emails to children with the statement ‘Buy before it’s too late’, was found to be in breach of point 28 of ANNEX I.⁶⁷

Point 29 refers to the common practice of ‘inertia selling’.

Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling)’

An example of such a practice comes from a Greek case from the financial services sector where certain companies were issuing credit cards in their consumers’ names and posting them to them without previously asking for their consent. Consumers had to go to a branch of the company to request cancellation of the credit card, otherwise it would be presumed they consented and they would be charged for it. After consumers complained to the Greek Consumer Ombudsman, the case was investigated and the practice was found to be unfair as per point 29 of ANNEX I.

Another interesting practice is point 30:

⁶⁵ For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=77&articleID=>> accessed May 2017.

⁶⁶ For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=61&articleID=>> accessed May 2017.

⁶⁷ For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=488&articleID=>> accessed May 2017.

Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

This practice could serve as an example of coercion. What is setting this practice apart is that the trader's statement that his job or livelihood will be in jeopardy has an undesirable result, yet it has no adverse effect for the consumer personally. The consumer does not have any duty to protect the trader. However, this practice is included in the list because very few people would be indifferent to the statement that someone's job or livelihood depends on their decision, even though it might be someone unknown to them up to that point. As seen in s.2.1. some Member States regulated such practices that appeal to the compassion of consumers, which explains why this practice was included in the blacklist. Still, it goes against the neoclassical assumption that people have strictly self-regarding preferences and there is no place for virtuous behaviour.⁶⁸ That assumption has been questioned empirically in behavioural, as research has shown that individuals exhibit altruistic behaviour.⁶⁹ Point 30 exemplifies the relation of aggressive practices with psychological pressure. It does not matter whether the claims made by the trader are true or not but if they are not the practice could also be misleading. Beyond the shadow of a doubt this is a practice that, in the wording of the Directive, is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

Point 31 has created confusion as to its meaning and its character as an aggressive practice which is discussed in the *Purely Creative* case.⁷⁰ Point 31 states:

Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

— There is no prize or other equivalent benefit,

or

— taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

⁶⁸ Dhimi (2016) 453.

⁶⁹ See for example: Sanjiv Erat and Uri Gneezy, 'White Lies' (2011) 58 Management Science 723.

⁷⁰ Case C-428/11 *Purely Creative Ltd v Office of Fair Trading* [2012] ECLI:EU:C:2012:651.

The phrase ‘creating a false impression’ seems better suited to a misleading practice. In fact, in Germany and Austria the predominant view has been that placing point 31 under aggressive practices is misguided as it is actually a misleading practice.⁷¹ As a result, in a revision of the German Unfair Competition Act (which implemented the Directive) point 31 was placed amongst the misleading practices.⁷² However, the CJEU in *Purely Creative* clarified that the practice is aggressive, since the Directive labels it as such and any misleading character is irrelevant.⁷³ The CJEU explained the aggressive character of the practice, stating that ‘the reference to a prize seeks to exploit the psychological effect created in the mind of the consumer.’⁷⁴ However, this does not explain why similar practices such as number 19 on claiming to offer a competition without awarding the prizes and number 20 on describing a product as free while the consumer has to pay for it are listed under misleading practices.⁷⁵

Purely Creative takes on importance as the only CJEU case concerning aggressive practices, although decided under point 31 of Annex I. It reflects some of the main issues with art.8-9 and aggressive practices in general. The nature of aggressive practices is difficult to grasp and explain and therefore, there will often be a regression to the misleading character of a practice as the default, rather than the elusive aggressive character. In practice, many practices might have both a misleading and an aggressive element.

In a Polish case, a limited company organised a lottery called ‘Empty text lottery’, as people had to send an empty text to the number provided to participate to the lottery.⁷⁶ Then, the company would send multiple messages to the participants suggesting they had already won the lottery and had to respond to the text to claim the

⁷¹ H Kohler, “‘Congratulations, You Have Won!’ New Standards Apply to Announcements of Wins: A Discussion of *Purely Creative* and Others’ (2013) 8 *Journal of Intellectual Property Law & Practice* 399, 400.

⁷² Anhang (zu § 3 Absatz 3) UWG, number 17

⁷³ *Purely Creative*, para.37

⁷⁴ *Purely Creative*, para.49

⁷⁵ Kohler (2013) 400.

⁷⁶ Decision no. RPZ-30/2010, Prezes Urzędu Ochrony Konkurencji i Konsumentów, Delegatura w Poznaniu, for a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=206&articleID=&countryID=PL>> accessed May 2017.

prize. However, in fact the prizes were awarded based on a draw and the winners were to be informed by phone. The practice was found to contravene point 31 of ANNEX I by the Polish consumer authority, as the messages were directed at all participants and they wrongly created the impression that they had won a prize.

In conclusion, the practices featured in the blacklist fit into two broad categories. There are practices that place psychological pressure on the consumer, namely points 25, 26, 28, 30, 31 and practices which place barriers on the consumer, namely point 24 places a physical barrier, while points 27 and 29 are non-contractual barriers. It is noted that point 28 forbidding direct exhortations to children is the only practice in the ANNEX that specifically mentions a vulnerable group. These categories can be useful also in the context of art.8-9 UCPD. Contrary to art 8.-9 UCPD, ANNEX It prioritises legal certainty over flexibility as the list of practices cannot change unless the Directive undergoes a revision. The Member States are bound by the list and can neither add nor remove practices from it.⁷⁷ The CJEU has reaffirmed this stating that Member States cannot prohibit a practice without first applying the criteria of art. 5-9 UCPD; unless it is one of the blacklisted practices.⁷⁸ The aim of the ANNEX to promote legal certainty may be undermined by the vague phrasing used in some of the practices that can result to divergent interpretations.⁷⁹

For example, point 27 of the ANNEX states that requiring a consumer who wants to claim on an insurance policy to produce documents ‘that could not reasonably be considered relevant’. Given that the average consumer standard does not apply for the practices listed in the ANNEX what is the standard to judge which documents can ‘reasonably’ be considered relevant? Should it be according to the standards of the insurance industry (which may vary) or is it within the discretion of the national judge to decide? The blacklist has received criticism for failing to have the desired impact on

⁷⁷ See UCPD, art.5.5.

⁷⁸ See Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECLI:EU:C:2010:12, paras 48-50

⁷⁹ Stuyck, Terry and Dyck (2006) 131.

national law and ensuring legal certainty thus resulting in a reduced level of protection for consumers as Member States cannot diverge from the UCPD.⁸⁰

Stuyck, Terry and Dyck in 2006 were predicting a heavy consumer law case load for the CJEU because of the above flagged issued of the blacklist.⁸¹ That is since the CJEU has the last word on the interpretation of the ANNEX which, as mentioned, cannot change unless the Directive is revised. That prediction has been verified to an extent as so far several of the CJEU preliminary rulings on the UCPD concerned the blacklist.⁸² As out of these rulings, only *Purely Creative* deals with aggressive practices, the analysis is limited to that as focus is on aggressive practices rather than the blacklist in general.

In addition to the case law of the CJEU, the aggressive practices part of the blacklist is coming up often in the case law of the Member States, as they are reported in the database of the Unfair Commercial Practices Directive, set up by the European Commission.⁸³ This could be due to several factors such as the fact that they are meant to represent the most commonly occurring aggressive practices. It could also mean that they are easier to apply compared to the small general clause on aggressive practices of art. 8-9 UCPD, as they are meant to be specific and clear-cut.

⁸⁰ Monika Namysłowska, 'The Blacklist of Unfair Commercial Practices: The Black Sheep, Red Herring or White Elephant of the Unfair Commercial Practices Directive' in Willem van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Publishing Group 2014) 84.

⁸¹ Stuyck, Terry and Dyck (2006) 131–132.

⁸² CJEU rulings on ANNEX I: Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR 2009 I-02949; Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217; Case C-522/08 *Telekomunikacja Polska* [2010] ECR I-2079; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909; Case C-288/10 *Wamo BVBA v JBC NV and Modemakers Fashion NV* [2011] ECR I 05835; Case C-126/11 *Köck* [2013] ECLI:EU:C:2013:14; Case C-343/12 *Euronics Belgium* [2013] ECLI:EU:C:2013:154; Case 391/12 *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] ECLI:EU:C:2013:669; Case C-515/12 *4finance* [2014] ECLI:EU:C:2014:211.

⁸³ See <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show&CFID=555153&CFTOKEN=b4138d7745d66b3c-F19369C2-91B447281283E59C27FCA53D&jsessionid=a403b315343ebf5e62cb243a563a13516223TR>> accessed May 2017.

The database on the Unfair Commercial Practices Directive was designed to be a one-stop-shop for information on the Directive; however, the information from its database needs to be taken with a pinch of salt as it is not clear whether all relevant cases are being reported by all the Member States. The database has fallen into disuse and has not been updated since 2013.⁸⁴ Overall, the case load generated from the blacklist reveals that legal certainty has not been achieved.

4. Aggressive commercial practices provisions

As mentioned above, the meaning of the aggressive practices provisions, especially the core concepts of harassment, coercion and undue influence lack clarity. The UCPD provides a full definition only for the concept of undue influence.⁸⁵ Coercion is partially defined as it is clear from art.8 that it includes the use of physical force. The UCPD uses innovative legal terms to Europeanise contract law, yet these concepts resemble their private law counterparts.⁸⁶ Definitions of the concepts would be useful for achieving legal certainty, as there is little case law to help interpret the meaning of these terms.⁸⁷ Otherwise, the lack of clarity might create divergence in application.⁸⁸

Therefore, the natural place to go for guidance as to their meaning is the common law tradition where concepts such as undue influence stem from. Nevertheless, it needs to be underlined that they are autonomous European concepts that should not be confused with the common contract law, even though in practice it is likely that there might be a degree of convergence.⁸⁹ For example, the concept of undue influence has its own meaning and tradition in common law but one should not

⁸⁴ This is confirmed in the European Commission website, also stating that the consumer acquis will be incorporated in the e-justice portal in 2017. See <http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm> accessed May 2017.

⁸⁵ See UCPD, art.2(j).

⁸⁶ Durovic (2016) 197.

⁸⁷ See C-382/87, *Ministere Public v Buet*, [1989] ECR 1235 and C-441/04, '*A-Punkt Schmuckshandels v Claudia Schmidt*', [2006] ECR I-2095 For a further analysis of these case see ch.3, s.3.2.8., 3.2.9.

⁸⁸ Chris Willett, 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive.' (2010) 33 *Journal of Consumer Policy* 247.

⁸⁹ Twigg-Flesner et al. (2005) 61.

be tempted to interpret the undue influence concept of the Directive in the same way.⁹⁰ They are to be interpreted by the national courts and of course by the CJEU.

The common law concepts of duress, undue influence, will be used to provide an insight into the aggressive practices provisions. Focus will be on the theoretical foundations and justifications of these concepts acting as a guideline as to why we regulate aggressive practices and what are the different options; their advantages and caveats. This part will not focus on the meaning of the average consumer, as the concept has been analysed in detail in previous chapter.

Aggressive practices in the Directive, on the second level of the small general clauses are regulated in art.8 and 9 UCPD. Article 8 UCPD sets the conditions that need to be satisfied for a practice to be considered aggressive:

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

Article 8 requires consideration of the factual context and all of the features and circumstances of the practice to decide whether it is aggressive. It reads 'harassment, coercion or undue influence' yet it is unlikely that the 'or' was meant to be read disjunctively.⁹¹ The elements of art.8-9 should be considered in combination with each other and it is the overall impact of the practice that should be evaluated.⁹² This would allow for a practice that would combine two or more of these elements but not to a high degree to still be deemed aggressive due to its overall aggressive character.⁹³ Viewing harassment, coercion and undue influence in conjunction suggests that they share several elements and there is significant overlap between them. In the context of the common law, Bigwood has suggested that related concepts such as duress, undue

⁹⁰ Howells (2006), 'Aggressive Commercial Practices' 172.

⁹¹ Howells (2006), 'Aggressive Commercial Practices' 173.

⁹² Howells (2006), 'Aggressive Commercial Practices' 173.

⁹³ Howells (2006), 'Aggressive Commercial Practices' 173.

influence and unconscionability can all be placed under the label of exploitative contracts.⁹⁴ Unifying them under an umbrella term could assist in bringing coherence and consistency to these closely linked concepts.

Article 9 UCPD lists factors to be considered when deciding whether there had been use of harassment, coercion or undue influence. Art 9 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:

- (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

The factors of art.9 will be examined in relation to the concepts of harassment, coercion and undue influence, as well as in separate part. They are meant to be applied to all three concepts indiscriminately for determining whether a practice is aggressive; however, some seem to be closer to one of the three concepts of harassment, coercion or undue influence. The application of the factors to all three concepts adds to the argument that they should be viewed as a whole.

4.1. Conceptualising Aggressive Practices

Before proceeding to examine the elements of art.8-9 UCPD, an attempt will be made to conceptualise what lies in the core of aggressive practices in the context of the Directive and what are the guiding principles for approaching them. For this purpose, insights from private law philosophy and contract theory will be utilised, as they offer the toolbox for approaching aggressive practices. This is not an attempt to present and explain all the philosophical and theoretical approaches in private and contract law, but

⁹⁴ Bigwood (2003) 21.

rather, an attempt to approach aggressive practices in the Directive by examining how they relate to existing private law categorisations.

Aggressive practices are prohibited in the Directive as unfair. What is the reasoning for considering them to be unfair? The UCPD wishes to remove unfair practices from the market to address the imbalance between the parties. It is accepted that traders will be likely to have more power and information in comparison to consumers, and it is not in the aims or scope of the Directive to change that. What it does wish to do is prevent them from exploiting their power to take advantage of consumers. To the extent that the UCPD gives rights to consumers and ensures their protection it reflects distributive justice considerations. Distributive justice refers to dividing a benefit or a burden according to some criterion.⁹⁵ In this context, power is distributed from the traders to the consumers. The Aristotelian conceptions of distributive justice offers a mechanism for giving each person what they are due, yet it does not help in defining which differences are relevant or what the criteria should be for determining what is just.⁹⁶

Lucy argues that in broad terms the interests that private law protects are: (a) an interest in bodily integrity and autonomy, (b) an interest in protection from the conduct of others, (c) an interest in other's completing or performing their undertakings, (d) an interest in protection of one's legitimate holdings and in others returning one's legitimate holdings, and (e) an interest in maintaining one's good reputation and in reliable information.⁹⁷

Out of these interests, the most relevant for aggressive practices is the interest in protection from the conduct of others, more specifically, the protection of consumers from the conduct of traders. What kind of conduct do consumers need to be protected against? In the context of private law, Lucy suggests the term 'wrongfulness' instead of the more frequently used wrongdoing.⁹⁸ That is because the term wrongdoing focuses attention on the behaviour of the alleged wrongdoer. Yet wrongs in private law are the

⁹⁵ Ernest Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 62. See also Ch.1, s.4.1.

⁹⁶ Hans Kelsen, *What is justice*, [1957] 125-136

⁹⁷ William Lucy, *Philosophy of Private Law* (Oxford University Press 2007) 222.

⁹⁸ Lucy (2007) 205.

‘combination of the conduct of the defendant and its impact upon the claimant’s protected interests’.⁹⁹

Although advanced in the context of private law, this formula is helpful for conceptualising aggressive practices in the UCPD. In this context, the conduct of the trader (using practices that employ harassment, coercion and undue influence) corresponds to the conduct of the defendant; while the impact upon the claimant’s protected interests corresponds to the impact on the consumer’s protected interests. Following the structure of art.8 UCPD this protected interest is the freedom of choice of the average consumer. Wrongfulness is helpful in shifting attention from the impact of the wrongdoing of the trader to the combination of the trader’s conduct and its impact on the consumer.

Yet, for wrongdoing or wrongfulness to not become a circular argument, of a conduct being wrongful because it is contrary to the law an explanation must be given on why the interest harmed by the conduct is worth protecting. As mentioned above the protected interest for aggressive practices is the freedom of choice of the average consumer. The impairment of freedom of choice is analysed further below, yet at this point it is important to reflect on the importance of the interest at stake.

The protection of freedom of choice seems to represent the libertarian values that shaped classic contract law in the 19th century, which in turn was influenced by neoclassical economics.¹⁰⁰ The influence of the libertarian values remains strong today, even though they have been subjected to criticism.¹⁰¹ Key among these values is individualism. Each individual should be left alone to pursue their self-interest and refrain from interfering with the pursuit of other people’s self-interest.¹⁰² The choices of the individuals are to be respected and when their decisions are autonomous then the person deserves the consequences.¹⁰³ From this it follows that for an individual to be

⁹⁹ Lucy (2007).

¹⁰⁰ See text to note 73 in Ch.1.

¹⁰¹ For a detailed account see PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979).

¹⁰² Rosenfeld., 788

¹⁰³ Menachem Mautner, ‘A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements’ (1990) 10 Tel Aviv University Studies in Law 239.246

bound by a transaction it must have been voluntary.¹⁰⁴ In other words, if a consumer takes a transactional decision that was involuntary, (or in the language of the Directive a transactional decision he would not have taken otherwise), then the practice that caused this involuntary decision is found to be unfair.

Individualism and freedom of choice are not the only ways to justify regulating aggressive practices. Another avenue is focusing on the avoidance of exploitation of inequality of power via aggressive practices. In the private law context, Bigwood has developed his theory on interpersonal exploitation as taking unfair advantage of another person for one's advantage or benefit which is of interest to the law, as above, for protecting autonomy of persons.¹⁰⁵ This holds true especially for vulnerable consumers who are easier to exploit, and therefore making use of the opportunity to exploit them would be considered unfair.¹⁰⁶ Exploitation helps to circumvent a possible debate on how free a choice can be and focuses attention on the unfair behaviour of the trader, while still protecting autonomy.

Next, the different elements of art.8 UCPD will be examined namely the three concepts of harassment, coercion and undue influence, followed by the requirement of impairment of freedom of choice of the average consumer to conclude with the requirement of likelihood of the average consumer to take a transactional decision he would not have taken otherwise. Reference will be made to the factors listed in art.9 UCPD where appropriate, as well as separately at s.4.2. In the UCPD, harassment, coercion and undue influence are grouped together and in practice the line between them will often be blurred. Still, it is necessary to attempt to clarify their meaning and distinguish between them, to gain a better understanding of what falls under the rubric of aggressive practices.

4.2. Article 8 UCPD

4.2.1. Harassment

To understand the meaning of harassment, the dictionary definition provides a useful starting point. According to the Oxford English Dictionary, to harass is to 1) To wear

¹⁰⁴ Bigwood (2003).87

¹⁰⁵ Bigwood (2003) 488–489.

¹⁰⁶ Robert E Goodin, *Protecting the Vulnerable: A Re-Analysis of Our Social Responsibilities* (The University of Chicago Press 1985) 194.

out, tire out, or exhaust with fatigue, care, trouble, etc.; 2) to trouble or vex by repeated attacks; 3) To trouble, worry, distress with annoying labour, care, perplexity, importunity, misfortune, etc.¹⁰⁷ All these definitions offer insights on how to formulate the legal meaning of harassment which may be distinct from its common usage. In consumer law context it has been argued that harassment can refer to the unwanted invasion of someone's personal sphere.¹⁰⁸

If the assertion that harassment is an invasion of someone's personal sphere, what is the average consumer expected to tolerate? In other words, how resilient should the average consumer be of such an invasion? As seen in Chapter 3, the characteristics attributed to the average consumer do not correspond to aggressive practices.¹⁰⁹ Art.9(a) UCPD offers some guidance stating that when assessing whether a practice uses harassment, coercion or undue influence account shall be taken of: '*its timing, location, nature or persistence*'.

When it comes to personal sphere and location, one's home would surely belong to their personal sphere. The same can be argued for their place of work or for approaching someone walking on the street. But would the answer be the same for someone's online presence? Can e.g. social media profiles be construed to be part of a consumer's personal sphere? The answer will depend on the other factors and circumstances. E.g. a single marketing call in someone's house will likely not amount to harassment but the answer may be different if that call is made early in the morning or if it is made repeatedly. Similarly, for online presence one can argue whether it is public or private but beyond a certain threshold communications can amount to harassment.

The implementation of harassment in the law of the Member States has given rise to a few issues. In Germany, para 4 No 1 UWG, does not mention 'harassment' but only 'coercion' and 'undue influence'. As Keirsbilck points out, the argument of the German Government that if the above provision of the UWG is interpreted in

¹⁰⁷'Oxford English Dictionary' (Oxford University Press, 2016) <<http://www.oed.com/view/Entry/84099?result=2&rskey=NXobRL&>> accessed May 2017.

¹⁰⁸ Howells (2006), 'Aggressive Commercial Practices' 178; Schulze and Schulte-Nölke (2003) 36.

¹⁰⁹ See text to note 207 in Ch.3.

compliance with the UCPD will also cover ‘harassment’, is unconvincing.¹¹⁰ If harassment could be absorbed by coercion there would be no reason to include it in the first place. The next sections will examine two key elements of harassment: persistence and emotional dimension. Other pertinent factors listed in art.9(a) such as timing will be examined in the section on art.9 UCPD.

4.2.1.1. Persistence

Persistence can be a significant factor to determine whether a practice amounts to harassment. Advertising messages that are not aggressive per se may become aggressive by constant repetition. For example, making one call to ask whether a consumer wishes to switch to a different phone company is not harassing but several calls a day which continue even after the consumer asks not to be bothered again, would be harassing; if the other conditions set by art.8 are satisfied. Conversely, depending on the overall character of the practice even a one-off communication can be considered harassing.

For example, in a German High Regional Court case_a consumer was taking action against a gravestone dealer who was sending letters advertising his products to the relatives of the deceased shortly after the death, requesting a cease-and-desist order for this and similar practices for four weeks after the death of a relative. The court found the practice to be in violation of §7 of the German Unfair Competition Act (UWG) which regulates harassment, and decided that such advertisements should not be sent out in the first two weeks after the death.¹¹¹ The reasoning was that this type of advertisement may disturb the bereaved who may find it immoral if so close after a death their bereavement was used for commercial purposes.¹¹² After the first 2 weeks the practice would be acceptable, meaning that timing was an important issue. The two weeks limit is very clear, even though one might argue it is an arbitrary distinction. It shows the need to balance the interests of traders who should be allowed to promote

¹¹⁰ Keirsbilck (2011) 374.

¹¹¹ The German Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb (UWG)) transposes the UCPD in national law. §4a UWG transposes articles 8-9 UCPD, yet the case was brought under §7 UWG on harassing practices specifically.

¹¹² For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=62&articleID=>> accessed May 2017.

their product and the interest of consumers who in this case would be disturbed by such a practice.

From the note of the case, it was not established how the solicitation would be likely to cause the average consumer to take a transactional decision he would not have taken otherwise, as this does not appear to be a requirement for the application of §7 UWG.¹¹³ What seemed to play the most important part were ethical concerns that this type of advertisement so close after the death of someone would be immoral and disturbing. Once again the emotional underpinning nature of aggressive practices becomes apparent, as well as its association with vulnerability as arguably the recently bereaved are in an emotional state that may render them vulnerable to a practice.

The Court decided that under such circumstances even one communication was enough to render the practice aggressive. Attempting to justify the decision under art.8 UCPD would be even more problematic as it is not established if the practice had impaired the average consumer's freedom of choice causing him to take a transactional decision he would not have taken otherwise. The above case can also be relevant to art.9(c) as the recently bereaved are a group of consumers whose misfortune can influence them to the extent that they take a transactional decision they would not have taken otherwise. Also art.9(b) UCPD on the use of threatening or abusive language can be relevant to harassment, especially in connection to debt collection where the communications to the consumers could contain such language. In fact, practices that occur in the post-contractual phase provide good examples of practices that would be caught under the Directive, since the transactional decision test would be easier to satisfy.

In spite of the German gravestone dealer case discussed above, where the national court interpreted harassment in a broad manner; it has been argued that the Directive takes a narrow approach in relation to what amounts to harassment. Merely annoying or irritating practices, such as spam e-mail or automated calls will usually not be caught by the Directive, as they fail to satisfy the transactional decision test.¹¹⁴ For example, in Finland the practice of fastening advertisements to consumers' front doors and letterboxes without permission of such consumers was not found to be an

¹¹³ UWG implements the UCPD in German law.

¹¹⁴ Collins (2010) 109.

aggressive practice, but rather a cause of annoyance, worry and insecurity for consumers that did not influence consumers' transactional decisions.¹¹⁵

However, the Supreme Court of Finland still found that the practice conflicted with the fundamental rights guaranteed by the Constitution of Finland, including respect and integrity of domestic peace, privacy and property. This shows that if Member States wish to outlaw a practice not caught by the UCPD, there may be another legal justification available.¹¹⁶ In fact, Howells argues that this is one of the main problems of the harassment provision, as many of the practices it aims to tackle will not pass the transactional decision test.¹¹⁷ However, there is room for a wider interpretation of what is a transactional decision that could help include more practices in the provisions. The transactional decision test will be examined in detail later in section 4.1.5.

4.2.1.2. Emotional Dimension

An element characteristic of harassment seems to be its emotional dimension. This does not mean that emotions do not play a role for coercion and undue influence as well. Harassment is the cause of negative emotional reactions ranging from mere annoyance to alarm, distress and fear. The effect of emotions in decision making has been documented also in behavioural economics.¹¹⁸ Unlike coercion where in most cases there is a threat of a negative outcome, a practice can be harassing without the formulation of a threat.

It is helpful to illustrate this with a hypothetical example. Consider this: a consumer receives several emails asking him to join an online dating service with titles such as 'Had enough of being alone and miserable? Join now and find your one true love'. After receiving more than one email daily he decides to join the service to make the emails stop. In this scenario, an offer is made by one party, the dating service, to entice the other party (the consumer) to decide. The offer can produce a consequence

¹¹⁵ For a note of the case in English see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=499&articleID=>> accessed May 2017.

¹¹⁶ See also UCPD, rec.7 for the taste and decency exception

¹¹⁷ Howells (2006), 'Aggressive Commercial Practices' 179.

¹¹⁸ See Ch.1, s.3.2.1.6.

welcome to the consumer, in this example, forming a relationship.¹¹⁹ A threat would incur an unwanted consequence for the consumer e.g. ‘Sign up for the service, or else you will die alone!’ Even if such phrasing can cause distress to the consumer, it can hardly be perceived as a credible threat as the consumer is able to understand that the dating service cannot make him alone and miserable if he does not accept, but instead offers a ‘solution’ to improve his position. The constant messages put him in such a state of distress that eventually he caved in and took a transactional decision he would not have taken otherwise, meaning that he signed up for the service. Would it have been different if there was only one email instead of a constant flow of emails?

As mentioned above in the gravestone dealer case, it is possible that a one-off communication will suffice to be characterised as harassing. That being said, repetition and persistence will be a common feature in many harassing practices. Back to the example, only one email would not be that likely to harass the average consumer into taking a transactional decision he would not have taken otherwise. However, the answer would perhaps be different if (similarly to the gravestone dealer case) the online dating service was targeting newly single people by monitoring their social media accounts and sending them emails as soon as the change to their relationship status was disclosed. Then the practice would be targeting people especially vulnerable to it and would be more likely to cause them distress.

Harassment is assessed from the perspective of the average consumer. The average consumer is a mainly normative standard that does not appear to be influenced by emotions.¹²⁰ The influence of neoclassical economics which do not account for the influence of emotions, becomes apparent here.¹²¹ Assessing the resilience of the average consumer to harassment is an arduous task, as making general and objective assessments on emotional reactions is not easy. Certain circumstances, such as relationship breakdown in the example, or bereavement in the case law above would most likely reduce resilience of the consumer. Yet, assessing resilience in this instance

¹¹⁹ Stephen Smith, ‘Contracting under Pressure: A Theory of Duress’ (1997) 56 Cambridge Law Journal 343, 347.

¹²⁰ See Ch.3, s.4.2.1.

¹²¹ For a critique on the emotionless deliberation of the homo economicus see Dhami (2016) ch.17.

would benefit from the use of empirical evidence. For example, a study has shown that the bereaved may be more resilient than thought previously.¹²²

4.2.1.3. *Harassing Practices outside the UCPD*

As mentioned above, the scope for catching harassing practices under the UCPD may be quite narrow due to the transactional decision test. The maximum harmonisation character of the Directive limits the possibility for Member States to take stricter measures to protect their citizens from harassing practices. The Directive is limited to the protection of the *economic* interests of the consumers.¹²³ It is possible for Member States to ban practices that do not impact on the economic interests of consumers due to taste and decency.¹²⁴

Commercial practices that harass consumers leaving them frustrated and distressed are a major issue. Practices such as cold calling and spam email are widespread and invasive.¹²⁵ However, they seem to be addressed in a different manner. Most of these practices, such as unsolicited communications by phone, mail or email, which may amount to harassment are treated as a privacy issue.¹²⁶ This tendency can be observed also in EU legislation where provisions limiting unsolicited communications can be found in the Privacy Directive¹²⁷ and the E-Commerce Directive.¹²⁸ The common element of these provisions is that they forbid unsolicited communications unless the

¹²² Bonanno (2004).

¹²³ UCPD, art.1.

¹²⁴ UCPD, rec.7.

¹²⁵ See for example the Information Commissioner's Office data on nuisance calls in the UK <<https://ico.org.uk/action-weve-taken/nuisance-calls-and-messages/>> accessed May 2017.

¹²⁶¹²⁶ See for example Lodewijk F Asscher and Sjo Anne Hoogcarspel, *Regulating Spam: A European Perspective after the Adoption of the E-Privacy Directive* (TMC Asser Press 2006) 3,6. where even though it is recognised that spam has a negative influence on consumer confidence, consumer law is not listed in the legal fields relevant for the regulation of spam.

¹²⁷ 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) [2002] OJ L 201/37, art.13.

¹²⁸ 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] OJ L 201/37, art.7.

consumer has consented to receiving such communications. Consent as a term, despite its fundamental role in private law, is nowhere to be seen in the UCPD.

However, the role of the UCPD and of aggressive practices in particular in the online environment and especially for spam is being recognised in the Second Guidance Document.¹²⁹ Using the aggressive practices provisions for addressing issues relating to spam may mean more effective enforcement that will not necessarily be dependent on whether the consumer provided his consent. Spam is a good example of aggressive practices in the online environment. It is a helpful reminder that aggressive practices have a modern dimension and are not limited to the more stereotypical examples of doorstep selling or high pressure selling in business premises.

4.2.1.4. Distinguishing Harassment from Coercion and Undue Influence

In the trio of harassment, coercion and undue influence, harassment appears to have a distinct character. Coercion and undue influence are linked as in both cases a party takes a decision influenced either by pressure applied or abuse of position.¹³⁰ Coercion and undue influence are heavily influenced by the inequality of bargaining power between the parties. By contrast, inequality of bargaining power is not a significant element of harassment.

A trader may use harassing practices regardless of whether he is in a position of power over the consumer. However, consumers exposed to harassing practices may feel powerless when it comes to stopping them. For example, a consumer may be receiving unsolicited calls from an accident claim company. He may not have been involved in an accident and therefore the company's advertised service is of little interest to him. He does not wish and does not need to enter in a transaction with them. Still, the consumer may be frustrated and find that there are significant hurdles in stopping these communications. The common element between harassment, coercion and undue influence is the pressure applied to the consumer.

¹²⁹ See Second Guidance Document 149

¹³⁰ J Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (2nd edn, Hart Publishing 2013) 181.

4.2.2. Coercion

Coercion is not defined in the Directive, save for art.8 clarifying that coercion includes the use of physical force. The aggressive character of practices involving physical force is clear-cut enough. In the ‘your money or your life’ scenario even though the decision to hand over the money is rational (given the alternative) and informed it cannot be characterised as voluntary.¹³¹ In fact, it is the classic example of an involuntary decision. That is because that proposition qualifies as a threat rather than an offer.¹³² In the extreme scenario of the use of physical force, the consumer should not be expected to exhibit any resistance. Resilience of the average consumer to the use of physical force would be non-existence, as any other alternative would overly burden the consumer, and more importantly, it would encourage traders to use physical force.

What is more interesting is the use of psychological coercion. It can be argued there is an overlap between psychological coercion and undue influence as coercion could also include the abuse of a position of power but is a broader concept.¹³³ It has been suggested that a distinction can be drawn between the three concepts with coercion and undue influence on the one side, as more connected and harassment on the other one.¹³⁴ This leaves coercion as the more general concept of the aggressive practices provisions that encompasses all the practices that are not harassment and do not amount to undue influence.¹³⁵ As coercion can be interpreted quite broadly the issue is where the line between legitimate pressure and coercion is to be drawn.¹³⁶

To assess whether there has been coercion the factors listed in art. 9 UCPD could be of help. In art. 9(a) UCPD timing could be relevant to the extent that a consumer is pressured to take a (transactional) decision in a limited time. Also, reference made to the nature of a practice as per art. 9(a) UCPD could be relevant; however it is quite general and doesn’t seem to be adding anything more than art.8 UCPD requiring that all the factors and circumstances of a practice are taken into account when assessing whether a practice is aggressive. Persistence could also be

¹³¹ Micheal J Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997) 84.

¹³² Trebilcock (1997) 84.

¹³³ Howells (2006), ‘Aggressive Commercial Practices’ 184.

¹³⁴ Howells (2006), ‘Aggressive Commercial Practices’ 173.

¹³⁵ Howells (2006), ‘Aggressive Commercial Practices’ 184.

¹³⁶ Howells (2006), ‘Aggressive Commercial Practices’ 185.

relevant for example when in the sense that the consumer may feel he cannot leave the premises and walk away until he has signed a contract.

Art. 9(b) UCPD on the use of threatening language or behaviour is closely linked to coercion which could include the threat to physical violence but certainly not limited to that. For example, in a Slovakian case concerning consumer credit; the plaintiff, a consumer, concluded two different credit agreements with the defendant, a credit agency.¹³⁷ When the plaintiff could no longer comply with his obligations the defendant sent him notices threatening to include him in a list of debtors to be published in local media. The plaintiff argued that this was an unfair practice as contrary to professional diligence. The court accepted that this was an unfair commercial practice and also held that the abusive language in the notices constituted an aggressive practice.

Threatening or abusive behaviour was also used in an Italian case where a travel agency required the consumers to pay a supplementary fuel surcharge, without indicating how this charge was calculated and without providing the consumers with proper documentation in respect thereof.¹³⁸ The Italian Competition Authority decided that the practice was a misleading omission, to the extent that the consumers were not informed about the amendment of an essential part of the contract.

The practice was also found to be aggressive as it used threatening and abusive language that was likely to impair the average consumer's freedom of choice causing him to take a transactional decision he would not have taken otherwise. What is more, it is noted that the practice is contrary to professional diligence, a remark that is redundant as there seems to be no need to use art.4 UCPD when it has already been established that the practice was both misleading and aggressive. This case shows that in real situations misleading and aggressive practices are used in conjunction.

Art.9(c) UCPD could also be relevant as the trader may take advantage of the specific misfortune or special circumstances of the consumer as for example the terminally ill or the recently ill or the over-indebted. Art. 9(d) and (e) are also relevant for undue influence. However, coercion could be easier to establish since there is not

¹³⁷ For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?-event=public.cases.showCase&caseID=407&articleID=>> accessed May 2017.

¹³⁸ For a note of the case see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=154&articleID=>> accessed May 2017.

the requirement to prove that the trader was in a position of power vis-a-vis the consumer.¹³⁹ There have been several cases of non-contractual barriers as per art.9(d) that amounted to an aggressive practice in Italy, as reported by the Italian Competition authority. These cases relate to the right of withdrawal either by imposing high penalties to consumers for trying to exercise their right of withdrawal, or in the case of a software company offering a free trial of a programme while unknowingly binding consumers to a two-year fee paying contract via the registration and then refusing to terminate the contracts even though requests were sent within a 10-day limit.¹⁴⁰

Similarly, The Bulgarian consumer authority investigated a company which introduced specific requirements for terminating the contract, such as that the request had to be filed a specific day of the month and only after the consumer had settled all their payments.¹⁴¹ Having decided it constituted an aggressive practice they ordered a preliminary enforcement of the ban as the terms had not yet entered into force. The court decided that the preliminary enforcement was justified as the interests of the consumers had to be prioritised over the economic interests of the company on which the ban was enforced.

As for threats that cannot legally be taken, as stated in art.9(e), an example comes from an Italian case where a debt collection agency served the consumers with unmeritorious claims for debt collection.¹⁴² The consumers were called to appear before the wrong courts, which did not have territorial jurisdiction on the case. The Italian Competition Authority which investigated the case also discovered that the defendant did not actually file the claims with the court, notwithstanding the fact that this was alleged in the communication towards the consumers. The practice was found to be aggressive as the claims were unmeritorious and obviously aimed at intimidating

¹³⁹Twigg-Flesner et al. (2005) 185.

¹⁴⁰ For a note of these cases see <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=152&articleID=>>>
<<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=357&articleID=>>> accessed May 2017.

¹⁴¹ For a note of the case see < <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=388&articleID=>>> accessed May 2017.

¹⁴² For a note of the case see < <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=509&articleID=>>> accessed May 2017.

consumers. Cases such as this could also be prosecuted under criminal law. It is up to the authorities of each Member State to decide whether to bring parallel charges under criminal law or to back up the UCPD with criminal sanctions.¹⁴³

4.2.2.1. *Threat*

In coercion, the wrongful conduct of the trader will often be expressed as a threat. Therefore it would be useful to examine the concept of threat in greater detail, as well as distinguish it from related concepts.

There is a set of questions to be answered in order to better understand threat: ‘1) What counts as a threat?; 2) What makes a threat wrongful; 3) when is an obligation obtained by a threat, in other words, what makes a threat operative?’¹⁴⁴ Aggressive practices in the UCPD go beyond threats to include e.g. non-contractual barriers to switching or terminating a contract, as seen in the cases listed above and as stated in art.9(d) UCPD. What are the requirements of the UCPD for making the consumer take a transactional decision he would not have taken otherwise there are consequences for the division between wrongdoing principle and lack of consent principle. It seems like pressure by itself is not enough-it only becomes ‘wrongdoing’ and therefore an aggressive practice if it has the potential for making the average consumer take a transactional decision he would not have taken otherwise.

Not all threats are wrongful. Smith argues that what makes a threat wrongful is the fact that the unwelcome consequence is wrongful.¹⁴⁵ Traditionally the concept of duress in common law had been limited to threats of personal violence or imprisonment.¹⁴⁶ These aspects are relevant for consumer law as well, however cases concerning threats of physical violence are straightforward. Conversely, threatening to take legal action (when there is basis for that) should not be considered wrongful. Similarly, one of the conditions of art.9(e) UCPD is threatening ‘to take any action which cannot legally be taken’. Willett argues that the problem in this instance lies in

¹⁴³ For example the UK has criminal sanctions for the UCPD, see Consumer Protection from Unfair Trading Regulations Act 2008, s. 11.

¹⁴⁴ Smith (1997) 346.

¹⁴⁵ Smith (1997) 351.

¹⁴⁶ Jonathan Morgan, *Great Debates in Contract Law* (Palgrave Macmillan 2012) 185.

the unreasonable consequences for the consumer.¹⁴⁷ The consumer may be aware that the threat is unlawful, yet enforcing his rights will be costly in money, time and resources.¹⁴⁸ In other words, such a practice presents a barrier for the consumer. Arguably, part of this barrier is that the consumer will be agitated by such a threat, because he would not be in a position to know whether the action is lawful or not.

The threat to take legal action may be characterised as an aggressive practice due to other characteristics such as the use of abusive language. For example, a representative from a debt collection agency calls a debtor to let him know that if he does not pay, legal action will be taken against him. This is not an aggressive practice but it might become one if the representative also threatens the debtor that ‘they will take away everything he has, that his family will be on the street because of him that his life will be ruined unless he finds a way to pay the soonest possible’ and then proceed to call him a ‘no-good loser’ and a ‘liar’ when saying that he cannot pay up at the moment. This is why it is important to consider the practice as a whole when determining whether or not it was aggressive.

Threat in the UCPD can take a broader meaning than that of an unwelcome consequence that is wrongful. It is argued that coercion would be best suited for covering instances of psychological pressure, especially those that appeal to the compassion on the consumer. Such an example is point 30 examined above in s.3, where it is unfair for the trader to inform the consumer that if he does not buy the product the trader’s livelihood will be in danger. The difference is that the unwelcome consequence is not directed at the consumer, but at someone else. Such a practice seeks to transfer responsibility for the unwelcome even to the consumer. It has been argued that such practices fall under undue influence.¹⁴⁹ That can be the case, however, coercion is preferable as there is no need to demonstrate position of power. Apart from the livelihood of the trader, another such instance could be environmental claims. For example, the trader informs the consumer that if he does not buy this low emission car, carbon emissions will rise. Whether such a claim can influence the average consumer

¹⁴⁷Willett (2010), ‘Unfairness under the Consumer Protection from Unfair Trading Regulations 2008’ 365.

¹⁴⁸ Willett (2010), ‘Unfairness under the Consumer Protection from Unfair Trading Regulations 2008’ 365.

¹⁴⁹ Schulze and Schulte-Nölke (2003) 37.

will depend on how the target group will be defined. If the product is aimed at environmentally conscious consumers that could be the case. However, the case discussed above where consumers that placed their trust on environmental claims were found to be credulous, points to the other direction.¹⁵⁰

Threats also need to be distinguished from related concepts such as warnings. The main difference between them is that a warning is a prediction of an unwelcome event over which the person issuing the warning has no control of, meaning that he cannot bring about this unwelcome event.¹⁵¹ In the example above with the carbon emissions, the claim would only impact on the consumer, if he believed that the unwelcome event can be prevented by his action. Similarly for requests. If the requesting party has not suggested that there will be unwelcome consequences if his proposal is not accepted or has made it conditional upon some action being taken by the other party then it is a request rather than a threat. Another concept similar to threats are offers. The person making the offer also wishes to entice the other party to take a certain decision; however the difference from a threat is that the outcome of the offer is welcome instead of unwelcome.¹⁵² For example, an ad stating: ‘buy this pair of shoes and we will donate another pair to a child in need’.

In private law the conduct of the trader, in this case the unlawful threats, and the decision taken by the consumer must be causally linked.¹⁵³ In the Directive it must be proven that the pressure applied by the trader was the reason for the consumer to take or be likely to take a transactional decision he would not have taken otherwise. In common law duress it is not necessary for the pressure to have been the only or the main reason, it is merely sufficient that it was one of the reasons for the decision.¹⁵⁴ This kind of rationale could be useful in the context of the Directive as well, as it would promote the view that it is not the content of the decision that is the issue, but rather the use of pressure by the trader.

¹⁵⁰ See text to note 304 in Ch.3.

¹⁵¹ Smith (1997) 347.

¹⁵² Smith (1997) 347.

¹⁵³ Cartwright (2013) 183.

¹⁵⁴ Cartwright (2013) 183.

4.2.3. Undue Influence

Undue influence is the only of the three concepts that is defined in the Directive. The definition was added by the European Parliament following the first reading of the Directive.¹⁵⁵ According to art.2(j) UCPD:

‘undue influence’ means 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

Undue influence is the only one of the three concepts that specifically requires a position of power, even though it may occur also in the context of coercion or indeed harassment.¹⁵⁶ Relations between consumers and traders have traditionally been characterised by power asymmetry as traders tend to have not only greater power but also better information and resources compared to consumers. It is this disparity of power between consumers and traders that is the traditional justification for consumer protection.¹⁵⁷

Undue influence is a common law concept that does not find its equivalent in civil law traditions. This means that for common law countries there is the temptation for judges and authorities to attempt to interpret undue influence as the concept has been formed in their jurisdiction. Civil law countries on the other hand, have introduced a novel *sui generis* concept which may have been approached with caution. The lack of clarity could have led to the use of more familiar national law mechanisms, such as national contract law, in place of the Directive. To avoid this terminological confusion, it might be best to replace undue influence with a different term.

Abuse of bargaining position or simply abuse of position could be a good candidate seeing as a similar term has already been successfully employed in EU

¹⁵⁵ European Parliament, Debates ‘Unfair business-to-consumer commercial practices’ (23 February 2005, Strasbourg) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=%2f%2fEP%2f%2fTEXT%2bCRE%2b20050223%2bITEM019%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>> accessed May 2017.

¹⁵⁶ Cartwright (2011), ‘Under Pressure: Regulating Aggressive Commercial Practices in the UK’ 128.

¹⁵⁷ Cartwright (2011), ‘Under Pressure: Regulating Aggressive Commercial Practices in the UK’ 125.

competition law with abuse of dominant position in art.102 TFEU.¹⁵⁸ The term used contributes to showcasing that this is a stand-alone concept. It could prove useful for assessing when a trader is in a position of power. For example, a trader that has the monopoly is more likely to be in position of power vis-a-vis the consumer.

Even though the language has been transferred from private law one of the key differences is that this is designed to protect collective interests of consumers and does not relate to any one specific case or set of parties. This also creates one of the main difficulties in defining undue influence in the Directive. Where contract law can refer to the specific relationship between two parties to determine undue influence, in the Directive it is the viewpoint of the average consumer that matters.

4.2.3.1. Distinguishing between Undue Influence and Coercion

There is a significant degree of overlap between coercion and undue influence. One could argue that this does not cause many problems as what is more important is that the practice is found to be overall aggressive. And that is indeed the case. Nevertheless, trying to distinguish between the two is helpful in discovering how well the terms capture the nature of aggressive practices and whether a different choice of terms would be advisable for achieving clarity.

According to art.2(j) UCPD for undue influence, pressure can be applied ‘even without using or threatening to use physical force’, meaning that undue influence includes the use of physical force, as does coercion. If a consumer is threatened with the use of physical force or physical force is used that is a clear-cut case of a coercive practice. Even if there was also at the same time exploitation of a position of power, it would not be sensible to complicate the situation with the added task of proving the further requirements for undue influence.

¹⁵⁸ Art. 102 TFEU reads: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Therefore, the use of physical force would be best reserved for coercion, leaving other types of pressure, namely psychological pressure to undue influence. However, as seen above, coercion also extends to psychological pressure. If all the instances of undue influence were covered by coercion, then there would be no point in including it in the aggressive practices provisions. Any instance where a direct threat is being made would be coercive, leaving instances of indirect pressure to be covered by undue influence. In the private law context it has been argued that the difference is that while a victim of duress enters knowingly into a transaction that he did not want, due to the lack of alternative, the victim of undue influence does not realise what the force was that made him enter a disadvantageous transaction.¹⁵⁹ Examining the concept of position of power can assist in clarifying the particular nature of undue influence.

4.2.3.2. Position of power

As mentioned above, traders are almost always in a position of power vis-a-vis the consumer, which is one of the main reasons for consumer protection.¹⁶⁰ However, arguing that every trader has undue influence over the consumer would unduly broaden the scope of the provision. Contractual agreements can place the trader in a position of power as often, contracts may include terms which are detrimental to the consumer.¹⁶¹

To evaluate whether there has been a position of power, it is necessary to assess the position of both trader and consumer. The specific circumstances of the consumer may make him particularly vulnerable in this instance. This is recognised also by the Directive, especially in art.9(c). The fact that the consumer is suffering from ‘any specific misfortune or circumstance’ is not enough. What is further required is that the trader is aware of this misfortune or circumstance and tries to take advantage of it (‘exploitation of the misfortune’). Is it enough that the trader attempts to exploit the vulnerable position of the consumer or is it required that he did succeed in distorting the decision of the consumer?

Art.8 UCPD states ‘impairs or is likely to impair’ (freedom of choice) and ‘causes him or is likely to cause him’ (to take a transactional decision) implying that

¹⁵⁹ J O’Sullivan and J Hilliard, *The law of contract* (4th edn, Oxford University Press 2010) 268; as cited in Cartwright, ‘Under pressure: regulating aggressive commercial practices in the UK’ 133

¹⁶⁰ Cartwright (2011), ‘Under Pressure: Regulating Aggressive Commercial Practices in the UK’ 125.

¹⁶¹ Howells (2006), ‘Aggressive Commercial Practices’ 188.

art.9(c) should be interpreted to mean ‘impair or be likely to impair’ the consumer’s judgement and to ‘influence or be likely to influence’ the consumer’s decision. On the other hand, if this was the intention of the legislator, then why not simply include it in the provision as was done for art.8 UCPD? Perhaps, art.9(c) UCPD opens a window to subjectivity and a chance to consider the circumstances of a particular case.

An example of personal circumstance that may put the trader in a position of power comes from a Greek case involving women in labour who were made to sign documents concerning the collection of stem cells upon entering a maternity clinic.¹⁶² In that case, consumers complained about charges for stem cells collection.¹⁶³ The Greek Consumer Ombudsman made recommendations to the clinics involved, which conformed to them and stopped charging for the service. This was deemed an aggressive practice as it influenced the consumer’s freedom of choice. Consumers had signed a contractual agreement upon entering the maternity clinics but many were surprised with the bill when discharged as they had not been aware that there were going to be charges. Also, in most of the occasions the personnel of the clinic was not involved in the harvesting and/or collection of the stem cells which were collected by a different company. It is suggested that the contractual term on the charge for the stem cells was not clear. It is also mentioned that the charge was disproportionately high compared to the services that (could be) provided.

The legal basis for the recommendation was Greek consumer law and Greek contact law on pre-contractual duties of good faith. Consumers felt pressured to sign the bill and did not dispute it as they needed it for filing a health insurance claim. The Ombudsman used the general clause of art.5 UCPD as well as art.8. The consumers (in this case women in labour) had to accept the contract as they had to sign it upon entering the clinic and were potentially already undergoing labour so it was too late for them to go somewhere else. Also, the decision on whether they wished for the stem cells collected was (because of its nature) an ‘it’s now or never’ dilemma and parents may have been in a vulnerable emotional state because of the labour. Arguably, women who

¹⁶² Blastocytes or stem cells are undifferentiated biological cells. They can be taken from umbilical cord blood just after birth. They are then cryo-preserved for future use.

¹⁶³ This technique requires either the collection of cord blood or the collection of tissue from the umbilical cord. Both procedures have to take place immediately after delivery.

have just been through labour are temporarily vulnerable. The collection was being promoted by everyone involved doctors, nurses, companies, clinics as a good thing and therefore parents may have felt pressured into a decision they may not have taken otherwise.

Instances where the trader is in a position of power vis-à-vis the consumer are easier to imagine in the post-contractual stage, especially in long-term contracts. Practices such as barriers to switching providers or terminating a contract, as listed in art.9(d) UCPD provide good examples of undue influence. As seen above in s.4.1.2. non-contractual barriers can also be found to be coercive. This shows the potential overlap between the two concepts. If a consumer wishes to switch e.g. electricity providers, the trader holds a position of power, as the consumer will not be able to sign another contract before the existing one is terminated. Also, the trader oversees the procedure and in possession of all the relevant information. If barriers are placed, e.g. by requiring multiple applications, paperwork or if the procedure is taking a lot longer than necessary in order to stall the consumer, this should constitute undue influence.

The existence of other alternatives in the market does the consumer little good, if he cannot terminate an existing contractual relationship. The relationship between unfair practices and unfair terms is contested. The CJEU commented on that in *Pereničová* where it decided that a finding that a practice is unfair under the UCPD, is one element among others on which the competent court may, pursuant to Article 4(1) of Directive 93/13 on unfair terms in consumer contracts, base its assessment of the unfairness of the contractual terms.¹⁶⁴ However, the effect is not direct.

4.2.3.3. Exploitation of a position of power

Being in a position of power is not enough in itself to constitute undue influence; it is also required that the trader exploits it.¹⁶⁵ Undue influence requires conduct on behalf of the trader. Without a certain conduct, no harm can come to the consumer.¹⁶⁶ What is problematic is not the position of power by itself but its abuse in order to pressure the consumer into taking a transactional decision. It is inevitable in most relationships that

¹⁶⁴ Case C-453/10, *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r.o.*, [2012] ECLI:EU:C:2012:144, para 47.

¹⁶⁵ Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 128.

¹⁶⁶ Lucy (2007).

one of the parties will be in a position of power over the other party. As Bigwood asserts ‘to possess power is not necessarily to use it, and to use power is not necessarily to misuse it’¹⁶⁷ Undue influence in the Directive calls for exploitation of a position of power. When is a trader considered to exploit his position of power in relation to the consumer?

As seen above in coercion, not all threats are wrongful. Similarly, not all instances of exploiting a position of power will be wrongful. So what are the criteria for defining when exploitation is wrongful? In other words, when is a trader not allowed to use the advantage he has over the consumer? Bigwood distills Goodin’s exploitation theory in two big categories of wrongful exploitation: (a) it is wrong to use this advantage over those who are in a special sort of relationship with us, and (b) it is wrong to use this advantage over people who cannot meaningfully engage in games of power or advantage.¹⁶⁸

The first category suggests the relationship of trust and confidence as seen in presumed undue influence in contract law. In common law, presumed undue influence requires a relationship of trust and confidence between the parties and a transaction which calls for an explanation.¹⁶⁹ Examples of such relationships of trust and confidence include that of parent and child¹⁷⁰, doctor and patient¹⁷¹, religious adviser and disciple¹⁷² and solicitor and client.¹⁷³ Most commercial relationships between trader and consumer would not hold up to that standard of trust and confidence. And fortunately, in the context of the Directive, the term used is merely that of position of power. Some of these examples are relevant for the UCPD, such as the lawyer-client and the doctor-patient relationships. Yet, these kinds of relationships are uncommon in a commercial setting.

¹⁶⁷ Bigwood (2003) 197.

¹⁶⁸ R Goodin, ‘Exploiting a Situation and Exploiting a Person’ in Andrew Reeve (ed), *Modern Theories of Exploitation* (SAGE Publications 1987); as quoted in Bigwood 199.

¹⁶⁹ *Royal Bank of Scotland v Etridge (No2)* [2001] UKHL 44.

¹⁷⁰ *Bullock v Lloyds Bank* [1955] Ch. 317.

¹⁷¹ *Cloughton v Price* [1997] E.G.C.S. 51.

¹⁷² *Roche v Sherrington* [1982] 1 WLR 599.

¹⁷³ *Wright v Carter* [1903] 1 Ch. 27.

Schulze and Schulte-Nölke argue that undue influence may arise in the exploitation of trust in third parties, such as teachers used as promoters in schools or a chairman used as promoter in a factory.¹⁷⁴ Other examples could include an employer that suggests to his employees to buy the products of a company owned by one of his family members. Or a celebrity with a big social media following endorsing a product. In the financial services, a similar problem with the role of credit intermediaries and financial advisors was regulated by the Mortgage Credit Directive.¹⁷⁵ It is not clear whether such instances would fall within the scope of the Directive, as that would depend on how the definition of trader. In the instances above, the third party can be considered as ‘acting in the name of or on behalf of a trader’ as per art.2(b) UCPD. In a Dutch case where the trader was subcontracting his selling activities to sellers who organised sale demonstrations, the trader was found to be liable for the actions of the sellers. Subsequently, as the sale demonstrations of the sellers were found to be a practice that used undue influence and the trader was held liable.¹⁷⁶

What is interesting is conceiving the consumer in this instance, as having ‘let down their guard.’¹⁷⁷ The average consumer, who is reasonably circumspect, is expected to approach the trader’s claims with a certain degree of caution. However, as seen in Chapter 3, circumspection relates to the consumer’s reaction to information and does not include broader power considerations.¹⁷⁸ So, when would the average consumer ‘let his guard down’? Could it be argued e.g. that a loyal repeated customer of a company that markets itself as one adhering to the highest quality and ethical standards has ‘let their guard down’? Instances like that may go beyond what was intended to fall under the scope of the Directive. Yet it cannot be ignored that companies strive to inspire brand loyalty.¹⁷⁹ In long-term contracts, where the consumer has already

¹⁷⁴ Schulze and Schulte-Nölke (2003) 38.

¹⁷⁵ Directive 2014/17/EU, art.22.

¹⁷⁶ *R&S Handelsvertretung GmbH v Autoriteit Consument en Markt*, (30 May 2013) Rechtbank Rotterdam ECLI:NL:RBROT:2013:CA2590

¹⁷⁷ Goodin 185; as quoted in Bigwood 199.

¹⁷⁸ See text to note 208 in Ch.3.

¹⁷⁹ See for example, Mary Susan Kennedy, Linda K Ferrell and Debbie Thorne Leclair, ‘Consumers’ Trust of Salesperson and Manufacturer: An Empirical Study’ (2001) 51 *Journal of Business Research* 73; Patrick Poon, Gerard Albaum and Peter Shiu-Fai Chan, ‘Managing Trust in Direct Selling Relationships’ (2012) 30 *Marketing Intelligence & Planning* 588.

shown enough trust to the trader to enter in this long-term contractual relationship, it can be argued that the average consumer has ‘let his guard down’, a fact that should not be exploited by the trader. For example, payday lenders that encourage their existing customers to take out more credit instead of repaying the sum they have already taken out.

The second category suggested by Goodin brings vulnerable consumers to mind. Being unable to engage in games of power may relate to different dimensions of vulnerability. It can relate to circumstances of the consumer, such as infirmity that reduce resilience; or to market considerations, such as the consumer’s lack of alternatives, which would give the trader a significant advantage. The credulous consumer of the UCPD may be relevant in this instance.¹⁸⁰ For example, if a consumer believes in astrology and consults an astrologist for important decisions in his life, then that trader has a position of power that he should not exploit as it would amount to undue influence.

There are rogue traders that indeed aim to take advantage of consumers. However, there are traders that will necessarily deal with a vulnerable group of consumers.¹⁸¹ For example, a funeral home dealing with bereaved relatives or mobility aids company dealing with elderly consumers with mobility problems. In such a case the balance between legitimate practices and undue influence will be a precarious one. It has been argued that the Directive requires the consideration of both the perspectives of the trader as well as the consumer, meaning that the trader is behaving aggressively as well as taking advantage of the special circumstances of the consumer.¹⁸² Industries that specifically target vulnerable consumers, or industries where undue influence is likely to arise due to the nature of the relationship, such as legal services, might benefit from codes of conduct that would ensure safeguards are in place to avoid undue influence.¹⁸³

¹⁸⁰ See Ch.3, s.4.2.3.5.

¹⁸¹ Howells (2006), ‘Aggressive Commercial Practices’ 189.

¹⁸² Collins (2010) 109.

¹⁸³ For more on codes of conduct, see Ch.5, s.4.2.

4.2.3.4. *Limiting the ability to make an informed decision*

The third element of undue influence is ‘significantly limiting the consumer’s ability to make an informed decision’. The problem with undue influence is not about information. The consumer may or may not have the information they need to make a decision. The point is they are obstructed from making their decision because the trader is exploiting his position of power. It has been suggested therefore that it would be better at least in some cases to replace informed decision with (fully) voluntary decision.¹⁸⁴ Both the requirement to exploit a position of power as well as to significantly limit the consumer’s ability to make an informed decision are telling of the focus on the transactional decision test which applies also in the context of a practice that uses undue influence. The transactional decision test which will be analysed below in greater detail limits the scope of the Directive; the Directive is concerned only with practices that have a certain outcome-meaning that they are likely to cause the average consumer to take a decision he would not have taken otherwise.

4.2.4. Remarks

Sections 4.2.1. to 4.2.3. analysed the three key concepts of harassment, coercion and undue influence. There is significant overlap between the three concepts, especially between coercion and undue influence, therefore, distinguishing between them is difficult. with coercion being the core concept. It is possible to trace some common themes between the practices covered, namely psychological pressure and barriers. These themes can serve as a different conceptualisation of aggressive practices and combined capture most aggressive practices, with the exception of the use of physical force.

A common theme between harassing, coercive and practices using undue influence is the use of psychological pressure. Psychological pressure may arise in a variety of contexts from the use of abusive language to time pressure for making a purchase, and threatening to take legal action. Notably, the CJEU has recognised the element of psychological pressure in aggressive practices in *Purely Creative*, examined above in s.3. All harassing practices involve a form of psychological pressure. Psychological pressure includes practices that employ appeal to emotion. An example is point 28 of ANNEX I UCPD forbidding direct exhortations to children, as they would place

¹⁸⁴ Cartwright (2011), ‘Under Pressure: Regulating Aggressive Commercial Practices in the UK’ 129.

pressure on their parents. While advertising may generally employ emotion to e.g. convince consumers to buy a product, there is a point where the practice will be characterised as aggressive. One that has to do with eliciting visceral emotions, particularly when they relate to special relationships or circumstances such as the relationship between parent and child and bereavement. Another example would be an advertisement for funeral plans that may overstress the element of becoming a burden to loved ones or advertisements of products for new mothers suggesting one is not a good mother if they do not buy this product. This category showcases again the relation of aggressive practices with vulnerability as very often those that will be more susceptible to this appeal to emotion will be certain categories of consumers.¹⁸⁵

In contrast to that, a different commonly occurring category would be that of placing barriers to the consumer. Barriers in this context refer to obstacles the trader places to reduce the freedom of choice of the consumer. They fall under coercion or undue influence and are unlikely in harassment. The prevalence of barriers in aggressive practices is noticeable also in the blacklist where points 27 and 29 on insurance companies and inertia selling refer to barriers. Unlike psychological pressure, the existence and effect of barriers are easier to establish, thus introducing an element of objectivity to aggressive practices. The use of physical violence is also a case where the practice is objectively aggressive, yet it is better described as a threat rather than a barrier. Barriers in this context include the instances covered by art.9(d) UCPD on barriers to switching or terminating a contract. The case law from the Member States point to the fact that the average consumer is not expected to be particularly resilient to barriers. This is sensible as the consumer should not be expected to navigate complex and time-consuming procedures to e.g. switch providers. Barriers are more likely to occur post-contractually, yet they may occur also in the pre-contractual stage and may include charges to the consumer, like inertia selling. Another example would be the practice of pre-ticked boxes with extra services followed by airline companies.¹⁸⁶

¹⁸⁵ See Ch.1, s.3.2.1.

¹⁸⁶ The practice is now banned under Directive 2011/83/EC on Consumer Rights, art.8.2.

4.2.5. Impairment of freedom of choice

4.2.5.1. *Freedom of choice as an interest protected by law*

As stated in art.8 UCPD a practice using harassment, coercion or undue influence is likely to significantly impair the freedom of choice or conduct (in relation to the product) of the average consumer. As stated previously, wrongfulness comprises of a combination of the conduct of the trader on the one hand and its effect on the legally protected interests of the consumer.¹⁸⁷ Following this structure, harassment, coercion and undue influence relate to the conduct of the trader while freedom of choice is the interest of the consumer that is under attack.

Impairment of the consumers' freedom of choice is at the core of aggressive practices in the context of the Directive.¹⁸⁸ The Directive prioritises the autonomy of the choice of the consumer.¹⁸⁹ It is not the outcome that is important, it is not implied that the consumer will always make the right (or the most rational) choice but rather that he would be in a position to do so. It is worth mentioning that the term 'freedom of choice' is used only for aggressive practices in the Directive. The term 'informed choice' is used for misleading omissions (art.8), undue influence (art.2(j)) and in the blacklist (point 7 ANNEX I). One could argue that it is because aggressive practices concern power asymmetry rather than informational asymmetry. However, this argument is weakened by the fact that undue influence, an element of aggressive practices is defined against the consumer's ability to make an informed choice. Willett argues that informed decision making is a prerequisite of freedom of choice as one cannot choose freely if he cannot understand the choices placed before him.¹⁹⁰ Conversely, if one is pressured into taking a transactional decision, then understanding the different choices does little good, as one is not able to exercise any of the alternative choices.

The meaning of 'freedom of choice' requires some further analysis. Freedom of choice is not absolute. No one has an infinite amount of choices in front of them. Choices may be limited due to a variety of factors such as income, location and market

¹⁸⁷ For an abstraction of the concept of wrongfulness in private law see Lucy (2007).

¹⁸⁸ Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 127.

¹⁸⁹ Howells (2006), 'Aggressive Commercial Practices' 174.

¹⁹⁰ Willett (2010), 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive.'

factors. In the analogous doctrine of economic duress, emphasis is placed on the existence of viable alternatives. Yet, as pointed out by Ben-Shahar and Bar-Gill, if a party did succumb to the pressure, then that means that there were no other viable alternatives.¹⁹¹ The viability of alternatives is important. There is always a choice available, even when it is a choice between very poor alternatives.¹⁹² In the dilemma ‘your money or your life’ there is always the choice of giving up your life, but this is not an option most people (or indeed the average consumer) would favour. Freedom of choice in the current context is better understood in conjunction with harassment, coercion and undue influence. It is not any impairment of freedom of choice that is punishable but the impairment that was caused by the behaviour of the trader (who employed a practice that uses harassment, coercion or undue influence).

4.2.5.2. Significant impairment of freedom of choice of the average consumer

The provision is not concerned about the freedom of choice of any consumer or of a specific consumer but of the average consumer. As analysed in Chapter 3, the average consumer standard in the UCPD is unsuitable for aggressive practices, as it is unclear how the average consumer would react to pressure.¹⁹³ It is argued that a more suitable concept for that would be resilience. Resilience of the consumer should be interpreted in a proportionate manner to avoid the danger of becoming too onerous for consumers.¹⁹⁴ Also, it would be advisable to use empirical evidence for identifying which factors influence resilience of the average consumer, especially due to the novelty of the term resilience. Still, based on the analysis above, it is possible to identify certain factors to be considered when assessing resilience.

1. *Existence of alternatives.* As pointed out above, freedom of choice exists only when there are alternative choices. A consumer that has viable alternatives and can easily walk away will be expected to exhibit a high level of resilience to pressure. These alternatives may be provided by the market, or even outside it. For example, a poor consumer can be resilient to a pressure sale by payday lenders because he can borrow money from family. If there is a monopoly or oligopoly in the market,

¹⁹¹ Oren Bar-Gill and Omri Ben-Shahar, ‘The Law of Duress and the Economics of Credible Threats’ (2004) 33 *Journal of Legal Studies* 391, 392.

¹⁹² Barnhizer (2005) 205.

¹⁹³ See Ch.3, s.4.2.1.

¹⁹⁴ See Ch.3, s.4.2.1.1.

alternatives will be limited.¹⁹⁵ Nature of the product. There will be instances where the existence of alternatives will not be enough to protect the consumer, as in the case of use of physical violence or of barriers to terminating a contract.

2. *Nature of product.* Resilience to the practice will be reduced, the more essential a product is to the consumer. This aspect is also related to the existence of alternatives. In markets for essential products, such as utilities, it is likely that alternatives may be limited. Nature of the product relates also to whether it is a highly complex product that a consumer rarely uses or an everyday product. For example, a consumer will be more susceptible to pressure e.g. when buying financial products than buying chocolate. Length of the contract is also relevant. Long-term contracts provide more opportunities for aggressive practices such as barriers to switching. Aggressive practices are common in the post contractual stage because then the consumer is already in the sphere of influence of the trader, especially in long-term contracts such as utilities or credit agreements.
3. *Circumstances of the consumer.* Attributes of consumers may influence their resilience to aggressive practice. Consumers may be going through a circumstance that reduces their resilience, such as bereavement or pregnancy. Characteristics of consumers are particularly relevant for practices that appeal to emotion. Establishing a normative standard may not be easy as it is not clear what makes some consumers more susceptible to such practices than others. The factors that influence the personal dimension of vulnerability will also be relevant here.¹⁹⁶

The impairment (or likelihood to impair) needs to be significant. This is another indication of the reluctance of the Directive to set the bar low. Yet it is not clear which impairment will qualify as significant. In most cases showing a consumer was forced to act in a certain way would be sufficient. Once more it is important to take all the circumstances of the practice into account. For example, a sale in a private dwelling may be more likely to impair the consumer's freedom of choice than a sale in a store. Or the sale of a credence good or an experience good is more likely to impair freedom of choice rather than a search good.

¹⁹⁵ See Peter Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2014) 38 *Journal of Consumer Policy* 119, 123. who describes that phenomenon as 'supply vulnerability'.

¹⁹⁶ See Ch.2, s.4.1.2.

The requirement of impairment of freedom of choice is closely linked to that of causing or being likely to cause the consumer to take a transactional decision he would not have taken otherwise'. It seems that the two are causally linked, meaning that when a consumer's freedom of choice is significantly impaired, this causes him to take a transactional decision he would not have taken otherwise.¹⁹⁷ Even though the possibility exists that the impairment of freedom of choice will not lead to a consumer being more likely to take such a transactional decision, it is highly unlikely. So unlikely, that in fact it is difficult to understand why it is included at all, as it does not add anything to the definition.

4.2.6. Transactional decision test

The concept of the transactional decision is central to the UCPD and for aggressive practices. It serves as the yardstick for determining when a practice is aggressive depending on how it is interpreted. Aggressive practices centre around power and in that context, the transactional decision test will relate to whether the trader has exerted his power to the consumer. Demonstrating when power has been exerted over someone is not an easy task. Dahl argues that A has power over B when A's attempts to exert power precede B's response and the response should comply with the wishes of A.¹⁹⁸ This formula applied to the transactional decision test means that the trader can make the consumer take the decision he favours, e.g. buying a product or accepting certain terms.

The level of power one party can apply over the other is variable. Emerson suggests measuring power of A over B as 'the amount of resistance on the part of B which can be potentially overcome by A'.¹⁹⁹ The pressure exerted on consumers by a trader reaches an unacceptable level when it is likely to cause the average consumer to take a decision he would not have taken otherwise. In contract law, for duress and undue influence, the crucial decision was usually that of one party entering the contract or accepting changes to the terms. The concept of the transactional decision is significantly

¹⁹⁷ Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 134.

¹⁹⁸ Dahl (1957) 204.

¹⁹⁹ Richard M Emerson, 'Power-Dependence Relations' (1962) 27 *American Sociological Review* 31, 32.

broadly, as it can encompass a wide range of decisions within the commercial relationship. Transactional decision is defined as:

any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

The wording of ‘any decision’ allows for a broad interpretation of the term that encompasses a wide spectrum of consumer decisions.²⁰⁰ This showcases the breadth of aggressive practices that can be caught by the UCPD, which is a lot wider than that of private law. Article 8 UCPD requires not that the practice causes a consumer to take a transactional decision, but rather that the practice is likely to cause the average consumer to take a transactional decision (that he would not have taken otherwise). Likelihood of the practice to cause the average consumer to take a transactional decision is sufficient. This means that it is easier to establish that a practice is aggressive and raises the level of protection. Accepting likelihood to take a transactional decision is dictated also by the nature of the average consumer as a legal concept, meaning the practice is not assessed with an individual consumer in mind.

The concept of transactional decision can be explored further. One of the most usual transactional decisions is the decision to purchase or not to purchase a product or service.²⁰¹ The inclusion of the decision to not purchase in the term of transactional decision could be key for establishing whether a practice has been aggressive. For harassment in particular, consumers may feel harassed by a practice even though they did not end up buying the product; in fact the aggressive practice may have actually caused them to decide not to buy it. For example, a consumer is bombarded by phone calls in his home, where a persistent sales person urges him to change internet provider and tries to convince him to enter a contract by phone. Perhaps that consumer would otherwise be interested in the offer but because of the harassing and pressuring behaviour of the sales person decides to reject the offer.

This approach could help resolve one of the main conundrums of the aggressive practices provisions. The Directive is not concerned with aggressive practices that are

²⁰⁰ First Guidance Document, 22

²⁰¹ First Guidance Document 22.

unlikely to cause the average consumer to take a transactional decision he would not have taken otherwise. However, often consumer complaints for aggressive practices do not centre on the fact that they took a different transactional decision but rather that they felt pressured or annoyed or upset over it.²⁰² What if the average consumer would be annoyed by a practice but not likely to take a transactional decision? It would either have to be accepted that such practices fall outside the scope of the Directive, or simply that the drafting of the Directive leaves something to be desired.²⁰³ Keeping in mind that the aim of the Directive is to have a European standard that would allow unfair practices to be removed from the market and to deter traders from using them in the first place. It is not providing redress for individual consumers, even though some Member States, such as the UK have chosen to do so.²⁰⁴

For example, debt collection agencies may be making constant calls demanding that consumers make payments. Consumers may not have the money to pay so they endure the threats and abusive language, yet they do not take a transactional decision they would not have taken otherwise simply because they do not have a meaningful alternative. If they did not take a transactional decision, then the practice would not be aggressive. The answer might be different if a consumer had some money to make a payment and instead of paying an instalment towards a more urgent debt chooses to make another payment instead because he is being harassed by a debt collection agency. Nevertheless it is important to bear in mind that the likelihood to take a transactional decision is calculated from the perspective of the average consumer. So, in this example using the average targeted standard, the average consumer would be the over-indebted consumer and if the harassing calls from the debt collection company would be likely to make him take a transactional decision, then the practice would be deemed aggressive.

The Directive covers commercial practices before, during and after a sale.²⁰⁵ This is reflected in the concept of the transactional decision as well, as it can include both pre- and post- purchase decisions as well as the purchase decision itself. Examples

²⁰² Howells (2006), 'Aggressive Commercial Practices' 175.

²⁰³ Howells (2006), 'Aggressive Commercial Practices' 175.

²⁰⁴ Consumer Protection from Unfair Trading Regulations 2008, part 4A.

²⁰⁵ See UCPD, art.3.

of pre-purchase decisions could be entering a shop or agreeing to sit through a sales presentation by a seller.²⁰⁶ Post-purchase decisions could include issues that relate to the consumer's contractual rights, such as the right to terminate a contract or switch to another trader.²⁰⁷

Including post-purchase decisions allows the Directive to include instances where there is a standing relationship between the trader and the consumer e.g. a magazine subscription or the purchase of a car from a dealer.²⁰⁸ An example of an after-sales practice from the field of financial services that is particularly relevant to aggressive practices is debt collection.²⁰⁹ Consumers have filed many complaints about debt collection as they are often intimidated into paying money they did not owe.²¹⁰ Furthermore, the decisions before a purchase are covered allowing for advertisements and pre-contractual commitments or promises made by the trader to be caught under the Directive. For example, if prior to the contract an internet service provider has promised 24-hour call service and then fails to deliver that service, then this practice is caught by the UCPD.²¹¹ Similarly the consumer could refrain from making a purchase as a result of the unfair practice, if for example he was assured that a product he already owns can be repaired.

Transactional decision also covers the mode the purchase was made. For example, a consumer may feel pressured into buying something at a store when informed the store will be closing by the end of the week. Another example for aggressive practices could be that a consumer is pressured into buying something at his home due to door-to-door selling. This could be a combination of the consumer being pressured due to the conditions of this sale and the behaviour of the seller but could also be pressured or misled into thinking e.g. this is a limited time offer or an offer only for door-to-door customers. Of course for door-to-door sales more often than not there is no store or online shop alternative)

²⁰⁶ Commission (2009).

²⁰⁷ Commission (2009).

²⁰⁸ Abbamonte 699.

²⁰⁹ Commission (2009).

²¹⁰ Law Commission and Scottish Commission (2012) 43.

²¹¹ Abbamonte 699.

The terms of a purchase are also included; for example the mode of payment cash or card or agreeing to a clause after being misled about its scope or meaning.²¹² Furthermore, a consumer could make a payment as a result of an unfair practice because they were misled as to the legal regime or perhaps because they were threatened that their name would be put on a blacklist or that they would be reported to a debt collection agency. There seems to be a grey area between misleading and aggressive practices here: when one of the above threats is used when in reality no such action can be used against the consumer one can argue that the consumer has been misled. However, since the consumer has been pressured and threatened to make a certain decision it can also be viewed as an aggressive practice. Art. 9(e) though lists ‘threatening to take action that cannot legally be taken’ as a factor for establishing that there has been harassment, coercion or undue influence. If the action can be taken legally, however if it is used in an excessive way or it is being accompanied with abusive language/characterisations then art. 9(b) could be used. If the problem is that the action is legal yet excessive for this instance then it could be difficult to characterise it as an aggressive practice but perhaps it could be caught by art.5 UCPD. It could also refer to disposing of a product or retaining it. Transactional decision may also refer to the exercise of legal rights on behalf of consumers as they may be misled as to which their rights are and they may also be pressured or discouraged from invoking them or exercising them.²¹³

The concept of the ‘transactional decision’ is purposefully general and does not seem to demand the existence of a contractual relationship. The Directive goes beyond contractual rights and duties of the parties to include practices, which for common law at least, may be considered extra-contractual or tortious.²¹⁴ Due to the close connection between consumer and contract law it is stated that the Directive is without prejudice to national rules on contract law.²¹⁵ There may be considerable overlap between the Directive and national contract law, yet it should be kept in mind that they are different

²¹² Twigg-Flesner et al. (2005) 13.

²¹³ Twigg-Flesner et al. (2005) 13.

²¹⁴ Simon Whittaker, ‘The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws’ in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart Publishing 2007) 147.

²¹⁵ See UCPD, rec.9.

sets of rights which exist in parallel and serve different purposes. It is only regulation of unfair commercial practices that has been harmonised and not national contract law.

For this requirement to be satisfied it is sufficient to show that, because of the practice, the average consumer would be likely to take a transactional decision he would not have taken otherwise. There is no need to prove that in fact such a decision was taken, much less to prove that the consumer suffered loss or harm.²¹⁶ The average consumer concept introduces an objective element that allows for the practice to be caught even before it reaches the consumer. The transactional decision test ultimately serves as the limit of the scope of the Directive, if a practice is not likely to cause the average consumer to take a transactional decision he would not have taken otherwise, it cannot be considered unfair. The transactional decision test may be limiting in some respects, as with harassing practices. Still, in comparison to private law mechanisms it offers a higher level of protection as a wide variety of decisions are included in its scope.

4.3. Article 9 UCPD

The factors of article 9 UCPD were examined alongside the concepts of harassment, coercion and undue influence, as well as in relation to the blacklisted practices where relevant. This section provides some final remarks on the function of art.9

Article 9 is meant to contain the factors that will assist in determining whether a commercial practice uses harassment, coercion or undue influence. The list of factors is not exhaustive as ultimately, the practice has to be judged in its entirety. Article 9 plays a key role in determining which practice is aggressive. As mentioned above, the meaning of harassment, coercion and undue influence is unclear and the concepts are closely linked, especially coercion and undue influence. Article 9 can act as a fast-track for determining when a practice is aggressive, by-passing the caveat of figuring out which of the three concepts is used (provided that the other conditions of art.8 are satisfied). This is what already seems to be happening in practice, as the case law shows. Authorities and courts of the Member States directly reference the factors of art.9 in determining whether a practice is aggressive, skipping the requirement of harassment, coercion and undue influence.

²¹⁶ Cartwright (2011), 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' 134.

Does that mean that the use of the three terms of harassment, coercion and undue influence becomes obsolete and is to be substituted with the factors of art.9? The answer has to be no as that would defeat the purpose of the aggressive practices provisions and would essentially turn them into a second blacklist. The factors of article 9 are not enough on their own to achieve the right balance between legal certainty and flexibility that the Directive is aiming for.

So, when applying articles 8 and 9 UCPD to determine whether a practice has been aggressive it might be more efficient to first look at the factors listed in art.9 UCPD. Should the practice entail one or more of them it can be concluded that the practice uses harassment, coercion or undue influence without it being necessary to determine which one. This leaves open the possibility of finding a practice using harassment, coercion or undue influence without using any of the factors of art.9 UCPD.

5. Conclusion

The UCPD introduced for the first time on a European level provisions on aggressive commercial practices. These present an opportunity to offer a wide scope of protection to European consumers, but unfortunately the provisions have not achieved the attention they deserve and are in the periphery of the UCDP. It was argued that the core element of aggressive practices is inequality of power between the trader and the consumer which limits the freedom of choice of the consumer. It was highlighted that aggressive practices relate to consumer vulnerability in two ways. The weaker party when there is inequality of power relates to the vulnerable. Aggressive practices often target vulnerable consumers, whether it is children and the elderly or the recently bereaved. The blacklist of practices in ANNEX I as well as art.8-9 were analysed. The blacklist of ANNEX I provide a useful list of aggressive practices that are either the most common aggressive practices or refer to specific sectors, such as insurance companies, or target vulnerable consumers such as children. Even though the aim of the blacklist is to ensure legal certainty the phrasing of some of the practices listed can create confusion.

Article 8 sets 3 conditions for a practice to be characterised as aggressive: (a) the use of harassment, coercion and undue influence; (b) likelihood to significantly impair the

freedom of choice of the average consumer; and (c) taking a transactional decision he would not have taken otherwise. The three concepts of harassment, coercion and undue influence were analysed, as they are central to the provisions. There is overlap between the three concepts of harassment, coercion and undue influence and distinguishing between them is not always an easy task. Therefore it is best to view them as a whole and examine the overall impact of a practice rather than trying to identify which of the three concepts is being used by a specific practice.

Harassing practices have a strong emotional dimension, as consumers experience negative emotions when targeted by them. However, many practices that cause distress to consumers are left outside the scope of the UCPD, as they do not satisfy the transactional decision test. Coercion is the broadest of the three concepts and the one that significantly overlaps both with harassment and undue influence. It includes physical force, psychological pressure, the formulation of threats as well as non-contractual barriers. Undue influence, the only concept out of the three that is defined in the Directive, focuses on exploitation of position of power. To distinguish from coercion, undue influence does not necessarily involve the threat of a negative result but it is the influence of one party over the other that forces the consumer to take a certain transactional decision. It is argued that most aggressive practices, with the exception of physical force can fit into two categories: psychological pressure and barriers. This may be a more helpful conceptualisation of aggressive practices along with the notion of abuse of power.

Freedom of choice of the consumer is the main good protected by the aggressive practices provisions. Freedom of choice in this context relates to the options available to the consumer. A consumer with viable alternatives is a consumer with freedom of choice. Impairment of freedom of choice is assessed in relation to the average consumer. It is argued that resilience is a helpful concept for assessing the impact of aggressive practices on the average consumer. Three helpful factors have been identified, namely: the existence of alternatives, the nature of the practice and the circumstances of the consumer. The transactional decision test is the final requirement, and while it is significantly broader than private law for the better part, it does not catch practices that consumers find merely irritating, as is the case with many harassing practices. Finally, the role of art. 9 was examined. Art.9 UCPD is a very helpful guide for the application of aggressive practices, yet it is not enough to achieve a high level

of protection without an art.8 UCPD working equally well. Aggressive practices in the UCPD are in the periphery, a state disproportionate to the impact and frequency of aggressive practices in practice. The lack of clarity surrounding them means they do not achieve the high level of protection that the UCPD aspires to.

Chapter 5

Conclusion

1. Introduction

This thesis has illuminated aggressive practices and consumer vulnerability in the Unfair Commercial Practices Directive. The UCPD has attracted a lot of attention from the academic community, which is analogous to its importance.¹ However, the provisions on aggressive practices have received relatively little comment and the link between them and vulnerable consumers has not been explored. This thesis answers the following research question: Does the Unfair Commercial Practices Directive (UCPD) ensure an adequate level of protection to vulnerable consumers against aggressive commercial practices?

The principal conclusion has been that the level of protection from aggressive practices granted to the vulnerable consumer in the UCPD is unsatisfactory, meaning that the UCPD does not achieve a high level of consumer protection.² Vulnerable consumers and aggressive practices are at the periphery of the UCPD, which focuses on the average consumers and misleading practices instead. The UCPD defines vulnerable consumers in a restrictive manner that is not sufficiently protective. The aggressive practices provisions suffer from a lack of clarity that hinders their application.

¹ See for example: Howells, Micklitz and Wilhelmsson (2006); Weatherill and Bernitz (2007); van Boom, Garde and Akseli (2014).

² UCPD, art.1.

This thesis has answered the above research question using doctrinal analysis. Furthermore, where necessary, especially in relation to consumer vulnerability, it employed an interdisciplinary approach, drawing on literature from marketing and economics. This thesis does not cover the application and enforcement of the UCPD in the Member States and concentrates on the European level. This choice was made because there is a need to first build up these concepts in the context of the UCPD. It is important to keep in mind some of the standpoints that underlie this analysis. The focus of this thesis is on vulnerable consumers and how to best protect them. Therefore, it prioritises achieving a high level of consumer protection. Furthermore, this thesis argues for the benefits of empirically informed policy, especially in the context of consumer vulnerability.

A key outcome of this research has been the development of a conceptualisation of consumer vulnerability, which can be used to assess who is vulnerable, as well as introduced the concept of resilience for assessing aggressive practices. It also provided a robust critique of the consumer standards in the UCPD, from the novel perspective of how suitable they are for aggressive practices and with a focus on the vulnerable consumer. Furthermore, it developed the meaning of the aggressive commercial practices provisions around the concept of power inequality.

The structure of this chapter will be as follows: First, it will offer a summary of the substantive chapters of the thesis and their findings, followed by some concluding remarks on the themes of the thesis as a whole. Next, it will offer suggestions for reform for consumer standards and aggressive practices provisions in the UCPD, as well as some suggestions for the use of codes of conduct. Finally, it will include some directions for future research based on the findings of the thesis.

2. Summary

2.1. Rationales for regulation

Chapter 1 set out the main rationales for regulation as a necessary background for the analysis to follow. The rationales were divided into economic and non-economic. Economic rationales covered neoclassical economics and behavioural economics. The subject of neoclassical economics is the *homo economicus*. The *homo economicus* is (i) sovereign, meaning he knows his preferences and is in the best position to make his

own decisions, (ii) rational, meaning his decisions are made with the aim of maximising his utility. The homo economicus remains emotionless and self-regarding.³ This ignores the effect emotions have on consumers which are relevant for assessing vulnerability as well as the effect of aggressive practices on the consumer.⁴ Furthermore, neoclassical economics ignores relations of power, which are relevant for aggressive practices.⁵ The influence of neoclassical economics in consumer law has been profound. This can be noted in the context of EU consumer policy, where consumer law has been instrumental for promoting the internal market. The average consumer of the UCPD, though not identical, echoes the homo economicus and is mostly rational.

The main challenge to the clear-cut but unrealistic assumptions of neoclassical economics has been behavioural economics.⁶ Behavioural economics may not offer an elegant unifying theory like neoclassical economics, but it has been far more successful in predicting human behaviour. Behavioural economics has been gaining in importance in consumer policy and the European Commission has recognised their value in designing policy.⁷ This thesis argues for using behavioural evidence to interpret the consumer standards in the UCPD, and potentially for aggressive practices.⁸ Behavioural evidence, which shows that most people are influenced by biases is consistent with the view of vulnerability advocated in this thesis that we are all vulnerable to an extent.⁹

As for non-economic rationales, distributive justice seeks to distribute resources in society in a fair manner and addresses inequality. Protecting consumers and distributing resources not only from trader to consumer but also amongst consumers is a distributive goal. As this thesis prioritises vulnerable consumers, it pursues distributive objectives. Distributive justice is also relevant for aggressive practices, to the extent that they address inequality of power.¹⁰ Finally, paternalism refers to the intervention of the state in order to protect the individual and perhaps substitute his

³ Dhimi (2016) 1.

⁴ See text to note 52 in Ch.4.

⁵ See text to note 80 in Ch.1.

⁶ See Ch.1, s. 3.2

⁷ See Ch.1, s. 3.2.5.

⁸ See Ch.3, s. 5

⁹ See Ch.2, s.2.2.3.

¹⁰ See text to note 23 in Ch.4.

decisions. Impacting on autonomy is one of the main critiques on paternalism. Sunstein's version of libertarian paternalism that maintains choice is easier to accept and justify. Measures that may be characterised as paternalistic are necessary for the protection of vulnerable consumers.

2.2. Consumer Vulnerability

Chapter 2 focused on consumer vulnerability. Consumer vulnerability tends to be a vague term, applied in a variety of contexts. In European consumer law, use of the concept of the vulnerable consumer is still relatively limited. It can be found in the context of universal services and in the UCPD, which provides the key definition of vulnerability in EU consumer law.¹¹ Private law failed to address the imbalance between trader and consumer, which is why consumer law was created. Following that, 'vulnerable consumer' is used to distinguish between the 'normal' or average consumers and the consumers who find themselves in a particularly weak position.¹²

This thesis offers a sophisticated conceptualisation of consumer vulnerability utilising theoretical and empirical perspectives on vulnerability, that is broader than the one currently used in European consumer law. This thesis adopts the state approach to vulnerability, meaning that, vulnerability may be experienced by everyone, as everyone is susceptible to harm.¹³ It argues that vulnerability is a state that is caused by the interplay between external and internal drivers of vulnerability. External factors relate to the nature and characteristics of the market, while internal factors relate to the attributes and circumstances of the consumer. The novelty of this approach is that it recognises the role the market plays in driving vulnerability and does not view vulnerability as applying only to certain groups.

Vulnerability is a stigmatising label and to apply it indiscriminately in a large group of consumers is ill advised. Still, it may sometimes be appropriate for regulation to single out certain categories of consumers. That will be the case consumers who experience long-lasting and heightened vulnerability. They are referred to in this thesis as disadvantaged consumers.¹⁴ This approach should be adopted to address the needs

¹¹ See Ch.2, s.2.1

¹² See text to note 17 in Ch.2.

¹³ See Ch.2, s.3.2.

¹⁴ See Ch.2, s.5

of a specific group in a specific context and not seen as an alternative to having a more inclusive definition in place. This chapter also introduces the counterpart of vulnerability, resilience.¹⁵ Resilience refers to the ability to withstand and overcome a negative event. Factors that build resilience are factors that reduce vulnerability. Resilience is a novel term for consumer law that this thesis wishes to introduce in the context of aggressive practices.

For the purposes of this thesis the vulnerable consumer is the one who experiences a heightened susceptibility to harm in the marketplace because of actions or omissions of the trader. Four key dimensions of vulnerability are identified: (a) detriment, (b) familiarity with the market, (c) capabilities, (d) freedom of choice.¹⁶ This conceptualisation offers a framework for assessing definitions to vulnerability, and in particular, the vulnerable consumer of the UCPD. Furthermore, it is designed to inform any suggestions for reform.

2.3. Consumer Standards in the UCPD

Chapter 3 examined the consumer standards in the UCPD. The UCPD employs two standards, the average consumer and the vulnerable consumer. To better understand the consumer standards, it is important to know the background behind them. The chapter offers an overview of EU Consumer Policy and analysed the CJEU case law on the average consumer. They show that furthering the internal market has been the driving force of EU consumer law. The task of furthering the internal market is better served by an empowered consumer, such as average consumer standard employed by the CJEU for bringing down barriers to the trade. The choice of the average consumer as the benchmark of the UCPD has been criticised, as the standard was created in the context of freedom of movement rather than consumer protection.¹⁷

The CJEU case law reveals that the average consumer is a relatively high standard. He is meant to be active, able to read and comprehend labels and does not take the statements of traders at face value. What the case law does not reveal, is how the average consumer would react to aggressive practices. The only two cases that feature aggressive practices, *Buet* and *A-Punkt Schmuckhandels*, offer a ray of hope as

¹⁵ See Ch.3, s.2.2.3.

¹⁶ See Ch.2, s.6.

¹⁷ See text to note 170 in Ch.3.

the court accepted the consumer protection justification for the national measures and was sympathetic to the fact that these practices targeted vulnerable consumers.¹⁸ Furthermore the CJEU displayed an understanding of the nature of aggressive practices by using the term ‘exposure to risk’ to describe them, over informed decision.¹⁹ However, these cases are the exception in the body of case law and it is not clear whether other cases featuring aggressive practices would be decided in the same way.

The UCPD which has two objectives: promoting the functioning of the internal market and ensuring a high level of consumer protection. The two main standards of the UCPD reflect that as the average consumer is a high standard that helps promote the internal market, while the average vulnerable consumer prioritises consumer protection and going a step further, distributive justice.

The average consumer standard is analysed to form a better understanding of how it caters to aggressive practices. The analysis reveals that the characteristics of the average consumer centre around his reactions to information and are not suitable for assessing aggressive practices.²⁰ The potential for making the standard more nuanced through proportionality and the use of social, cultural and linguistic factors is also covered. Proportionality is essential to achieve balance between the competing interests of traders and consumers, while social, cultural and linguistic factors have potential for considering the cultural differences of reactions to pressure in the marketplace, their impact appears to have been limited.

The average targeted consumer, is a variation of the average consumer standard.²¹ The average targeted consumer is more flexible and can play a role in protecting vulnerable consumers, as it does not require the satisfaction of the conditions of art.5.3. UCPD, yet is it argued that it should not replace the average vulnerable consumer.

The average vulnerable consumer is the exception to the average consumer, designed to help protect vulnerable consumers without undermining the average consumer. The analysis of the elements of art.5.3 UCPD shows that the standard does

¹⁸ See Ch.3, s.3.2.8, 3.2.9.

¹⁹ See text to note 127 in Ch.3.

²⁰ See text to note 207 in Ch.3.

²¹ See Ch.3, s.4.2.2.

not adequately protect vulnerable consumers.²² Requirements such as a ‘clearly identifiable group’ and ‘foreseeability’ are overly restrictive. Yet, the main issue is the how the UCPD follows the class approach to vulnerability limiting it to certain groups. It is suggested that both the average and vulnerable standard need reform and that interpretation according to empirical evidence would be useful for making the standards more realistic.

2.4. Aggressive Commercial Practices

Chapter 4 examined aggressive commercial practices in the UCPD. The introduction of aggressive practices provisions in the UCPD was an innovation as it introduced a general prohibition of aggressive practices in the EU, yet the provisions do not play an important role in the UCPD. This thesis argues that inequality of power is a central concept for aggressive practices, similar to the role that information plays for misleading practices.²³ It also sets out the common elements between aggressive practices and vulnerability, including how vulnerable consumers are targeted by aggressive practices.

This chapter analyses the practices listed in Annex I under the aggressive practices heading, as well as art. 8-9 UCPD. The case law on the blacklist has provided many good examples of how aggressive practices work in practice and how they have been applied by the Member States. They showcase the variety of practices caught by aggressive practices which fall into two main categories: psychological pressure and barriers.²⁴ Articles 8 and 9 UCPD are analysed with insights and their meaning developed with insights from private law theory. The rationale for regulating aggressive practices is to safeguard freedom of choice and autonomy.²⁵ It is argued that another rationale can be the preventing exploitation of the vulnerable.

The concepts of harassment, coercion and undue influence were analysed. Thought there is significant overlap between them and they are best viewed as a whole, an effort was made to distinguish between them for the sake of clarity and for developing their meaning. Harassment often has an emotional nature as the practices

²² See Ch.3, s.4.2.3.7.

²³ See text to note 23 in Ch.4.

²⁴ See text to note 77 in Ch.4.

²⁵ See text to note 103 in Ch.4.

place psychological pressure on the consumer.²⁶ Often that pressure is intensified through persistence. Coercion is the broadest concept out of the three and usually involves the formulation of a threat.²⁷ It may also include non-contractual barriers, as well as the use of physical force. Undue influence can refer to convincing the consumer to take a decision without the use of threats.²⁸ It requires the exploitation of a position of power. This position of power should go beyond than the general power imbalance that tends to exist between trader and consumer. Some examples can include post-contractual practices in long-term contracts or relationships with a high level of trust, such as those between medical professionals and consumers.²⁹ It is argued that it would be useful to categorisation aggressive practices in a different way, into practices using psychological pressure and to practices that use barriers.³⁰

The conditions of impairment of freedom of choice of the average consumer and taking a transactional decision were also covered. It is argued that resilience can be a helpful concept for assessing what would amount to significant impairment of the average consumer's freedom of choice. It is suggested that some of the factors that can influence the resilience of the consumer are: the existence of alternatives, the nature of products and the circumstances of the consumer. Art.9 UCPD is a useful tool for conceptualising aggressive practices and its role should be expanded.

3. Concluding remarks

After summarising what has been covered in this thesis, this section serves to bring together the main insights of this research. This thesis focuses on vulnerable consumers and therefore prioritises achieving a high level of consumer protection. A high level of consumer protection should translate into ensuring that the ones that need protection the most, the vulnerable, are protected. Both vulnerable consumers and aggressive practices have been peripheral to the UCPD. One of the contributions of this thesis is that it brings them to the forefront, analyses them, criticised them and, as is seen in the

²⁶ See Ch.4, s.4.2.1.

²⁷ See Ch.4, s.4.2.2.

²⁸ See Ch.4, s.4.2.3.

²⁹ See text to note 171 in Ch.4.

³⁰ See Ch.4, s.4.2.4.

next section, suggests ways to improve them. But what are the reasons why these two topics have been peripheral to the UCPD?

It is submitted that the lack of attention that these two topics have received, vulnerable consumers less so than aggressive practices, is not reflective of their importance and their prevalence in real life. An explanation for the peripheral role of aggressive practices and the limited version of vulnerability in the UCPD, can be found in the prevalence of the information paradigm in EU consumer law and the emphasis on promoting the functioning of the internal market.

As mentioned above, one of the aims of the UCPD is to promote the functioning of the internal market. Even though the Directive does not prioritise one aim over the other, it has been argued that eliminating barriers to the internal market is the main focus.³¹ The internal market has been central not only for the UCPD, but for EU consumer law in general. Freedom of movement of goods has been instrumental in consumer law, both before consumer protection was included in the Treaties as well as after. The average consumer, the benchmark of the UCPD was developed in CJEU case law for free movement of goods, with a view of bringing down barriers to trade.³² The average consumer who is well-informed, observant and circumspect is friendlier to trade than the vulnerable consumer who may require a higher level of protection.

The average consumer is influenced by neo-classical economics. Although not perfectly rational, the expectation is that he is able to make optimal decisions provided he has the right information. The average consumer fits in well with the information paradigm according to which there is an informational asymmetry between trader and consumer which regulation addresses with the use of informational remedies.³³ The information paradigm has been influential for the UCPD. The UCPD has indirectly introduced a general duty to provide information with art.7 UCPD on misleading omissions.³⁴ Information has a role to play even in the definition of undue influence,

³¹ Bernitz (2007) 37.

³² See Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt- Amt für Lebensmittelüberwachung* [1998] ECR I-04657.
and Ch.3, s. 3.

³³ Howells (2005) 350.

³⁴ Durovic (2016) 115.

which is defined as limiting the consumer's ability to make an informed decision.³⁵ However, aggressive practices do not fit in with the information paradigm, as they require going beyond informational asymmetry to consider the broader power asymmetry between trader and consumer.

It is not argued that the information paradigm should be abolished, as a new paradigm to replace it with has not emerged and indeed, information does play an important role. However, what is important is that the dominance of the information paradigm does not exclude the consideration of other issues faced by consumers, such as aggressive practices. Not every problem in consumer law should be equated to an informational asymmetry problem.

This thesis has argued for the reform and development of consumer vulnerability and aggressive practices in the UCPD. Both present complex concepts which are not easy to define. The view adopted is that vulnerability is inherent to the human condition. Viewing vulnerability as something that may happen to anyone is important. It makes it a worthwhile goal for policy to pursue, rather than it being framed as an issue that affects only certain groups of consumers. This approach also reduces the stigma associated with the vulnerability label. Aggressive practices require evaluating the power relationship between trader and consumer for identifying when it is unfair for traders to use their advantage over consumers. The foundations for these complex tasks have been provided by this thesis, yet their development will be an ongoing task. It is argued that a better conceptualisation of vulnerable consumers and aggressive practices will contribute to achieving a high level of protection.

4. Suggestions for reform

After the analysis of the themes and problems that the thesis has brought out, this section will discuss potential reforms that would better reflect the criticisms and stance taken on the thesis. As 2017 marks the ten year of application of the UCPD and the European Commission is conducting a fitness check of EU consumer law, this seems like a good time to re-evaluate the UCPD regime. The Fitness Check aims at assessing

³⁵ UCPD, art.2(j).

the effectiveness, efficiency, coherence, relevance and EU added value of the policy framed by the directives subject to the Fitness Check, which includes the UCPD.³⁶

The suggestions made here are no panacea but serve to point to the kind of changes that can be made so that the UCPD is more aligned with the goals of this thesis which is to ensure vulnerable consumers are protected from aggressive practices. The first part discusses potential reform to UCPD regime focusing on the consumer standards and the aggressive practices provisions. The second part considers the potential for use of codes of conduct.

4.1. UCPD

4.1.1. Consumer Standards

As analysed in Chapter 3, the UCPD includes the following standards: average consumer, average targeted consumer and average vulnerable consumer.

4.1.1.1. Average consumer

Rec.18 defines the average consumer as the ‘notional, typical consumer’ who is ‘reasonably well-informed, reasonably observant and circumspect’. These characteristics relate to information and are not suitable for assessing aggressive practices.³⁷ Therefore, the average consumer requires reform to include a characteristic that is suitable for aggressive practices. It is argued that resilience should be that characteristic. Thus, rec.18 UCPD could be reformed to read:

this Directive takes as a benchmark the average consumer, who is reasonably well-informed, *reasonably resilient*, and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice.

Resilience is a helpful term for assessing aggressive practices. As argued in Chapter 4 inequality of power is at the core of aggressive practices.³⁸ However, assessing inequality of power on a more general level can be a vexing task. Resilience

³⁶ European Commission, ‘Evaluation and Fitness Check Roadmap’, [2015], available online at <http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf> accessed May 2017 9.

³⁷ See text to note 207 in Ch.3.

³⁸ See text to note 23 in Ch.4.

is a flexible term that allows for taking the various power considerations into account. Resilience is connected to vulnerability.³⁹ If vulnerability makes consumers more susceptible to harm, resilience makes them less susceptible to harm.

In relation to aggressive practices, resilience refers to the expectations of the average consumer when facing pressure. Resilience is the measure for assessing how much pressure the average consumer is expected to withstand. What is also included are the factors for increasing resilience to aggressive practices. Thus, resilience for aggressive practices plays the role that information does for misleading practices. When facing misleading practices the average consumer is meant to be well-informed, observant and circumspect. Information is the tool for the average consumer to protect himself against misleading practices and the average consumer is expected to be circumspect towards communications of the trader.

Conceptualising resilience to aggressive practices is not an easy task. It is suggested, in line with the findings of Chapter 4 that some key factors to take into account are: (a) the existence of alternatives, (b) the nature of the product, and (c) the circumstances of the consumer.⁴⁰ Resilience is variable and what is expected of the average consumer will vary according to the context of each case. Resilience would apply also for the average targeted consumer standard and that would allow for a more nuanced view of resilience according to the target audience of the practice. It would open the possibility for considering the needs of vulnerable consumers who should be expected to be less resilient.

It is up to the Member States and the CJEU to elaborate on the meaning of resilience. The reasonably resilient average consumer would be one that is able to withstand a pushy seller and is able to say no, thank you and walk away. Of course the level of resistance expected will depend on the intensity of the pressure applied by the trader. The reasonably resilient consumer is also one that adopts a sceptical stance towards the trader.⁴¹ This quality would be particularly relevant in the context of undue influence. Similar to how the circumspect consumer does not take every statement e.g. in advertising at face value, the reasonably resilient consumer is able to exhibit a healthy

³⁹ See Ch.2, s.2.2.3.

⁴⁰ See Ch.4, s.4.2.5.2.

⁴¹ See text to note 173 in Ch.4.

amount of scepticism about the suggestions and potentially advice coming from the trader.

One could argue that adding the characteristic of resilience to the average consumer' standard would mean that the standard is raised as there is another hurdle to pass for a practice to be considered aggressive. This thesis has no intention of arguing for a more onerous consumer standard. However, as argued above, this addition is necessary to have a criterion that allows courts and authorities to assess the impact of an aggressive practice on the average consumer. There are safeguards to ensure that the interpretation of resilience will strike the right balance between ensuring a high level of protection for consumers and not being overly restrictive to traders.

The average consumer would not be expected to always be resilient but only 'reasonably resilient', same as the other characteristics of the average consumer. It is important for resilience to be proportionate. Consumers should be expected to exhibit a degree of resilience but not to the extent that they are considered to not need protection or to the extent where their confidence in the internal market would be undermined, as there would be an expectation of constant vigilance.⁴² Given that resilience is a novel concept and there would be no case law on how to apply it, empirical evidence could provide useful guidance as to what is to be reasonable expected of consumers in different contexts.

It is envisioned that the addition of resilience would also help raise the profile of the aggressive practices provisions and enhance the cohesion within the system of the UCPD, where currently aggressive practices sit uneasily. Providing regulating authorities and courts with the appropriate tool for a meaningful assessment of aggressive practices that is not conducted in the language of the information paradigm could mean that the provisions are used more.

4.1.1.2. Average vulnerable consumer

This thesis has shown that there are several issues with the average vulnerable consumer standard in the UCPD.⁴³ It sets restrictive conditions for its use. This is particularly visible in the causes of vulnerability in the UCPD which are limited to age, infirmity

⁴² UCPD, rec.4.

⁴³ See Ch.3, s.4.2.3.7.

and credulity. The average vulnerable consumer standard reflects a class approach of vulnerability, meaning that certain categories of consumers are to be considered as vulnerable. This approach does not leave room for considering the different capabilities of consumers within those categories, nor does it allow for consumers who do not fall into these categories to be characterised as vulnerable.

There is a need to reform the average vulnerable consumer standard. It is necessary to have a more sophisticated approach to consumer vulnerability, one that would be in line with the framework of vulnerability suggested in this thesis.⁴⁴ The UCPD should adopt a general definition of vulnerability which is not limited to particular categories of consumers; instead it describes the parameters of vulnerability, in line with the state-based approach to vulnerability.⁴⁵

There are benefits to having a state-based definition of consumer vulnerability for the UCPD. The UCPD is a horizontal Directive with a wide scope of application, meaning that it requires a flexible definition that would be able to address a wide range of cases. Then the average vulnerable consumer would be more in line with the average consumer; a flexible, adaptable standard.

The average vulnerable consumer is restricted in the UCPD to avoid undermining the average consumer standard. Would a more general state-based definition of vulnerability displace the average consumer as the benchmark of the UCPD? This need not be the case. A state-based approach of vulnerability does not mean there are no conditions for determining when someone is in a vulnerable position. Instead, it means that a multitude of factors are considered when assessing vulnerability, instead of labelling certain groups as vulnerable. As argued in the vulnerability chapter, the vulnerable consumer in this thesis is one who experiences a heightened susceptibility to harm in the marketplace because of actions or omissions of the trader.⁴⁶ This thesis argues that everyone is susceptible to harm, though not everyone will find themselves at a vulnerable position always. It is not a quantitative distinction where vulnerable consumers are the arithmetic minority, but a qualitative one meaning that some consumers are more susceptible to harm.

⁴⁴ See Ch.2, s.6.

⁴⁵ See Ch.3, s.3.2.

⁴⁶ See Ch.2, s.6.

For example, an alternative to art.5.3 UCPD could be:

Commercial practices which are likely to exploit vulnerable consumers or disproportionately impact negatively on vulnerable consumers in a way that the trader could be reasonably expected to foresee, shall be assessed from the perspective of the average vulnerable consumer. Vulnerable consumers are those who are highly susceptible to harm as a result of the conditions of the market and their characteristics and circumstances. Such characteristics may include: age, mental or physical infirmity, level of income, language skills etc. Such circumstances may include: bereavement, unemployment, relationship breakdown, caring responsibilities, asylum seeking.

The second part providing the definition of vulnerable consumers and the list of potential consumer characteristics and circumstances that contribute to vulnerability can be included in the recital, like rec.18 UCPD for the average consumer. Alternatively, if consensus could be achieved the definition can be included in art.2 UCPD. The suggested reform of art.5.3 UCPD is by no means perfect, yet it is a considerable improvement. It sets out the two main instances where vulnerable consumers need to be considered: (a) practices that specifically target certain vulnerable consumers, and (b) practices that are not unfair for the general population, yet adversely influence vulnerable consumers.

The definition for vulnerability describes vulnerability as a state and as the outcome of market conditions and characteristics of the consumer, as advocated in this thesis. Furthermore, it recognises that identifying certain characteristics that may be especially relevant may be beneficial. The same is true for circumstances of the consumer, which are difficult to consider with the current criteria for vulnerability in the UCPD.⁴⁷ It is important that the list is indicative rather than the exhaustive list of criteria currently included in art.5.3. UCPD, as an indicative list allows Member States to consider a broad range of factors.

An open-textured definition of vulnerability, is open to the criticism of undermining legal certainty, as it may not always be easy to predict when a consumer will be in a vulnerable position. Yet, for the UCPD to offer effective protection to vulnerable consumers, it needs to offer a flexible definition. Some of the issues can be

⁴⁷ See text to note 225 in Ch.3.

addressed by further interpreting this definition in codes of conduct. This option is further examined below in s.4.2. On an EU level, it is possible to have sectoral legislation which can include definitions of vulnerable consumers that are more specific and adapted to the needs of the particular sector. The directives on energy are a good example of this.⁴⁸ A reformed average vulnerable consumer standard combined with soft law instruments, such as the Commission guidance, codes of conduct and where appropriate, sectoral Directives would be useful for qualifying the general definition of the UCPD and achieving the optimal balance between legal certainty and flexibility and for ensuring a high level of protection.

4.1.2. Aggressive practices provisions

It has been argued that harassment, coercion and undue influence lack clarity thus undermining the legal certainty of the aggressive practices provisions. This thesis has sought to develop the meaning of these three concepts with the aim of establishing what is at the core of aggressive practices, which is power inequality.⁴⁹ Power inequality becomes problematic when abused by the trader.

Article 8 UCPD should make it explicit that aggressive practices centre around inequality of power between trader and consumer. This would make the core of the provision prominent, in the same way that misleading practices centre around information. In this case, harassment, coercion and undue influence would be instances under the broader concept of abuse of power. Abuse of power is a good choice of term as it is not borrowed from a specific legal tradition and can develop into a European term more easily.

The concept of harassment needs reform. The only harassing practices caught are the ones that satisfy the transactional decision test, leaving out practices that cause distress to consumers, but would not make the average consumer take a transactional decision. It is argued that the harassing practices that do pass the transactional decision test can be caught by coercion, thereby eliminating the need for harassment. That would not mean that harassing practices would be allowed but rather that they would be caught by the general clause where necessary or would be regulated by other pieces of

⁴⁸ See note 24 in Ch.2.

⁴⁹ See text to note 23 in Ch.4.

legislation that would offer a broader understanding of harassment than the one it has in the UCPD.

The concept of undue influence also requires reform. The term is clearly imported from common law. However, it is designed to be an autonomous European law concept, which is why a definition for it is provided, unlike coercion and harassment. However, the definition provided could go further to detach it from the preconceptions the term may carry, especially for common lawyers.⁵⁰ That would relate especially to clarifying how such pressure is applied in a commercial context. Another change would be to remove the mention of physical violence, given that coercion can cover any instances of use of physical violence without the need to extend it also to undue influence.

However, it is argued that the aggressive practices provisions would benefit from a more radical reform. The aggressive practices provisions have not been widely used; which suggests that the current wording is not working very well. As mentioned in Chapter 4, the two main categories of aggressive practices, with the exception of practices that use physical violence, can be summed up into: a) practices that employ psychological pressure, b) barriers either contractual or charges or other types aiming at limiting the choices of the consumer.⁵¹ Based on that art.8 UCPD can be reformed to:

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, (a) places psychological pressure on the consumer, (b) places barriers on the consumer or otherwise constitutes an abuse of power of the trader and significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

This approach would help achieve greater clarity to the provisions unburdened by preconceptions. Arguably, abuse of power would introduce a new abstract legal term that would require interpretation by the Member States and the CJEU to further clarify its meaning. Yet, it would provide a much needed core element for aggressive practices

⁵⁰ The exit of the UK from the EU will mean that the influence of common law on EU law will subside.

⁵¹ See Ch.4, s.4.2.4.

and its effect would be mitigated by the impairment of freedom of choice requirement and the transactional decision test.

4.1.3. The role of empirical evidence

It has been argued that empirical evidence can be useful for interpreting the UCPD, and this is the stance taken in this thesis.⁵² *Gut Springenheide* referred to statistical evidence and in particular, an expert's report or a consumer survey that can be taken into account for interpreting the average consumer.⁵³ It is questionable whether e.g. an expert's report falls under the rubric of statistical evidence. Empirical evidence is a general term that can encompass a breadth of evidence. One such type can be behavioural evidence that are gaining in importance and have been discussed also in this thesis.⁵⁴ For behavioural economics to produce benefits, it is important to go beyond the general experimental findings, that tend to be produced in lab experiments to studies that test these behavioural findings real-life consumer contexts.

Empirical evidence can be used in different stages, starting from designing a policy or a law to the interpretation of a law by a national authority or in the courtroom. While it is recognised that both are relevant, this thesis mostly deals with the second aspect, that of the interpretation of existing standards.

As seen also in Chapter 3 the approach taken in this thesis is that empirical evidence can support legal judgements, not substitute them. The role of empirical evidence should be to inform the law, rather than dictate the content or the interpretation of the law.⁵⁵ It is desirable to have legal standards that are realistic and grounded in empirical evidence. In the context of the thesis there are several opportunities to take empirical evidence into account:

1. *Interpretation of the average consumer.* Empirical evidence can be used to assess the behaviour and reactions of the average consumer. Such evidence can be useful for making the average consumer more realistic. For example, empirical evidence can be used to demonstrate that the average consumer is likely to be influenced by

⁵² See text to note 319 in Ch.3.

⁵³ *Gut Springenheide*, para 31.

⁵⁴ See Ch.1, s.3.2.

⁵⁵ See text to note 318 in Ch.3.

some of the well-established biases such as framing.⁵⁶ For aggressive practices in particular, it would be useful for assessing the emotional reactions of the consumer. It was suggested above, that the average consumer standard should be reformed to include the characteristic of resilience, for assessing aggressive practices. Empirical evidence could be useful for assessing resilience. For example, a market survey could offer some insight as to how consumers react e.g. to cold calling practices that would help assess whether the average consumer would find the practice harassing.

2. *Interpretation of vulnerable consumer.* Empirical evidence is key for assessing vulnerability as it may be challenging for regulators and judges to assess the behaviour of vulnerable consumers. E.g. it may be more difficult for a judge to decide on how an overindebted consumer that became unemployed would react to a debt collection practice. Robust evidence referring to a specific context could help assess the factors that contribute to vulnerability. For example, evidence on how elderly consumers respond to funeral plan advertising. It can also be used to identify which groups may be vulnerable to a certain practice or product away from preconceived notions.
3. *Assessing aggressive practices.* Assessing aggressive practices outside the context of a specific trader-consumer relationship may be challenging. Empirical evidence can help assess when a practice is placing too much pressure on the consumer. Empirical evidence can be used to assess the effect of psychological pressure on consumers to help establish whether a practice is aggressive.
4. *Building resilience.* Empirical evidence can be used for assessing vulnerability as well as interpreting the behaviour of the reasonably resilient average consumer. The use of empirical evidence can go beyond assisting with the interpretation of the law to the design of policies that help protect consumers, especially vulnerable consumers. As argued in this thesis, resilience is the other side of vulnerability, it includes the factors that mitigate the vulnerability of consumers.⁵⁷ The use of robust empirical evidence from targeted designs is imperative for identifying the factors that build resilience. Similar to vulnerability, resilience depends on the particular

⁵⁶ See Ch.1, s.3.2.1.4.

⁵⁷ See Ch.2, s.2.2.3.

context and making blanket judgements will not be easy. Identifying the factors that increase resilience will allow for policy measures to be designed to promote these factors. That is of course with the recognition that it will not always be possible to build resilience and mitigate vulnerability.⁵⁸ Without empirical evidence any attempt of policymakers to boost resilience will most likely be ineffective.

It is important to stress that the use of empirical evidence is not a perfect solution. There are many caveats that come with the use of empirical evidence, as to their methodology, the cost of commissioning studies and their reliability. There are ways to address some of the concerns that relate to the use of empirical evidence. For example, in the EU context Perez suggests that methodological guidelines would be useful, provided they are cross-institutional, empirically validated and reflexive.⁵⁹ Other measures relating to the choice of experts would be ensuring diversity of the body of experts by blind selection or randomisation.⁶⁰

Empirical evidence will not always be necessary. But when they will be, it is important to consider them. Even though there are many issues to take into account, it is preferable to strive for an alignment of the law with empirical reality rather than use formulas that may be elegant in theory, but do not work in practice. It is encouraging that EU law appears to be open to taking behavioural evidence into account and especially behavioural evidence and it would be desirable for this trend to continue and to bring about a more substantive change.⁶¹

4.2. The role of soft law

4.2.1. Codes of conduct

Codes of conduct can play a role in supporting the UCPD. For the purposes of this thesis, codes can be particularly useful for the protection of vulnerable consumers.⁶²

⁵⁸ See text to note 67 in Ch.2.

⁵⁹ Oren Perez, 'Can Experts Be Trusted and What Can Be Done about It? Insights from the Biases and Heuristics Literature' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015) 132–133.

⁶⁰ Perez (2015) 134.

⁶¹ Sibony and Helleringer (2015) 233.

⁶² See text to note 121, 198 in Ch.2.

The UCPD acknowledges the role codes of conduct can play encouraging their use as a means of reducing the need for recourse to administrative or judicial action.⁶³ Art.2(f) UCPD contains a definition for code of conduct:

‘code of conduct’ means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;

The standing of codes of conduct is fortified by the UCPD which states that non-compliance of the trader with commitments contained in a code of conduct that the trader has agreed to be bound by, will be a misleading practice under certain conditions.⁶⁴ However, the UCPD does not underline the potential of codes of conduct for protecting vulnerable consumers to the extent that other EU Directives do. The E-Commerce Directive encourages codes of conduct for protecting minors and disabled.⁶⁵

The Member States have different traditions when it comes to codes of conduct. For the UK and Ireland, codes of conduct are an important part of the government policy for fair trading standards. The prevalence of codes of conduct in the UK relates to the lack of general clause, as opposed to many civil law countries.⁶⁶ Civil law countries, such as Italy and the Netherlands also employ codes of conduct, while in Scandinavian countries the Consumer Ombudsman issues non-legally binding guidelines.⁶⁷ The diverse approaches taken in the Member States show that codes of conduct are a flexible instrument that Member States can adjust to their own needs and national traditions.

Codes of conduct can be sectoral or horizontal, national or supranational. Both national and supranational codes can be useful. A supranational code with members across the EU is more likely to be adopted by industries with an interest in cross-border trade. One such example is the e-commerce sector where a code of conduct has been adopted for 14 countries in Europe⁶⁸ Yet, the adoption of supra-national codes has been

⁶³ UCPD, rec.20.

⁶⁴ UCPD, art.6.2(b).

⁶⁵ Directive 2000/31/EC on Electronic Commerce, (2000) OJ L 178/1, art.16(d), (e).

⁶⁶ Hans-W Micklitz, ‘A General Framework Directive on Fair Trading’ in Hugh Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International 2004) 77.

⁶⁷ Micklitz (2004) 77.

⁶⁸ <<https://www.ecommercetrustmark.eu/the-code-of-conduct/>> accessed May 2017.

shown to be a difficult task.⁶⁹ Codes can be the result of self-regulation or co-regulation. Self-regulation means the industry regulates itself, while co-regulation involves different stakeholders including the legislator, enforcement authorities and consumers and may also be included in legislation. Under art.2(f) UCPD it is made clear that any code needs to be voluntary and not imposed by law. That does not mean that states cannot be involved in the drafting of a voluntary code.

It is argued that a broad consultation and participation of various stakeholders in the drafting and enforcement of a code would produce the best results. That is especially true for protecting vulnerable consumers where consumer organisations and national authorities may have a better overview of the problems faced by vulnerable consumers. The cooperation and consultation of various stakeholders could lead to the adoption of other initiatives for addressing consumer vulnerability and building resilience, as for example, informational campaigns on consumer rights.

Codes of conduct can be used to elaborate on the standard of the UCPD or to uphold a standard higher than the one prescribed in the UCPD. Micklitz argues that due to the nature of commercial communications, codes would be best used for elaborating on the UCPD, leaving room for differences between Member States. Both possibilities can be beneficial, especially in light of the changes proposed above. For example, for vulnerable consumers, with the current vulnerable consumer standard it would be desirable for a code of conduct to go beyond that to protect vulnerable consumers. However, with the proposed changes, it would be more fitting to elaborate on the vulnerable standard. Codes would also be an opportunity to enforce the foreseeability requirement to a higher standard, as a duty of the traders to modify their practices to cater to the needs of vulnerable consumers.⁷⁰

For codes of conduct to be successful, traders need to be incentivised to take part and adhere to standards higher than those of the UCPD. One way to achieve that is the use of a logo for the traders that are members of the code. A widely recognisable logo can increase the trust of consumers towards traders. This has been the approach of

⁶⁹ Geraint Howells, 'Codes of Conduct' in Geraint Howells, Hans W Micklitz and Thomas Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006) 200.

⁷⁰ See Ch.3, s.4.2.3.6.

E-Commerce Europe, the example used above, that has adopted an E-Commerce Europe trustmark.⁷¹ Traders would also be more likely to adhere to a code if it ensured that their practices would not breach the UCPD. However, even though the Commission considered that possibility, the UCPD makes no such link between codes of conduct and the general clauses.⁷²

Pavillon in her account of how the UCPD has influenced self-regulation paints a not so encouraging picture. Her findings are that the UCPD does not appear to have spurred an increase in self-regulation, something that can be partially attributed to the framework character of the UCPD, as opposed to a sector-specific Directive.⁷³ Yet, the UCPD covers topics, such as vulnerability and aggressive practices that sectoral legislation may not address. The involvement of national authorities could help nudging certain industries towards the adoption of a code, where that would be deemed appropriate. Codes of conduct can be useful tools for achieving legal certainty and high standards of consumer protection or they may fail to deliver these benefits. A broad consultation, a targeted approach and an effective enforcement mechanism of the code can help ensure its success.

5. Directions for the future

This thesis has explored how successful the UCPD has been at protecting vulnerable consumers from aggressive commercial practices. While conducting this research, other interesting questions arose, yet there was not enough space and time to explore them in the thesis. Aggressive commercial practices are an underdeveloped field and while this thesis is a contribution to further knowledge on it, it is by no means exhaustive. The same is true for consumer vulnerability, which is beginning to gather greater interest in the consumer law field. This section offers an overview of topics worth developing and researching in the future.

⁷¹ See <<https://www.ecommerce-europe.eu/ecommerce-europe-trustmark/>> accessed May 2017.

⁷² Howells (2006), 'Codes of Conduct' 212.

⁷³ Charlotte Pavillon, 'The Interaction between the Unfair Commercial Practices Directive and Self-Regulation: The Case of Codes of Conduct' in Willem H van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Pub Limited 2014) 152.

5.1. Aggressive commercial Practices in different sectors

The marketplace is rapidly changing because of technological advances and the online environment is becoming ever more prevalent. As hinted in the thesis, these changes bring forward new challenges for regulating aggressive practices.⁷⁴ If in the past the typical example of an aggressive practice was door-to-door selling in the coming years the regulatory landscape may look very different. In fact, it already does. The online environment creates novel issues; from personalised targeted advertising to website layout and in-app purchases, there needs to be ensured that the current legal framework works to ensure effective protection of consumers. This would go beyond the UCPD to look at other instruments regulating the online environment, such as the E-Commerce Directive.⁷⁵ The willingness to examine the potential overlap and overall effectiveness of the legal instruments that exist in parallel can be seen also in the Second Guidance Document of the UCPD.⁷⁶

Aggressive practices in the online environment are also interesting in conjunction with vulnerability. Technological illiteracy and familiarity with technology in general can be aspects of vulnerability. Furthermore, as access to technology is becoming ever more essential, not having e.g. internet access can lead to exclusion from certain services and subsequent detriment for consumers.

Looking more closely at the overlap between the UCPD and other sectoral legislation as well as national legislation is relevant not only for the online environment. As seen above, aggressive practices are especially relevant for financial services.⁷⁷ This can be attributed to the fact that financial services are often highly complex and long-term commitments meaning that the power imbalance between traders and consumers is more prevalent. For financial services in particular, there is the added dimension that they are exempt from the maximum harmonisation character of the UCPD.⁷⁸

⁷⁴ See text to note 253 in Ch.3, text to note 119, 129 in Ch.4.

⁷⁵ Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178 (E-Commerce Directive).

⁷⁶ Second Guidance Document, s.1.4

⁷⁷ See text to note 46, 209 in Ch.4.

⁷⁸ UCPD, rec.9.

5.2. Developing Consumer Vulnerability

As seen in this thesis, consumer vulnerability is a relatively novel concept in European consumer law, spearheaded by the UCPD and sporadic references in other pieces of legislation. Vulnerability has the potential of becoming a central concept of European consumer law, as the approach to it is becoming more nuanced and allows for taking the interests of different groups into account. There is still a lot of work to be done in that direction. The ultimate goal would be to see a sophisticated definition of the vulnerable consumer be applied more broadly in EU consumer law, perhaps in a piece of legislation that would enshrine the concept on an EU level.

However, consumer vulnerability was never meant to be a purely theoretical concept. In line with the approach taken in this thesis that argues for empirically-informed policy it would be exciting to see empirical studies exploring consumer vulnerability in specific contexts. That could relate to specific markets, specific circumstances and specific groups. It would be highly desirable to see consumer policy designed taking robust and specific empirical evidence into account.

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