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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**First Report on the application of Directive 2005/29/EC of the European Parliament and
of the Council of 11 May 2005 concerning unfair business-to-consumer commercial
practices in the internal market and amending Council Directive 84/450/EEC, Directives
97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and
Regulation (EC) No 2006/2004 of the European Parliament and of the Council
(‘Unfair Commercial Practices Directive’)**

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First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

1. INTRODUCTION

This Report¹ provides a first assessment of the application of Directive 2005/29/EC on Unfair Commercial Practices² ('the Directive' or 'the UCPD') in the Member States and evaluates its effects. The Report is one of the key initiatives undertaken with a view to implementing the European Consumer Agenda.³

For the purpose of this Report, targeted questionnaires were addressed to Member States and a wide range of stakeholders in the course of 2011.⁴ As regards the application of the Directive in the fields of financial services and immovable property,⁵ this Report relies on data collected on behalf of the Commission through a study conducted in 2011/2012.⁶

The UCPD was adopted on 11 May 2005. It seeks to ensure that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, thus enabling consumers to make informed and meaningful choices. Its principle-based provisions are meant to guarantee that the legislative framework is flexible enough to cope with new selling methods, products and marketing techniques.

The Directive is horizontal in nature and covers the totality of business-to-consumer ('B2C') transactions whether offline or online, involving both goods and services.

¹ This Report accompanies the Commission Communication to the European Parliament, the Council and the European and Social Committee on the Application of the Unfair Commercial Practices Directive '*Achieving a high level of consumer protection – Building trust in the Internal Market*'. In accordance with Article 18 of the UCPD, the Commission must report on the application of the Directive in relation to specific issues, such as financial services and immovable property, and the black list of practices banned in all circumstances, as well as on the scope for further harmonisation and simplification. As provided by Recital 24 of the UCPD, the application of the Directive is assessed in order to ensure that barriers to the internal market have been addressed and a high level of consumer protection is achieved.

² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

³ See *European Consumer Agenda*, Action 3 (Modernisation of the consumer *acquis*).

⁴ The consultation resulted in 25 responses from Member States (Luxembourg and Malta did not provide a response), two responses from Iceland and Norway and 76 responses from stakeholders, including 20 European Consumer Centres ('ECCs'), 9 Consumer Associations and 47 business stakeholders (these included Chambers of Commerce, business 'umbrella' organisations / federations and self-regulatory bodies).

⁵ Based on Article 18 of the Directive, this Report provides an assessment as to the functioning of Article 3(9) concerning the application of the UCPD in the fields of financial services and immovable property.

⁶ See *Study on the application of the Unfair Commercial Practices Directive to financial services and immovable property* conducted by Civic Consulting on behalf of the European Commission, DG Justice 2012, available at: <http://ec.europa.eu/justice/consumer-marketing/document>.

The general aims of the Directive are to contribute to the completion of the internal market by removing barriers that are due to differences in the national laws on unfair commercial practices and to provide a high level of consumer protection.

2. TRANSPOSITION OF THE DIRECTIVE

2.1. Timetable

The Member States had to publish and adopt their measures transposing the Directive by 12 June 2007, so that they would come into force at national level by 12 December 2007 at the latest.

There were, however, significant delays in the transposition of the Directive, due mainly to its very broad field of application. The full harmonisation character of the Directive, enshrined in its ‘Internal Market clause’,⁷ also meant that Member States had to carry out an extensive review of their national legislation to bring it into line.

Only a few Member States⁸ transposed the Directive on time. The last transposition took place at the end of 2009⁹ while the majority of national measures were implemented in the course of 2008 and 2009.¹⁰ Action taken by the Commission before the European Court of Justice (the ‘ECJ’) resulted in the ECJ issuing judgments against two Member States¹¹ while other proceedings were closed as a result of subsequent notification of the measures.¹²

2.2. Implementation approaches in the Member States and characteristics of the transposition process

The technical choices made by Member States to implement the UCPD can be grouped in two main categories, largely depending on whether the Member States already had legislation on unfair commercial practices or not. Some Member States have incorporated it into existing laws: acts against unfair competition (Germany, Austria, Denmark, Spain), consumer codes (France, Italy, Bulgaria, Czech Republic, Malta), civil codes (the Netherlands) or specific existing acts (Belgium, Finland and Sweden). Others have adopted a new ad hoc law transposing the UCPD almost verbatim (UK, Portugal, Romania, Hungary, Cyprus, Poland, Slovenia, Slovakia, Estonia, Ireland, Luxembourg, Latvia, Lithuania and Greece).

2.3. Article 4 – The Internal Market clause

Article 4 of the UCPD, known as the ‘Internal Market clause’, embodies the full harmonisation effect of the Directive and prevents Member States from deviating from its rules. This feature was confirmed by the ECJ in the ‘Total Belgium’ case and in the context of other preliminary rulings,¹³ where the Court has consistently held that ‘*the Directive fully*

⁷ See Article 4 of the Directive.

⁸ Belgium, Ireland, Malta, Poland, Slovakia, Slovenia transposed by 12 June 2007.

⁹ Spain.

¹⁰ Also the three EEA countries, Iceland, Liechtenstein and Norway adopted legislation implementing it.

¹¹ See cases: C-321/08 - Commission of the European Communities v Kingdom of Spain, 23 April 2009 and C-282/08, Commission of the European Communities v Grand Duchy of Luxembourg, 5 February 2009.

¹² To access the list of national transposition measures please consult the Unfair Commercial Practices Database at: <https://webgate.ec.europa.eu/ucp/> or use the link: http://ec.europa.eu/justice/consumer-marketing/unfair-trade/unfair-practices/index_en.htm.

¹³ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV*, 23 April 2009; C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, 14 January 2010; C-288/10 *Wamo BVBA v JBC NV and Modemakers Fashion NV*, order of 30 June 2011; C-126/11 *Inno NV v Unizo and others*, order of 15 December 2011.

harmonises those rules at the Community level. Accordingly, [...] Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection'.

The full harmonisation aspect has proved the most problematic in implementing the Directive. The Internal Market clause has required substantial adaptation of national legal systems to the provisions of the Directive. In particular, the Member States had to carry out extensive screening of their national legislation and repeal any provisions which were incompatible with the Directive. Such provisions had to do mainly with bans on specific commercial practices which were not included in Annex I to the Directive (the 'Black List' of practices prohibited in all circumstances), especially in the area of sales promotions.

The Internal Market clause has resulted in a major simplification of the rules on misleading advertising and unfair commercial practices in business-to-consumer transactions across the EU, by replacing the 27 national regimes with one set of rules, whilst maintaining a high level of consumer protection. It was essential to overcome the specific legal barriers caused by the fragmented regulation of unfair commercial practices, which gave rise to cost, complexity and uncertainty for both businesses and consumers.

2.4. Derogations

Article 3(9) of the Directive provides for an important limitation on the full harmonisation character of the UCPD by stating that 'in relation to *financial services* [...] and *immovable property*, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates'. Thus, minimum harmonisation applies to these two sectors. As Recital 9 explains, '*financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders*'. Consequently, in these sectors, Member States can impose rules which go beyond the provisions of the Directive, as long as they comply with other EU legislation.

As explained below, the consultation has shown that there is no case for removing this limitation, whether in relation to financial services or in relation to immovable property.

A second temporary derogation from the full harmonisation principle applies to national provisions which implement directives containing minimum harmonisation clauses. According to Article 3(5), for a period of six years until 12 June 2013, Member States will be able to continue to apply national provisions¹⁴ which are more restrictive or prescriptive than the Directive itself and implement minimum harmonisation clauses contained in other EU legislation.¹⁵

Article 3(6) indicates that Member States must without delay notify the Commission of any national provisions applied on the basis of Article 3(5).

Only five Member States claim to have maintained rules under Article 3(5).¹⁶ One Member State,¹⁷ for instance, has notified provisions relating to television advertising for the

¹⁴ In the field approximated by the Directive.

¹⁵ Examples of directives which contain minimum harmonisation clauses within the field approximated by Directive 2005/29/EC are: Directive 98/6/EC on the indication of the prices of products offered to consumers, Directive 97/7/EC on distance contracts, Directive 85/577/EEC on contracts negotiated away from business practices, Directive 94/47/EC on the purchase of the right to use immovable properties on a timeshare basis and Directive 90/314/EEC on package travel.

¹⁶ Denmark, Finland, Ireland, Latvia and Sweden.

¹⁷ On 10 March 2008, Denmark notified the provisions relating to television advertising in section 21 of Order No 1368 of 15 December 2005 on advertising and sponsoring on radio and television. These provisions, concerning inter alia the characteristics of the product advertised, the price, and level of

protection of minors, implementing the Audiovisual Media Services Directive.¹⁸ Another Member State has failed to notify a restrictive measure concerning doorstep selling.¹⁹ A reluctance to repeal certain national measures (by 12 June 2013) may explain why few Member States have so far made use of Article 3(5).

The Commission considers that the derogation should not be further extended. Whilst a few Member States signalled a need for such an extension, this need to apply certain rules at national level can be met by virtue of other EU legislation.

2.5. Relationship between the UCP Directive and EU sectoral legislation

The Directive is the general law governing unfair commercial practices in business-to-consumer transactions. It covers all B2C commercial practices, unless otherwise explicitly stipulated, such as in the case of conditions of establishment or of authorisation regimes (see Article 3(8)). Where sectoral legislation conflicts with the Directive's general provisions, the corresponding provisions of the *lex specialis* will prevail.²⁰ Often, such conflict occurs because the *lex specialis* contains more detailed pre-contractual information requirements, or stricter rules on the way information is presented to consumers (see Recital 10 of the Directive). However, the existence of specific EU rules in a given sector does not exclude the application of the Directive: in these cases and in relation to all the aspects not covered by the *lex specialis*, the UCPD complements these sectoral provisions and fills any remaining gaps in the protection of consumers against unfair commercial practices.²¹

2.6. Follow-up to transposition

The current analysis points to inaccuracies in several Member States related, in a few cases, to key concepts of the Directive. In this connection, the Commission services have carried out an extensive transposition check and are currently engaged in a structured dialogue with the Member States concerned.

skills needed to use the product, are firmly enshrined in Danish law, pay special attention to the protection of minors, and implemented the Directive on 'Television without Frontiers' (Council Directive 89/552/EEC, now Directive 2010/13/EU on Audiovisual Media Services).

¹⁸ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

¹⁹ Belgium has not notified its national rules prohibiting doorstep selling for products of a value above 250 euros. The compatibility of such measures will be assessed by the ECJ in the context of a pending case against Belgium.

²⁰ Article 3(4) of the Directive clarifies that '*in 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.*'

²¹ See Guidance document p. 18-19. For example, the Air Services Regulation (Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules on the operation of air services in the Community) contains specific provisions on the price information to be made available to the general public. According to Article 23 of the Regulation, in addition to the final price, which must include all applicable taxes, charges, surcharges and fees, air carriers should also provide a breakdown of the final price. Therefore, in respect of pre-contractual information regarding prices for air fares, these more specific provisions will apply. The Directive's provisions come into play to prohibit commercial practices which are likely to deceive the average consumer (such as 'bait' advertising and marketing of air fares), and practices which constitute aggressive conduct (such as onerous and disproportionate non-contractual barriers imposed on consumers who wish to exercise a contractual right to terminate a contract).

3. THE APPLICATION OF THE DIRECTIVE

3.1. Uniform Application

3.1.1. *The role and case law of the European Court of Justice*

The role of the ECJ in making sure that EU legislation is interpreted and applied in the same way in all the Member States has been crucial in relation to the UCPD. Its judgments have proved extremely valuable in clarifying general matters concerning the relationship of the Directive with national legislation as well as more specific issues related to the interpretation of some of its substantive provisions. The Commission, for its part, acts as *amicus curiae* in the proceedings before the ECJ.

Since 2009, the ECJ has pronounced on several references for a preliminary ruling, confirming in particular the full harmonisation character of the Directive and the fact that Member States cannot retain national rules which go beyond its provisions.

In this connection, the Court has ruled that the following national provisions are not compatible with the Directive:

- A general prohibition on combined offers:

- Joined cases C-261/07 and C-299/07 (*Total Belgium*, 23 April 2009) concerned a fuel company offering free breakdown services with every purchase of fuel and a company which had published a magazine containing a promotional voucher for a lingerie shop;
- Case C-522/08 (*Telekomunikacja Polska*, 11 March 2010) concerned a telecom company which had made the conclusion of a contract for the provision of broadband internet access services contingent on the conclusion of a contract for telephone services.

- A general prohibition on commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or services:

- Case C-304/08 (*Plus Warenhandelsgesellschaft*, 14 January 2010) concerned a promotional campaign launched by a company whereby consumers were invited to purchase goods in order to obtain a certain number of bonus points permitting them to participate in the draws of a national lottery.

- A general prohibition on sales with bonuses, which is not only designed to protect consumers but also pursues other objectives:

- Case C-540/08 (*Mediaprint*, 9 November 2010) concerned a daily newspaper which had organised a competition in which consumers could participate by means of a voucher contained in the newspaper. In this case, the Austrian government had argued that the national provision did not fall within the scope of the Directive as it was mainly aimed at maintaining the pluralism of the press in Austria;

- A general prohibition on announcements of price reductions during the period preceding sales, in so far as the provision in question seeks to protect the economic interests of consumers:

- Case C-288/10 (*Wamo*, 30 June 2011) concerned a company which had sent an invitation to some of its customers for a private sale organised two weeks before the sales period.
- Case C-126/11 (*Inno*, 15 December 2011) concerned a company which had offered a loyalty card allowing customers to benefit from several promotional actions,

including price reductions during the pre-sales period. It is worth noting that in this case, the ECJ considered that a national rule does not fall within the scope of the Directive if its only aim, as argued by the referring court, is the protection of competition.²²

- A prohibition to announce "clearance sales" without obtaining the prior authorisation of the competent local administrative authority:

- Case C-206/11 (*Köck*, 17 January 2013) concerned a trader in Austria who announced in a newspaper a 'total clearance' of the products in his shop without applying for an administrative authorisation, as required by national law. The ECJ ruled that a commercial practice not covered by Annex I of the Directive cannot be prohibited on the sole ground that the practice has not been the subject of prior authorisation by the competent administrative authority, without an assessment of the unfairness of the practice in question against the criteria set out in Articles 5 to 9 of the UCPD.

In the Case C-122/10 (*Ving Sverige*, 12 May 2011), the ECJ clarified the concept of 'invitation to purchase', as defined in Article 2(i) of the Directive. It considered, for example, that an invitation to purchase exists as soon as there is visual reference to the product and the price, without the immediate availability of an actual 'mechanism' to purchase. The ECJ also stated that the Directive does not rule out the use of entry-level prices, as long as the information so provided meets the requirements of the Directive, taking into account the circumstances of the real case. The matter concerned a travel agency selling holiday products, which had put a commercial communication in a daily newspaper with only limited information on the trip advertised. In this case, the ECJ followed the approach of the Commission services in the Guidance document, which advocated a wide notion of the invitation to purchase.²³

In the Case C-559/11 (*Pelckmans Turnhout NV*, 4 October 2012), the ECJ clarified that a national provision which does not aim at protecting consumers does not fall in the scope of the Directive. The case concerned the compatibility, with the Directive, of a Belgian provision prohibiting a trader from opening his shop seven days a week, therefore requiring that the trader chooses a weekly closing day for the shop. The ECJ considered that such provision only aims to protect the interests of workers and employees in the distribution sector and does not intend to protect consumers.

In the Case C-428/11 (*Purely Creative e.a.*, 18 October 2012), the ECJ was for the first time called on to interpret a provision of Annex I to the Directive, and in particular point 31, which prevents traders from giving consumers the impression that they have already won a prize, when claiming such prize is subject to paying money or incurring a cost. In England, several companies had distributed mailings and inserts, including scratch-cards that were placed into newspapers and magazines, informing the recipients that they had won a prize. In order to claim this prize, the winner had to either call a premium rate number, send a text message or apply by post. The ECJ considered that such practices are prohibited even when the cost imposed on the consumer is minimal (as in the case of a stamp) compared with the value of

²² '[...] une disposition nationale telle que celle en cause au principal n'est pas susceptible de relever du champ d'application de la directive sur les pratiques commerciales déloyales si elle se limite seulement, comme le considère la juridiction de renvoi, à réglementer les relations concurrentielles entre commerçants et ne poursuit pas des finalités tenant à la protection des consommateurs.' (case C-126/11, *Inno*, recital 29).

²³ See moreover Section 3.3.4. on Invitation to Purchase and price information requirements.

the prize, and regardless of whether the payment of such costs procures any benefits to the trader.

Three more references for a preliminary ruling are currently pending before the ECJ:

- Case C-435/11 (*CHS Tour Services*) concerning the interpretation of Article 5 of the Directive, in particular as to whether the UCPD requires a separate examination of the requirement of professional diligence (set out in Article 5(2) (a)) of the Directive) when assessing a real case involving misleading actions or omissions;
- Case C-265/12 (*Citroën Belux NV*) referring to the compatibility, with the Directive (in particular its Article 3(9)), of a Belgian provision which prevents traders from making combined offers, when at least one component is a financial service;
- Case C-281/12 (*Trento Sviluppo Centrale Adriatica*) in which the referring court wonders whether the UCPD requires, for a violation to be established that, in addition to the misleading conduct, a separate evaluation of the material distortion of consumer economic behaviour be performed.

3.1.2. *Initiatives taken by the Commission*

The Commission has been taking measures, since the very beginning of the transposition process, to help national authorities and courts achieve uniform implementation and consistent enforcement of the Directive. This is a particularly difficult objective in a field which is characterised by considerable differences in national policy, style and enforcement techniques.

3.1.3. *The UCPD Guidance*

In December 2009, the Commission services issued a Guidance document on the application of the Directive²⁴ to develop a common understanding and convergence of practices. This document, available in 22 official EU languages, has helped to clarify some key concepts and provisions perceived as problematic. It includes practical examples showing how the Directive works. Despite the fact that this document has no formal legal status (binding nature), it has been widely used including in the context of proceedings before the ECJ,²⁵ as well as by national courts and authorities in their assessment of individual cases. The Guidance was conceived as a living document to be updated on a regular basis as the knowledge of unfair commercial practices grows.

3.1.4. *The UCPD Legal Database*

In July 2011, the Commission launched an online legal database (the ‘UCPD Database’).²⁶ The development of this database started in 2008, together with the Guidance, to support the uniform application and adequate / effective enforcement of the Directive.

²⁴ Guidance on the application /implementation of Directive 2005/29/EC on Unfair Commercial Practices (SEC(2009) 1666, Commission Staff Working Document) 3 December 2009 - http://wcmcom-ec-europa-eu-wip.wcm3vue.cec.eu.int:8080/justice/consumer-marketing/unfair-trade/unfair-practices/index_en.htm.

²⁵ See for instance the Advocate General conclusions in case C-122/10 *Konsumentombudsmannen KO contre Ving Sverige AB*, par. 30, 40 and footnote n. 13.

²⁶ See <https://webgate.ec.europa.eu/ucp/public/>. This database is based on Decision No 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007-2013), Action 9: Legal and technical expertise, including studies, for the monitoring and assessment of the transposition, implementation and enforcement of consumer protection legislation by Member States, notably Directive 2005/29/EC. This also includes the development and maintenance of easily and publicly accessible databases covering the implementation of Community consumer protection legislation.

The legal database is very comprehensive and allows the public to access in a user-friendly manner the laws and jurisprudence of the Member States related to the Directive, as well as other useful material such as any relevant academic work. It currently contains about 330 legal articles, 400 cases²⁷ and 25 other items (such as studies or guidelines adopted by national enforcement authorities). The information included in the database is arranged in sections and can be filtered by reference to specific Articles of the Directive, keywords, case law, and legal literature. All sections are interlinked and also allow for comparisons across different Member States. The country sections always include an overview of the national enforcement system.

The Commission is still working on the development of the UCPD database, which is meant to be regularly updated with new case law, legal articles and other material. The idea is to eventually create a new Consumer Law Database by merging the UCPD database with the EU Consumer Law Compendium database.²⁸ The Commission services are currently evaluating the available options to ensure an effective link between the UCPD database and the E-Justice portal.²⁹

3.2. The scope of application of the Directive

The Directive has a very broad scope of application, as laid down by the definition of (business-to-consumer) commercial practices in its Article 2(d): *‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’*. Product is described as *‘any goods or service including immovable property, rights and obligations’*.³⁰ The Directive applies to virtually all business-to-consumer (‘B2C’) transactions and in all sectors. In addition, it applies not only at the advertising / marketing stage of a transaction but also *‘...during and after a commercial transaction in relation to a product’*.³¹ It is, however, only concerned with protection of the economic interests of consumers in relation to measures aiming at or resulting in the classification of a commercial practice as unfair, to the exclusion of other interests such as health and safety or the environment. The Member States remain free to extend the scope of the UCPD or to regulate, in conformity with other EU legislation, other types of relations. They are also free to determine the effect of unfair practices on the validity, formation or effect of a contract, given that the UCPD does not harmonise contract law.³²

3.2.1. Need for extension beyond business-to-consumer transactions

Extension of the Directive beyond B2C transactions has been raised mainly in relation to three types of situations. Excluded from the scope of the Directive are transactions between businesses (‘B2B’), between consumers (‘C2C’) or when consumers sell or supply a product to a trader (‘C2B’). While Member States remain free to regulate these relations, most of them have chosen to implement the UCPD by keeping to its original scope.

Business-to-business transactions

²⁷ The database currently contains (as of May 2012) summaries of 158 administrative decisions and 202 court decisions (including 63 national Supreme Court decisions).

²⁸ <http://www.eu-consumer-law.org/index.html>.

²⁹ <https://e-justice.europa.eu/home.do>.

³⁰ See Article 2 (c) of the Directive.

³¹ See Article 3 (1) of the Directive.

³² See Article 3 (2) of the Directive.

Only four Member States currently apply, with some modulation, the UCPD also to B2B relations.³³ The extension, at EU level, of the scope of the UCPD to B2B relations has been mooted in the past by some stakeholders mainly with a view to solving the problem of the practices of Misleading Directory Companies affecting mainly small enterprises and independent professionals. Such practices are currently forbidden by Directive 2006/114/EC on misleading and comparative advertising ('the MCAD'). In its recent Communication on the overall functioning of the MCAD, the Commission concluded that the available cross-border enforcement means should be strengthened and the current legal framework reviewed in order to better combat such schemes.³⁴

Consumer-to-business relations

National enforcers³⁵ have signalled cases where consumers were the victims of unfair commercial practices while selling products to traders. Cases have been reported where, for example, consumers have sold their antiques and jewellery (especially gold) to traders and been misled by the representations made by the traders in relation to the characteristics and/or value of the items. Only a few Member States³⁶ would want the Directive to be extended while the remainder do not support an extension. One Member State,³⁷ which applies the Directive by keeping to its original scope, has suggested that an extensive approach to interpretation of the Directive be taken³⁸ instead of proceeding to a regulatory change at EU level.

Consumer-to-consumer relations

The fast development of Internet platforms has raised the issue of whether protection should be strengthened in relation to C2C transactions. Enforcement experience shows that the main problem is, in reality, caused by traders disguised as consumers and hiding their real qualification/commercial intent. Such practices are already forbidden by the Directive which, in its Annex I, point 22, bans the practice of '*Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.*'³⁹ Preventing such practices is, therefore, more a question of enforcement rather than a gap in the UCPD.

To conclude, the results of the consultation show that the vast majority of Member States and stakeholders⁴⁰ do not support an extension of the Directive, whether to B2B transactions or to C2B or C2C. The Commission considers that there is currently no case for such extension.

³³ These are Germany, Austria, France and Sweden. However, in Germany only Annex I of the Directive ('the Black List'), while in France exclusively Article 6 and Annex I (limited to the misleading practices part), apply to B2B relations.

³⁴ See Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on '*Protecting businesses against misleading practices and ensuring effective enforcement*', Review of Directive 2006/114/EC concerning misleading and comparative advertising, of 27 November 2012 (COM(2012) 702 final).

³⁵ The Office of Fair Trading in the UK.

³⁶ Estonia, Ireland, Latvia and Romania.

³⁷ The UK.

³⁸ E.g. by clarification in the Commission services' Guidance document.

³⁹ See also Article 6 (1) (c) and (f) of the Directive.

⁴⁰ Some Member States (e.g. Italy and France) and stakeholders have claimed that they would support an extension only to solve very specific problems such as the activities of the Misleading Directory Companies. Romania considers that extending the UCPD to B2B would create a more coherent approach in relation to business practices which target both businesses and consumers. The Netherlands would like to extend the UCPD to the extent necessary to protect businesses from the problem of 'fake invoices'. Germany, Austria and Sweden, who already fully apply the provisions of the Directive also to B2B transactions, would like businesses to enjoy the same level of protection as consumers across the EU.

While the specific B2B problem of Misleading Directory Companies will be addressed by the ongoing review of the MCAD, for other types of relations the Member States are free to regulate the area concerned to address national specificities and needs.

3.2.2. Sales Promotions

The issue of sales promotions started to be debated⁴¹ after the Commission's proposal for a Regulation on Sales Promotions⁴² was withdrawn in 2006 since the Member States had failed to reach an agreement. The proposal contained a number of information requirements designed to ensure that commercial communications relating to sales promotions are transparent and that interested recipients would be able to obtain all the relevant information announced therein.

The UCPD provides protection from unfair practices in the field of sales promotions. Article 6 (1) (d) prevents traders from misleading consumers on '*the price or the manner in which the price is calculated, or the existence of a specific price advantage*'. Prohibitions laid down in Annex I target specific promotional practices such as bait advertising (point 5), special offers (point 7), prize promotions (point 19), prize competitions (point 31), and use of the word 'free' (point 20).

In the 'Total Belgium' case,⁴³ the ECJ confirmed in particular that, because of the full harmonisation character of the Directive, Member States cannot retain national rules on sales promotions which go beyond the provisions of the Directive.

A few Member States and stakeholders have argued that the sudden repeal of certain national rules on sales promotions may adversely affect the protection of consumers against misleading promotional sales at national level.⁴⁴ They take the view that some of the existing, more stringent national rules (such as those which relate to a 'reference price' to calculate whether a certain announced discount is truthful or not) would be of great value to consumers and enforcers, although they are today legally incompatible with the Directive.⁴⁵

The feedback from the consultation shows that some Member States and stakeholders would be in favour of making legislative changes in this area, either in the form of further regulation⁴⁶ or by excluding sales promotions from the scope of the UCPD.⁴⁷ The remainder of the Member States explicitly reject the possibility of any further regulation of this area, while some others⁴⁸ would welcome more guidance from the Commission on the topic. Out of the other stakeholders, only two business representatives,⁴⁹ BEUC, one national consumer

⁴¹ See for instance EP questions E-5539/08, E-010017/2010, E-1704/2011.

⁴² COM(2001) 546 final, 2.10.2001, amended proposal COM(2002) 585 final, 25.10.2002.

⁴³ See also C-304/08 *Plus Warenhandelsgesellschaft* (Preliminary ruling – Germany), 14 January 2010; C-540/08 *Mediaprint Zeitungs* (Preliminary ruling – Austria), 9 November 2010; C-522/08 *Telekomunikacja Polska* (Preliminary Ruling – Poland), 11 March 2010.

⁴⁴ Some national enforcement agencies consider that the absence of such detailed rules would create legal uncertainty and make enforcement too burdensome/inefficient (under the UCPD it needs to be demonstrated on a case by case basis that a promotional sale is misleading).

⁴⁵ Six Member States (Belgium, Denmark, Finland, France, Ireland, Latvia) have already (partially) modified their legislation in relation to sales promotions in order to comply with the Directive and with the case law of the Court of Justice. At the moment, 13 Member States still maintain more restrictive rules than the UCPD, either in relation to price reductions (Belgium, Bulgaria, Estonia, Finland, France, Latvia, Poland, Portugal and Spain) or as regards commercial lotteries (Austria, Denmark, Finland, France, Germany and Luxembourg). Similar rules exist in Iceland and Norway.

⁴⁶ France, Germany, Ireland, Latvia and Spain.

⁴⁷ Belgium, Denmark, Spain (and Norway).

⁴⁸ Slovakia, Poland, Bulgaria, Netherlands, United Kingdom.

⁴⁹ The European Brand Association and the Federal Chamber of Labour in Austria.

organisation⁵⁰ and one ECC⁵¹ call for further regulation and stress that the absence of detailed rules generates legal uncertainty, whilst the Danish Chamber of Commerce supports the exclusion of sales promotions from the scope of the Directive to give Member States a wider national margin of manoeuvre.

The Commission believes that most of the concerns raised by Member States and stakeholders can be addressed through measures aiming at increasing legal certainty and uniform application of the Directive in this field. Further development of the Guidance document can be one way to achieve this objective.

However, the Commission will continue to closely monitor the application of the Directive in this area and consider legislative measures in the future if such a need arises.

3.3. Substantive provisions of the Directive

This part of the Report provides an outline of the substantive provisions of the Directive (in particular Articles 5 to 9 and Annex I) and of the main issues which have emerged in relation to their application in the Member States.

3.3.1. The notion of professional diligence

Article 5(2) is the ‘general clause’ of the UCPD, as it generally prohibits unfair commercial practices. It provides for two cumulative criteria for assessing whether a commercial practice should be deemed unfair, namely:

- if it is contrary to the requirements of ‘professional diligence’,
- and it materially distorts or is likely to materially distort the economic behaviour of the average consumer.

Professional diligence is defined as the ‘*standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity*’. This notion encompasses principles which were already well-established in the laws of the Member States, such as ‘honest market practice’ and ‘good faith’, with additional relevance being given to the normative values specifically applying in a given field of business activity.

The concept of professional diligence has been correctly transposed in most of the Member States. It appears that a few Member States have instead maintained the notions of ‘good practice’ or ‘good market practice’.⁵² In this connection, the Commission is currently in contact with the Member States concerned to make sure that these concepts do not lead to a more restrictive interpretation than required by the UCPD.

One issue raised by some national enforcers was whether, in order to penalise a trader for a breach of Articles 6 to 9 of the UCPD, it had to be demonstrated that the conduct was in breach of ‘professional diligence’. The Commission considers that there is no such need and that professional diligence is automatically violated in the event of a misleading action, omission or aggressive practice. By contrast, Article 5 can be applied as a stand-alone provision, as a ‘safety net’, to make sure that any unfair practice which is not caught by the remainder of the Directive can be penalised.⁵³

⁵⁰ CLCV: Consommation Logement Cadre de Vie, France.

⁵¹ The Irish ECC.

⁵² E.g. Poland, Denmark and Sweden.

⁵³ An example of this can be found in a case where a national enforcer considered that the practice of interrupting the water supply without any prior communication contravened the requirement of professional diligence. The authority took the view, taking into account the relevance of the water

Following a recent request for a preliminary ruling,⁵⁴ the opinion of the ECJ on whether a separate examination of the requirement of professional diligence is necessary when assessing unfair commercial practices (UCPD Articles 6 to 9), is currently pending.

3.3.2. Protection of vulnerable consumers

Article 5(3) provides for specific protection of consumers who are particularly vulnerable because of their mental or physical infirmity, age or credulity, if the commercial practice in question affects their economic behaviour in a way which the trader could reasonably be expected to foresee.

A specific category of vulnerable consumers, children, benefit from additional protection through Annex I, which specifically prohibits in point 28 the practice of '*[i]ncluding in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them*'.

The feedback from the consultation has not signalled significant problems in relation to vulnerable consumers. The UK is not calling for a revision but states that, if the Directive were to be reviewed, then it may be worth adding provisions to specifically protect also the elderly from certain aggressive practices. Denmark points out that frequent aggressive practices target children in the field of online games. Only two Member States support further regulation to improve contractual protection for children, which is not an issue that can be addressed by the UCPD.⁵⁵

The experience and data gathered show that further efforts should be made to strengthen the enforcement of the UCPD in relation to vulnerable consumers, such as elderly persons, children/teenagers and other categories of citizens who find themselves in a situation of weakness.⁵⁶

The 'Sweep'⁵⁷ conducted in 2008 by national enforcers in the framework of the CPC regulation showed, for instance, that more than half of the investigated websites specifically targeted teenagers and children. After 18 months of investigation at national level, 70% of those websites were corrected or closed. The outcome of the first phase of the 2012 sweep on digital content revealed that minors are still targeted by web-sites, which do not appear to comply with consumer protection rules, and that they are frequently lured into purchasing items related to supposedly free games.⁵⁸

supply service, that the trader was expected to attain a higher degree of professional diligence and that he should have adopted specific measures prior to the interruption of the water supply. Italian Competition Authority (AGCM), decision of 12 March 2009 PS 166 – *Acea Distacco fornitura d'acqua*.

⁵⁴ C 435/11 *CHS Tour Services*.

⁵⁵ Denmark and the Netherlands refer to enhancing the protection of vulnerable consumers through regulation but without suggesting specific solutions / options.

⁵⁶ As outlined in the European Consumer Agenda, it must be ensured that vulnerable consumers are protected from the risks deriving from the effects of the economic crisis, the ageing of the population, and the increased complexity of digital markets, together with the difficulty some consumers may encounter in mastering the digital environment.

⁵⁷ See Section 4 of this Report on Enforcement.

⁵⁸ The 'Sweep' conducted in 2008 targeted websites selling ringtones, wallpapers and other mobile phone services. 301 websites, out of more than 500 websites checked during this exercise, were found to seriously breach EU consumer law. And more than half of these specifically targeted teenagers and children. The three main problems reported were: unclear pricing, failure to provide complete information, and misleading advertising (in particular, falsely advertising ringtones as 'free' when the consumer in fact enters into a paying subscription). See

3.3.3. Article 6 on misleading actions

Under Article 6 of the Directive a misleading action occurs when a practice misleads through the information it contains or the deceptive presentation thereof, and causes or is likely to cause the average consumer to take a different transactional decision than he or she would have taken otherwise. This, together with Article 7 on misleading omissions, is by far the most frequently used provision for national enforcement purposes.

The feedback from the consultation shows that Member States have so far not encountered specific problems in applying Article 6. The most frequently reported practices mentioned by respondents to the consultation involve untruthful information on the main characteristics and/or on the price of the product or service offered for sale in the areas of internet and telecommunication services (e.g. broadband speed), financial services (e.g. consumer credit, life insurance), tourism (e.g. accommodation services including credit card fees in respect of hotels, timeshare and related products), air transport and e-commerce.

One recent example of the application of Article 6(1)(g) (which forbids traders to mislead consumers about their rights established in other legislation) is particularly interesting since it concerned a practice with EU-wide impact. A leading market player in electronic devices was fined by a national enforcer for offering consumers a paying commercial warranty which included services to which they are already entitled for free by law.⁵⁹

The protection provided by Article 6 is wide-ranging and has been invoked for instance even for politically sensitive issues concerning trade, as in the case of products imported from territories whose national sovereignty is disputed and for which there is a risk that consumers would be misled on the actual geographical or commercial origin of the product, in possible breach of Article 6(1)(b).

One issue which has been vigorously raised by an industry association⁶⁰ concerns the suitability of Article 6(2) and 6(2)(a) to penalise ‘copycat packaging’. ‘Copycat packaging’ refers to the practice of designing the packaging of a product (or its ‘trade dress’ or ‘get-up’) to give it the general ‘look and feel’ of a competing well-known brand. Copycat packaging is distinct from counterfeiting as normally it does not involve copying trade marks. The problem has affected countries where the remedies against unfair competition appear not to be satisfactory and competitors regard the UCPD as a possible tool for starting legal action. The Commission services have already addressed this issue in the 2009 Guidance document. The Commission will support stronger enforcement action on this matter whenever the practices at issue mislead consumers.

http://ec.europa.eu/consumers/enforcement/sweep/digital_content/index_en.htm for the results of the first phase of the 2012 Sweep on Digital Content.

⁵⁹ Decision of the Italian Antitrust Authority (AGCM) PS7256 – *Comet-Apple Prodotti in Garanzia* Provvedimento n. 23193, 27 December 2011 – The company under investigation offered a commercial warranty whose scope included services to which consumers are already entitled under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (i.e. 2 years of legal guarantee vis-à-vis the seller for lack of conformity). The Commission has supported the efforts of consumer associations by raising this matter in the context of the CPC-Network of national enforcement bodies and by writing (in a letter from Vice-President Reding of 21 September 2012) to all EU Ministers in charge of consumer affairs, in order to ensure a coordinated enforcement approach where a recurring problem arises in different Member States.

⁶⁰ AIM (The European Brands Association).

3.3.4. Article 7(4) Commercial offers and Price Information Requirements

Traders may choose whether to include the price in their advertising. However, all commercial communications that include the price qualify as ‘invitation to purchase’ under the UCPD⁶¹: for those, the Directive obliges traders, by virtue of its Article 7(4), to comply with a number of specific information requirements.

The invitation to purchase is indeed a critical moment in the consumer’s decision-making and a typical way of advertising and offering products and services to consumers, also in the online world. By its nature, it is a direct and immediate form of product promotion, triggering a more impulsive reaction from consumers and thus exposing them to higher risks. The aim of the provision in Article 7(4) is hence to make sure that, whenever traders make commercial offers to consumers, they make available simultaneously, in an intelligible and unambiguous manner, enough data and do not mislead them by omitting important information. These requirements concern: the main characteristics of the product, the geographical address of the trader, the total price, the arrangements for payment and delivery, performance and complaint handling policy, and the existence of the right of withdrawal or cancellation, if applicable. They should be read in conjunction with the information requirements contained in the Consumer Rights Directive⁶² and in Article 5 of the E-commerce Directive.⁶³

The Commission services, in the Guidance document, advocate a wide notion of invitation to purchase with flexible and proportionate application of the information requirements. They maintain, however, that a ‘mechanism’ to purchase (e.g. the possibility to proceed to an online booking) is not necessary to trigger the information requirements.⁶⁴

The ECJ, in a preliminary ruling,⁶⁵ followed this approach and confirmed that ‘*an invitation to purchase exists [...] without it being necessary for the commercial communication also to offer an actual opportunity to purchase the product or for it to appear in proximity to and at the same time as such an opportunity*’. The dispute involved the Swedish Consumer Ombudsman and a travel agency (Ving) selling throughout Sweden, also through the Internet, holiday products. In response to the question whether Ving had indicated the product’s main characteristics to an extent appropriate to the medium and the product the ECJ ruled that, while it was up to the national court to make an assessment in concreto, ‘*a verbal or visual reference to the product makes it possible to meet the requirement relating to the indication of the product’s characteristics*’ and that a reference to the trader’s website may be used under certain circumstances to provide certain information on the product’s main characteristics.

⁶¹ See UCPD Article 2(i).

⁶² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁶³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

⁶⁴ The main initial concern raised by stakeholders during the transposition stage of the Directive was that a rigid (‘check-list’ type of) approach in the application of these requirements would result in a disproportionate burden on traders and advertisers. The invitation to purchase being a new concept, it was not clear, for instance, to what extent the display of the ‘main characteristics’ would be found appropriate in relation to the medium used for the advertising and the product concerned (see Article 7(4)(a)). The World Federation of Advertisers was therefore keen on restricting the application of the information requirements only when, together with the invitation to purchase, there was made available to the consumer a ‘mechanism’ to make a purchase.

⁶⁵ In Case C-122/10, *Konsumentombudsmannen v Ving Sverige AB*, 12 May 2011.

Article 7(4) (c) of the UCPD specifically requires traders to display the (final) price inclusive of all applicable taxes or, when the price cannot reasonably be calculated in advance, the manner in which the price is calculated. In *Ving Sverige* the ECJ ruled that including an ‘entry-level price’ in an invitation to purchase does not in itself constitute an infringement of the UCPD provided that, in the light of all the facts and circumstances of the individual case including the nature and characteristics of the product and the commercial medium of communication used, such ‘entry-level’ price⁶⁶ enables the consumer to take an informed decision.

The 2008 Regulation on Air Services⁶⁷ complemented the UCPD by adding a number of provisions to ensure that the price of air tickets is transparent during the booking process and in advertising. In particular, it specifies that ‘the final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, charges, surcharges and fees which are unavoidable and foreseeable at the time of publication.’ The recently adopted Directive on Consumer Rights⁶⁸ contains provisions on pricing and charges which apply also to the air transport sector.

While there is a general consensus that the advertised price should include, from the outset,⁶⁹ all applicable fees and charges, the feedback received from several stakeholders⁷⁰ suggests that price requirements are often neglected in invitations to purchase.

In 2007, the first sweep organised in the framework of the CPC Regulation focused on websites selling airline tickets. Authorities from 15 Member States and Norway investigated 386 websites, out of which 145 were reported as containing irregularities. The three main issues detected were misleading indication of price, lack of information on the availability of offers, and irregularities related to the presentation of contract terms.

A recent study on ‘Price Transparency in the air transport sector’⁷¹ found that many airlines show the price excluding taxes, fees and charges, while many of them add charges which are, de facto, unavoidable (e.g. free means of payment only if the credit card of the airline is used), qualifying them as ‘optional’. The problem has particularly detrimental repercussions at the stage where consumers compare prices to inform their decision.⁷²

⁶⁶ The lowest price for which the advertised product or category of products can be bought, while the advertised product/category of products are also available at prices which are not indicated (e.g. tickets to Paris available ‘as of €100’).

⁶⁷ See in particular Article 23 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast).

⁶⁸ See in particular Articles 5 1(c), 19 and 22 of the Consumer Rights Directive.

⁶⁹ Since the moment when a trader makes an ‘invitation to purchase’ in the sense of Article 7(4) of the Directive.

⁷⁰ 8 Consumer Associations, 11 ECCs and 10 Business Organisations signalled problems in relation to price.

⁷¹ The Steer Davies Gleave study (2011) commissioned by the European Commission on ‘Price Transparency in the air transport sector’ assessed the compliance of websites with the information requirements of five pieces of EU legislation including Directive 2005/29 on unfair commercial practices. The outcome of the study recommends working on enforcement rather than amending the existing legislation.

⁷² An OFT study on the ‘Advertising of Prices’ investigated whether the manner in which prices are presented to consumers affects their decision-making and welfare. Its results showed that ‘drip pricing’ (also referred to as partitioned pricing) — where consumers see only part of the full price upfront and price increments are dripped through the buying process — accounted for the largest average welfare loss, which went up to 15% of the stakes involved. OFT(2010), Advertising of prices, <http://www.of.gov.uk/OFTwork/markets-work/advertising-prices/>.

Authorities in at least two Member States have recently taken enforcement action against numerous airline companies to prevent them from presenting prices to consumers that are split into components ('price partitioning') or from revealing the full price only at the end of the booking process ('drip pricing'). The investigations focused on credit and debit card surcharges: as a result, in the UK,⁷³ 12 airlines agreed to include debit card surcharges in the headline price and ensure that surcharges for paying by credit card are easy to find when booking online; in Italy, six airline companies were penalised and agreed to include such charges in the advertised price by the end of 2012.⁷⁴

The available evidence demonstrates that the recurrent use of inadequate price information in invitations to purchase does not depend on a gap in the current legal framework at EU level,⁷⁵ which will soon become even more stringent: it is also apparent that national authorities encounter difficulties in reacting to such infringements when the trader is located in another jurisdiction, as it is the case for other unfair practices. Improvements in this area could be obtained if the Commission were to take a more prominent role in supporting intensified national enforcement action and in promoting stronger cooperation in cross-border enforcement.⁷⁶ The results of the consultation confirm that there is no need to consider regulatory measures at this stage.⁷⁷

3.3.5. Articles 8 and 9 – Aggressive Practices

As an innovation at EU level, the Directive harmonises the concept of aggressive commercial practices. These practices are dealt with by Articles 8 and 9 of the UCPD and prevent traders from adopting selling techniques which impair the consumer's freedom of choice, thereby distorting their economic behaviour.

⁷³ Case Reference: Airline payment surcharges - CRE-E/27017, (July 2012). - <http://www.ofg.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/>.

⁷⁴ See Provvedimenti Autorità Garante per la Concorrenza ed il Mercato, (years 2011-2012): PS/4261, PS/5530, PS/3773, PS/892, PS/6147, PS/5667, PS/7430, PS/3771, PS/7505, PS/7493 and PS/7383 - <http://www.agcm.it/consumatore.html>.

⁷⁵ The conclusions of the Communication about the implementation of the Price Indication Directive adopted in 2006 by the Commission stated that the Directive did not give rise to any major transposition problems in any of the Member States and that, in general, the Directive had contributed to increasing consumer protection. A more recent consultation was conducted in spring 2012 amongst the Member States to help the Commission in assessing the overall effectiveness of this Directive today. The results showed that the Member States: (i) are not aware of any cross-border problems related to the implementation of the Directive (which does not have a significant cross-border dimension); (ii) widely make use of the derogations provided by the Directive (i.e. the exemption for services, sales by auction and sales of works of art and antiques and the temporary derogation to apply the Directive to small businesses); (iii) support minimum harmonisation in this field (more than 10 Member States have introduced or maintained national rules providing a higher level of consumer protection as regards the price indication). The large majority of Member States replied that they carry out regular and systematic checks on the market and they have efficient sanctions (in the form of fines) at national level for violations of this Directive. Further investigation may be needed in this respect.

⁷⁶ France and Italy, for instance, have signalled, in the context of their working dialogues with the Commission, that requests for cooperation on pricing issues were, at least on one occasion, refused by Member States (e.g. Ireland in the air-transport sector) who found that the practices at issue would not be capable of harming the 'collective interest of consumers', as required by the CPC Regulation.

⁷⁷ Only six Member States (Belgium, Finland, Ireland, Lithuania, Romania, the Netherlands), in addition to Iceland and Norway, support further regulation in the area of price requirements, but for different reasons (e.g. to clarify when the information on price is 'material' and to ensure that the unit price is mentioned in advertising).

Aggressive practices in the sense of the Directive are those which make use of harassment, coercion, physical force or undue influence. They can involve behaviour at the marketing stage but also practices which occur during or after a transaction has taken place.

Aggressive practices concern conduct which was already covered by other legislation in the Member States, including contract and criminal law. In this respect, the Directive has added an additional layer of protection which can be activated by public enforcement means but without necessarily having to start criminal or civil law proceedings.

The conduct regulated by Article 9(c), (d) and (e) is particularly relevant in this context. Article 9(c) outlaws practices which exert undue influence on consumers, such as the exploitation by the trader of any specific misfortune or circumstance of which the trader is aware, to influence the consumer's decision with regard to the product. Article 9(d) prevents traders from imposing disproportionate non-contractual barriers detrimental to consumers who wish to exercise rights under a contract, including the right to terminate the contract or to switch to another product or another trader. Article 9(e) covers any threat to take any action that cannot legally be taken.

Article 9(d) has been very useful especially in the fields of telecoms and energy in relation to non-contractual barriers to switching. Cases were reported where, for instance, telecoms operators unduly delayed the migration of consumers to other providers,⁷⁸ or energy providers made it difficult for consumers to exercise their right of withdrawal.⁷⁹

The aggressive practices reported by Member States and stakeholders in response to the consultation occur mainly in doorstep selling or other off-premises sales. European Consumer Centres (ECCs), who deal with many individual complaints, encounter frequent aggressive practices in the timeshare sector (holiday clubs and related practices⁸⁰) and, to a lesser extent, in the off-premises sale of consumer goods (e.g. furniture, electronic outlets, health or food products).

The general rules of Articles 8 and 9 on aggressive practices are complemented by eight specific aggressive practices described in the 'Black List' which are banned in all circumstances.⁸¹

3.3.6. Annex I – The 'Black List' of prohibited practices

Annex I to the UCPD contains a list of commercial practices which are to be considered unfair in all circumstances and which are therefore prohibited. The list was drawn up to prevent practices which are by experience considered unfair and to enable enforcers, traders, marketing professionals and customers to identify such practices, thus enhancing legal certainty.

As stated in Recital 17 of the Directive, these are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. In other words, if it can be proved that the trader has carried out the practice in actual fact, national enforcers do not need to apply the material distortion test (i.e. to consider the impact of the practice on the average consumer's economic behaviour) in order to take action and prohibit or penalise the practice.

⁷⁸ Italy, AGCM, 2009, PS1270 - Vodafone – *Ostacoli alla migrazione e retention ingannevole*, Provvedimento n. 19756.

⁷⁹ Italy, AGCM, 2008, PS91 – Enel Energia – *Richiesta cambio fornitore*, Provvedimento n. 18829.

⁸⁰ Data available to the Commission services show that consumers are exposed to various forms of pressure to enter into a contract.

⁸¹ The UCPD, Annex I, n. 24-31.

The implementation of the Directive shows that the Black List has proved to be a useful tool in the hands of enforcers.

Amongst the most used provisions of the Black List are:

Point 5 on ‘bait advertising’ and point 6 on ‘bait and switch’, which prevent traders from using particularly attractive offers on products and services in order to attract consumers to their website or shop, or with the intention of selling them another product. This provision has been used, for instance, in the airline transport sector to prevent companies from advertising conditions which they could only guarantee in relation to an unreasonably low number of consumers, taking into account the scale of advertising.

Point 10, whereby rights given to consumers in law cannot be presented as a distinctive feature of the trader’s offer. This ban has been particularly helpful in tackling cases where traders present the legal guarantee for lack of conformity as an added value of their product.

Point 20, which prevents traders from describing a product as ‘free’ when it is not the case. This provision has been used in relation to a frequently reported practice, targeting mainly vulnerable consumers (teenagers), on websites offering mobile phone ringtones for ‘free’ but where in reality consumers enter into a paying subscription.⁸² The Commission services clarified the application of this provision to joint offers (e.g. ‘buy one get one free’) in the Guidance document.

Point 17 ‘*Falsely claiming that a product is able to cure illnesses, dysfunction or malformations*’, which has been used, in combination with Article 6 of the UCPD, to stop unfair practices for instance in the field of cosmetics.

Point 31, which forbids ‘*creating the false impression that the consumer has already won, will win [...] a prize or other equivalent benefit, when in fact [...] there is no prize or [...] taking any action in relation to claiming the prize [...] is subject to the consumer paying money or incurring a cost.*’ It has been used to outlaw practices, including outright frauds, which lured consumers into paying considerable sums to receive a prize which either did not exist or whose value was lower than the amounts paid. There has been debate amongst enforcers on how to interpret the element of ‘*the consumer paying money or incurring a cost*’ and, in particular, whether requiring the consumer to make a call at standard local rate or buying a postage stamp to claim the prize would be in breach of the Directive. The ECJ clarified this matter ruling out the possibility of imposing even minimal costs on consumers (as in the case of a stamp).⁸³

One business federation⁸⁴ which represents various operators of multi-level marketing schemes considers that the harmonisation of the rules concerning pyramid schemes, provided by Annex I point 14, is adequate and has proved to be largely beneficial, enabling them to set up one single business model which could be valid across the EU, in a sort of ‘one-stop shop’ fashion. The other main association of direct sellers⁸⁵ takes a similar position and regards the current legal framework as complete. A company active in direct selling suggested in its contacts with the Commission services that, in the context of pyramid schemes, there should not be any distinction between consumers and professionals and that Member States should be encouraged to apply the national laws transposing Annex I (point 14) of the UCPD mutatis

⁸² In the 2008 ‘Sweep’ which targeted websites selling ringtones, wallpapers and other mobile phone services, 301 out of more than 500 websites checked during this exercise were found to be in serious breach of EU consumer law, including Annex I, point 20. See Paragraph 3.3.2. on vulnerable consumers.

⁸³ C-428/11 *Purely Creative e.a.* – See Section 3.1.1. of this Report.

⁸⁴ SELDIA, The European Direct Selling Association.

⁸⁵ DSE, Direct Selling Europe.

mutandis to business-to-business pyramid promotional schemes. The Commission's view is that there is currently no need to further harmonise pyramid schemes.⁸⁶

In the light of the enforcers' experience and the feedback from the consultation, there is no need at this stage to amend the Black List. No new practices which are not covered by the Directive have been identified. It is, however, important to make sure that the criteria and concepts contained in Annex I are interpreted in a uniform manner, which can be done by enhancing the Guidance and the UCPD Database.

3.4. THE APPLICATION OF THE DIRECTIVE TO SPECIFIC SECTORS AND COMMERCIAL PRACTICES

3.4.1. Environmental Claims

The expression 'environmental claims' or 'green claims' refers to the practice of suggesting or otherwise creating the impression (in the context of a commercial communication, marketing or advertising) that a product or a service is environmentally friendly (i.e. it has a positive impact on the environment) or is less damaging to the environment than competing goods or services.

The growing use of environmental claims as a marketing and advertising tool reflects the increase in environmental concerns among the population. Such claims can refer to the manner in which products are produced, packaged, distributed, used, consumed and/or disposed of.

Beyond the aspects covered by specific EU legislation (e.g. 'bio' or 'eco' labels),⁸⁷ the UCPD is the main instrument of horizontal legislation for assessing environmental claims and establishing whether a claim is misleading either in its content or in the way it is presented to consumers.⁸⁸

Under Article 6(1)(a) and (b) of the Directive, national authorities perform a case-by-case assessment of the practice in question, the content of the environmental claim and its impact on the average consumer's purchasing decision. As the Commission services have explained in the Guidance document,⁸⁹ the application of the provisions of the Directive to environmental claims can be summarised in regard to two main principles:

- Based on the Directive's general provisions, traders must, above all, present their green claims in a specific, accurate and unambiguous manner;
- Traders must have scientific evidence to support their claims and be ready to provide it in an understandable way in case the claim is challenged.

⁸⁶ No concerns were raised in relation to Annex I, point 14 by consumer associations or other stakeholders.

⁸⁷ Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ L 189, 20.7.2007, p. 1–23. Other examples of specific legislation are Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products; Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters.

⁸⁸ As stated in Recital 10 of the Directive, it indeed '*provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products*'.

⁸⁹ Guidance on the application /implementation of Directive 2005/29/EC on Unfair Commercial Practices (SEC(2009) 1666, Commission Staff Working Document) 3 December 2009.

Annex I of the Directive refers in addition to a number of practices which are particularly relevant to environmental claims and which are prohibited, regardless of the impact they have on the consumer's behaviour. They concern unauthorised use of logos (point 2), false approval or endorsement by public or private bodies (point 4), falsely claiming to be a signatory to a code of conduct (point 1) or that a code of conduct has been endorsed by a public or private body (point 3).

Further regulation of environmental claims can only be achieved through a revision of the UCPD or the adoption of other (specific) EU legislation. Despite the fact that some Member States⁹⁰ might be interested in adopting more specific rules on environmental claims at a national level, it is widely accepted that the way this increasingly important aspect of advertising is addressed across the EU should not be hindered through fragmentation. The results of the consultation show that Member States and stakeholders are generally satisfied with the current legal framework and consider that the tools provided by the Directive and the Commission services' Guidance are sufficient to assess environmental claims. Only a few Member States⁹¹ would be keen on further regulating this sector through the UCPD.

However, a number of stakeholders have suggested that, despite the current legal backstop, green claims are still not used responsibly and are often very general, vague and not well-defined.⁹² Consumer associations⁹³ claim that an additional difficulty lies in verifying the truthfulness of these claims especially in the energy, cosmetics, car and detergents sectors.

Credible and responsible use of green claims in advertising is extremely important since it can drive consumer preferences and hence contribute to the development of a more sustainable economy, in line with the Europe 2020 Strategy and the European Consumer Agenda.

The Commission considers that the problems identified with regard to the use of green claims can be addressed by measures related to enforcement and development of best practices rather than by legislative changes to the UCPD. It will, therefore, support appropriate and consistent enforcement, for example by developing guidance on this topic as announced in the European Consumer Agenda.⁹⁴

The Commission, in the context of the ongoing work on the SCP⁹⁵ Action Plan is, however, evaluating how the further development of the current scientific standards can contribute to the verifiability of green claims. In particular, thought is being given to options which could allow the development of an 'environmental footprint' of products (i.e. common formats/standards which could allow comparisons between products fulfilling the same functions). Based on this exercise, appropriate measures will be considered.

⁹⁰ E.g. France.

⁹¹ Belgium, France, Lithuania, Portugal, Slovenia.

⁹² E.g. amongst the expressions commonly used are: 'eco-friendly, biodegradable, carbon neutral, green, sustainable, natural, energy efficient, non-toxic, low carbon, pollutant-free, clean, zero emissions, ethical and fair'.

⁹³ E.g. BEUC.

⁹⁴ The Advertising Standard Authority ('ASA') in the UK, for instance, received and thoroughly assessed a large number of complaints including on environmental claims. See moreover section 4 on Enforcement.

⁹⁵ On 16 July 2008 the European Commission presented the Sustainable Consumption and Production and Sustainable Industrial Policy (SCP/SIP) Action Plan. On 11 January 2012 the Commission launched the public consultation on 'Delivering more Sustainable Consumption and Production'. For more information see: http://ec.europa.eu/environment/eussd/escp_en.htm

At the European Consumer Summit on 29 May 2012 environmental claims were discussed in depth and input was gathered on the state of play in different EU markets and on the way forward in this area.⁹⁶

3.4.2. Customer Review Tools and Price Comparison Websites

Amongst the benefits that the development of the online market in the EU can deliver to consumers are price savings and choice. Search engines, price and product comparison websites, consumer reviews and social media are tools that are becoming embedded in consumer behaviour and business models.⁹⁷ Four out of five EU online consumers (81 %) used a price comparison website in 2010.⁹⁸ However, such tools can help to boost consumer confidence only if they provide information in a clear, transparent and accurate form.

The Directive contains various provisions which can be applied to price comparison websites ('PCWs') and customer review tools.

- Articles 6 and 7 prevent traders from using PCWs to provide misleading statements, omitting material information inter alia about the price and / or the availability of products and services.
- Annex I, point 18 prohibits in all circumstances the practice of: *'Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions'*.
- The Directive also demands clarity on whether a PCW is independent, operated or (directly or indirectly) sponsored by a trader (see Article 6(1) (c), (f) and Article 7). In this connection, *'Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer'* is prohibited in all circumstances by Annex I, point 22 of the Directive.

The evidence available to the Commission shows that, despite such a comprehensive legal framework, consumers find it difficult to compare the price and quality of different goods on offer and the problems encountered undermine their confidence in PCWs.

Various stakeholders⁹⁹ have signalled problems with PCWs, especially in relation to transparency and incompleteness of the information given. BEUC points out that the issue is

⁹⁶ At the European Consumer Summit on 29 May 2012, the European Commission organised a workshop on greenwashing and misleading environmental claims. The workshop was a first step in a process that will provide input into the reflection on environmental claims at EU level. For more information see <http://www.european-consumer-summit.eu/>

⁹⁷ See Commission Staff Working Document, *'Bringing e-commerce benefits to consumers'*, document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services*, Brussels 11.1.2012 (SEC(2011) 1640 final), p.19. Shoppers use a variety of research methods to inform their purchase decisions before they buy goods online. In their first three steps during their research, 31 % visit sellers' websites, 30 % use a search engine, 27 % use a price comparison website and 24 % visit an online market place, while 24 % read customer reviews.

⁹⁸ See Commission Staff Working Paper, *'Bringing e-commerce benefits to consumers'*, Brussels 11.1.2012 (SEC(2011) 1640 final), p.20. Contrary to the provisions of the E-commerce Directive, Article 5, many price comparison websites (53 %) do not provide their full business address, see p. 22.

⁹⁹ 5 Consumer Associations, 7 Business Organisations and 4 ECCs.

particularly serious in the air transport sector. One Member State¹⁰⁰ acknowledges that PCWs often display incomplete price information, which makes any comparison unfair.

The Commission Staff Working Paper on *'Bringing E-commerce Benefits to Consumers'* showed that the information provided to consumers through information intermediaries, such as PCWs, is frequently partial and sometimes misleading and incorrect, especially in relation to the price, whether the retailer has paid to have its product listed, the criteria for ranking the offers, or delivery costs.

The enforcement experience confirms that one of the major problems stems from PCWs not disclosing clearly the identity of the trader operating the site and /or whether retailers pay to have their products and services displayed (i.e. whether the site is sponsored or not). Hidden advertising appears to affect not only PCWs but customer review tools in general. Websites hosting user-generated reviews have on a number of occasions been subject to criticism about reviews that appear to be based on a consumer's unbiased opinion, but are in fact advertising in disguise.¹⁰¹

In one Member State, for instance, an investigation into how consumers compare prices in the retail energy market found that a number of websites were leading consumers to think that they were PCWs when it was not the case.¹⁰² In another case the courts of a Member State fined a company operating hotel booking websites and seven of its subsidiaries for breach of the rules on unfair commercial practices. The websites claimed to provide a comparison between best offers and availability, but, instead, steered bookings towards 'partner hotels', to the detriment of 'non-partner hotels'.¹⁰³

The problems identified with PCWs and customer review tools need a strong enforcement response. The Commission will consider how, in accordance with the Treaties, it can play a more active role in encouraging coherent application of the Directive in particular with regard to unfair practices having a cross-border dimension such as those which take place in the online environment and which raise common questions for enforcers. As announced in the January 2012 e-Commerce Communication, the Commission will also address the issue of transparency and reliability of comparison tools through a direct dialogue with stakeholders which could eventually lead to the development of codes of good conduct and/or EU-wide guidance.¹⁰⁴

As noted in the Commission Staff Working Paper on *'Bringing e-commerce benefits to consumers'*, the dominant factor for shopping online seems to be price, followed by perceived saving of time, the possibility to carry out price comparisons easily, the flexibility of ordering at any time of the day/week and finding a wider selection online. The provision of prices and other key information should be offered upfront in a clear and simple manner so as not to mislead consumers. The fact that such websites are so widely used by consumers to inform their decisions amplifies the overall detriment suffered by them.

In applying the Directive across the EU, specific attention should in the future be given to the increasing involvement of social networks in online advertising. Based on the third generation of internet advertising models (i.e. 'E-commerce 3.0'), social networks are increasingly

¹⁰⁰ The Netherlands.

¹⁰¹ See Commission Staff Working Document on *Knowledge Enhancing Aspects of Consumer Empowerment 2012-1014*, 19.7.2012, SWD (2012) 235 final.

¹⁰² Office of Fair Trading, UK, Case reference: CRE-E-26547, 26555, 26759, 26760, 26761, January 2011, <http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/heating-oil/>.

¹⁰³ *Tribunal de Commerce*, 4 October 2011, *Synhorcat et autres / Expedia et autres*.

¹⁰⁴ See e-Commerce Communication (page 10).

becoming platforms where companies invest to engage customers. In addition to what can be expected from more traditional forms of online advertising (e.g. companies' websites), social media, where consumers share their likes with friends and family, can provide traders with a 'network effect' to their online advertising and a valuable insight into consumer behaviour / preferences. Enforcement action should therefore focus on ensuring that the new advertising models remain compliant with the Directive, especially as regards 'hidden advertising' and product information.

3.4.3. Article 3(9) – Application of the Directive in the fields of Financial Services and Immovable Property

As mentioned in section 2.4 of this Report, by virtue of Article 3(9)¹⁰⁵ of the UCPD, minimum harmonisation applies in the fields of financial services and immovable property.¹⁰⁶ Under Article 18 of the UCPD, the Commission is to report on the application of the Directive in these sectors and consider, in particular, whether the exemption from full harmonisation contained in Article 3(9) should be kept. For these purposes, the Commission launched a study on the application of the UCPD in the areas of financial services and immovable property.¹⁰⁷ The study was carried out in the course of 2011 until the beginning of 2012 and is based on a wide consultation of Member States and stakeholders.¹⁰⁸

The evidence collected by the study shows that the exemption contained in Article 3(9) has been widely used. In other words, most Member States have maintained or adopted legislation in the areas of financial services and immovable property that goes beyond the standards laid down by the UCPD.

Most of these additional rules consist of sector-specific pre-contractual and contractual information obligations.¹⁰⁹ In addition, a significant number of prohibitions predominantly concern direct selling and promotional practices,¹¹⁰ practices that take advantage of particular vulnerabilities,¹¹¹ or the prevention of conflicts of interest.¹¹² For example, in Austria doorstep selling for mortgage loans is prohibited while in Italy it is forbidden to tie compulsory car

¹⁰⁵ Art. 3(9) of the UCPD: 'In relation to 'financial services', as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.'

¹⁰⁶ For instance, Directive 2007/64/EC in the field of payment services, and Directive 2008/48/EC in the field of consumer credit, establish fully harmonised rules.

¹⁰⁷ See *Study on the application of the Unfair Commercial Practices Directive to financial services and immovable property* conducted by Civic Consulting on behalf of the European Commission, DG Justice 2012, available at: <http://ec.europa.eu/justice/consumer-marketing/document>.

¹⁰⁸ Organisations such as national enforcement authorities, national consumer organisations and ombudsmen, as well as a selection of academics and EU-level stakeholders such as the European Banking Federation (EBF), the European insurance and reinsurance federation (CEA), and the European Consumers' Organisation (BEUC).

¹⁰⁹ E.g. as regards financial services, specific information requirements in the banking sector (such as for the assignment of secured credit to a third person in Germany or an advertisement for money exchange services in Spain), investment services, insurance, financial intermediaries. In relation to immovable property, information requirements related to the purchase of a property, the transaction itself, the real estate agent and the construction contracts.

¹¹⁰ E.g. prohibition of cold calling, unsolicited e-mails, doorstep selling of mortgage loans and for a real estate agent to retain money without legal reason in Austria, doorstep selling of monetary credit in the Netherlands, combined offers in Belgium and France.

¹¹¹ E.g. prohibition of usurious credit in most of the Member States, prohibition on advertising that a loan may be granted without documentary proof of the consumer's financial position in France, or on issuing, without prior consent of the legal representative, ATM cards to minors in Austria.

¹¹² E.g., in Denmark, prohibition on banks financing their clients' purchase of shares issued by the bank itself; in France, prohibition on banks stopping their customers from using another credit insurance provider (than the one provided by the bank itself) when the level of guarantee offered is similar.

insurance liability contracts to other insurance services. In Denmark there is a ban on tying several real estate services.

In this connection it should be noted that the question as to whether the Member States can prohibit tying when at least one of the products/services involved is of a financial nature, is pending before the ECJ in *Case C-265/12 (Citroën Belux NV)*. In this case the ECJ will need to clarify, in particular, the scope of the exemption under Article 3(9)).

In relation to both financial services and immovable property, the most commonly reported unfair practices (in the sense of the UCPD) concern a lack of essential information at the advertising stage and misleading description of products.

As regards financial services, lack of information in advertising on the annual rate and the cost of credit, offers of misleading bargains for credit contracts with a low interest rate, and lack of proper information on the legal obligations related to the signing of contracts were amongst the practices reported.¹¹³ In relation to immovable property, examples of practices encountered were: misdescription of property characteristics, lack of transparency in relation to the cost of the property and respective taxes, bait advertising, aggressive practices by real estate agents such as intimidating consumers into signing an exclusive contract with an agent when attempting to sell their properties.

The Commission has received a large number of complaints, citizens' letters, parliamentary questions and petitions on problems relating to the purchase of property in Cyprus, Bulgaria and Spain. In Cyprus and Bulgaria property developers engage in misleading advertising by making various misrepresentations about the characteristics of a property and in particular omitting to disclose that properties sold would continue to be subject to prior mortgages for present and future bank loans contracted by the developers. The Commission is currently in contact with the Cypriot and Bulgarian authorities on these matters in order to find a solution to the issues raised. In Spain the problems are only to a limited extent related to misleading advertising/unfair practices in the sense of the Directive and mainly concern relationships between consumers and local authorities, such as irregularities in granting of licences to build or the imposition of urbanisation charges for the development of new projects on foreign residents.

Notwithstanding the extensive national rules, it is interesting to note that, in at least half of the cases assessed in the Member States concerning unfair practices in the fields of financial services and immovable property, the provisions of the Directive (misleading actions, omission, aggressive practices, sometimes in combination with blacklisted practices) have been used as the legal basis. In the other half, more prescriptive national rules have been applied.¹¹⁴

In the insurance sector, for instance, Annex I, point 27 has been applied to situations where insurers refused to pay claims by compelling consumers, who wanted to apply for compensation under an insurance policy, to produce documents which could not be reasonably considered relevant to establish the validity of the request. In these cases,

¹¹³ It should be noted that credits related to immovable property are not covered by Directive 2008/48/EC on Consumer Credit and that the Commission adopted a proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property on 31 March 2011.

¹¹⁴ See *Study on the application of the Unfair Commercial Practices Directive to financial services and immovable property* conducted by Civic Consulting on behalf of the European Commission, DG Justice 2012, available at: <http://ec.europa.eu/justice/consumer-marketing/document>.

providers systematically failed to respond to pertinent correspondence in order to dissuade consumers from exercising their contractual rights.¹¹⁵

The results of the investigation conducted in the areas of financial services and immovable property indicate that it would not be appropriate to remove the exemption under Article 3(9) of the Directive.¹¹⁶

The main reasons are: the higher financial risk in respect of financial services and immovable property (as compared to other goods and services); the particular inexperience of consumers in these areas (combined with a lack of transparency, in particular of financial operations); particular vulnerabilities found in both sectors that make consumers susceptible to both promotional practices and pressure; the experience of the competent financial enforcement bodies with a nationally grown system; and finally the functioning and the stability of the financial markets as such.

Enforcement authorities and other stakeholders responding to the consultation¹¹⁷ have come to a similar conclusion. A large majority of responding organisations in both the areas of financial services and immovable property consider it very or fairly important to keep the exemption under Article 3(9) of the UCPD.

4. ENFORCEMENT

4.1. Enforcement in the Member States

The Directive does not harmonise enforcement systems. Under Article 11 of the UCPD, Member States are free to choose the enforcement mechanisms which best suit their legal tradition, as long as they ensure that adequate and effective means exist to prevent unfair commercial practices. On the basis of Article 13 of the UCPD, it is also left to the Member States to decide what type of penalties should be applied, as long as these are ‘effective, proportionate and dissuasive’.

The role of the Commission in the overall enforcement of the Directive is crucial because it must ensure that the Directive is properly and effectively applied in all the Member States.

The Member States have put in place a wide variety of enforcement regimes. In some countries enforcement is mainly carried out by public authorities such as consumer ombudsmen (e.g. Denmark, Sweden and Finland), consumer / competition authorities (e.g. Italy, Ireland, the Netherlands, Romania and the UK) and dedicated departments of ministries (e.g. Portugal and Belgium). Other Member States run a private enforcement scheme led by competitors (e.g. Austria and Germany). Most systems, however, combine elements of public and private enforcement. Penalties range from injunction orders, damages, administrative

¹¹⁵ Reported in Portugal, see study on the application of the UCPD to financial services and immovable property in the EU, 2012.

¹¹⁶ The study states that *‘the possibility of Member States to adopt or maintain stricter provisions than those in the Directive gives them the flexibility that they need to deal with newly developed (unfair) commercial practices that react to the specificities of national legislation in the areas of financial services and immovable property, and the removal of Article 3(9) would harm well-working enforcement systems and therefore lower the level of consumer protection ...’*.

¹¹⁷ The respondents include the European consumer organisation BEUC as well as some national consumer associations. One of the findings of the study is that specific national information obligations usually apply regardless of their suitability to mislead the consumer, and they are therefore easier to handle for authorities, courts, businesses and consumers alike. Often, they also come under a different enforcement system. Accordingly, the survey has shown a preference for pre-existing rules in those Member States that had information obligations already in place. This applies to both the sectors of financial services and immovable property.

fines and criminal sanctions, and in most Member States there is a combination of all of these.¹¹⁸

Member States and stakeholders consider that, at a national level, the enforcement of the Directive in the Member States is, in general terms, appropriate and effective. However, according to some, adequate enforcement at a national level may be hampered by the lack of resources of national enforcers, the complexity/length of enforcement procedures and the insufficient deterrent effect of the penalties. One Member State¹¹⁹ and various consumer associations¹²⁰ want heavier penalties¹²¹ and, in some instances, collective redress.

Several Member States and stakeholders confirm that this situation has an impact also on the effective enforcement of the legislation at cross-border level. The consultation has revealed that, in cases of cross-border unfair commercial practices, it is a real challenge for enforcers to provide a rapid and efficient response given the constraints posed by jurisdictional boundaries. In addition, resources available are limited.

The statistics contained in the 2012 Report on the application of the CPC Regulation¹²² show that the UCPD accounts by far for the highest number of mutual assistance requests as an individual body of legislation. From 2007 to 2010, out of 1343 CPC actions, 654 (48.7%) related to UCPD infringements. The remainder of the requests related to infringements of 14 other Directives (e.g. Directive 1999/44/EC on sale of consumer goods and associated guarantees) and one Regulation.

Since its inception, the Network has carried out, under the coordination of the Commission, annual enforcement actions called ‘sweeps’ in addition to the bilateral enforcement cooperation. In a sweep, enforcement authorities simultaneously screen a sample of websites in a given sector for compliance with EU consumer legislation and in a second phase take appropriate enforcement measures where required. The five sweeps completed so far have helped to improve compliance in the targeted sectors (websites selling airline tickets, ringtones for mobile phones, electronic goods, tickets for sports and cultural events, and consumer credit). Authorities have checked about 2200 websites from different sectors. On average, 80% of the websites found to be in breach of consumer law were corrected as a result of the enforcement action by national authorities. The outcome of the first phase of the 2012 sweep on digital content confirms a rate of non-compliance that is similar to previous

¹¹⁸ For further details and examples of the enforcement regimes and penalties in the Member States, please consult the country sections ‘enforcement fiche’ in the UCPD Database at <https://webgate.ec.europa.eu/ucpd/public/>.

¹¹⁹ Belgium.

¹²⁰ BEUC, Citizens Advice (UK), CLCV (Consommation, Logement, Cadre de Vie - FR), Which (UK).

¹²¹ To improve this aspect Italy, for instance, has recently increased the maximum penalty for violations of the Directive tenfold, from 500 000 euros to 5 million euros.

¹²² The CPC Regulation establishes a cooperation framework linking enforcement authorities in the Member States to form an EU-wide network (the CPC-Network). This framework enables enforcers to work closely together in order to swiftly and effectively stop commercial practices that breach consumer laws whenever traders and consumers are established in different countries. The Network brings together the consumer enforcement authorities of all the Member States (as well as Norway and Iceland). See Report from the Commission to the European Parliament and the Council on the application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (‘The Regulation on consumer protection cooperation’), COM(2012) 100 final, 12.03.2012; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0336:FIN:EN:PDF>

sweeps. Further enforcement action is now being carried out by national authorities to enable the companies concerned to clarify their position or correct their website.¹²³

Although consolidated data on the number of decisions adopted and penalties imposed by national enforcement authorities are not available, the following representative examples can be provided: between the entry into force of the Directive and mid 2011, the Italian Competition Authority issued more than 700 decisions and applied administrative fines totalling €91 million; the French General Directorate for Competition, Consumer Issues and Fraud Control (DGCCRF) issued 1251 Reports¹²⁴ and corresponding fines amounting to approximately €1.7 million were imposed;¹²⁵ the Latvian Consumer Rights Protection Centre took 154 binding decisions and imposed fines of €159 400; the Finnish Consumer Ombudsman initiated 8 court cases; the Irish National Consumer Agency issued 14 undertakings, 116 compliance notices, 2 prohibition orders, and started 2 prosecutions; the Slovak Trade Inspection issued 46 administrative decisions and imposed a total amount of €151 800 in fines; and, finally, 18 court rulings and 52 injunction orders were issued in Sweden.

Further enforcement efforts should be made to guarantee a high level of consumer protection, especially at cross-border level but also in a national context. This conclusion is based on the Commission's experience in cooperating with national authorities, on the feedback received from the ECCs¹²⁶ and other stakeholders, and other available sources (in particular the Reports on the application of the CPC Regulation).¹²⁷

4.2. Self-regulation

The UCPD upholds the principle that self-regulation can support judicial and administrative enforcement and clarifies the role that code owners can play in enforcement.¹²⁸

As the experience of certain legal systems shows,¹²⁹ self-regulatory bodies can contribute to enhancing compliance with legal standards and alleviating the burden on public enforcement bodies. Member States are allowed to rely on self-regulatory dispute settlements to enhance

¹²³ See http://ec.europa.eu/consumers/enforcement/sweep/digital_content/index_en.htm for the results of the first phase of the 2012 Sweep on Digital Content.

¹²⁴ 'Procès verbaux'.

¹²⁵ In France, the DGCCRF issued 1195 Reports for misleading practices corresponding to financial penalties of €73 828 imposed by courts and €1 649 451 directly imposed by DGCCRF, and 56 Reports for aggressive practices, on which financial penalties of €15.000 were imposed by courts.

¹²⁶ ECCs in Belgium, the Czech Republic, Portugal and the UK signalled enforcement problems in cross-border cases (either suggesting that cooperation between national authorities should be improved or indicating that cross-border cases are not handled properly by national courts). ECCs in Estonia, Finland, Ireland, Latvia, Poland and Sweden consider that current national enforcement powers, penalties and redress are not adequate.

¹²⁷ See for instance the second biennial Report from the Commission to the European Parliament and the Council on the application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation). See p. 9 of the Report 'The number of authorities that do not actively use the cooperation mechanisms established by the CPC Regulation remains significant.' One cannot rule out that, although the UCPD is by far the most used legal basis for CPC actions, the number of UCPD mutual assistance requests remains low for such a horizontal and encompassing type of legislation.

¹²⁸ See UCPD Article 10.

¹²⁹ The Advertising Standard Authority ('ASA') in the UK, for instance, received and thoroughly assessed 14596 complaints which resulted in 6542 cases in the first half of 2010. Complaints have been declining (around 10%) from previous years, which may be explained by increased compliance due to the efforts of the ASA. For numbers and decisions and cases see the ASA Annual Activities Reports at: <http://www.asa.org.uk/About-ASA/Annual-Report.aspx>.

the level of consumer protection and to maximise compliance with the legislation and best market practices.

However, the Directive confirms the fact that self-regulation cannot replace judicial or administrative means of enforcement. Moreover, the Directive reinforces the effectiveness of codes of conduct requiring that Member States enforce the self-regulatory rules against traders who have undertaken to be bound by the applicable codes.¹³⁰

5. OVERVIEW OF THE BENEFITS OF THE DIRECTIVE

The experience gained from its first years of implementation demonstrates that the Directive has helped to enhance consumer protection in the Member States while protecting legitimate businesses from competitors who do not play by the rules.

It has been used by national consumer protection watchdogs to curb and penalise a wide variety of unfair business practices.¹³¹ The UCPD is the only general instrument of EU legislation in place to assess environmental claims or aggressive practices.

Its principle-based rules have proved particularly effective in allowing national authorities to adapt their assessments to the rapid evolution of products, services and selling methods. The 'Black List' has provided national authorities with an effective tool for tackling common unfair practices like bait advertising,¹³² fake free offers, hidden advertising and direct exhortations to children. Provisions of the Black List have been used also to tackle unfair practices in the fields of financial services and immovable property.

This legal framework is also well suited to assessing the fairness of new online practices that are developing in parallel with the evolution of advertising techniques. It can provide a prompt enforcement response to abuses perpetrated by means of new commonly used tools such as price comparison and collective booking websites or in relation, for example, to the increasing involvement of advertising in social networks.

At cross-border level, around half of the actions taken under the CPC-Network (requests for information, alerts and enforcement requests) concerned infringements of the UCPD.¹³³ In addition, several joint surveillance actions ('sweeps') have been carried out by the CPC-Network on the basis of UCPD provisions (websites selling airline tickets, online mobile phone services, websites selling consumer electronic goods).¹³⁴

Cooperation with national enforcement authorities and the implementation elements gathered in the UCPD Database reveal that the rules are mostly interpreted in a uniform manner. The clarifications provided by the ECJ and the Commission have indeed contributed to this process.

¹³⁰ See UCPD, Article 6(2)(b).

¹³¹ See above Section 4 of this Report on enforcement.

¹³² See Annex I, point 5 of the Directive. This prohibited practice involves making attractive offers to consumers when the trader is not able to supply the product in the quantities expected based (inter alia) on the scale of advertising.

¹³³ From 2007 to 2010, out of 1343 CPC actions, 654 (48.7%) related to UCPD infringements. See Report from the Commission to the European Parliament and the Council on the application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), 12.3.2012 COM(2012) 100 final, available at http://ec.europa.eu/consumers/enforcement/docs/comm_biennial_report_2011_en.pdf

¹³⁴ http://ec.europa.eu/consumers/enforcement/index_en.htm

By replacing the fragmented regulations of the Member States on unfair commercial practices with one set of rules, the Directive has contributed to the removal of obstacles to cross-border commerce and simplified the regulatory environment.

The Europe 2020 Strategy calls for ‘citizens to be empowered to play a full role in the single market’, which ‘requires strengthening their ability and confidence to buy goods and services cross-border’. The high level of consumer protection set by the Directive appears to be helping to boost consumers’ confidence. Recent evidence reveals that more consumers are now interested in making cross-border purchases (52 %, +19) and are willing to spend more money cross-border (18 %, +5) than in 2006, when the Directive had not yet been transposed in the Member States.¹³⁵ Nevertheless, it has to be recognised that growth in online cross-border shopping lags far behind domestic growth, so it is clear that more needs to be done.¹³⁶ This is why emphasis now needs to be placed on correct and consistent application of the Directive as a precondition for EU citizens and businesses to take full advantage of the opportunities offered by the Single Market.

The Commission has identified retail trade (including e-commerce), the transport sector, the digital economy and energy / sustainability as key areas where the Single Market’s growth potential is greatest.¹³⁷ The Directive has a crucial role to play in this context.

Further efforts should therefore be made in terms of strengthening UCPD enforcement. Member States’ resources are limited and the deterrence value of penalties should be improved. Cooperation in cross-border cases within the scope of the CPC Regulation should also be stepped up.

The drive to step up enforcement activity both on a cross-border basis and at a national level calls for the Commission to take up **a more prominent role**, joining forces with the Member States and supporting them in the application of the Directive across the EU. In this respect, the Commission will consider how, in accordance with the Treaties, it can play a more active role in encouraging consistent application of the Directive, in particular with regard to unfair practices having a cross-border dimension such as those taking place in the online environment and which raise common questions for enforcers.

6. CONCLUSIONS

As announced in the Communication on the application of the Unfair Commercial Practices Directive accompanying this Report, it does not seem appropriate to amend the Directive at this stage. This outcome reflects the results of the consultation and the preliminary conclusions drawn from the enforcement experience in the Member States, which is significant but still too limited in time for such a comprehensive body of legislation.

¹³⁵ See Flash Eurobarometer 332 *Consumers’ attitudes towards cross-border trade and consumer protection*, May 2012, p. 8. More consumers are now interested in making cross-border purchases (52 %, +19) and are willing to spend more money (18 %, +5) than in 2006. A growing proportion of consumers, 50 %, are willing to purchase goods or services using another EU language (+ 17 points in comparison to 2006). The percentage that would be totally unwilling to shop in a different language has fallen from 42 % in 2008 to 30 % in 2011. The proportion of Europeans who say they know where to get information and advice about cross-border shopping has also risen significantly, from 24 % in 2006 to 39 % in 2011.

¹³⁶ During the period 2008-2010, domestic business-to-consumer e-commerce grew from 28 % to 36 % of the population making an online domestic purchase, while cross-border e-shoppers have only grown from 6 % to 9 %. Only 9 % of European consumers said they shopped online cross-border in 2010 based on Eurostat, Information Society Statistics, 2010.

¹³⁷ See the *European Consumer Agenda* and the Communication of the European Commission ‘A new governance pact for a better functioning Single Market.’

The concerns which have been raised by some stakeholders in relation to the application of the UCPD to certain specific unfair commercial practices can be addressed by initiatives to improve enforcement in the Member States. In this connection, as outlined in the Communication, future efforts will need to concentrate on key thematic areas where detriment and lost opportunities for consumers appear to be most frequently recurring and where the Single Market's growth potential is the biggest.