

## Articles

# The Use of Unfair Contractual Terms as an Unfair Commercial Practice

SALVATORE ORLANDO

*Abstract: The purpose of the present article is to propose a coordination between the provisions of directive 93/13/EEC (the Unfair Terms Directive, 'UTD') and those of the 'framework' directive 2005/29/EC (the Unfair Commercial Practices Directive 'UCPD'), and in particular to assess whether the 'use of unfair terms' as meant by the UTD entails and shall be treated by the Member States as an 'unfair commercial practice'. It is herein argued that the use of unfair terms (as understood by the UTD) will normally entail the constitutive elements of an unfair business-to-consumer commercial practice (as specified by the UCPD), namely a 'misleading action', since it will usually amount to the supply of false information or be capable of misleading the average consumer during the performance of the contract as to the parties' rights and obligations arising under the contract, in particular as to rights and obligations literally provided by terms which are legally non-binding on the consumer. Secondly, it is observed that the use of written terms which are not drafted in plain, intelligible language shall always be deemed prohibited pursuant to the UTD, while in those cases entailing a lack of transparency about 'material information', as defined by Article 7 of the UCPD, the relevant practice shall also be construed as an unfair commercial practice, namely a 'misleading omission'. Thirdly, it is attempted to demonstrate that no conflict exists between the provisions of Articles 5 and 7 of the UTD (on one side) and the provisions of the UCPD (on the other side), and that, as a consequence, Member States must ensure that the commercial practices consisting in the use of unfair terms and the use of non-transparent terms are made subject to the national provisions adopted in application of the UCPD. Finally, a recommendation for a better coordination with the UCPD is put forward in relation to the recent Proposal for a Directive on Consumer Rights.*

*Résumé: Le but du présent article est de proposer une coordination entre les dispositions de la directive 93/13/CEE (la directive sur les clauses abusives) et celles de la directive cadre 2005/29/CE (la directive sur les pratiques commerciales déloyales), et en particulier d'apprécier si l'utilisation des clauses abusives comme entendues par la première directive suppose et sera traitée par les États membres comme une pratique commerciale déloyale. Il est ici soutenu que l'utilisation des clauses abusives (comme comprises par la directive) impliquera normalement l'existence des éléments constitutifs d'une pratique commerciale déloyale (au sens de la directive de 2005) entre professionnels et consommateurs, c'est-à-dire une action de nature à induire en erreur, et ce dans la mesure où elle consistera habituellement à fournir des informations fausses ou à induire en erreur le consommateur moyen durant l'exécution du contrat quant aux droits et obligations des parties résultant du contrat, en particulier quant aux droits et obligations littéralement prévus par les clauses ne liant pas légalement le consommateur. En second lieu, il est ici observé que l'utilisation de clauses écrites qui ne sont pas rédigées en langage clair et intelligible devraient toujours être interdites au regard de la directive sur les clauses abusives, et que, dans ces cas impliquant un manque de transparence sur les informations pertinentes comme définies par l'article 7 de la directive sur les pratiques déloyales, les*

*pratiques en cause devraient également être qualifiées de pratiques commerciales déloyales, plus précisément d'omission trompeuse. En troisième lieu, nous essayons ici de démontrer qu'aucun conflit n'existe entre les dispositions des articles 5 et 7 de la directive sur les clauses abusives d'une part, et les dispositions de la directive sur les pratiques commerciales déloyales d'autre part, et que, par conséquent, les États membres doivent s'assurer que les pratiques commerciales consistant à utiliser des clauses abusives et à rédiger des clauses obscures sont soumises aux dispositions nationales adoptées en application de la directive sur les pratiques commerciales déloyales. En dernier lieu, il est fait une recommandation pour une meilleure coordination avec la directive sur les pratiques commerciales déloyales en relation avec la récente proposition de directive sur les droits des consommateurs.*

*Kurzfassung: In diesem Beitrag wird eine integrierte Sicht vorgeschlagen für die Anwendung der AGB-Richtlinie (93/13/EWG) und der Geschäftspraktiken-Richtlinie (2005/29/EG), wobei sich vor allem die Frage stellt, ob die Verwendung missbräuchlicher Klauseln iSd erstgenannten Richtlinie zugleich auch eine "unlautere Geschäftspraxis" iSd zweitgenannten Richtlinie darstellt. Diese Frage wird grundsätzlich bejaht: Solch eine Verwendung wird vor allem als "irreführende Geschäftspraxis" gesehen, da idR falsche Information vermittelt wird oder aber der Verbraucher im Unklaren bleibt über seine Rechte und Pflichten bei der Vertragsdurchführung, insbesondere im Hinblick auf Rechte und Pflichten aus den missbräuchlichen (und damit unwirksamen) AGB. Sodann werden insbesondere AGB, die das Transparenzgebot der AGB-Richtlinie verletzen, als Verstöße auch gegen die Geschäftspraktiken-Richtlinie qualifiziert, weil damit auch "wesentliche Informationen" iSv Artikel 7 dieser Richtlinie vorenthalten werden. Zuletzt wird aufgezeigt, dass zwischen Artikel 5 und 7 der Geschäftspraktiken-Richtlinie und den Vorgaben der AGB-Richtlinie kein Konflikt besteht und dass daher die genannten missbräuchlichen oder intransparenten AGB den nationalen Sanktionsmechanismen unterworfen werden müssen, die in Umsetzung der Geschäftspraktiken-Richtlinie eingeführt wurden. Für die bessere Koordinierung beider Richtlinien im Zusammenhang mit der Verabschiedung einer Verbraucherrechte-Richtlinie wird abschließend ein Vorschlag unterbreitet.*

## Introduction

Generally speaking, scholars commenting upon the legislation and the phenomenon of unfair terms do not adopt the categories and concepts put forward by the 'framework' directive on unfair commercial practices of 2005 (directive 29/2005/EC, the 'UCPD')<sup>1</sup>. This is mainly due to the fact that the UCPD is more recent than the directive 13/1993/ECC on unfair terms (the 'UTD'), but

<sup>1</sup> Cf however the interesting comments in H. Micklitz, 'Legal Redress', in G. Howells, H. Micklitz and T. Wilhelmsson, *European Fair Trading Law, The UCPD* (Ashgate: Aldershot, 2006) 224: 'Read broadly, one may understand unfair contract terms as a form of commercial practice'; and C. Willett, *Fairness in Consumer Contracts, The case of Unfair Terms* (Ashgate: Aldershot, 2007) 418 ff; M. Meli, 'Trasparenza e vessatorietà delle clausole nei contratti per adesione', in G. De Cristofaro (ed), *I "Principi" del diritto comunitario dei contratti* (Torino: Giappichelli, 2009) 484–485. In addition, see the reference made in footnote 45 below to the German literature formed on the theory of 'Vorsprung durch Rechtsbruch' (advantage through violation of law).

is also due to a tendency to consider the provisions of the UTD as dealing *exclusively* with contract law, thus falling outside the scope of the UCPD because of the exclusion for contract law provided by the latter (Article 3 para 2 of the UCPD). On the contrary, it seems correct to observe that the UTD not only contains provisions relevant to contract law (these are the provisions of Article 6 requiring the Member States to ensure that unfair terms shall be non-binding on the consumer in the individual contractual relationships between trader and consumers) but also introduced a ‘pioneer’ provision relevant to commercial practices law. This is the important provision of Article 7 of the UTD, according to which Member States were required to adopt adequate and effective means to prevent the ‘use’ or ‘continued use’ of unfair contractual terms by traders<sup>2</sup>.

Now, the ‘use’ or ‘continued use’ of unfair contractual terms by traders, as defined by Article 7 of the UTD<sup>3</sup>, is certainly a ‘business-to-consumer commercial practice’ according to the definition provided by Article 2 (d) of the UCPD<sup>4</sup>, and the question therefore arises of whether such practice qualifies as an *unfair* commercial practice. A similar problem of coordination between the UTD and the UCPD arises with respect to Article 5 of the UTD, in particular in relation to the use by the trader of terms that are not drafted in plain and intelligible language (non-transparent terms).

As better illustrated in this article, the use of unfair/non-transparent terms by the trader may consist of:

- a) the *offer* by the trader of unfair/non-transparent terms to consumers, or
- b) the *maintenance* of unfair/non-transparent terms in already concluded contracts.

In this paper, I will address the following three questions:

- (i) whether, and upon which conditions, the use of unfair terms by traders can be construed as an unfair commercial practice (paragraph 1);

2 The importance of art 7 of the UTD is stressed by many authors. Cf H. Collins, ‘The Directive on Unfair Contract Terms’, in H. Collins (ed), *Standard Contract Terms in Europe* (Austin et al: Wolters Kluwer, 2008) 9–10: ‘... there can be little doubt that it provides a much more effective model for cleaning unfair terms out of the market’; Willett, n 1 above, 404 ff.

3 Art. 7, first paragraph of the UTD: ‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

4 Art. 2 (d) of the UCPD: ‘“business-to-consumer commercial practices” (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertisement and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’.

- (ii) whether, and upon which conditions the use of non-transparent terms can be construed as an unfair commercial practice (paragraph 2); and
- (iii) whether the provisions of the UTD qualify as ‘conflicting provisions’ with respect to the provisions of the UCPD, in the sense of Article 3 para 4 of the UCPD<sup>5</sup> (paragraph 3).

## **1 The use of unfair terms as a commercial practice. The cases in which such practice entails the constitutive elements of an unfair commercial practice.**

### **1.1 Contractual terms which are always non-binding on the consumer according to the law applicable to the contract**

The UCPD prohibits commercial practices containing false information<sup>6</sup> or deceptive information regarding the extent of the trader’s commitments, the rights of the trader or the consumer’s rights<sup>7</sup>. Any such commercial practice is a ‘*misleading action*’, thus falling within the scope of the general prohibition set by Article 5 para 1 of the same directive<sup>8</sup>. Now, before commenting specifically on the use of unfair terms, it appears useful to take a more general position on the use of *non-binding* terms. In this respect, it seems correct to say that the use of non-binding terms by the trader falls directly within the scope of the above-mentioned prohibition, since, as a matter of fact, when using non-binding terms the trader provides *false or deceptive information as to the parties’ rights and obligations arising under the contract*.

If one agrees with the above conclusion, a further observation appears relevant. We can say that the above-mentioned rules of Article 6 of the UCPD provide for a test which is necessarily dependant on the *national contract law* applicable to the contracts between traders and consumers. In fact, in order to apply the test of whether the trader is providing false or deceptive information about the rights and obligations arising under the contract by way of using non-binding terms, an assessment shall be made about the *set of rights and obligations enforceable under the national law applicable to the contract*. The above is only apparently a complex approach, as, in brief, it simply means that whenever contractual terms are non-binding *in terms of the national law*

5 Art. 3 para 4 of the UCPD: ‘In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.’

6 Art. 6 para 1, first sentence of the UCPD.

7 Art. 6 para 1, letters (c), (f) and (g) of the UCPD.

8 By virtue of the provision of art 5 para 4 (a) of the UCPD.

*applicable to the contract*, their use by the trader shall be deemed to constitute an unfair commercial practice (namely a misleading action).

Coming now to the use of unfair terms, it is useful to recall that the UTD required the Member States to introduce or maintain provisions so as to ensure that certain terms *which are not individually negotiated* shall be non-binding on the consumer, if they correspond to the general definition of unfair terms (ie if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer). However, as is well known, according to the contract law of many Member States, certain terms which still correspond to the above definition of unfair terms, or even fall within the list contained in the Annex to the UTD, *are always invalid irrespective of whether or not they are individually negotiated*. This is the case of the terms listed in the 'black lists' provided by certain Member States in their provisions adopted in application of the UTD. For instance, under Italian law clauses limiting or excluding the liability of the trader in the event of the death of the consumer or personal injury to the latter resulting from an act or omission of the trader<sup>9</sup> are null and void notwithstanding any possible individual negotiation with the consumer<sup>10</sup>. It seems correct to state that the use by the trader of any such terms *always* entails the constitutive elements of an unfair commercial practice, namely a misleading action, pursuant to Article 6 para 1 of the UCPD, since it responds to the rule illustrated above: whenever contract terms are non-binding as a matter of the national law applicable to the contract, their use by the trader shall be deemed to constitute a misleading action.

The same conclusion as to the unfair nature of the use of non-binding terms would be reached if one applied the general test provided for by Article 5 para 2 of the UCPD, in relation to the two constitutive elements of the 'grand clause' of unfair commercial practices, namely:

- the contravention of the 'requirements of professional diligence', and
- the ability to 'materially distort the economic behaviour of the average consumer'.

With respect to the first element, in fact, the trader who offers invalid contract terms is or should be aware that such terms are destined to be legally non-

<sup>9</sup> Letter (a) of Annex II to the UTD.

<sup>10</sup> Art. 36 para 2 of the Italian Consumer Code. In addition, it is important to recall that the UTD is a 'minimum measure' (cf, *ex multis*, G. Howells and S. Weatherill, *Consumer Protection Law* (2<sup>nd</sup> ed, Ashgate: Aldershot, 2005) 269: 'The Directive [the UTD], a minimum measure, does not pre-empt national initiatives which offer more stringent protection, nor does it affect national measures outwith its scope. So, for example, although the Directive [the UTD] does not address individually negotiated terms, it offers no objection to national rules which extend control in this area').

binding on the consumer in the individual contractual relationships; and the trader who maintains invalid terms in already concluded contracts is or should be aware that such terms are non-binding on the consumer. It seems in fact correct to state that the requirements of professional diligence include the duty of the trader, who is aware or should be aware of the non-binding character of certain contractual terms used by himself, to inform the consumer of such a circumstance, as well as the prohibition on offering, or maintaining post the conclusion of the contract, a contractual text whose content is false or ambiguous as to the legal position of the parties: in particular, a text containing terms that are legally non-binding.

The use of invalid terms should also be deemed capable of materially distorting the economic behaviour of the average consumer during the performance of the contract (second element). In this respect, it seems correct to observe that the average consumer, faced with contractual forms drafted by the trader, which do not precisely reflect the legally binding clauses (since they contain some non-binding clauses), would usually be unclear about the parties' rights and obligations arising under the contract, and would normally believe himself to be bound by all clauses. For the same reason, the trader would in practice be able to enforce the rights and powers literally provided in his favour by the unfair contract terms, even if such terms are legally non-binding and in principle unenforceable, thus profiting from the ignorance of the average consumer about the precise legal value (ie the non-binding character) of those terms. The use of invalid terms is therefore capable in the above circumstances of materially distorting the economic behaviour of the average consumer in relation to the exercise of his 'contractual rights'<sup>11</sup>.

## **1.2 Contractual terms that may be binding only if they are individually negotiated.**

The test of unfairness of the practices consisting in the use of unfair terms, other than those unfair terms which are in any case invalid according to the national law applicable to the contract, is apparently more complicated. This test concerns contractual terms that, despite responding to the abstract notion of unfairness set by the UTD<sup>12</sup>, may be legally binding if they are individually negotiated.

In order to introduce this issue and suggest a straightforward approach, it seems correct to state that this test too is dependent on the national laws applicable to the contract. In fact, in order to take a position on the elements

<sup>11</sup> Art. 2, letter (k) of the UCPD.

<sup>12</sup> Ie contractual terms that 'contrary to the requirement of good faith cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer' (art 3 para 1 of the UTD).

which are critical to the test, such as the extent of the definition of unfair terms and the notion of ‘individual negotiation’ (including the relevant assumptions), it is necessary to look at the way in which the respective national laws implemented the UTD, which is a minimum harmonisation measure<sup>13</sup>. Without prejudice to the above remark, it is, however, possible to look at the UTD in isolation (ie without considering the way in which the various Member States implemented the said directive) in order to identify in general terms the criteria to be followed for applying the relevant test *in all Member States*. In particular, it seems correct to say that the commercial practice consisting of the use of terms which may be binding according to the applicable law only if they are individually negotiated shall always be construed as an unfair commercial practice unless the trader puts in place a broader practice comprising:

both

(a) an attempt to individually negotiate any such terms with all consumers to whom the same terms are offered, according to the requirements of ‘individual negotiation’ as set forth by the applicable national law;

and

(b) information provided to all consumers about the non-binding character of the unfair terms which have not been individually negotiated.

In fact, unless the trader puts in place actions under (a) and (b) above, the constitutive elements of an unfair commercial practice as provided by Article 5 para 2 of the UCPD shall be deemed to occur, namely:

- the contravention of the ‘requirements of professional diligence’, and
- the ability to ‘materially distort the economic behaviour of the average consumer’.

This is because, in the absence of the said two actions, the trader is or should be aware that the unfair terms would not, as a rule, be legally binding, and the average consumer would not, as a rule, be informed about the non-binding character of those terms.

### 1.3 General remarks and conclusions.

In conclusion, while the identification of the precise conditions upon which

<sup>13</sup> A comparative analysis is made by P. Nebbia, *Unfair Contract Terms in European law, A study in Comparative and EC Law* (Oxford: Hart, 2007). Cf also the important contributions contained in H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *The EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States* (Munich: Sellier, 2008); J. Stuyck, ‘Unfair terms’, in G. Howells and R. Schulze (eds), *Modernising and harmonising consumer contract law* (Munich: Sellier, 2009) 117 ff.

the use of unfair terms may be deemed to entail the constitutive elements of an unfair commercial practice is ultimately dependent on the national laws applicable to the contract (see sections 1.1 and 1.2 above), it is nevertheless true that such identification is possible in any jurisdiction, i.e. that in any jurisdiction the use of unfair terms entails, upon certain conditions that may differ from one Member State to another, the constitutive elements of an unfair commercial practice.

While the possible divergences in this respect may create a concern about the achievement of the goal of the maximum harmonisation of the law of unfair commercial practices, my opinion is that such concern should not be overestimated. One should not miss the point that the essence of the unfairness of the commercial practice under discussion is the use by the trader of terms which the trader knows or should know to be non-binding. Since this is the essence of the unfairness of the practice at issue, there is one concept only and one rule of conduct only to be taken into account in all Member States. On the contrary, it is not relevant that certain contractual terms may be non-binding in one jurisdiction and binding in another jurisdiction. The relevant point is that whenever a trader operates in a given jurisdiction *it shall refrain from using terms that are non-binding in that jurisdiction*. This is a single and uniform rule of conduct, which, as noted<sup>14</sup>, derives directly from Article 6 para 1 of the UCPD containing a prohibition on providing consumers with false or misleading information as to the parties' rights and obligations arising under the contract.

Similarly, as regards the use of terms that may be legally binding on the consumers only if they have been individually negotiated between the trader and the consumer, it is beside the point that the extent of the notion of 'unfair terms' and the requirements for an 'individual negotiation' may differ from one Member State to another. Again, the relevant point is that whenever a trader operates in a given jurisdiction, it should refrain from using terms that are non-binding in that jurisdiction. Therefore, unless the trader operates in a way so as to ensure (i) an attempt at individual negotiation of such terms with all consumers to whom the terms are offered, according to the law of that jurisdiction, and (ii) the supply of adequate information about the non-binding character of the terms that have not been individually negotiated, it must refrain from using such terms. This is nothing but a specification of the above-mentioned single and uniform rule of conduct.

Of course, any attempt by the EU legislator to seek approximation or uniformity of the laws of the Member States in relation to the above-mentioned aspects relevant to contract law could not but enhance the achievement of the ultimate goals sought by the UCPD. However, one should not confuse con-

<sup>14</sup> Cf section 1.1 above.

tract law with commercial practices law. The existing differences in the contract laws of the various Member States should not distract from the acknowledgement of a firm and uniform rule which, in my opinion, exists and is relevant to commercial practices law: traders shall behave vis-à-vis consumers in a way compliant with the applicable laws and regulations. This rule of conduct not only is far from denying but indeed assumes differences in the applicable laws in the Member States, and shall apply in the presence of differences in the contract laws of the Member States<sup>15</sup>.

## **2 Transparency of contractual terms. The practice of using contractual terms not drafted in plain and intelligible language: the case in which such practice entails the constitutive elements of an unfair commercial practice.**

The provisions of Article 7 of the UCPD relating to ‘misleading omissions’ can be coordinated with those of Article 5 of the UTD. As regards, in particular, those terms that identify the main subject matter of the contract<sup>16</sup>, the practice consisting in the use of terms defining the services or goods or the price or remuneration under the contract not drafted in plain and intelligible language should always be construed as an unfair commercial practice, namely a misleading omission pursuant to Article 7 para 2 and 4 of the UCPD. If, for instance, a trader employs contractual terms providing for an unclear mechanism of price increase for certain services in connection with the occurrence of certain conditions, such practice should be construed as a ‘misleading omission’ (thus subject to prohibition measures and penalties as provided by the relevant national provisions enacted in application of the UCPD), to the extent that it is found that the trader ‘provides in an unclear, unintelligible, ambiguous or untimely manner’ (Article 7 para 2 of the UCPD) material information regarding the ‘manner in which the price is calculated’ (Article 7 para 4, letter c) of the UCPD) in relation to the services offered to the consumers.

15 This does not necessarily imply that any infringement of any applicable laws or regulations amounts per se to an unfair commercial practice as intended by the UCPD. In fact, in order for a commercial practice to be unfair, in the sense intended by the UCPD, it must be able to materially distort the economic behaviour of the average consumer, which is not an essential feature of conduct constituting an infringement of applicable laws and regulations (see further under sections 3.3, 3.5 and footnote 45 below). On the contrary, for the reasons illustrated in this paragraph (sections 1.1 and 1.2 above), I am of the opinion that the requirement of material distortion of the economic behaviour of the average consumer is met in relation to the practice of using contractual terms that are non-binding according to the national law applicable to the contract.

16 Cf M. Farneti, *La vessatorietà delle clausole “principali” nei contratti del consumatore* (Padova: Cedam, 2009).

As known, the issue of the appropriate legal sanction to be attached to the violation of the duty of transparency provided by Article 5 of the UTD has been extensively debated among scholars<sup>17</sup>. It seems correct to observe that the use by the trader of contractual terms not drafted in plain and intelligible language shall be deemed an illegitimate practice under the UTD, since the formula of the obligation to use contractual terms drafted in plain and intelligible language (contained in Article 5 of the UTD) implies the simultaneous establishment of a corresponding prohibition: the prohibition on using contractual terms not drafted in plain and intelligible language. In any case, the new directive (the UCPD) expressly establishes a prohibition in relation to the 'material information', since it prohibits traders from presenting such information in an unclear, unintelligible, ambiguous or untimely manner, in the context of contractual forms, qualifying the relevant conduct as a misleading omission, ie a form of unfair commercial practice subject to the general enforcement rules provided by the UCPD.

It seems correct to state that such a prohibition is intended to prevent consumers' economic behaviour (both in relation to the decision of whether or not to enter into a contract documented by non-transparent terms, and in relation to the many transactional decisions regarding the performance phase) from being distorted by non-transparent terms.

### **3 The EU's general law on unfair business-to-consumer commercial practices. The issue of normative coordination between the UTD and the UCPD.**

#### **3.1 Introduction**

Having argued that the use of unfair terms and the use of non-transparent terms may qualify as unfair commercial practices, the next questions follow: are the Member States required to treat the use of unfair terms and the use of non-transparent terms as commercial practices subject to the rules provided for by the UCPD? What is the relevance of the existing provisions of the UTD? Does the existence of the UTD preclude the application of the UCPD, in the sense that Member States are not required to, or even should not, treat the use of unfair terms or non-transparent terms as commercial practices

<sup>17</sup> For references on this debate, cf C. Willett, 'Good Faith in Consumer Contracts: Rule, Policy and Principle', in A.D.M. Forte (ed), *Good faith in Contract and Property* (Oxford: Hart, 1999) 195 ff; E. Ferrante, 'Contractual Disclosure and Remedies under the Unfair Contract Terms Directive', in G. Howells, A. Janssen and R. Schulze (eds), *Information Rights and Obligations – A Challenge for Party Autonomy and Transactional Fairness* (Ashgate: Aldershot, 2005) spec 118 ff; C. Armbruster, 'Standard Contract Terms and Information Rules', in Collins (ed), n2 above, 168 ff.

according to the provisions of the UCPD? These questions appear to be of a significant practical importance, since, as known, unlike the UTD, the UCPD expressly requires Member States to provide not only for injunctions but also for *penalties* in the case of infringements of national provisions adopted in application of the said directive<sup>18</sup>.

In order to properly address the issue of coordination under discussion, it seems necessary to express a view on whether a ‘conflict’ exists between the provisions of the UCPD and those of the UTD, in the sense of Article 3 para 4 of the UCPD, which reads as follows:

*‘In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.’*

This provision appears to require:

1. determination of whether the UTD contains provisions ‘*regulating specific aspects of unfair commercial practices*’; and, if so,
2. determination of whether any such provision ‘conflicts’ with those of the UCPD.

I will start addressing this issue with reference to the use of unfair terms.

### **3.2 Individual legal dimension of unfair contractual terms and super-individual legal dimension of the use of unfair contractual terms**

The UTD followed a two-level approach in regulating the phenomenon of unfair terms, which is reflected in the provisions contained in Articles 6 and 7 of the directive. In particular, Article 6 of the UTD established an *individual legal dimension* of the *unfair terms* relevant to contract law, while Article 7 of the UTD established a *super-individual legal dimension* of the *use* of unfair terms relevant to commercial practices law.

Article 6 of the UTD provided for the legal treatment of the unfair terms as a matter of contract law, ie at the level of the *individual contractual relationships* between traders and consumers, by requiring Member States to ensure that unfair terms are legally non-binding on the consumer in the contractual relationships between traders and consumers.

The level of intervention designed by Article 6 of the UTD:

- (i) concerns contract law,
- (ii) deals with unfair terms, and

<sup>18</sup> Art. 13 of the UCPD.

- (iii) has effect with respect to *ex post* individual remedies, ie remedies available to single consumers to contest the non-binding character of unfair terms in respect of concluded contracts.

Therefore, the provisions of Article 6 of the UTD are beyond the scope of the UCPD because of the exclusion for contract law provided by the latter<sup>19</sup>.

However, the UTD also introduced an innovative provision by way of requiring Member States to put in place suitable means so as to '*prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers*' (Article 7 of the UTD). The subject matter of this provision does not consist of the 'unfair terms'; rather it consists of the 'use' of unfair terms, which, as mentioned, where relevant to traders<sup>20</sup>, is a practice falling within the definition of 'business-to-consumer commercial practices' provided by the UCPD.

This means that the level of intervention conceived by Article 7 of the UTD:

- (i) does not concern contract law, but rather commercial practices law,
- (ii) deals not with unfair terms, but rather with the "use" of unfair terms by traders, and
- (iii) has no effect with respect to *ex post* individual remedies, but applies to collective remedies, ie remedies available to consumers' associations or other persons or organisations having a legitimate interest under national law in protecting consumers, aimed at preventing the continued use of unfair terms by traders.

Consequently, it is possible to say that the UTD identified a commercial practice consisting of the use of unfair terms by traders, and required Member States to put in place suitable means to combat such commercial practice.

It is important to note that the above reconstruction implies an *intermediate regulatory element*, which is not spelt out by Article 7 of the UTD. This implicit element consists of a *legal prohibition*, since, as a matter of logic, the request addressed to Member States to adopt means to prevent a certain practice presupposes the establishment of a corresponding legal prohibition, ie the prohibition on the use of such commercial practice.

It seems therefore correct to say that Article 7 of the UTD:

- (a) identified a commercial practice consisting of the use of unfair terms;

<sup>19</sup> Art. 3 para 2 of the UCPD.

<sup>20</sup> Art. 7 para 3 provides that preventive measures may be established not only against the commercial practice of the *trader* consisting in the use of unfair terms but also against the *recommendation* of unfair terms by *associations of traders*. This is not a business-to-consumer commercial practice, in the sense intended by the UCPD.

- (b) regulated such a commercial practice by way of establishing a corresponding prohibition;
- (c) required Member States to establish enforcement rules to remedy breach of that prohibition, ie suitable means to prevent traders from continuing to use such commercial practices.

To summarise, the above means that Article 7 of the UTD required Member States to provide for a *definite legal treatment of a certain practice by the trader* (ie the *use* of unfair terms), consisting of a prohibition and a remedy for the case of breach of that prohibition, such a legal regime being distinct from, although complementary to, the contract law regime of the unfair terms regulating the individual contractual relationships between traders and consumers.

### 3.3 The need to establish a unitary notion of unfairness under the UCPD for the purposes of normative coordination.

We can now observe that the UCPD too required the Member States to establish a definite legal treatment for certain commercial practices independently from the legal relevance of the same practices as a matter of contract law. In this sense, we can say that the provisions of the UCPD too established a super-individual legal dimension for certain practices of traders in their dealings with consumers. Whether or not a given unfair commercial practice would trigger effects relevant to the individual relationships between the interested trader and consumers and entitle the latter to individual claims, objections or rights (such as damages or restitution claims, invalidity or rescission claims/objections, rights of withdrawal) is a matter for the applicable contract law (more or less harmonised, depending on the specific remedy or right under discussion) and is *not* a matter regulated by the UCPD. According to the UCPD, unfair commercial practices shall be prohibited *as such* in all Member States, and any given unfair commercial practice shall be subject to injunctions and penalties in all Member States, independently of any ulterior potential *individual* remedy or right available to consumers under the applicable contract law<sup>21</sup>. In other words, as a result of the implementation of the UCPD, traders must know that unfair commercial practices are prohibited as such in all Member States, and are subject to banning measures and penalties that may vary from one Member State to the other<sup>22</sup>, albeit still responding to the essential features set by the enforcement rules contained in Articles 11, 12

21 Similarly, whether a given unfair commercial practice entails the constitutive elements of a tort or a crime, or entitles the competitors of the relevant trader to individual remedies, are not matters regulated by the UCPD.

22 This is the reason for the concern expressed by some authors as to a possible 'penalty shopping' induced by the UCPD.

and 13 of the UCPD. Traders must also be aware that unfair commercial practices may also trigger effects in the individual relationships between traders and consumers under the terms of contract law, which may be different from one Member State to the other; however contract law is not the field of law which has been harmonised by the UCPD.

We can now further observe that this same characterisation as a rule designing a super-individual legal dimension for traders' commercial practices is shared by a very significant number of other EU and national provisions, which similarly make certain practices by traders subject to injunctions and penalties independently of the legal relevance of the same practices at the level of the individual relationships between traders and consumers. This is traditionally the case of advertising legislation, but it is also the case of many other regulations that have been introduced during the last 20 years in the various Member States providing for fines and banning measures in specific sectors of the promotion and marketing of products, in relation to breaches of specific duties of conduct, information requirements and prohibitions. For many of these disciplines the question arises of how they should be coordinated with the general provisions of the UCPD. And effectively, in many Recitals of the UCPD mention is made of the fact that, before the introduction of the directive, there were already many provisions in existence regulating '*unfair commercial practices*', both Community law provisions and national provisions<sup>23</sup>. Reference is also made to an issue of internal 'coherence' of Community law in this respect<sup>24</sup>. In conclusion, it is clear that the issue of the potential conflict between the UTD and the UCPD can only be properly dealt with in terms of a broader issue of normative coordination requiring the interpreter to express a clear view on the position of the UCPD in respect of many other Union law provisions (both predating and postdating the UCPD), which similarly establish a super-individual legal dimension to the practices of traders in their dealings with consumers.

In addressing this complex problem, I shall restrict myself to very concise remarks.

I would start by observing that the UCPD introduced into EU law a *general law*, by way of providing a systematic and organised set of rules containing a number of general principles, concepts and criteria.

The second observation is that the UCPD does not contain the Union general law on *commercial practices*, but the Union general law on *unfair business-to-consumer commercial practices*, which introduced a new unitary concept that can be named as '*unfairness toward consumers*'.

<sup>23</sup> Recitals 3, 10 of the UCPD.

<sup>24</sup> Recital 10 of the UCPD.

The above features shape the discipline in two directions, namely:

- 1) limiting the relevant test of illegitimacy: the UCPD deals only with a particular aspect of illegitimacy consisting of the capacity of commercial practices to ‘distort’ consumers’ economic behaviour through conduct contrary to the requirements of professional diligence (see section 3.4 below);
- 2) attracting under its general provisions and principles many EU and national rules which, in relation to specific practices or sectors of the promotion and marketing of products, provide prohibitions, duties of conduct and disclosure of information, the breach of which may now be construed in terms of ‘unfairness towards consumers’ (see sections 3.4 and 3.5 below).

To understand what ‘unfairness towards consumers’ consists in is therefore absolutely necessary, not only to correctly interpret the provisions of the UCPD, but also to establish the correct approach for dealing with the many and complex issues of normative coordination deriving from the character of the discipline as the EU’s ‘general’ law on ‘unfair’ business-to-consumer commercial practices.

### 3.4 The unitary concept of unfairness towards consumers under the UCPD.

In order to explain the precise meaning of ‘unfairness’ under the UCPD, it is useful to start by looking at the subject matter of the discipline and to state in clear terms that the UCPD regulates only those commercial practices that *can influence consumers’ transactional decisions*<sup>25</sup>.

25 In this respect, it should be granted that while the wording of the provisions of the directive may create some confusion as to the subject matter of the discipline, the Recitals of the directive itself are of help. The drafters of the UCPD clearly indicate that they have proceeded on the basis of observation of the marketing and advertising practices existing in the market, and in particular the consideration that such practices are by their nature aimed at *influencing* the economic behaviour of consumers, and that, upon certain conditions, this aim can be legitimately pursued. This is clearly stated in Recital 6: ‘... *this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers’ perception of products and influence their behaviour without impairing the consumer’s ability to make an informed decision.*’ From this Recital we can see that, not only does the directive not prohibit many advertising and marketing practices that can influence consumers’ economic behaviour, but more significantly we can appreciate that the directive intends to regulate advertising and marketing practices precisely because they have such orientation and capacity. In other words, the drafters of the UCPD made it clear that they had precisely considered the current character of marketing and advertising practices as a set of activities, procedures and means effectively aimed at influencing consumers’ transactional decisions, and had decided to regulate such practices. This concept is furthermore clearly expressed *in general terms* for all

Influencing consumers' transactional decisions is *not* per se prohibited. To give a pair of indisputable examples: advertising and marketing in general are not prohibited as such.

The purpose of the discipline is precisely that of fixing general criteria for establishing upon which conditions influencing is legitimate ('fair') and upon which conditions it becomes illegitimate ('unfair'). The UCPD established, for regulatory purposes, a broad notion of commercial practices – including but not limited to advertising and marketing practices – on the basis of the observation that there are other widespread market practices that can influence consumers' economic behaviour. Therefore commercial practices include all traders' behaviour relating to or connected with invitations to purchase and to the contractual performance phase. This extension undoubtedly indicates a step forward in EU law, since it is the result of the acknowledgement by the drafters of the UCPD that there are widespread market practices that can distort not only the consumers' perception of *products* but also the consumers' perception of *contracts* and '*contractual rights*'<sup>26</sup>. Therefore, commercial practices include all traders' actions and omissions that can influence the consumers' initial decision whether or not to enter into a contract as well as the numerous transactional decisions of consumers relevant to the contractual performance phase.

Many criticisms have been made of the approach adopted by the UCPD in construing the constitutive elements of the 'grand general clause', the 'small general clauses' and the many types of unfair commercial practices included in the blacklist, also in relation to the necessary interaction with the various definitions contained in Article 2 of the Directive<sup>27</sup>. In effect, the wording of the discipline is not always straightforward, while the impressive 'architecture', consisting of a pyramid of small general and typical notions of unfair commercial practices at the bottom of which stands the grand general clause of Article 5 para 2, may appear confusing in some respects<sup>28</sup>.

commercial practices (ie not only for marketing and advertising practices) in the subsequent Recital 7: '*This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products.*' On the basis of this specification, I believe it is correct to state that the subject matter of the discipline consists not of all the commercial practices responding to the definition of art 2(d), but of any such commercial practices that can influence the consumer's economic behaviour.

<sup>26</sup> Art. 2 (k) of the UCPD.

<sup>27</sup> Cf, for instance, J. Stuyck, E. Terryn and T. Van Dick, 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market' *Common Market Law Review* 2006, 124 ff.

<sup>28</sup> Cf also the remarks by H. Collins, 'The Unfair Commercial Practices Directive' *European Review of Contract Law* 2005, 417 ff; and F. Gomez, 'The Unfair Commercial Practices Directive: a Law and Economics perspective' *European Review of Contract*

In order to propose an interpretative approach aimed at designating the unitary concept of unfairness evidently sought by the drafters of the directive, it seems correct to state that the focus of the discipline has been set in the concept of the consumer's transactional decision and, more specifically, around certain average consumer's conditions of vulnerability associated with the consumer's decision-making process. And it seems correct to state that acting in a manner contrary to the requirements of professional diligence, in the sense of the grand clause<sup>29</sup>, essentially means acting in a way that *allows the trader to take advantage of certain average consumer's conditions of vulnerability associated with the consumer's decision-making process*.

In essence, it is forbidden to influence consumers' transactional decisions in such a way as to take advantage of certain average consumer's conditions of vulnerability. Whenever the trader puts in place commercial practices that present this feature he is said to '*distort*' (as opposite to '*influence*') the consumers' economic behaviour, and, in brief, to act unfairly<sup>30</sup>.

*Law* 2006, 4 ff; G. Anagnostaras, 'The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?' *Common Market Law Review* 2010, 147 ff.

29 Cf the relevant definition under art 2 (h) of the UCPD.

30 It is true that the formulation of the grand general clause seems to establish two *separate* constitutive elements: the contrariety to the requirements of professional diligence *and* the ability to materially distort the consumers' economic behaviour. However, this is simply due to the approach followed by the legislator in providing the definition of commercial practices. If we adhere to the interpretation, herein supported, according to which the commercial practices that form the subject matter of the discipline are 'commercial practices' (according to the definition of art 2 (d) of the UCPD) that are further able to influence consumers' economic behaviour (Recital 7 of the UCPD), we also appreciate that *the two elements should be merged into one*. And effectively – even without considering how hard it would be to adhere to the proposition that a commercial practice which can materially distort the economic behaviour of the average consumer may be compliant with the requirements of professional diligence, thus qualifying as fair, which possibility would have to be contemplated were one to accept that the two elements are separate – the definition of '*professional diligence*' contained in art 2 (h) as well as the spirit and the ultimate goal of the discipline support the above conclusion. The first observation is that the definition-formula of 'professional diligence' makes clear that the trader has a *duty of care towards consumers*. Now, the point of reference of such duty of care cannot consist of single identified consumers and, thus, single relationships (including contractual relationships) between given traders and individual identified consumers, consisting instead of the *average consumer interested by the commercial practice* from time to time under consideration. It appears indeed consistent with the rationale and the subject matter of the discipline to affirm that traders shall responsibly take care of average consumers' subjective conditions of decisional vulnerability in relation to commercial practices that can influence their economic behaviour. The second observation is that the trader's duty of care toward consumers should be set in relation to '*honest market practices and/or the general principle of good faith*', and that the reference contained (in the same definition formula) to the '*trader's field of activity*' requires the

In effect, in contemporary professional organisations there are functions specifically designated for the purpose of studying, formulating, implementing and controlling techniques and strategies for influencing consumers' economic behaviour. The Community legislator of 2005 decided to look at such professional activity realistically, and with a historically appropriate approach, ie in significantly broader terms than those characterising pre-existing advertising legislation.

As a matter of normative technique, the Community legislator has put forward a '*single, common general prohibition*' (the prohibition on distorting the economic behaviour of consumers)<sup>31</sup>, which, in positive terms, means that in influencing consumers' economic behaviour traders must take into consideration consumers' subjective conditions of vulnerability in the making of transactional decisions, and, again in negative terms, that traders shall not behave so as to take advantage of the average consumer's conditions of vulnerability associated with the making of transactional decisions<sup>32</sup>.

To state which average conditions of vulnerability are precisely relevant for the UCPD is a matter of interpretation. In many provisions, the UCPD clearly states the concept of *decisional vulnerability* in general terms and also makes clear that *average* conditions of decisional vulnerability are relevant<sup>33</sup>. The

interpreter to put '*honest market practices and/or the general principle of good faith*' in context. Putting in context honest market practices and/or the general principle of good faith in relation to the trader's field of activity means that the guiding principles of honest market practices and/or good faith shall be applied, taking into account not only the nature of the commercial practice from time to time under scrutiny and the features of the relevant product, but also the *target* or *targets* of consumers interested by the same practice, since any such target essentially characterises the '*trader's field of activity*' and also essentially characterises the commercial practice, allowing the interpreter to capture the quality critical for the purposes of the discipline in question, ie its influential capacity. On this basis, it seems correct to state that *the parameter of the average consumer is not external from but is indeed inherent to the notion of professional diligence*, in the sense that the 'contrariety to the requirements of professional diligence' shall be construed in theoretical terms and assessed in practice precisely in relation to the parameter of the average consumer, and more specifically in relation to certain *average subjective conditions of decisional vulnerability* of consumers.

31 Recital 13 of the UCPD.

32 This leads to the merger between the two apparently separate constitutive elements of the grand general clause.

33 Art. 5 para 3 and Recital 18 of the UCPD. The test of decisional vulnerability required by the discipline is a test of "average" decisional vulnerability, since it has to be parametered to the average consumer. This test shall proceed on the basis of the selection of one or more subjective conditions of vulnerability (eg information, observance, circumspection) which may be indistinct for all consumers or may vary in relation to the characteristics of individual categories of consumers that may be affected by the commercial practice, thus making it possible in this case to 'clearly identify' a group of consumers

directive further expressly mentions the following subjective conditions of decisional vulnerability: *information, observance, circumspection*<sup>34</sup>. These subjective conditions are such that, by taking advantage of the same (eg of the lack of information of the average consumer or of the average member of a given group of consumers), the trader impairs the average consumer's *awareness* in the making of a transactional decision.

However, these are not the only subjective conditions of vulnerability relevant for the UCPD, because others exist and are critical for assessing whether the average consumer is potentially impaired (not in his *awareness* in making a transactional decision, but) in his *freedom* to make a transactional decision. This observation is based on the interpretation of the definition of the 'aggressive commercial practices'<sup>35</sup> whose introduction by the drafters of the UCPD constitutes another important step forward in EU law. The nature of aggressive practices and of their statutory forms (consisting of 'harassment', 'coercion' and 'undue influence') require the interpreter to make reference to a judgement of vulnerability as measured against different average subjective conditions, such as the consumer's *impressionability* and the consumer's *ability to resist* and *to react*, which may in turn depend on average conditions of information, observance, and circumspection, but may also be completely *independent* of the latter<sup>36</sup>.

for the purposes of art 5 para 3 of the UCPD, and to set special average standards of vulnerability. This is not a surprising feature unique to this Directive, since categorisation of clients and corresponding differentiation of duties in relation to different vulnerability standards is – to cite a simple example – one of the driving features of MiFID. MiFID recognises that investors have different levels of knowledge, skill and expertise and that the regulatory requirements should reflect this. MiFID's client classification rules set a framework for differentiating between smaller, less sophisticated clients, and larger, more experienced and knowledgeable clients, who have the expertise to make their own investment decisions and assess the inherent risks. MiFID recognises certain prescribed types of client as having these qualifications and classifies them as professional clients.

34 Recital 18 of the UCPD.

35 Art. 8–9 of the UCPD.

36 More precisely, in respect of commercial practices the nature of which as *harassment* should be established, the critical subjective conditions relevant to the test of average vulnerability will be those of the ability to resist and the ability to react. On the basis of 'average' *psychological or economic* abilities of resistance and reaction it will have to be assessed whether the practice qualifies as harassment, ie whether the commercial practice is able to significantly impair the average consumer's freedom of choice or conduct. An affirmative answer will be given even in those cases where it is judged that the average consumer is well-informed about his right to resist or react to the harassment. Similar considerations seem to apply in relation to aggressive commercial practices consisting of *coercion* and *undue influence*. In particular, it seems appropriate to observe that the subjective condition relevant for coercion is that of the 'impressionability' (rather than those of information, observance and circumspection); similarly, a consumer, despite being reasonably well-informed and reasonably observant and circumspect, may never-

In essence, looking at the discipline of the UCPD as a whole, it appears that by labelling as ‘unfair’ certain commercial practices, the directive protects both the awareness and the freedom of consumers in making transactional decisions<sup>37</sup>, and that a *unitary concept of unfairness towards consumers* can be formulated accordingly as the capacity of a commercial practice to allow the trader to take advantage of certain average consumer’s conditions of vulner-

theless be impaired in his freedom of choice or conduct by commercial practices consisting of undue influence, depending on his abilities to resist and react to the pressure exercised by the trader in the exploitation of a position of power vis-à-vis the consumer (art 2 (j) of the UCPD).

- 37 Without prejudice to the solidity of the above conclusion, another problem is that of the intrinsic coherence of the ‘architecture’ of the discipline, in relation to the prominent role evidently attributed by the drafters of the directive to the grand general clause of art 5 para 2. More precisely, the problem arises of assessing *whether or not it is correct to derive a unitary notion of unfairness from the grand general clause*. I believe that to derive a unitary concept of unfairness from the grand general clause is a correct hermeneutical operation under the UCPD, although not one easy to support and defend in the light of its wording. In particular, the wording of the directive is confusing in relation to the definition contained in art 2 (e): “*to materially distort the economic behaviour of consumers*” means *using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.*’ In particular, I share the criticisms raised by some authors (Stuyck, Terry and Van Dick, n 27 above, 125–126) regarding the language of this definition, which makes reference only to the limited concept of ‘*an informed decision*’ and not to a broader concept of ‘*a free and aware decision*’. The notion of ‘an informed decision’ is narrower than that of ‘an aware decision’, since ‘awareness’ comprises but is not limited to ‘information’ (more specifically, the subjective conditions of ‘observance’ and ‘circumspection’ – mentioned by Recital 18 of the directive – are relevant to awareness rather than to information, and, in fact, Recital 18 of the directive distinguishes between the three subjective conditions of the average consumer: ‘*reasonably well-informed*’, ‘*reasonably observant and circumspect*’). Further, the notion of ‘an informed decision’ is completely different from that of ‘a free decision’, since a decision can be an informed decision but still, for instance, the product of coercion (*coactus tamen voluit*). While it is not difficult to explain the origin of the language of the definition in question (since the protection of ‘informative’ conditions of vulnerability has historically constituted the first frontier of legislation combating unfair commercial practices and a kind of passkey for accessing the most varied areas of application, so that the literal expression ‘informed decision’ has acquired, in common usage, a semantic potential designating meanings ulterior to those expressly included in the relevant concept), nonetheless the wording of this definition (insofar as it reads ‘informed decision’ rather than ‘free and aware decision’) may constitute an obstacle to the affirmation of a correct reading of the directive in the light of the hermeneutical criteria of systematic coherence and intrinsic consistency having regard to the role of the ‘grand general clause’ and the associated goal (evidently pursued by the drafters of the directive) of establishing a unitary concept of unfairness *derived from the grand general clause*.

ability that are critical for assessing the freedom and awareness of consumers in the making of transactional decisions<sup>38</sup>.

### 3.5 The issues of normative coordination.

As mentioned, the UCPD not only deals with unfair commercial practices, but also introduced to the Union a *general law* on unfair business-to-consumer commercial practices. Moreover, the UCPD is intended to be a so-called full or maximum harmonisation measure. The goals of establishing a ‘general’ law and a ‘fully harmonised’ measure are both ambitious but are also two distinct goals, involving different problems. This is reflected in two different provisions of the UCPD:

- Article 3 paragraph 4, dealing with the issues of normative coordination

<sup>38</sup> Finally, the above remarks also help in interpreting correctly the statement that the UCPD is aimed at protecting the ‘*economic interests*’ of consumers (art 1 of the UCPD). This statement should not be interpreted in the sense that the directive ‘exclusively’ protects the economic interests of the consumers and looks at the consumer as a *homo oeconomicus*. The provisions on aggressive commercial practices (if correctly interpreted) make it clear that consumers impaired in their *freedom* to make a transactional choice shall have protection irrespective of whether or not they are *aware* of their right to resist or react to aggressive commercial practices. A *homo oeconomicus*, ie the model of a man who makes only rational economic choices, typically will not make a choice on the basis of psychological pressure, being informed that such a choice is not economically convenient. However, the UCPD combats psychological pressure *as such*, in line with the ancient doctrine relevant to contract law which gives legal relevance to psychological pressure even in the presence of the awareness of the person making a transactional decision about the consequences of the same decision (*coactus tamen voluit*). While it is certainly true that the subject matter of the UCPD consists exclusively of practices that can influence the *economic* behaviour of the consumers, this circumstance does not eliminate the fact that the directive prohibits conduct consisting of taking advantage of subjective conditions of vulnerability of the persons making those decisions, which include, as observed, average psychological conditions of vulnerability involving the fundamental rights of the persons. In other words, we must appreciate that the underlying essential concept of the UCPD is that of the ability of contemporaneous techniques of direct or surreptitious communication to influence/distort people’s behaviour in a way that can harm fundamental rights. A similar problem arises with communication practices aimed at influencing non-economic decisions (such as political or religious decisions) in practically all aspects of people’s lives. For this reason, I am of the opinion that the UCPD is a very innovative measure and a real milestone in the progress to be achieved by jurists in the years to come in many sectors of the law for the identification and protection of the fundamental rights involved in the multiform phenomenology of mass-communication and marketing influencing people’s behaviour, *including but not limited to economic behaviour*. For an authoritative testimony of the marketing strategies used by non-profit organisations, such as political parties, churches, charities, etc cf *ex multis* P. Kotler, J. Armstrong, V. Wong and J. Saunders, *Principles of marketing* (5<sup>th</sup> ed, London: Pearson, 2008) 32 ff, 623 ff.

deriving from the first characteristic of the discipline (its nature as a measure introducing 'general' provisions), and

- Article 3 paragraph 5, dealing with the issues of normative coordination deriving from the second characteristic of the discipline (the goal of maximum harmonisation).

More specifically, the first issue concerns the problem of the internal coherence of EU law, while the second is about the steps and the actions to be taken by the Member States to comply with the duties deriving from the goal of maximum harmonisation.

In order to appreciate the specific questions raised by the above-mentioned two distinct issues of normative coordination, it is important to bear in mind the following:

- the behaviour prohibited as unfair business-to-consumer commercial practice may consist in either actions or omissions<sup>39</sup>;
- before the adoption of the UCPD, Community law already contained many provisions establishing specific prohibitions and specific duties of information and conduct in relation to precise commercial practices or particular sectors of product promotion or marketing;
- in many cases the traders' behaviour in breach of national provisions (enforcing EU directives) establishing such specific prohibitions or duties of information or conduct may be construed as 'unfair commercial practice' according to the general concept of unfairness introduced by the UCPD;
- most of the EU directives predating the UCPD are characterised as 'minimum harmonisation' measures;
- consequently, in the laws of the Member States diverging provisions exist that establish specific duties of information and conduct and specific prohibitions on the traders.

The above means, in the first place, that well before the introduction of the UCPD many Community provisions already existed which, although not expressly labelled as 'provisions relevant to unfair commercial practices law', were nevertheless aimed at developing fair commercial practices<sup>40</sup> and at combating unfair commercial practices<sup>41</sup> by way of fixing requirements and limits on traders' activity directed at influencing consumers' economic behaviour. These pre-existing provisions can be distinguished, in terms of structure, respectively, as provisions establishing *positive duties* (duties of information

<sup>39</sup> Art. 2 letter (d) of the UCPD.

<sup>40</sup> Recital 2 of the UCPD.

<sup>41</sup> Recitals 3 and 10 of the UCPD.

and conduct) and provisions establishing *prohibitions* (such as the pre-existing Community legislation on deceptive advertising).

The important innovation introduced by the UCPD is that the unfair commercial practices law is now organised around a general concept of unfairness towards consumers (see section 3.4 above) and ‘a *single general prohibition*’<sup>42</sup>. This general prohibition should however be coordinated with the specific prohibitions and the specific duties of disclosure and conduct established by Union law provisions predating the UCPD and applicable to particular sectors or practices.

A similar coordination was made *directly* by the Community legislator of 2005 *to a certain extent*, namely in relation to the types of ‘misleading commercial practice’, and, more in particular, with respect to:

- the types of ‘misleading actions’, which now include those of deceptive advertising and those of comparative advertising that is deceptive for consumers insofar as it creates confusion<sup>43</sup>, and
- the types of ‘misleading omissions’, which now include all conduct consisting of breach of certain positive duties, namely the information requirements established by EU law in relation to commercial communication, a non-exhaustive list of which is contained in Annex II to the UCPD)<sup>44</sup>.

Nonetheless, a similar coordination is still called for in terms of *interpretation and construction of Union law* in relation to all the other existing EU provisions establishing duties and prohibitions other than those entailing information requirements, and also, of course, in relation to future provisions of EU law (including subsequent provisions establishing information requirements) dealing with commercial practices that can influence the consumers’ economic behaviour. This explains the reason for the provision of Article 3 para 4 of the UCPD.

The goals that can be obtained through a correct and full coordination between the provisions of the UCPD and the sectoral EU provisions on unfair commercial practices are of two kinds, and can ‘decrease’ or ‘increase’ the number of commercial practices subject to the general discipline of the UCPD, and more precisely:

- (i) the identification of specific types of *fair* commercial practice;
- (ii) the identification of specific types of *unfair* commercial practice.

The first goal can be explained by looking at the normative technique adopted

42 Recital 11 of the UCPD.

43 Art. 6 para 1 and 2 (a) of the UCPD.

44 Art. 7 para 5 of the UCPD.

by the drafters of the UCPD, who, having to decide between organising the general principle around the legal structure of a *general duty* or around the legal structure of a *general prohibition*, chose the structure of prohibition.

On the contrary, many sectoral EU provisions govern the matter of unfairness in positive terms, as a matter of *fairness*, ie by way of providing detailed *duties* aimed at establishing *fair commercial practices* in the market. In other words, many EU provisions specify an ideal ‘duty to behave fairly’ through detailed notions of positive duties of information and conduct that traders must comply with when putting in place certain commercial practices that influence consumers’ economic behaviour. The above implies – as a matter of internal coherence of EU law – that traders’ conduct that is capable of influencing consumers’ behaviour and which conforms to the detailed duties of information and to the detailed duties of conduct provided by those sectoral EU provisions cannot be deemed as unfair commercial practice, but on the contrary must be qualified as a ‘non-unfair’ or ‘fair’ commercial practice, ie practice legitimately or ‘fairly’ influencing the consumers’ economic behaviour. This further means that the provisions of the UCPD (including the tests of unfairness provided by the UCPD) will not be applicable to such commercial practices. The same situation occurs with respect to those EU sectoral provisions that, to an extent, allow traders to put in place certain commercial practices that could otherwise be qualified as unfair. To give a simple example, this is the case of the EU discipline of product placement (directive 2010/13/EU), which allows the trader to put in place certain product placement practices subject to the satisfaction of certain requirements.

It is worth noting that identifying specific types of fair commercial practice is an exercise of a theoretical nature, since it is related to the provisions of EU law only, and not to the provisions of national legislation which may differ from the former. However, this is exactly the exercise that Article 3 para 4 of the UCPD requires the interpreter to make, since this provision, as mentioned, is about the *internal coherence of EU law only*. In fact, the separate issue of how Member States should comply with the duties deriving from the goal of maximum harmonisation is dealt with by the different provision of Article 3 para 5 of the UCPD, upon which we shall briefly comment below in this paragraph.

The second goal (ie the identification of ‘specific’ types of *unfair* commercial practice) is consistent with the observation that in certain sectors of activity the trader is subject to certain restrictions, ie specific duties and prohibitions, *which are not applicable in other sectors*. When the provisions establishing such duties and prohibitions are intended to regulate the activity of the trader that may influence consumers’ economic behaviour, the traders’ conduct in breach of such provisions may entail a specific type of unfair commercial practice.

Consequently, the interpreter has the task of identifying, through the reading of sectoral or 'specific' EU provisions, certain types of unfair commercial practice ideally consisting of behaviour by the trader that qualifies as in breach of those EU provisions establishing, in certain sectors or in relation to specific practices, detailed duties and prohibitions governed by the same rationale as the provisions of the UCPD, ie rules aimed at protecting the freedom and awareness of consumers in the making of transactional decisions<sup>45</sup>. Again, this

45 The concept of *unfairness towards consumers* established by the UCPD (see section 3.4 above) plays a central role in identifying the specific types of unfair commercial practice (in the sense illustrated above), limiting these to conduct consisting in infringements of provisions intended to protect the freedom and awareness of consumers in the making of transactional decisions, and excluding conduct consisting in infringements of other provisions governed by a different rationale. To give a simple example of how the concept of unfairness towards consumers plays a role in narrowing down the number of specific types of unfair commercial practices in the sense intended by the UCPD, it appears correct to say that tobacco advertising, although illegitimate pursuant to the Tobacco Advertising Directive 2003/33/EC, does not *per se* qualify as an unfair commercial practice in the sense intended by the UCPD, since the prohibition on advertising tobacco products is not intended to protect the freedom and awareness of consumers in the making of transactional decisions (and such prohibition is in fact unrelated to the assessment of the capacity of the advertising practice to affect the freedom and awareness of the consumers in the making of a transactional decision relevant to tobacco products) but the said categorical ban is intended to protect people's health. Therefore, tobacco advertising certainly is an illegitimate commercial practice under EU law but is *not* an unfair business-to-consumer commercial practice in the sense intended by the UCPD.

On this basis, it seems worth examining the provision of §4 No.11 of the German (reformed) UWG, according to which examples of 'unfair commercial practices' include the cases in which a person *'infringes a statutory provision that is also intended to regulate market behaviour in the interest of market participants'*. In order to understand the meaning of this provision we have to consider, on one side, that Germany (like Austria, Spain, Denmark and Sweden) implemented the UCPD in its existing act against *unfair competition* (cf eg H. Köhler, 'Die Umsetzung der Richtlinie über unlautere Geschäftspraktiken in Deutschland', in S. Augenhöfer (ed), *Die Europäisierung des Kartell- und Lauterkeitsrechts* (Tübingen: Mohr Siebeck, 2009) 101–116), and on the other, that the provision in question is directly referable to the theory known in Germany under the name of '*Vorsprung durch Rechtsbruch*', in the context of which, even before the adoption of the UTD and the UCPD, German scholars and German courts have at length been debating the conditions upon which it is possible to argue that breaches of statutory provisions may result in the acquisition (or potential acquisition) of unfair *competitive* advantages, thus qualifying as *unfair competition* (cf *ex multis* R. Böhler, *Alter und neuer Rechtsbruchtatbestand. Aufgezeigt am Beispiel des Marktzutritts kommunaler Unternehmen* (Berlin: Duncker & Humboldt, 2009); J. Glöckner, 'Wettbewerbsbezogenes Verständnis der Unlauterkeit und Vorsprungserlangung durch Rechtsbruch' *GRUR* 2008, 960; W. Axel, *Rechtsbruch als unlauteres Marktverhalten* (Tübingen: Mohr Siebeck, 2007). The relation between this theory and the AGB (the former German law governing standard contract terms: now §§ 305–310 of the BGB) has also been discussed in German literature, and the respective debate is particularly valuable as it makes clear

is an exercise of a theoretical nature, since it is related to the provisions of EU law only, and not to the provisions of national laws which may be different. However, since here we are dealing with the internal coherence of the EU law on unfair business-to-consumer commercial practices, this exercise shall be limited to the Union provisions.

It is important to note that the EU provisions relevant for identifying specific types of 'fair' commercial practice are also relevant for identifying specific types of 'unfair' commercial practice. In fact, if a commercial practice conforming to the requirements of an EU special provision aimed at establishing fair commercial practices in the market, is qualified as a 'fair' commercial practice, then any trader's conduct in breach of the *same provision* must be qualified as an 'unfair' commercial practice.

Commenting upon the wording of Article 3 para 4 of the UCPD, it is important to note that the 'special' EU provisions *may* 'conflict' with the UCPD provisions, and, in such case, the special EU provisions will 'prevail'.

Although the formula of this rule is far from clear, it seems correct to say that

that the *use* of unfair terms has the nature of a commercial practice (cf *ex multis* M. Armgardt, 'Verbraucherschutz und Wettbewerbsrecht: unwirksame AGB-Klauseln im Licht der neueren Rechtsprechung zum UWG und zur UGP-Richtlinie' *WRP* 2009, 122; H. Köhler, 'Konkurrentenklage gegen die Verwendung unwirksamer Allgemeiner Geschäftsbedingungen?' *NJW* 2008, 177; R. Mann, 'Die wettbewerbsrechtliche Beurteilung von unwirksamen Allgemeinen Geschäftsbedingungen' *WRP* 2007, 1035). However, it seems correct to say that the test required by § 4 No. 11 of the UWG is different from that necessary for identifying specific types of unfair commercial practice in the sense intended by the UCPD, because § 4, No. 11 of the UWG provides for a broader test which comprises infringements of any provisions intended to regulate market behaviour in the interest of market participants, including *but not limited* to provisions intended to protect the freedom and awareness of consumers in their making of transactional decisions. This is because the UWG directly combats both *unfairness towards consumers* (to the extent deemed necessary for implementing the UCPD) and *unfairness towards competitors*, and also labels as 'unfair commercial practices' those commercial practices that, although they do not distort consumers' economic behaviour, impair the interests of competitors (cf eg A. Ohly, in H. Piper, A. Ohly and O. Sosnitzer, *UWG, § 4 Beispiele unlauterer geschäftlicher Handlungen*, Rn. 11/1, 1. Normzweck (5<sup>th</sup> ed, Munich: Beck, 2010): '*Diese Vorschrift kodifiziert die Fallgruppe des Rechtsbruchs, die bereits unter § 1 aF anerkannt war. § 4 Nr. 11 stellt Voraussetzungen auf, unter denen der Verstoß gegen eine gesetzliche Vorschrift außerhalb der §§ 3–7 als unlautere geschäftliche Handlung zu beurteilen ist, und verschafft daher als Transformationsnorm außewettbewerbsrechtlichen Vorschriften lauterkeitsrechtliche Wirkung*'). In the light of the above, one can understand why tobacco advertising may be deemed to entail the constitutive elements of an 'unfair commercial practice' in the sense meant by the UWG (precisely through the operation of the provision of § 4 No. 11 of the UWG: see Oberlandesgericht Hamburg, decision of 19 August 2009 in *LMRR*, 2009, 35) while it is not an unfair commercial practice in the sense intended by the UCPD.

by ‘conflict’ the EU legislator intended exclusively to refer to situations of *irreconcilable conflict between substantive norms*, ie situations where *the same business-to-consumer commercial practice* would qualify as ‘unfair’ under one provision and ‘non-unfair’ (or ‘legitimate’ or ‘fair’) under another provision<sup>46</sup>. In such cases, the EU special provision shall ‘prevail’.

If this interpretation is correct, clearly there are also many situations where no such ‘conflict’ exists, eg because the same commercial practice is considered unfair or prohibited *both* under the UCPD *and* under another EU special provision. In such situations, the normative coordination between the two provisions should not be governed by the ‘prevalence rule’ set by Article 3 para 4 of the UCPD, but must be inspired by criteria of coherence and consistency aimed at ensuring that the unfair commercial practice under consideration is treated in principle in the same way as any other unfair commercial practice, ie *according to the EU enforcement rules provided by Articles 11 to 13 of the UCPD*. In addition, one should take into account that the UCPD was introduced by the EU legislator only *after* the establishment of other special EU provisions governing business-to-consumer commercial practices, some of which contain enforcement rules. This implies that, *in the absence of an irreconcilable conflict of substantive norms*, the chronological criterion of solution of conflicts of norms must be employed *in relation to the enforcement rules*, with the consequence that the enforcement rules of the UCPD should prevail on the other special enforcement rules predating the UCPD.

The difficulty associated with the exercise of finding cases where no irreconcilable conflict between *substantive norms* occurs, is that the coordination between the relevant provisions has to be made on a case by case basis, selecting from among the business-to-consumer commercial practices falling within the scope of application of the special provision those that also qualify as ‘unfair’ according to the UCPD. This is because attention shall be paid to the ‘design’ of the two provisions that needs to be coordinated, so that effect may be given to both. For instance, the design of a special provision establishing a prohibition may be such that a large number of concrete commercial practices may fall within its scope of application (ie a large number of concrete commercial practices happen to be prohibited under that special provision) but *only some* of these prohibited commercial practices also qualify as ‘unfair’ according to the UCPD. To give an example, this is the case of the commercial practices consisting in the use of non-transparent terms, which are always prohibited under Article 5 of the UTD but shall be considered unfair only

<sup>46</sup> The conflicting situation may be in either direction: both in the sense that a special provision allows a commercial practice that would otherwise be qualified as unfair under the general provisions of the UCPD, or in the (opposite) sense that a special provision prohibits a commercial practice that would not be considered unfair under the general provisions of the UCPD.

where the terms not drafted in plain and intelligible language contain ‘material information’ pursuant to Article 7 of the UCPD (see paragraph 2 above).

On the basis of all of the above observations, we can finally take a position on the commercial practices which form the subject matter of our analysis, stating that no ‘conflict’ exists between the provisions of Articles 5 and 7 of the UTD (on one side) and the provisions of the UCPD (on the other side). Indeed, Articles 5 and 7 of the UTD are also intended to protect the awareness of consumers in making transactional decisions<sup>47</sup>, and they *prohibit* both the use of non-transparent terms and the use of unfair terms (see sections 2 and 3.2 above). As a consequence, no room exists for the ‘prevalence’ rule of Article 3 para 4 of the UCPD, and, as a matter of EU law, the enforcement rules of Articles 11 to 13 of the UCPD must apply (and shall prevail over the enforcement rules of Article 7 of the UTD) to the commercial practices consisting in the use of unfair terms and the use of non-transparent terms whenever such practices entail the constitutive elements of an unfair business-to-consumer commercial practice.

And lastly, commenting on Article 3 para 5 of the UCPD, it seems correct to state that this provision concerns the steps and actions to be taken by Member

47 This is evident for art 5 of the UTD, designed to avoid consumers being misled by terms not drafted in plain and intelligible language. But it is also true with respect to art 7 of the UTD. In particular, the wish to ‘cleanse the market of unfair terms’ shown by art 7 of the UTD (Collins, n 2 above, 9–10), can be explained by the awareness of the Community legislator of 1993 that the *individual remedies* (ie the individual actions, defences or objections) available to single consumers as a matter of contract law based on the non-binding character of the unfair terms, do not constitute a sufficient deterrent for traders, since traders characteristically take advantage of the ignorance of the average consumer as to the invalidity of the unfair terms, as well as of the economic restrictions on the capacity of the average consumer to resist and react to traders’ claims and initiatives based on written unfair terms. In this respect, we should recall that the Court of Justice has held that the protection which the UTD confers on consumers extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfairness of the term, whether *because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve* (cf Case C-473/00, *Cofidis SA v Jean-Louis Fredout* [2002] ECR-10875, para 34; and Case C-243/08, *Pannon GSM Zrt v Erzsébet Sustikéné Gyorfí* [2009] ECR-4713, para 30). The Court of Justice has, with these words, made reference to precise conditions of consumers’ decisional vulnerability, exactly in the sense mentioned under section 3.4 above, ie lack of information and lack of economic resources to resist and react.

As to the conditions of information vulnerability, it should be noted that the Italian Court of Cassation is of the view that, at the time of issuing an injunction to cease using unfair terms, the Judge may also order the trader to individually inform each and every client with whom the trader has already concluded contracts, about the non-binding character of the unfair terms, by post or other appropriate means.

States to comply with the duties deriving from the goal of maximum harmonisation. More specifically, the Community legislator provided for a limited period during which Member States are allowed to continue to apply national provisions within the field of unfair commercial practices which are more restrictive or prescriptive than those provided by the UCPD, and which implement directives containing minimum harmonisation clauses. In other words, the Community legislator is aware of the fact that the goal of maximum harmonisation in the field of unfair commercial practices cannot be achieved all at once, and, on the basis of such awareness, allowed for a derogation for a limited period. During this period Member States are allowed to continue to apply more restrictive or prescriptive provisions in favour of consumers. The other side of the coin is that, upon expiration of this limited period (or any extension thereof) Member States shall not be allowed to continue to apply such national provisions<sup>48</sup>.

#### 4 Conclusions

We have tried to demonstrate in this article that the use of unfair terms (as conceived by the UTD) will normally entail the constitutive elements of an unfair business-to-consumer commercial practice (as described by the UCPD), namely a ‘misleading action’, since it will usually amount to the supply of false information or be capable of misleading the average consumer during the performance of the contract as to the parties’ rights and obligations arising under the contract, in particular as to rights and obligations literally provided by terms which are legally non-binding on the consumer (see paragraph 1 above).

Secondly, we have observed that the use of written terms which are not drafted in plain, intelligible language shall always be deemed prohibited pursuant to the UTD, while in those cases entailing a lack of transparency about ‘material

48 This triggers the question of whether art 3 para 5 of the UCPD implicitly transformed into maximum-harmonisation measures pre-existent directives (or single provisions thereof) characterised as minimum-harmonisation measures (cf S. Augenhöfer, ‘Ein “Flickenteppich” oder doch der große Wurf? Überlegungen zur neuen RL über unlautere Geschäftspraktiken’ *Zeitschrift für Rechtsvergleichung (ZfRV)* 2005, 207; P. Rosenauer, *Die Harmonisierung des Lauterkeitsrecht in der Europäischen Union* (Norderstedt: Grin, 2009) 151). This complex issue cannot be addressed in this paper. I should simply like to note that a similar problem exists also in relation to directives postdating the UCPD, although it is certainly true that the formula of art 3 para 5 of the UCPD seems to refer only to pre-existing directives as it makes reference to already existing national provisions (cf J. Keßler and H. Micklitz, ‘Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken im binnenmarktinternen Geschäftsverkehr zwischen Unternehmen und Verbrauchern’ *Betriebs-Berater (BB)* 2005 Special 13/05, 7).

information', as intended by Article 7 of the UCPD, the relevant practice shall also be construed as an unfair commercial practice, namely a 'misleading omission' (see paragraph 2 above).

Finally, we have tried to demonstrate that no conflict exists between the provisions of Articles 5 and 7 of the UTD (on one side) and the provisions of the UCPD (on the other side), and that, as a consequence, Member States must ensure that the commercial practices consisting in the use of unfair terms and the use of non-transparent terms are made subject to the national provisions adopted in application of the UCPD, save for the possibility, for a limited period, to continue to apply the national provisions adopted in implementation of the UTD to the extent they are more favourable to consumers, according to Article 3 para 5 of the UCPD (see paragraph 3 above).

The difficulty of coordinating the EU directives with each other is referable to the singular structural complexity of Union law. Whenever the interplay of different EU directives has to be assessed, interpretation becomes, to a much greater degree than traditionally occurs in relation to national provisions, synonymous with the risk posed by, and the duty to contribute to, the work of construction. Inevitably, certain relations or interactions are not always evident from the reading of the EU provisions and (whether because of the intrinsic difficulty of rendering these connections in normative terms or due to a lack of attention given by the EU legislator) this is often true even in relation to those legislative initiatives that are the product of projects aimed at 'coordinating' and 'consolidating', such as the recent Proposal for a Directive on Consumer Rights<sup>49</sup>.

Clearly this article is not the place to present or comment extensively on the Proposal, nor would it be consistent with the limited scope of this paper to report the wide debate induced by the project, including the discussion on the policy issue of a 'horizontal' directive on consumer rights, its proposed character as measure of full harmonisation<sup>50</sup> and its relation with the Common Frame of Reference<sup>51</sup>. I shall rather confine myself to using the conclusions

49 Proposal adopted on 8 October 2008 by the European Commission (see: [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm#directive](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#directive)).

50 Article 4 of the Proposal.

51 Among the numerous comments on the Proposal, cf S. Whittaker, 'Unfair Contract Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the significance of "full harmonisation"' *European Review of Contract Law* 2009, 223 ff; C. Twigg-Flesner and D. Metcalfe, 'The proposed Consumer Rights Directive – less haste, more thought?' *European Review of Contract Law* 2009, 368 ff; M.W. Hesselink, 'The Consumer Rights Directive and the CFR: two worlds apart?' *European Review of Contract Law* 2009, 290 ff. Cf also the many contributions contained in Howells and Schulze (eds), n13 above, in particular: G. Howells and R. Schulze, 'Overview of the proposed Consumer Rights Directive', 3 ff; H. Schulte-

reached in this work to hazard a comment on the Proposal that is confined to the issue of coordination of the same with the UCPD, and with specific reference to the commercial practice consisting in the use of unfair terms.

In the system of the proposed directive, the regulation of unfair terms<sup>52</sup> applies to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content<sup>53</sup>. Although some significant changes have been made by the drafters of the Proposal to the scope of the UTD (among which the introduction of the concept of the ‘possibility of influencing the content’ of the contract terms, as opposed to the concept of ‘individual negotiation’, and the creation of a black-list of unfair terms which shall always be non-binding on the consumer), the Proposal maintains the two-level approach characteristic of the UTD (see section 3.2 above) by way of providing a *contract-law regime of unfair terms*, consisting in the sanction of the non-binding character of the unfair terms in the individual contractual relationships between traders and consumers<sup>54</sup>, and a *commercial practices-law regime of the use of unfair terms*, consisting in the enforcement rules of Article 38 of the proposed directive. In Article 38 the Proposal almost literally reproduces the wording of Article 7 of the UTD, and, accordingly, requires Member States to establish means to prevent traders from continuing to use terms which are found to be unfair. The enforcement rules contained in Article 38 of the Proposal are different from those contained in Articles 11 to 13 of the UCPD, and, notably, do not include any reference to *penalties*, as contemplated, instead, by Article 13 of the UCPD.

The problem with Article 38 of the Proposal consists in the fact that it does not appear to recognise that the use of unfair terms by traders is a business-to-consumer commercial practice which would normally qualify as unfair under the UCPD, and should be treated accordingly. As we tried to argue in paragraph 3 above, there does not appear to be any reason to treat this commercial practice differently from any other unfair business-to-consumer commercial practice; nor do the changes introduced by the Proposal make any substantial difference in respect of the reasoning that we made in relation of the UTD (see paragraph 1 above). In fact, the essential concept to be borne in mind is always the same, that is the equivalence of ‘unfair terms’ with ‘non-binding terms’ for the triggering of the prohibition of the commercial practice as an unfair one: whenever, by virtue of any provisions of the national law applicable to the

Nölke, ‘Scope and role of the horizontal directive and its relationship with the CFR’, 29 ff (and cf 42 as to the issue of coordination with the UCPD in relation to information requirements); H. Micklitz, ‘The targeted full harmonisation approach: looking behind the curtain’, 48 ff.

52 Art. 30–39 of the Proposal.

53 Art. 30 of the Proposal.

54 Art. 37 of the Proposal.

contract – including by virtue of the national provisions adopted in application of any EU fully harmonised discipline of unfair terms – a term shall be legally non-binding (or legally non-binding on the consumer), there should also be a prohibition for the trader to use that contract term *as a matter of the EU law on unfair business-to-consumer commercial practices*.

As a consequence, it seems sensible to amend Article 38 of the proposed directive since, in the event of its adoption, its wording could be interpreted as if the EU legislator (with a measure post-dating the UCPD) intended to create – for the use of unfair terms by traders – a legal regime separate from the UCPD's general regime, which would unreasonably impair the internal coherence and consistency of the Union law on unfair business-to-consumer commercial practices.