

**UNFAIR COMMERCIAL PRACTICES
IN TERMS OF
THE CONSUMER PROTECTION ACT 68 OF 2008**

**Submitted in partial fulfilment of the requirements for the degree
Magister Legum**

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ABSTRACT

The Consumer Protection Act is a comprehensive piece of legislation which aims to regulate the consumer market widely. The South African situation, in comparison with the European Union for example, reveals that the general purpose and principle of the European Unfair Commercial Practice Directive (hereinafter the UCPD) is to create a general statutory duty to trade fairly in consumer transactions. The UCPD aims to eliminate distortions in the international market caused by different laws of unfair trading. The enactment of the CPA is a clear indicator that the legislator has taken note of international trends in the field of consumer protection and has fulfilled the promise to bring South African Law in line with international consumer law and practice.

The aim in the dissertation is critically to analyse the provisions of the CPA in relation to unfair commercial practices. The core focus lies with the critical analyses of sections 40, 41 of the CPA in this regard. The dissertation attempts to explain the rationale for a comparison with the UCPD and how this comparison assists in addressing issues that the critical analysis of the unfair commercial practice provisions in the CPA elucidate. It is hoped that the comparison will bring to light shortfalls and inconsistencies, as well as consistencies, between these pieces of legislation (CPA and UCPD).

The law needs to promote and to protect the economic interest of consumers, to improve access to information that is necessary for the consumer to be able to make an informed choice, to protect consumers from any hazard which is a threat to their well-being and safety, to develop effective means of redress for consumers, to promote and provide consumer education and to promote consumer participation.

Focus will be on the conduct of the supplier and is limited to a discussion of sections 40 and 41. With regards to section 40 the focus is on unconscionable conduct. An extensive explanation of unfair commercial practices in terms of the UCPD will be provided, and includes a broad overview of the relevant articles read together with the relevant recitals. An overview of definitions, concepts and case law will be presented in order to offer a clear view of unfair commercial practices in terms of the said directive.

The research aims will be achieved by examining national and international legislation, relevant case law (where applicable and possible) from South Africa, The European Court of Justice (ECJ) and member states.

The result will be that the consumer has greater confidence in the protection the law provides and which offers a similar level of redress to consumers so that they are not discouraged that the law has only face value. Instead, consumers will be encouraged to defend their rights and will be educated as to what they are entitled.

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DECLARATION OF ORIGINALITY
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Declaration

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2. I declare that this dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person to hand in as my own.

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TABLE OF CONTENTS

Page

ABSTRACT	
ACKNOWLEDGEMENTS	
DECLARATION OF ORIGINALITY	
TABLE OF CONTENTS	
CHAPTER 1 RESEARCH AIM AND PROBLEM	1
CHAPTER 2 PURPOSE, SCOPE AND APPLICATION OF THE CPA AND THE UCPD	4
CHAPTER 3 UNFAIR COMMERCIAL PRACTICES PROVISIONS IN TERMS OF THE CPA	15
CHAPTER 4 UNFAIR COMMERCIAL PRACTICES IN TERMS OF THE UCPD	29
CHAPTER 5 A COMPARATIVE DISCUSSION OF UNFAIR COMMERCIAL PRACTICE IN TERMS OF THE CPA AND UCPD	61
CHAPTER 6 CONCLUSION	71
BIBLIOGRAPHY	72

CHAPTER 1

RESEARCH AIM AND PROBLEM

1 INTRODUCTION

As soon as the focus of the world economy moved from being production-orientated to being consumer-orientated, most Western economies saw the development of consumer protection law.¹ Even though some common law rules protect consumers, there was very little protection against poor quality, dangerous goods and services, unfair contract terms, unfair or irresponsible marketing practices, unfair discrimination in the marketplace, the consumers right to choose, protection against unfair direct marketing practices, the provision of insufficient information on products and services and actions detrimental to the right to fair and honest dealing.² The Consumer Protection Act³ is an ambitious and comprehensive piece of legislation which aims to regulate the consumer market as widely as possible.⁴

Previously, South Africa had a consumer protection law, however the legislature noted international trends in the field of consumer protection, and by way of the Consumer Protection Act (CPA or 'the Act') endeavoured to bring South African law in line with relevant international consumer law and practice.⁵ The CPA intertwines law, economics and social welfare.⁶ The CPA is the cumulative result of several decades of debate and legal development in the field of consumer protection in South Africa and reflects work done by government, legislation and academics.⁷

The South African situation, in comparison with the European Union for example, reveals that the general purpose and principle of the European Unfair Commercial Practice Directive⁸ (hereinafter the UCPD) is to create a general statutory duty to trade fairly in consumer transactions. The UCPD aims to eliminate distortions in the international market caused by different laws of unfair trading.⁹ Therefore, the UCPD was introduced to protect the

¹ Naudè & Eiselen *Commentary on the Consumer Protection Act (2014)* 1.

² *Ibid*

³ 68 of 2008.

⁴ Naudè, *supra* note 1, at 2

⁵ Van Eeden *Consumer Protection Law in South Africa (2013)* 2.

⁶ *Ibid*

⁷ *Ibid* 23.

⁸ Directive 2005/29/EC of May 11, 2005.

⁹ Van Eeden, *supra* note 5, at 23.

consumer's economic welfare and interests. Clearly, this goal coincides with the aim and purpose of the CPA. The enactment of the CPA is a clear indicator that the legislator has taken note of international trends in the field of consumer protection and has fulfilled the promise to bring South African Law in line with international consumer law and practice.¹⁰ These developments should be viewed against the general historical background of the development of consumer protection law in Europe, in particular in the European Union, and in the United States of America, as well as the preparatory work carried out by South Africa's Department of Trade and Industry leading up to the adoption of the CPA.¹¹ Consumer law must do more than solve an individual consumer's problem, which is what traditional private law seeks to do.¹²

2 RESEARCH AIM AND PROBLEM

The aim in this dissertation is to carry out a comparative analysis of the way in which unfair practices covered by the CPA and the EU UCPD are dealt with. Recommendations will be proposed as to what can be done to promote the highest level of harmonisation between the CPA, its implementation and regulation, and international standards.

The aim in the dissertation, further, is critically to analyse the provisions of the CPA in relation to unfair commercial practices. The core focus lies with the critical analyses of sections 40, 41 of the CPA in this regard. The dissertation attempts to explain the rationale for a comparison with the UCPD and how this comparison assists in addressing issues that the critical analysis of the unfair commercial practice provisions in the CPA elucidate. It is hoped that the comparison will bring to light shortfalls and inconsistencies, as well as consistencies, between these pieces of legislation (CPA and UCPD). In this manner an indication can be given of where the CPA should be amended or be kept unaltered, ultimately, the aim is to add value to its interpretation.

3 BRIEF OUTLINE OF CHAPTERS

In CHAPTER 2 the author explains the application, scope and purpose of the Consumer Protection Act (the CPA) in detail. In order to compare the CPA with the UCPD, first an outline of the application, scope and purpose of each is provided. Further, various concepts and

¹⁰ Van Eeden, *supra* note 5, at 5.

¹¹ Naudè, *supra* note 1, at 6.

¹² Naudè, *supra* note 1, at 8.

definitions will be discussed. The chapter identifies the similarities and the differences between the CPA and UCPD in respect of the provisions regarding unfair commercial practices that are critically discussed in the chapters to follow.

CHAPTER 3 focuses on the conduct of the supplier and is limited to a discussion of sections 40 and 41. With regards to section 40 the focus is on unconscionable conduct. The reference in the CPA to “unconscionable conduct” relates to what the UCPD refers to as “unfair commercial practices”. Unfair commercial practices” will be elaborated on when needed, but the focus in this dissertation is on the conduct of unfair commercial practices, though advertising and marketing are mentioned. A discussion of unfair, unreasonable and unjust contract terms and conditions are outside of the scope of this dissertation, however they are mentioned in the introductory chapter.

CHAPTER 4 provides an extensive explanation of unfair commercial practices in terms of the UCPD, and includes a broad overview of the relevant articles read together with the relevant recitals. An overview of definitions, concepts and case law will be presented in order to offer a clear view of unfair commercial practices in terms of the said directive. Consumer law norms are seen as exceptions to the common law as a special form of law designed for the protection of consumers.¹³ An internal market depends on consumer confidence. The internal market of the European Union has a large pool of consumers, and to meet its goals the European Union needs a fully- functioning internal market. This is an asset that is not fully exploited by the relevant markets and suppliers, but it could offer consumers access to greater choice and better prices.¹⁴ As a result of a specific series of directives¹⁵ greater harmonisation could be achieved.

The dissertation follows an analytical and critical approach. The research aims will be achieved by examining national and international legislation, relevant case law (where applicable and possible) from South Africa, The European Court of Justice (ECJ) and member states. Literature from legal scholars in this area, which includes academic text books, journal articles and other scholarly material, will also be considered.

¹³ Iain Ramsay, *Consumer Law & Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart 2012) 136.

¹⁴ *Ibid* 157.

¹⁵ Hereafter referred to as the UCPD.

CHAPTER 2

PURPOSE, SCOPE AND APPLICATION OF THE CPA AND THE UCPD

1 INTRODUCTION

In this chapter the author examines the application, scope and purpose of the Consumer Protection Act (the CPA) in detail. A comparative analysis of the CPA and the UCPD requires first outlining the application, scope and purpose of each, as well as reference to significant concepts and definitions. The chapter describes similarities and differences between the CPA and UCPD relating to the provisions regarding unfair commercial practices which are critically discussed in the chapters to follow.

2 HISTORICAL PERSPECTIVE

The Consumer Affairs, Unfair Business Practices, Act. Act 71 of 1988 originally was called the Harmful Business Practices Act. The title and a number of its provisions were amended in 1999 by the Harmful Business Practices Amendment Act, Act 23 of 1999. This Act was instituted to provide for prohibition or control of unfair business practices. However it does not list the practices which were considered to be unfair. This act was an enabling Act and not a prescriptive one, and did not prohibit everything. The Act authorises the Consumer Affairs Committee, known as the CAFCOM, to investigate business practices and to report to the minister. The Committee is a statutory body in the Department of Trade and Industry whose members are not full-time employees but are chosen on grounds of having specialised knowledge or experience of consumer advocacy, economics, industry, commerce or law. They are appointed to investigate any business practice and if a specific business practice is found to be unfair, the Committee makes recommendations to the minister. If the minister accepts the recommendations, the practice is declared to be unfair by publication in the Government Gazette and the relevant parties and/or businesses are directed to refrain from its application.

¹⁶ The Committee however is under-resourced and lacks the capacity to be really effective. ¹⁷ This failure has led to consumers relying on the general principles of the common law if they have a problem. The question many ask: Does the common law provide consumers with

¹⁶ Why the need for Consumer Protection Legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act. Tanya Woker. *Obiter* 2010. 217 – 231, 219.

¹⁷ *Ibid* 220.

adequate remedies? Due to the lack of protection in the general principles of the common law, the purpose of the CPA is to promote fair business practices and to protect consumers from unconscionable, unfair, unreasonable, unjust and other improper trade practices, as well as deceptive, misleading and unfair or fraudulent conduct.¹⁸ Consumer law in South Africa was fragmented and outdated. Many internationally-accepted consumer principles were absent in South Africa.¹⁹

It is clear that the provisions of the CPA cannot be interpreted in isolation: in many instances there is overlap with other pieces of legislation.²⁰ Section 2 of the CPA governs the interpretation of the CPA and thus is very important. Section 2(9) makes provision for the fact that if there are inconsistencies in any provisions within the CPA and a provision in any other act, the provisions of both apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the other. If the provisions in the Acts cannot apply concurrently, the provisions that extend the greater protection to the consumer prevail.²¹ Therefore the CPA cannot be interpreted in isolation: the common law, as well as pre-existing legislation, has an important role in the interpretation of the CPA.

3 PURPOSE

In its judgement, the Court emphasised that from the Preamble to the CPA it is evident that the purpose of the CPA, amongst others, is to protect the interests of all consumers and to ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the market place.²²

The Court emphasised that according to section 4(3):

if any provision of this Act, read in its context, **can reasonably be construed to have more than one meaning**, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment

¹⁸ Tanya Woker *supra* note 16, at 223-224.

¹⁹ Tanya Woker *supra* note 16, at 230.

²⁰ Barnard & Scott, 'An overview of Promotional Activities in terms of the Consumer Protection Act in South Africa', 33.

²¹ *Ibid*

²² *Joroy 4440 CC t/a Ubuntu Procurement v Phillipus Christoffel Johannes Potgieter N.O & Christina Martha Potgieter N.O (In their capacity as executors for the time being of the Rally Motors Trust, IT 408/97) [Judge: C Reinders]*, par 1.

of the consumer rights generally, and in particular by persons contemplated in section 3(1)(b).²³

The Court refers to *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC), in which a precedent was set by the Constitutional Court that where a specialised framework has been created for the resolution of disputes, the parties must pursue their claims primarily through such mechanisms.²⁴

Section 3 of the CPA sets out its purposes and has an important role in how the CPA is interpreted.²⁵ The section also sets out the responsibilities of the National Consumer Commission in the achievement of its purposes.²⁶ The purposes of the CPA are generally ‘to be interpreted against the backdrop of these purposes’.²⁷ Sometimes the aim to advance and promote consumers’ welfare may support more than one interpretation given the complex nature of the consumer-supplier relationship. The purposes are broadly stated in open-ended language and their practical assistance in interpreting the CPA remains to be tested.²⁸

The Court confirms that the point of departure of the CPA is that it applies to all transactions occurring within South Africa.²⁹ The Court states further that the term “goods” in Part H is to be considered in the context of the CPA as a whole, and with regard to the purpose of the CPA and of Part H in particular. Without doubt in the view of the Court the term “goods” includes used or second-hand goods. The Court confirms further that the purpose of the CPA *inter alia* is to protect the interests of all consumers and to ensure accessible, transparent and efficient redress for consumers who are subject to abuse or exploitation in the market place, and that the CPA should be interpreted in a manner that gives effect to the purposes set out in section 3 of the CPA.³⁰

²³ *Ibid* par 7.

²⁴ *Supra* note 22, at par 10.

²⁵ De Stadler ‘Section 3’ in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) 3-2.

²⁶ *Ibid*

²⁷ De Stadler, *supra* note 25, at 3-2.

²⁸ De Stadler, *supra* note 25, at 3-3.

²⁹ *Georgios Vouvoukis v Queen Ace CC t/a Ace Motors* [Judge: JD Pickering], par 81.

³⁰ *Georgios Vouvoukis v Queen Ace CC t/a Ace Motors* [Judge: JD Pickering], par 85-87.

Section 4 of the CPA provides that in any matter brought before the court in terms of the CPA the court must develop the common law, as necessary, in order to improve the realisation and enjoyment of consumers' rights generally and, in particular, of persons contemplated in section 3(1)(b). Section 4(3) takes the protection of consumers further in providing, if any of the provisions of the CPA as read in context can reasonably be construed to have more than one meaning, the Court must prefer the meaning that best promotes the spirit and purpose of the CPA, and will best improve the realisation and enjoyment of consumers' rights generally and, in particular, of persons contemplated in section 3(1)(b), which refers to vulnerable consumers. The Court confirms an interpretation of the CPA and quotes from Naude and Eiselen in that "any ambiguous provision in the Act must be interpreted in favour of the consumer, particularly any consumers who are 'vulnerable' as a result of poverty, illiteracy, old age or any other similar disability".³¹ This particular aspect in relation to the UCPD is discussed in the chapters that follow.

Section 3(1)(b) recognises a class of 'vulnerable consumers' who are prone to be taken advantage of by suppliers. Even though there are more open-ended definitions in the CPA, this section does not have a general catch-all provision by means of which additional categories of vulnerability can be recognised. De Stadler argues that the Act does not give vulnerable consumers any additional specific rights more than other consumers.³² Instead, he argues that section 4(2)(a) provides that the difficulty in relation to vulnerable consumers must be considered when courts develop the common law,³³ and that section 4(3) provides that where the CPA is vague the interpretation which best improves the realisation and enjoyment of rights of vulnerable consumers must be preferred.³⁴

4 PURPOSE AND SCOPE OF THE CPA

The CPA in its Preamble sets out its purpose as follows: *To promote a fair, accessible and sustainable market place for consumer products and services and for that purpose to establish national norms and services relating to consumer protection.*³⁵ The CPA does not provide a general definition of the concept 'fundamental consumer rights', although reference is made

³¹ *Ibid* par 89-91.

³² De Stadler, *supra* note 25, at 3-3.

³³ De Stadler, *supra* note 25, at 4-6.

³⁴ De Stadler, *supra* note 25, at 4-7

³⁵ Introduction, CPA.

in the Preamble to 'internationally recognised consumer rights'.³⁶ The Preamble clearly recognises that apartheid policy and discriminatory laws in the past had a negative impact on high levels of poverty, illiteracy and on other forms of inequality.³⁷ It is clear from the Preamble that the CPA is to develop and employ innovative ways to fulfil the rights of historically-disadvantaged persons and to promote their participation as consumers. It is necessary to protect consumers' interests with regard to accessibility, to redress, to give effect to and take into consideration internationally-recognised consumer rights.³⁸ The law needs to promote and to protect the economic interest of consumers, to improve access to information that is necessary for the consumer to be able to make an informed choice, to protect consumers from any hazard which is a threat to their well-being and safety, to develop effective means of redress for consumers, to promote and provide consumer education and to promote consumer participation.³⁹

Van Eeden states that the Preamble to the Act recognises the historical background which has bequeathed social and economic inequality in South Africa, as well as the need for an appropriate legal framework to enable an accommodation with technology and with changes to the economy.⁴⁰ The purpose of the CPA in respect of social and economic inequalities, such as poverty and illiteracy, is to ensure the fulfilment of the rights of historically-disadvantaged persons and to promote their full participation as consumers. It is also indicated by Van Eeden that there is a need for a positive economic environment and an appropriate legal framework.⁴¹

The following measures which support the legal framework, are identified:⁴² improving access to and the quality of information that is necessary for consumers to be able to make informed choices and decisions according to their individual wishes and needs, protecting consumers from hazards to their well-being, promoting and providing consumer education and facilitating the freedom of consumers to associate and form groups to advocate and promote their

³⁶ Van Eeden *Consumer Protection Law in South Africa* (2013) 27.

³⁷ Preamble, CPA.

³⁸ Preamble, CPA.

³⁹ *Ibid*

⁴⁰ Van Eeden *Consumer Protection Law in South Africa* (2013) 42.

⁴¹ *Ibid*

⁴² Van Eeden, *supra* note 40, at 43.

common interests, promoting consumer participation in decision-making processes with reference to the marketplace and promoting the interests of consumers.

Section 2 of the CPA deals with several matters relating to the interpretation of the CPA and other unrelated miscellaneous provisions and must be read with section 3 which sets out the purpose and policy of the CPA.⁴³ It is clearly confirmed in Naude & Eiselen that section 2(1) of the CPA provides that its provisions must be interpreted purposively.⁴⁴

Section 2 of the CPA states the Act must be interpreted in such a manner that it gives effect to the purpose as set out in section 3.⁴⁵ Section 2 further gives points of consideration that need to be effected when interpreting or applying the CPA:⁴⁶ a person, Court, Tribunal or the Consumer Commissioner may consider the appropriate foreign and international law⁴⁷, the appropriate international conventions, declarations or protocols relating to consumer protection⁴⁸ and any decision of a consumer court, ombud or arbitrator in terms of the CPA to the extent that such a decision has not been set aside, reversed or overruled by a High Court, the Supreme Court of Appeal or the Constitutional Court.⁴⁹ Naude & Eiselen argue, unlike section 2(1) of the CPA, sections 2(2)(a) and 2(2)(b) are permissive rather than mandatory because of the word 'may'.⁵⁰ Even though provision is made for the use of foreign law in interpretation, however foreign law should be followed circumspectly:⁵¹ I agree with this argument.

It is important to note if there are inconsistencies in the provisions of the CPA and a provision in any other Act not contemplated in section 2(2)(8), the provisions of both Acts apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second and, if this is not possible, the provisions that extend the greater protection to the consumer prevail over any alternative provision.⁵² The CPA should not be interpreted in such a way as to preclude a consumer from exercising rights

⁴³ Naudè & Eiselen *Commentary on the Consumer Protection Act (2014)* 2-2.

⁴⁴ *Ibid.*

⁴⁵ Section 2(1), CPA.

⁴⁶ Section 2(2), CPA.

⁴⁷ Section 2(2)(a), CPA.

⁴⁸ Section 2(2)(b), CPA.

⁴⁹ Section 2(2)(c), CPA.

⁵⁰ Naudè, *supra* note 43, at 2-5.

⁵¹ *Ibid.*

⁵² Section 2(9)(a) and Section 2(9)(a), CPA.

afforded in terms of the common law.⁵³ The author concurs with the view of Naude & Eiselen that the best protection for the consumer should be provided.

The CPA regulates the marketing of goods and services to consumers and the relationships, transactions and agreements into which consumers enter.⁵⁴ One should always promote the spirit and purpose of the CPA.⁵⁵ The CPA is seen as a remedial law and therefore is interpreted in such a manner that will extend the consumers' remedy as far as is allowed.⁵⁶ The general purpose of the CPA, as set out in the Preamble, is augmented by more specific aims and objectives in section 3 of the CPA.⁵⁷ Thus, any ambiguous provision in the CPA must be interpreted in favour of the consumer, especially the vulnerable consumer.⁵⁸ These purposes play a very important role in the way in which the CPA is interpreted.⁵⁹

When interpreting the CPA, Acting Judge of Appeal, Schoeman, referred to the principle articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [Natal Joint Municipality Pension Fund V Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18] and to *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [Novartis SA (Pty) Ltd V Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) 518 para 27] that the interpretative process involves establishing the intention of the legislature but by considering the words used in the light of all relevant and admissible contexts, including the circumstances in which the legislation came into being. Further it is stated that a sensible meaning is to be preferred to one that leads to nonsensical or un-business-like results.⁶⁰

The Green Paper discussions on the CPA made it clear that a broad spectrum of consumer needs protection: consumers had to be defined broadly as individuals who purchase goods and services and must include third parties who act on behalf of the consumer. [Draft Green Paper on the Consumer Policy Framework, GN 1957, GG 26774 of 9 September 2004]. If there is an

⁵³ Section 2(10), CPA.

⁵⁴ *Van Eeden Consumer Protection Law in South Africa* (2013)38.

⁵⁵ *Ibid* 39.

⁵⁶ *Van Eeden, supra* note 54, at 39.

⁵⁷ *Naudè, supra* note 43, at 4.

⁵⁸ *Naudè, supra* note 43, at 2-4.

⁵⁹ *Naudè, supra* note 43, at 3-2.

⁶⁰ *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016) [Supreme Court of Appeal of South Africa] [Doram: Lewis and Willis JJA and Schoeman, Fourie and Makgoka AJJA] [Acting Judge of Appeal: I Schoeman], par 9.

inconsistency between the CPA and any other legislation, both Acts apply concurrently to the extent that it is possible. If this is not possible, the provisions that extend the greater protection to a consumer prevail over the alternative provision.⁶¹ The important features to note are that there must be a transaction to which a consumer is party or that the goods are used by another person consequent on that transaction. The Act must be interpreted keeping in mind that its focus is the protection of consumers.⁶²

5 PURPOSE AND SCOPE OF THE UCPD

The UCPD declares that the development of fair commercial practices within the area without internal frontiers is vital for the promotion of the development of cross-border activities.⁶³ The laws of Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of internal markets.⁶⁴ The Directive 84/450/EEC of September 1984 deals with the advertising component, although this is not in the scope of this dissertation. In the absence of uniform rules one should recognise the public interest objectives and uphold those objectives. The UCPD protects consumers from the consequences of such unfair commercial practices where they are material but recognises that sometimes the impact on consumers may be negligible. The Directive also addresses commercial practices which directly relate to influencing consumers' transactional decisions in relation to products. It is important to ensure that the relationship between the UCPD and community law is coherent. Since the objective of the UCPD is to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high level of consumer protection, it will be best achieved at a community level.

The purpose of the Directive is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating the law, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interest.⁶⁵ The Scope of the UCPD is set out in article 3.⁶⁶ The article

⁶¹ *Ibid* par 11-12.

⁶² *Ibid* par 15-16.

⁶³ UCPD, 2005/29/EC.

⁶⁴ *Ibid*

⁶⁵ Article 1, UCPD, 2009/29/EC.

⁶⁶ 2005/29/EC.

states that the directive shall apply to unfair business-to-consumer commercial practices as laid down in article 5 of the UCPD, before, during and after a commercial transaction in relation to a product.⁶⁷ Article 5 of the UCPD is found in chapter two of the UCPD.

The purpose and scope of the UCPD is discussed as part of the Directive and will be discussed in detail throughout the following chapters.

6 APPLICATION OF THE CPA

Section 5 of the CPA regulates the application of the Act: it is the basis to be used to determine the application of the Act. It is important to note that the CPA will apply only to transactions that take place within South Africa as section 5 needs to be interpreted together with section 3 of the Act.⁶⁸ Its application within the Republic permits an exemption by sections 5(2), 5(3) or 5(4) of the Act.⁶⁹

The relevant definitions in terms of the CPA are discussed below.

- (1) 'Consumer' in respect of any particular goods and services, means –
- (a) *A person to whom those particular goods and services are marketed in the ordinary course of the supplier's business;*
 - (b) *A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by Section 5(2) or in terms of Section 5(3);*
 - (c) *If the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to the transaction concerning the supply of those particular goods or services; and*
 - (d) *A franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);*⁷⁰

The Supreme Court of Appeal mentions and emphasises that *a consumer is a person who buys goods and services, as well as persons who act on their behalf or use products that have been bought by consumers...The Act must therefore be interpreted keeping in mind the that its focus is the protection of consumers.*⁷¹

- (2) 'Prohibited conduct' means an act or omission in contravention of the CPA.⁷²

⁶⁷ Article 3(1), UCPD, 2005/29/EC.

⁶⁸ Section 5(1)(a), CPA.

⁶⁹ De Stadler 'Section 5' in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) 5-4.

⁷⁰ Section 1, Act 68 of 2008.

⁷¹ *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016) [Supreme Court of Appeal of South Africa] [Doram: Lewis and Willis JJA and Schoeman, Fourie and Makgoka AJJA] [Acting Judge of Appeal: I Schoeman], par 7.

⁷² Section 1, Act 68 of 2008.

(3) 'Supplier' means a person who markets any goods or services.⁷³

(4) 'Unconscionable' when used with any conduct, means –

(a) having a character contemplated in section 40; or

*(b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person...*⁷⁴

(5) A 'vulnerable consumer' in terms of section 3(1)(b) of the CPA is defined as low-income persons or low-income communities who live in remote, isolated or low-density population areas or communities, minors, seniors or other vulnerable consumers, or those with limited literacy as a target group. This definition is clearly stated in the Preamble and in section 3 of the CPA.

The CPA makes provision for every consumer to have a fundamental right of choice and the fundamental right to fair and honest dealing.⁷⁵ The CPA aims to protect particular types of consumers in terms of section 3(1)(b) - vulnerable consumers. As a part of these fundamental rights consumers are also protected against certain unfair practices. The CPA is distinguishable from previous developments as it comprises a large, comprehensive and coherent treatment of a wide range of consumer protection issues which is set within the overall legal framework of international standards.⁷⁶

Section 3(1) of the CPA clearly indicates that the purpose of the CPA is to promote and advance the social and economic welfare of consumers. Therefore the CPA must be interpreted in a manner that gives effect to the purpose set out in section 3 of the CPA.⁷⁷ Section 3 of the CPA has a general purpose and a specific purpose.⁷⁸ Section 3 of the CPA gives a more detailed rendering of the purposes that the CPA is intended to achieve and the policy it is intended to advance.⁷⁹ The author specifically focuses on section 3(1)(d) of the CPA.⁸⁰

Section 3(1)(d) reads as follows:

⁷³ Section 1, Act 68 of 2008.

⁷⁴ Section 1, Act 68 of 2008.

⁷⁵ Chapter 2, Parts C and F, CPA.

⁷⁶ Van Eeden *Consumer Protection Law in South Africa* (2013) 25.

⁷⁷ *Ibid* 40.

⁷⁸ Van Eeden, *supra* note 76, at 40.

⁷⁹ Van Eeden, *supra* note 76, at 43.

⁸⁰ Section 40 of the CPA and Section 41 of the CPA gives substance to these purpose.

The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by –

- (d) protecting consumers from –
 - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
 - (ii) deceptive, misleading, unfair or fraudulent conduct...

This section refers to the promotion of fair business practices, the protection of consumers against ‘unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices’ and to ‘deceptive, misleading, unfair or fraudulent conduct’.⁸¹ Although the CPA does not refer to the concept of good faith, it is at the heart of Chapter 2, Parts F and G, which deal with unconscionable conduct and the right to fair, just and reasonable terms and conditions.⁸² Due to the Preamble and purposes (section 3) of the CPA, international and foreign law play a prominent and influential role in protecting the rights of consumers. Although only certain purposes are listed in section 3 of the CPA, there are additional purposes that can be gathered from the rest of the CPA.

In conclusion it is clear that there are similarities between the CPA and the UCPD in a comparison of the application, scope and purpose of each. However, it seems as if the UCPD is more comprehensive in its application than the CPA.

⁸¹ Van Eeden, *supra* note 76, at 30.

⁸² Naudè & Eiselen *Commentary on the Consumer Protection Act (2014)* 3.

CHAPTER 3

UNFAIR COMMERCIAL PRACTICES PROVISIONS IN TERMS OF THE CPA

1 INTRODUCTION

This chapter focuses on the conduct of the supplier and is limited in its address to sections 40 and 41. With regard to section 40 the focus is on 'unconscionable conduct'. The reference in the CPA to 'unconscionable conduct' is similar to what in the UCPD is termed 'unfair commercial practices'. These practices are referred to as needed but the focus is on the conduct of unfair commercial practices, though advertising and marketing will be mentioned. Further discussion of unfair, unreasonable and unjust contract terms and conditions is excluded from the scope of this dissertation, as mentioned in the introductory chapter.

Chapter 2 of the CPA deals with 'Fundamental Consumer rights', and the focus in this dissertation is on Part F: Fundamental right to fair and honest dealing, and specifically on section 40 - 'unconscionable conduct' - and on section 41 - false, misleading or deceptive representation.

General market-practice norms revolve around the concepts of unfairness and deception. The legislator uses the wording 'unreasonableness', 'unjustness', 'unconscionability', 'unethical conduct' and 'improper conduct'.⁸³

There were two generations of market-practice legislation in South Africa before the CPA. First, the Trade Practice Act⁸⁴ stipulated certain rule-making powers to the Minister of Trade and Industry and imposed a prohibition on misleading advertisements, statements and price indications. There were no provisions which referred to the negative impact of market practices.⁸⁵ Second, in 1988 the Harmful Business Practice Act,⁸⁶ renamed the Consumer Affairs (Unfair Business Practice) Act, replaced previous legislation and, in turn, is the predecessor of the CPA and marks the second generation of market-practice legislation.⁸⁷

⁸³ Van Eeden *Consumer Protection Law in South Africa* (2013) 108.

⁸⁴ 76 of 1976.

⁸⁵ Van Eeden *Consumer Protection Law in South Africa* (2013) 109.

⁸⁶ 71 of 1988.

⁸⁷ Van Eeden, *supra* note 85, at 109.

In terms of the Harmful Business Practice Act⁸⁸, renamed the Consumer Affairs (Unfair Business Practice) Act, a 'harmful business practice' was defined as business conduct that might harm the relations between business and consumers or unreasonably prejudice or deceive any consumer.⁸⁹ This definition was considered in *Janse van Rensburg NO en 'n Ander v Minister van Handel en Nywerheid NO en 'n Ander*.⁹⁰ The presiding judge determined that the definition was not vague and that the concept was used regularly in courts. He described it as a workable and useful concept.⁹¹ Van Eeden argues that the definition of unfair business practice as interpreted by the court was the beginning of a more detailed and comprehensive definition and concept as contained in the CPA.⁹²

Van Eeden states that the fair business practices that the CPA tries to encourage and the market practices that the CPA prohibits refer to conduct or activity that occurs within the scope/context of the promotion and supply of goods and services in the consumer market.⁹³ Van Eeden goes on to state that the characterisation of conduct as fair, as opposed to unconscionable, unreasonable, unjust, unethical or improper forms, is part of the market practice jurisdiction under the CPA and provides the basis on which various powers are allowed.⁹⁴ There are two components, namely 'unfair or unconscionable' conduct and 'deceptive or misleading' conduct.⁹⁵

Jacobs, Stoop and Van Niekerk are of the view that the provisions in sections 41 of the CPA regarding false, misleading and deceptive representation may affect or even prohibit certain conduct. Taking into consideration section 41(1)(b), the argument the authors present is correct in that an alteration of the common law position regarding a material fact is now prohibited.⁹⁶ In addition, where there is a court proceeding in terms of section 41, section 51

⁸⁸ 71 of 1988.

⁸⁹ Van Eeden, *supra* note 85, at 109.

⁹⁰ 1999 (2) BCLR 204.

⁹¹ Van Eeden, *supra* note 85, at 109.

⁹² Van Eeden, *supra* note 85, at 109.

⁹³ Van Eeden, *supra* note 85, at 110.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Barnard & Scott, 'An overview of Promotional Activities in terms of the Consumer Protection Act in South Africa', 14.

applies. This position is confirmed in section 41(5) of the CPA and affirms the seriousness of false, misleading and deceptive representation, and how it is dealt with in the CPA.⁹⁷

2 UNFAIR AND UNCONSCIONABLE CONDUCT

Van Eeden quotes the House Conference Report on Federal Trade Commission Act as follows:⁹⁸

It is important to frame definitions which embrace all unfair practices. There is no limits to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would at once be necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

I argue that this should be the view of legislators in order to create proper definitions to protect consumers and to regulate conduct towards consumers. Protection will then be much easier and will be regulated properly in the future (my italics).

Section 4(5)(a) of the CPA states that a person in any dealings with a consumer in the ordinary course of business must not engage in any conduct contrary to the purpose and policy of the CPA. Section 4(5)(b) of the CPA states that a person in dealing with a consumer in the ordinary course of business must not engage in any conduct that is unconscionable. This section is to be read with section 40 of the CPA.

In terms of paragraph (a) of the definition of 'unconscionable' in section 1 of the CPA (as discussed in chapter two), used with regard to any type of conduct means that the term has a character contemplated in section 40 of the CPA.

Section 40 [Unconscionable conduct] of the CPA reads as follows:⁹⁹

A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any –

- (a) marketing of any goods and services;*
- (b) supply of goods to a consumer;*
- (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;*
- (d) demand for, or collection of, payment for goods or services by a consumer; or*
- (e) recovery of goods from a consumer.*

(1) In addition to any conduct contemplated in subsection (1) it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

⁹⁷ Barnard & Scott, 'An overview of Promotional Activities in terms of the Consumer Protection Act in South Africa', 14.

⁹⁸ Van Eeden *Consumer Protection Law in South Africa* (2013) 113.

⁹⁹ 68 of 2008.

(2) Section 51 applies to any court proceedings concerning this section

3 UNCONSCIONABILITY

Unconscionable conduct¹⁰⁰ is prohibited in terms of section 40 of the CPA. A supplier may not use physical force against a consumer, coercion, undue influence, pressure, duress, harassment, unfair tactics or any other similar conduct¹⁰¹. Section 40 of the CPA focuses on multiple wrong ways a supplier can influence a consumer. Du Plessis states correctly that another explanation is to confirm that the section is concerned with procedural unfairness by means of which consent was obtained, rather than substantive unfairness.¹⁰² Du Plessis further notes that the term “unconscionable conduct” is not well known in South African law, and was inspired by the common law and consumer legislation.¹⁰³ It is a vague description of various forms of conduct, however no other or new term has been created or used since.

Glover mentions that ‘unconscionability’ is a word that has been used in a moral or adjectival manner in case law to disapprove of conduct in a variety of legal forms. However there has been no specific recognition of a private law doctrine of unconscionability.¹⁰⁴ It seems as if the term was preferable to the terminology of good faith which has a long history in our common law.¹⁰⁵

¹⁰⁰ “Unconscionable conduct. –

- (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any –
 - (a) marketing of any goods or services;
 - (b) supply of goods or services to a consumer;
 - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods and services to a consumer;
 - (d) demand for, or collection of, payment for goods or services by a consumer; or
 - (e) recovery of goods or services.
- (2) In addition to any conduct contemplated in subs (1). It is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disabilities, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factors.
- (3) Section 51 [*sic*] applies to any court proceedings concerning this section.”

¹⁰¹ Du Plessis ‘Section 40’ in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) 40-1.

¹⁰² Du Plessis J “Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008” 2012 THRHR 26-42 26.

¹⁰³ *Ibid* 27.

¹⁰⁴ Glover G “Section 40 of the Consumer Protection Act in comparative perspective” 2013 TSAR 689-697 690.

¹⁰⁵ *Ibid*.

What is unconscionability? According to *The Concise Oxford English Dictionary*¹⁰⁶ ‘unconscionable’ is described as having no conscience, contrary to conscience, unreasonably excessive and not right or reasonable.

According to section 1 of the CPA ‘unconscionable’ means *conduct having a character contemplated in section 40 or otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.*¹⁰⁷

Three types of conduct are termed ‘unconscionable’: they are physical force, coercion and duress. The test for duress in the South African law of contract is *vis absolute (physical force) or vis compulsive (use of threats to coerce the will)*. ‘Coercion’ is a term largely used as a synonym for ‘duress’.¹⁰⁸ Another form of unconscionable conduct is the use of “pressure”. From the perspective of the definition these actions would have to be “unethical or improper to a degree that would shock the conscience of a reasonable person” in terms of section 1 of the CPA if their prohibition is to be enforced.¹⁰⁹ I agree with Glover: ‘unconscionability’ seems to be a type of umbrella term, a broad descriptive principle that embraces the many forms of procedural unfairness that are specified under section 40 of the CPA.¹¹⁰

Section 4(5)(b) of the CPA generally prohibits a person from engaging in any conduct that is unconscionable in any dealings with a consumer in the ordinary course of business. The fact that unconscionable conduct includes conduct otherwise unethical or improper to a degree that would shock the conscience of a reasonable person means section 4(5) of the CPA covers conduct that is unconscionable and is not covered by section 40.¹¹¹ The fact that section 40 makes provision for ‘any other similar conduct’ means that a broader scope of application is taken into consideration.

What are the requirements for unconscionable conduct in terms of section 40? Section 40 can be divided into two parts: Part one contains section 40(1), which lists various forms of unconscionable conduct, Part two contains section 40(2) which applies only to suppliers. The

¹⁰⁶ *Concise Oxford English Dictionary, Luxury Edition (12th edn, Oxford, 2011), 1570.*

¹⁰⁷ Section 1, CPA.

¹⁰⁸ Glover G “Section 40 of the Consumer Protection Act in comparative perspective” 2013 TSAR 689-697 694.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid* 695.

¹¹¹ Du Plessis J “Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008” 2012 THRHR 26-42 28.

distinction is made because section 40(2) deals with consumers who suffer from a pre-existing weakness that might not be clear to the supplier, whereas section 40(1) deals with consumers who do not.¹¹²

4 SECTION 40(1)¹¹³

This section in the CPA lists forms of conduct by suppliers which are viewed as unacceptable behaviour. To interpret this list of unacceptable behaviour is not easy. It is a general rule of interpretation that the legislator does not use unnecessary words, automatically that implies that each word used should have an independent meaning. When it comes to the list in section 40(1) of the CPA it seems as if the legislator used a variety of words or terms without concern that their meaning might overlap. It is suggested, instead of a list of words with more or less the same meaning, the use of a general expression would have been better.¹¹⁴ It seems as if the drafters of the CPA took terms used in foreign legislation without realising the overlap in meaning might be a concern in their use in South African law.¹¹⁵ The list of unacceptable behaviours will briefly be dealt with individually in order to provide clarity.

Physical force against a consumer:

Vis absoluta is the term that covers the use of absolute physical force. This is conduct by a supplier which results in the consumer not being allowed or not being able to exercise choice. The consumer does not exercise free will. This conduct can be interpreted to include threats

¹¹² Du Plessis J “Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008” 2012 THRHR 26-42 28.

¹¹³ “Unconscionable conduct. –

- (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any –
- (a) marketing of any goods or services;
 - (b) supply of goods or services to a consumer;
 - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods and services to a consumer;
 - (d) demand for, or collection of, payment for goods or services by a consumer; or
 - (e) recovery of goods or services.”

¹¹⁴ Du Plessis J, *supra* note 112, at 29.

¹¹⁵ Du Plessis J, *supra* note 112, at 29.

of physical force, which is termed *vis compulsiva*. These threats are also termed 'coercion' or 'duress'.¹¹⁶

Coercion:

It is defined in the dictionary as a form of "constraint, restraint, compulsion, the application of force to control the action of a voluntary agent," and to coerce is defined as "to force or compel someone to do something using threats."¹¹⁷ It can be assumed that coercion is a generic term for any form of illicit pressure exerted on a contracting party which entails legal sanctions.¹¹⁸ It appears that there is a huge overlap between 'coercion' and 'duress' in respect of South African law.

Undue influence:

In South African law "undue influence" is a situation where *one person obtains influence over another, which weakens the latter's powers of resistance and makes his or her will compliant or flexible. This influence is then used in an unconscionable way to agree to a detrimental transaction which otherwise and voluntarily would not have been concluded.*

In the *Preller v Jordaan*¹¹⁹ case the following was discussed: Even though the term of "undue influence" is a concept that originated from the English law, it has different meanings in many other common law jurisdictions. Thus, the English law meaning is much broader than the modern South African law meaning. It is suggested that care should be taken when interpreting the definition of "undue influence", as one should take into consideration the common law jurisdiction. The common law of South Africa should be the starting point.

Usually the definition of "undue influence" is used where there is a strong emotional link between the parties. It is difficult for a consumer to prove undue influence as there is no presumption that may be used to ease the consumer's burden of proof in South African law.¹²⁰

¹¹⁶ Du Plessis J, *supra* note 112, at 29.

¹¹⁷ *Concise Oxford English Dictionary, Luxury Edition* (12th edn, Oxford, 2011), 278.

¹¹⁸ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 29 & 30.

¹¹⁹ 1956 1 SA 483 (A) 492 G-H.

¹²⁰ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 30.

Pressure:

It is difficult to determine in what situation pressuring consumers can be seen as an unconscionable conduct without it being covered by the other forms of conduct listed in section 40(1). Thus, if the pressure arises from unlawful threats, the situation is one of coercion and duress. If it is a form of exploitation of influence, it might be seen as undue influence. Some forms of pressure might even be seen as harassment or unfair tactics.¹²¹

Duress:

This type of conduct is an established ground to rescind a contract. Even though the term is adopted from the English law, the meaning is in accordance with the traditional civil-law authorities. The requirement is that unlawful threats should be used to induce a person to conclude a contract, therefore the meaning of 'duress' overlaps with the meaning of 'coercion'.¹²² The fear felt by a consumer who is subjected to duress is reasonable, however even though this is an objective standard it does not protect a consumer who is sensitive to or prone to be influenced by way of pressure.¹²³ Even if the common law requires harm, it is unclear whether this is required in terms of section 40 of the CPA, however it is clear that the use of duress is unacceptable.¹²⁴

Harassment & Unfair tactics:

If someone is harassed it means he is troubled, worried or distressed in various ways; usually this is in the form of different types of marketing.¹²⁵ It is not clear from the CPA what is seen as unfair tactics.

It could not have been the intention of the legislator that section 40(1) should apply to broad attempts to influence consumers. Section 40(1) does not contain any indication as to what the state of mind of the supplier has to be for an action to be unconscionable.¹²⁶ Section 40 does

¹²¹ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 31.

¹²² *Ibid.*

¹²³ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 32.

¹²⁴ *Ibid.*

¹²⁵ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 33.

¹²⁶ Du Plessis J, *supra* note 112, at 33.

not state to what extent it is expected of a consumer to display constancy or resilience when subjected to unconscionable conduct by a supplier. This section also does not specifically state that the supplier's conduct has to impair the consumer's freedom of choice or freedom of conduct.¹²⁷

Section 40(1)(a) - (e) lists activities where a supplier is not allowed to use certain types of conduct, thus the conduct is prohibited. Section 40 clearly widens the ambit or field of application of unconscionable conduct that could influence the validity of an agreement. In determining the impact of the unconscionable conduct it does not matter if transfer was due or not.¹²⁸

Section 40(1) of the CPA therefore defines conduct that is unconscionable with regard to specific settings and context.¹²⁹ There are four sets of activities: the marketing and supply of goods and services; negotiation, conclusion, execution or enforcement of an agreement to supply goods and services; any demand for or collection of payment for goods or services by a consumer and, lastly, to recover goods from a consumer. It is clear from section 40(1) of the CPA that it focuses on aggressive conduct in the broadest sense, however in terms of the common law the way of redress is a delict, and physical force and coercion are seen as a sign of duress.¹³⁰

The requirements in section 40(2) of the CPA apply, in addition, to the conduct mentioned in section 40(1).¹³¹ This section highlights the conduct of a supplier who knowingly takes advantage of a consumer who is not in a position to protect his interests because of the listed factors in section 40(2) of the CPA. These consumers are seen as vulnerable consumers.¹³² Therefore 'unconscionable conduct' in the context of a 'vulnerable consumer' is subject to several factors of disability, the fact that the consumer is unable to protect his interests because of the disability and that the supplier knowingly takes advantage of the consumer. Section 40(2) gives fair notice to the supplier that he cannot take his victim as he finds him but

¹²⁷ Du Plessis J, *supra* note 112, at 34.

¹²⁸ *Ibid.*

¹²⁹ Van Eeden *Consumer Protection Law in South Africa* (2013) 115.

¹³⁰ Van Eeden *Consumer Protection Law in South Africa* (2013) 116.

¹³¹ *Ibid.*

¹³² Groups that are vulnerable are children, the elderly and the ailing.

should consider a possibility of disability, whether or not these factors impair the consumer's ability to protect his own interest.¹³³

In terms of paragraph (b) of the definition of 'unconscionable' in section 1 of the CPA, the term, when used with regard to any conduct, means that it is unethical or improper to a degree that would shock the reasonable person.¹³⁴

5 SECTION 40(2)¹³⁵

Section 40(2) of the CPA deals with two aspects of unconscionable behaviour: first, the existence of certain weaknesses that renders consumers unable to protect their own interests and, second, the fact that a supplier knowingly takes advantage as a result of these weaknesses.¹³⁶ The high levels of illiteracy in South Africa pose a risk to suppliers that they could be accused of unconscionable conduct. Section 40(2) deals with suppliers who knowingly take advantage of the consumer's weaknesses but does not cover circumstances where the supplier reasonably should have known of the consumer's weaknesses.

Misleading or deceptive conduct:

The provisions dealing with misleading or deceptive conduct are section 4(5)(b) and 4(5)(c) of the CPA, section 29(a) and (b) of the CPA and section 41 of the CPA.

In terms of section 4(5)(b) of the CPA a person in any dealings with a consumer in the ordinary course of business must not engage in any conduct that is misleading or deceptive or that is reasonably likely to mislead or deceive. If any conduct conflicts with this section it is considered to be prohibited.¹³⁷

In terms of section 4(5)(c) of the CPA a person in any dealings with a consumer in the ordinary course of business must not make any representation about a supplier of any goods or services

¹³³ Van Eeden *Consumer Protection Law in South Africa* (2013) 117.

¹³⁴ *Ibid.*

¹³⁵ "Unconscionable conduct. –

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interest because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor."

¹³⁶ Du Plessis J, *supra* note 112, at 35.

¹³⁷ Van Eeden, *supra* note 133, at 120.

or a related matter, unless the person has reasonable grounds for believing that the representation is true.¹³⁸

Section 41(1) [False, misleading or deceptive representations] of the CPA reads as follows:

- (1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct –
 - (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
 - (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
 - (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation,

or permit or require any other person to do so on behalf of the supplier.

In *Barkhuizen v Napier* 2007 5 SA 323 (CC), the Constitutional Court upheld the rule of law in deciding that “[a]s the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law” (347G-H). This ruling gives expression to the ideals of individual freedom and human dignity.¹³⁹ Although the definition of good faith as an underlying value leaves the door open for possible future developments, it is clear that the courts continue to show restraint in respect of the tension between the rule of law, the guarantor of legal certainty, and the constitutional imperatives exhorting societal transformation. Promulgation of the CPA has been a decisive move in this process since mandatory consumer protection legislation represents a shift from a rule based on formal reasoning to a rule based on a more discretionary form of reasoning, characteristic of a fairness-based approach to contract law. The CPA introduces fairness into the dynamic of contract: first, the pre-contractual stage which deals with negotiations, second, the procedural stage which involves fairness leading up to the conclusion of the contract and, lastly, it provides guidance for substantive fairness which involves fairness relating to the distribution of substantive rights and obligations in an agreement.¹⁴⁰

The CPA gives a broad definition of unconscionable conduct. The use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct is outlawed from the contract dynamic. An innovation is found in section 40(2) in which exploitation of a consumer’s inability to protect its own interests as the result of factors

¹³⁸ *Ibid.*

¹³⁹ Public governance: Unpacking the Consumer Protection Act 68 of 2008. L Hawthorne. THRHR. 345 – 370, page 347.

¹⁴⁰ *Ibid* 353.

such as illiteracy, ignorance, the inability to understand the language of the agreement or mental or physical disability is declared unconscionable. Section 41(1)(a), (b) and (c) mirror the common law and do not constitute a superfluous repetition, but emphasise the fact that they form part of both the common law and the consumer protection regime.¹⁴¹

Section 40(2) provides that it is unconscionable for a supplier knowingly to take advantage of a consumer's inability to protect her own interest. The factors listed in section 3(1)(b) and section 52(2)(b) are of a personal nature and have been brought into the equation in order to eliminate the exploitation of consumers by taking advantage of their vulnerabilities. In doing so the Act secures fair and just conduct, terms and conditions.¹⁴²

The CPA also provides for the voiding of an agreement on the basis of unconscionable conduct. Section 40(2) provides that an agreement is unconscionable if it takes advantage of a consumer's inability to protect her own interests as the result of factors such as illiteracy, ignorance, the inability to understand the language of the agreement or mental or physical disability. This provision demonstrates that the CPA requires substantive equality between the parties. The CPA has the purpose of protecting citizens and provides that if any of the factors are present in the negotiation of a contract they may cause the negotiations to be tainted, then any contract concluded subsequent to negotiations, which is qualified by any of the factors, runs the risk of being void in part or in full.¹⁴³

Due to the vague wording of section 40(2), as well as the value-laden potential of interpretation, the CPA introduces a number of prohibited agreements. These are referred to as the blacklist of terms which are prohibited. The CPA provides additional protection against possible exploitation of consumers by the provision for a second list known as the grey list. [Section 44 of Reg 293 GG 34180 of 1 April 2011] This list is non-exhaustive and includes contract terms which *prima facie* are presumed to be unfair and unreasonable.¹⁴⁴

¹⁴¹ Public governance: Unpacking the Consumer Protection Act 68 of 2008. L Hawthorne. THRHR. 345 – 370, page 358-359.

¹⁴² *Ibid* page 360.

¹⁴³ Concretising the open norm of public policy: Inequality of bargaining power and exploitation. L Hawthorne. THRHR 407 – 426, page 417.

¹⁴⁴ *Ibid* page 420-421.

Section 52(2)(b) exhorts a court to consider the nature of the parties in a transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position in any proceedings concerning a transaction where the consumer alleges that the supplier contravened sections 40, 41 and 48.¹⁴⁵

In terms of section 29(a)¹⁴⁶ and (b)¹⁴⁷ goods and services may not be marketed in such a manner that reasonably is likely to imply false, misleading, fraudulent or deceptive representation of such goods and services.¹⁴⁸ In terms of the CPA deceptive marketing is considered an unfair commercial practice. This is the EU position as well; a separate Directive on Misleading Advertising, called the Misleading and Comparative Advertising Directive, must be read together with the UCPD. Reference is made to these similarities in the discussion of False, Misleading or Deceptive Representations (Advertising) but they will not be discussed in detail as has been explained in the introductory chapter.

Section 29 of the CPA applies to all types of marketing.¹⁴⁹ The core of this section is that it prohibits marketing that is or will be misleading, fraudulent or deceptive, or might be conducted in such a manner that would likely imply a false or misleading representation regarding goods and services as contemplated or listed in section 41 of the CPA. Furthermore, section 29 should be read in conjunction with sections 3(1)(a), 4(5)(b), 22, 40, 41, 48(2)(c),

¹⁴⁵ Concretising the open norm of public policy: Inequality of bargaining power and exploitation. L Hawthorne. THRHR 407 – 426, footnote 70.

¹⁴⁶ Section 29(a) reads as follow:

“A producer, importer, distributor, retailer or service provider must not market any goods or services-

- (a) in a manner that is reasonable likely to imply a false or misleading representation concerning those goods and services, as contemplated in section 41;

¹⁴⁷ Section 29(b) reads as follow:

“A producer, importer, distributor, retailer or service provider must not market any goods or services-

- (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of-
 - (i) the nature, properties, advantages or uses of the goods or services;
 - (ii) the manner in or conditions on which those goods or services may be supplied;
 - (iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor’s price for comparable or similar goods or services;
 - (iv) the sponsoring of any event; or
 - (v) any other material aspect of the goods or services.”

¹⁴⁸ Van Eeden *Consumer Protection Law in South Africa* (2013) 123.

¹⁴⁹ Van Zyl ‘Section 29’ in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) 29-1.

51(1)(a)(i) and 51(1)(g).¹⁵⁰ Section 29 refers to section 41 in order to give an understanding as to what is likely to imply false and misleading conduct and to raise concern.¹⁵¹ It seems as if the wording in section 41 is broader in meaning than in section 29 however the list set out in section 41(3) is not exhaustive.¹⁵² It seems the average distressed consumer would rather rely on his rights in terms of section 41 than section 29, and therefore section 51 specifically section 51(1)(a)(ii),¹⁵³ will apply to any further court proceedings concerning section 41.¹⁵⁴ Any further discussion of the issue is beyond the scope of the topic investigated.

In conclusion a broad explanation has been given as to how the CPA regulates unfair commercial practices as stipulated in sections 40 and 41 of the Act. It is clear that section 41(1) provides that the supplier may not by way of conduct mislead or deceive the consumer.¹⁵⁵ In terms of section 41 false, misleading or deceptive representations are considered to be a form of unconscionable conduct and are linked to another fundamental consumer right - the right to fair and responsible marketing practices. Section 29, in which there is a cross-reference to section 41, is mentioned but not discussed in detail as the focus is on section 40. Marketing practices justify a dissertation on their own.

In the next chapter unfair commercial practices in terms of the UCPD will be discussed.

¹⁵⁰ Van Zyl 'Section 29' in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) 29-2.

¹⁵¹ *Ibid* 29-7.

¹⁵² Van Zyl, *supra* note 150, at 29-10.

¹⁵³ Section 51(1)(a)(ii) reads as follow:

“(1) A supplier must not make a transaction or agreement subject to any term or condition if-

(a) Its general purpose or effect is to-

(ii) mislead or deceive the consumer;”

¹⁵⁴ Van Zyl, *supra* note 150, at 29-11.

¹⁵⁵ Van Eeden *Consumer Protection Law in South Africa* (2013) 120.

CHAPTER 4

UNFAIR COMMERCIAL PRACTICES IN TERMS OF THE UCPD

1 INTRODUCTION

In this chapter the author explains the nature of unfair commercial practices in terms of the UCPD. The explanation includes a broad overview of the relevant articles read together with the relevant recitals as well as definitions, concepts and case law in order to provide a clear understanding of unfair commercial practices in terms of the Directive.

2 THE UCPD

Consumer law norms are seen as exceptions to the common law because they are part of a special form of law designed to protect consumers.¹⁵⁶ An internal market depends on consumer confidence. It is obvious that the internal market of the EU has a large pool of consumers. In order to meet its goals the European Union needs a fully-functional internal market; an asset that has not been fully explored by the relevant markets and suppliers. If exploited correctly, consumers would have access to greater choice and better prices.¹⁵⁷ By means of a series of specific directives¹⁵⁸ greater harmonisation can be achieved.

The objective in the Unfair Commercial Practice Directive¹⁵⁹ is to reach for the unreachable. The methods used are innovative and the legal impact possibly will be on a very large scale. Stuyck, Terryn and Van Dyk state that the legal and intellectual challenges are hidden behind the Directive's apparent "straightforwardness".¹⁶⁰ The European Parliament and the Council of the European Union, with reference to the treaty establishing the European Community, by the measures they adopt need to contribute to a greater level of consumer protection..¹⁶¹ It is vital to develop fair commercial practices for the promotion of the development of cross-

¹⁵⁶ Iain Ramsay, *Consumer Law & Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart 2012) 136.

¹⁵⁷ *Ibid* 157.

¹⁵⁸ Hereafter referred to as the UCPD.

¹⁵⁹ 2005/29/EC.

¹⁶⁰ Stuyck, Terryn and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 107.

¹⁶¹ UCPD, 2005/29/EC, L149/22.

border activity.¹⁶² It appears that the Unfair Commercial Practice Directive¹⁶³ is much more progressive and advanced than any of the other directives regarding the forms/types of unfair commercial practices,¹⁶⁴ but, if the UCPD is incorrectly applied, it could lead to insufficient protection and a lack of harmonisation.¹⁶⁵

The UCPD applies to business-to-consumer commercial practices and it mainly intends to foresee and secure total harmonisation.¹⁶⁶ Member states had to implement the Unfair Commercial Practice Directive¹⁶⁷ by 12 June 2007. The laws in Member States which relate to unfair commercial practices show exclusive differences and can generate appreciable distortions of competition and create an obstacle to the smooth functioning of the internal market.¹⁶⁸ In a historical context the laws of the Member States reveal that at least three fundamental divergences underpin technical differences in regulation.¹⁶⁹ The author will only mention these approaches and will not discuss them in detail. The first fundamental distinction is a Private Law approach versus Public Law, the second fundamental distinction is the structural approach¹⁷⁰ and the third fundamental distinction is the degree to which Member States have resorted to the use of a general fair-trading clause.¹⁷¹

The 2001 *Green Paper on Consumer Protection* stimulated the old idea of a general approach towards unfair trade practices. The framework of a directive pertaining to a general duty in relation to unfair commercial practices was identified as a possible basis for reform. According to the Commission a directive harmonising the Member States' rules on unfair commercial practices was the best policy option. After further consultation the Commission adopted the proposal which eventually led to the adoption of the Unfair Commercial Practice Directive in May 2005.¹⁷²

¹⁶² UCPD, 2005/29/EC, L149/22.

¹⁶³ 2005/29/EC.

¹⁶⁴ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 107.

¹⁶⁵ Ramsay, *supra* note 156, at 159.

¹⁶⁶ Stuyck, *supra* note 164, at 107.

¹⁶⁷ 2005/29/EC.

¹⁶⁸ UCPD, 2005/29/EC, L149/22.

¹⁶⁹ Stuyck, *supra* note 164, at 111.

¹⁷⁰ *Ibid.*

¹⁷¹ Stuyck, *supra* note 164, at 112.

¹⁷² *Ibid* Foot note 30.

The disparities in approach that have been identified created uncertainty as to which national rules on unfair commercial practices harming the consumers' economic interests should apply, as well as creating many barriers affecting both business and consumers. Such barriers cause consumers to be uncertain of their rights and undermine their confidence in the internal market.¹⁷³ If there are no uniform rules at the Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment can be justified in the light of the case law of the Court of Justice of the European Communities as long as they seek to protect recognised public-interest objectives and its rulings are proportionate to those objectives. For this reason uniform rules at community level would establish a greater level of consumer protection as well as legal certainty.¹⁷⁴ The Unfair Commercial Practice Directive¹⁷⁵ is supposed to uplift consumer confidence in general, which is in support of a European Consumer Law ideal of harmonisation since the 1992 Sutherland Report.¹⁷⁶

The *Tobacco advertising-case*¹⁷⁷ made clear that Community institutions have to identify a solid basis for measures in the area of consumer protection. This view is also expressed in the Commission's 2001 Green Paper on European Consumer Protection:¹⁷⁸

For the internal market to yield its benefits to consumers, they must be able to have easy access to goods and services promoted, offered and sold across the borders. It is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they optimize their consumption decisions. This cross-border demand increases competitive pressure within the internal market and allows for a more efficient and competitively priced supply of goods and services. This virtuous circle can only be achieved if the regulatory framework in place encourages consumer and businesses to engage in cross-border trade. Different national laws on commercial practices relating to business-consumer relations can hinder this evolution."

Therefore the Unfair Commercial Practice Directive, 2005/29/EC, codifies the law of all member states on unfair commercial practices. The Directive protects consumers from the consequences of an unfair commercial practice where it is material, but recognises that the impact might be negligible.¹⁷⁹ Member states should be able to ban commercial practices in their territory in conformity with the Community Law. Full account should be taken of the

¹⁷³ UCPD, 2005/29/EC, L149/22.

¹⁷⁴ UCPD, 2005/29/EC, L149/22.

¹⁷⁵ 2005/29/EC.

¹⁷⁶ Stuyck, *supra* note 164, at 108.

¹⁷⁷ *Germany v Parliament and Council* [2002] ECR I-8419. (the "Tobacco advertising case")

¹⁷⁸ Stuyck, *supra* note 164, at 114.

¹⁷⁹ UCPD, 2005/29/EC, L149/23.

context of the individual case concerned in applying this Directive, in particular the general clause.¹⁸⁰ The Directive guarantees fair competition in fields it co-ordinates. Member States will be able to retain or introduce restrictions on and to prohibit commercial practices on grounds of the protection of the health and safety of the consumers in their territory wherever the trade is based.¹⁸¹ It is important to ensure that the relationship between this Directive and the existing Community law is coherent.¹⁸² Furthermore the Unfair Commercial Practice Directive¹⁸³ portrays a more market-orientated approach, which underlines transparency as the main method of consumer protection and the provisions essentially are based on the belief that only informed choice leads to efficient choices ensuring the maximisation of consumers' collective interests.¹⁸⁴

The purpose of the UCPD is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by harmonising the laws of the Member States on unfair commercial practices which harm consumers' economic interests.¹⁸⁵

The Unfair Commercial Practice Directive¹⁸⁶ is a harmonisation directive, which means that a Member State is not allowed to deviate from the Directive, except where the Directive¹⁸⁷ provides for an exception.¹⁸⁸ Due to this need for harmonisation consumers are entitled to no less but also to no more than the Unfair Commercial Practice Directive provides. The harmonisation aspect of the Directive has its advantages however it is a controversial aspect in the Directive that is justified by the need to create a level playing field throughout the European Union in order to promote a competitive internal market with high levels of consumer protection.¹⁸⁹ Thus, cross-border market practices will become easier. Harmonisation has disadvantages as well; critics argue that the benefits of total harmonisation

¹⁸⁰ UCPD, 2005/29/EC, L149/23.

¹⁸¹ UCPD, 2005/29/EC, L149/23.

¹⁸² UCPD, 2005/29/EC, L149/23.

¹⁸³ 2005/29/EC.

¹⁸⁴ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 108.

¹⁸⁵ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 107. Foot note 3

¹⁸⁶ 2005/29/EC.

¹⁸⁷ 2005/29/EC.

¹⁸⁸ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 115.

¹⁸⁹ Ramsay, *supra* note 156, at 160.

should be weighed against the fact that total harmonisation leaves no room for Member States to take into account the particularities of their national consumers which relate to enduring differences in the physical, geographical, legal, political, and cultural environment and which may translate into different consumer behaviour, expectations and consumer needs.¹⁹⁰ The positive aspect of total harmonisation is that it rules out legislative experimentation by any Member State. Legislative experimentation however is not ruled out at Community level, but the complicated decision-making procedures make these experiments highly unlikely.¹⁹¹ Due to harmonisation there is a higher degree of legal certainty, because only one set of rules applies to all Member States.¹⁹² Therefore the Directive seeks to bring about full harmonisation of law in all Member States concerning unfair commercial practices.

In the view of some countries total harmonisation implies a *de facto* presumption that traders who comply with their local law will not be in breach of the law in other Member States. On the other hand there are Member States who read the Directive differently.¹⁹³ They feel it has to be interpreted as allowing Member States to invoke the mandatory requirements in order to defend higher standards of consumer protection as legitimate barriers to trade.¹⁹⁴ Stuyck, Terry and Van Dyk are of the view that Article 4 of the Unfair Commercial Practices Directive¹⁹⁵ cannot be read as a safeguard clause for the reason that it¹⁹⁶ provides for total harmonisation and the possibility of imposing stricter standards of consumer protection based on mandatory requirements calls for an explicit exception to total harmonisation.¹⁹⁷ If a trader employs the same commercial practice in different jurisdictions these may be different acts which give rise to different cases before courts in different Member States to be judged according to different national laws governing the implementation of the Unfair Commercial

¹⁹⁰ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 116.

¹⁹¹ *Ibid* 117.

¹⁹² Stuyck, *supra* note 190, at 118.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid*.

¹⁹⁵ 2005/29/EC.

¹⁹⁶ 2005/29/EC.

¹⁹⁷ Stuyck, *supra* note 190, at 118.

Practice Directive¹⁹⁸. Article 4 of the Unfair Commercial Practice Directive¹⁹⁹ does not constitute a conflict of law rule.²⁰⁰

All definitions relevant to the Directive pertain in Article 2. Article 3 sets out the scope of the Directive. It is clear from Article 3(1) that this Directive applies to all unfair business-to-consumer commercial practices as are set out in Article 5, before, during and after a commercial transaction in relation to a product.²⁰¹ If there is a conflict between the provisions of the Directive and Community rules regarding unfair commercial practices, the Community rules prevail in those specific aspects.²⁰²

Relevant definitions of the UCPD:

- (1) 'Consumer' means any natural person who, in commercial practice covered by the Directive, is acting for purposes which are outside his trade, business, craft or profession.²⁰³
- (2) 'Trader' means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession, and anyone acting in the name of or on behalf of a trader.²⁰⁴
- (3) 'To materially distort the economic behaviour of the consumer' means using a commercial practice appreciably to impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.²⁰⁵
- (4) 'Professional diligence' means the standard of special skill and care which a trader responsibly may 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.²⁰⁶

¹⁹⁸ 2005/29/EC.

¹⁹⁹ 2005/29/EC.

²⁰⁰ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 119. Foot note 63.

²⁰¹ Article 3(1), UCPD, 2005/29/EC.

²⁰² Article 3(4), UCPD, 2005/29/EC.

²⁰³ Article 2(a), UCPD, 2005/29/EC.

²⁰⁴ Article 2(b), UCPD, 2005/29/EC.

²⁰⁵ Article 2(e), UCPD, 2005/29/EC.

²⁰⁶ Article 2(h), UCPD, 2005/29/EC.

(5) 'Undue influence' means exploiting a position of power in the relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.²⁰⁷

(6) 'Transactional decision' means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.²⁰⁸

The 'average consumer' and the 'vulnerable consumer' are described by Du Plessis and Zimmermann in such a manner that in both South Africa and Scotland a broader comparison is used in the sense that they accept a set of principles in European private law regarding undue influence.²⁰⁹ The UCPD protects the average consumer rather than the vulnerable consumer however the Directive also sets out as an objective the prevention of the exploitation of consumers whose characteristics make them more vulnerable than others. The way it achieves this goal is to target the average consumer of a certain commercial practice or an average member of a vulnerable group.²¹⁰

What is the benchmark for an average consumer?

The benchmark was recognised before the Directive in the case law of the European Court of Justice (CJEU) and later was codified in the UCPD. Thus the average consumer is interpreted to be a reasonably informed consumer.²¹¹

What is the benchmark for a target group?

This benchmark applies if a commercial practice is directed at a specific group of consumers: here the average consumer of that specific group sets the standard. In the case of a vulnerable

²⁰⁷ Article 2(j), UCPD, 2005/29/EC.

²⁰⁸ Article 2(k), UCPD, 2005/29/EC.

²⁰⁹ J. Du Plessis & R Zimmermann "The Relevance of Reverence; Undue Influence Civilian Style" 10 Maastricht J Eur. & Comp. L 345 (2003) 346.

²¹⁰ B Duivenvoorde "The Protection of Vulnerable Consumer Under the Unfair Commercial Practices Directive" Journal Of European Consumer and Market Law (2013) 2:69-79 69.

²¹¹ *ibid* 70.

group the UCPD sometimes waives the protection of an average consumer.²¹² However the intent is that the vulnerable-group benchmark provides extra protection. The requirement of a vulnerable group is that the group should be clearly identifiable - an unclear term.²¹³ The UCPD also states that when the vulnerable group might be harmed or is harmed by a certain commercial practice should be reasonably foreseeable to the trader and not to the consumer.²¹⁴ Thus, within the targeted group the vulnerable group should be easily identifiable and their vulnerability easily foreseeable.

As a general principle the UCPD protects the “average consumer” rather than “vulnerable consumers”. In its Preamble the UCPD sets out as an objective to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices by assessing a specific commercial practice from the perspective of the average member of a target group or from the perspective of the average member of a vulnerable group. This practice is seen as the consumer benchmark. It is sometimes difficult to define vulnerability in terms of a group and therefore it needs to be established whether the protection of a vulnerable consumer or group is effective or not. A benchmark in the sense of the UCPD is a fictitious consumer or standard against whom the commercial practice is tested. The aim of the UCPD is to protect the average consumer rather than the vulnerable consumer²¹⁵

The Directive illustrates three categories of benchmarks:

1. Average Consumer Benchmark;
2. Target Group Benchmark;
3. Vulnerable group Benchmark;

Average Consumer Benchmark:

This test was transformed and created before the UCPD came into effect by case law before the European Court of Justice (CJEU) and later was codified in the UCPD. An ‘average consumer’

²¹² B Duivenvoorde “The Protection of Vulnerable Consumer Under the Unfair Commercial Practices Directive” *Journal Of European Consumer and Market Law* (2013) 2:69-79 70.

²¹³ *Ibid* 71.

²¹⁴ B Duivenvoorde, *supra* note 212, at 72.

²¹⁵ B Duivenvoorde, *supra* note 212, at 69-70.

is someone who is reasonably informed, is observant and cautious. With a standard such as this the consequence is that some consumers are protected others not; with regard to the aspect of vulnerability, it was equalised by setting a standard test. It is recommended that courts and enforcement authorities in the Member States should determine the typical reaction of an average consumer, rather than take into account the reaction of a vulnerable group.

Target Group Benchmark:

Commercial practices are not always measured or assessed from the benchmark of an average consumer. Article 5.2 of the UCPD clearly states that specific target groups should also be considered. This “Target Group Benchmark” applies when and if a commercial practice is focused on a certain group of consumers. In this case the reasonable consumer in such a group sets the standard.

Vulnerable Group Benchmark:

This is an interesting benchmark as it focuses on who is affected by a commercial practice rather than concentrating on who is targeted by the commercial practice. The benchmark was included at a later stage as the concern was that the average consumer benchmark as incorporated in the UCPD might lose its protective nature. It is an extra precautionary measure taken to secure greater levels of protection, which are secured by article 5.3 of the UCPD. This benchmark aims to provide additional protection to groups such as the elderly, adolescents, children and the mentally or physically infirm, however its application is not limited to the groups mentioned but to any other vulnerable groups. Therefore the list is non-exclusive. The vulnerability factor is an added value to groups who might not be targeted. The application of this benchmark either gives protection or affords no protection at all. If the vulnerable consumer benchmark became the rule rather than the exception, every commercial practice would have to be perfect or, as Bram Duivenvoorde puts it, “Idiot proof”. The requirement for the benchmark is therefore that the vulnerable group has to be clearly and easily identifiable and this aspect remains unclear. A further requirement is that only that specific group must be affected by a commercial practice and no other consumers. Lastly, there is a requirement that the specific vulnerable group harmed by the commercial practice must be reasonably

foreseeable to the trader. Therefore this benchmark only applies if the trader knew or should have known that the vulnerable group was going to be affected.²¹⁶

The scope of the Unfair Commercial Practices Directive²¹⁷ is limited because it applies only to business-to-consumer commercial practices which are defined as 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.²¹⁸ According to article 2(a) of the Unfair Commercial Practice Directive²¹⁹ a consumer is defined as a natural person who, in commercial practices covered by the Unfair Commercial Practice Directive²²⁰, is acting for a purpose which is outside of their trade, business, craft or profession. A trader, according to article 2(b) of the Unfair Commercial Practice Directive,²²¹ is defined as any natural person or legal person who, in commercial practices covered by the Unfair Commercial Practice Directive²²² is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.²²³ Ramsay correctly states that this is a broad and comprehensive definition that goes beyond the pre-contractual focus of any traditional rules on misrepresentation.²²⁴ Furthermore, the definition is not limited only to misrepresentation but makes provision for acts and omissions. Stuyck, Terry and Van Dyk correctly confirm this view.

The framework of the Unfair Commercial Practice Directive²²⁵ rests on attaining fairness in commercial practices, which are tested in accordance with a 'blacklist', a 'grand' general clause and two other general clauses.²²⁶ The blacklisted practices are prohibited irrespective of the circumstances. The grand general clause sets out a general fairness test: a commercial practice is considered to be unfair if it is contrary to the requirements of professional diligence and it

²¹⁶ B Duivenvoorde, *supra* note 212, at 71-72.

²¹⁷ 2005/29/EC.

²¹⁸ Article 2(d), 2005/29/EC.

²¹⁹ 2005/29/EC.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 119. Foot note 68.

²²⁴ Ramsay, *supra* note 156, at 163.

²²⁵ 2005/29/EC.

²²⁶ Stuyck, *supra* note 190, at 108.

materially distorts or is likely materially to distort the economic behaviour of the average consumer.²²⁷ Misleading practices, misleading omissions and aggressive practices such as harassment, coercion or undue influence are prohibited under a lesser general clause if they cause or are likely to cause the consumer to take a transactional decision he/she would otherwise not have taken. The lesser general clauses assume that the practices listed there are contrary to professional diligence.²²⁸ This tripartite structure results in this being referred to as the *three-level fairness test*.

This Directive sets out a single general prohibition against unfair commercial practices which distort consumers' economic behaviour. Harmonisation increases legal certainty for both the consumers and business.²²⁹ If it is to secure consumer confidence, the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution.²³⁰ The general prohibition is elaborated upon by rules governing the two types of commercial practices which are the most common - misleading commercial practices and aggressive commercial practices.²³¹ The Directive co-exists with the Community Law, which expressly affords the Member States the choice between several regulatory options for the protection of consumers in the field of commercial practices.²³² Where Community Law sets out information requirements it is considered as material under the Directive. Member States may retain or add information requirements.²³³ In situations where Member States have introduced information requirements over and above what is specified in Community Law, the omission of extra information does not constitute a misleading omission under the Directive.²³⁴

The consumer protected by the Unfair Commercial Practice Directive²³⁵ is the "average consumer"²³⁶.²³⁷ However the term "average consumer" is not defined in the Directive, though

²²⁷ Stuyck, *supra* note 190, at 108.

²²⁸ *Ibid* 109.

²²⁹ UCPD, 2005/29/EC, L149/24.

²³⁰ UCPD, 2005/29/EC, L149/24.

²³¹ *Ibid*.

²³² *Ibid*.

²³³ *Ibid*.

²³⁴ *Ibid*.

²³⁵ 2005/29/EC.

²³⁶ An average consumer is a consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice.

²³⁷ Stuyck, *supra* note 190, at 121.

guidelines have been provided. The test for fairness is based on the jurisdiction of the European Court of Justice. The Directive takes as a benchmark the average consumer who is reasonably well-informed and reasonably observant. It takes into account social, cultural and linguistic factors as these are interpreted by the Court of Justice. It also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.²³⁸ The Unfair Commercial Practice Directive²³⁹ provides protection to particular groups of vulnerable consumers at two levels: it provides protection against certain commercial practices aimed at vulnerable consumers included in the blacklist of Annexure I and secondly, where a trader could reasonably foresee that a commercial practice is likely to distort the behaviour of only a particular group of consumers, specifically vulnerable consumers, because of their mental or physical infirmity, age or credulity.²⁴⁰ The average consumer test is not a statistical test, courts and authorities have to exercise their own faculty of judgment, having regard to the case law of the Court of Justice, in order to determine the typical reaction of an average consumer in any given case.²⁴¹ Though not a statistical test, it is based on the norms of such average consumers or groups.²⁴² I agree with Ramsay's argument that the test should be based on the norms of an average consumer. This test is best illustrated by the *Estee Lauder Cosmetics – case*.²⁴³ In this case it was held necessary to take into account expectations of a certain product by the average consumer who is reasonably well-informed and reasonably observant, bearing in mind several considerations such as social, cultural or linguistic factors. According to the *EU Commission Guidance (2011)* the view of the General Court was that an average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The fact should be taken into account that the average consumer only rarely has the chance to make a direct comparison between the different marks but places his trust in the image he has retained in his mind. Lastly, it should be recognised that the average consumer's level of attention is likely to differ according to the category of goods and services in question.²⁴⁴ The level of knowledge of an

²³⁸ UCPD, 2005/29/EC, L149/25.

²³⁹ 2005/29/EC.

²⁴⁰ Stuyck, *supra* note 190, at 121.

²⁴¹ UCPD, 2005/29/EC, L149/25.

²⁴² Ramsay, *supra* note 156, at 166.

²⁴³ *Estee Lauder Cosmetics GmbH & CO OHG v Lancaster Group GmbH, Case C-220, [2000] ECR I-117.*

²⁴⁴ Ramsay, *supra* note 156, at 171.

average consumer cannot be assumed. Thus, all the relevant factors should be taken into account in order to determine the validity of the test as applied to the average consumer. This account raises the issue of the vulnerable consumer, this is a group of consumers, such as the elderly, teenagers and children, who may need greater protection than the average consumer.

A Commercial Practice must be directly connected with the promotion, sale or supply of a product. The purpose of the Unfair Commercial Practice Directive, 2005/29/EC, is set out in Article 1 of the General Provisions of the Directive. The purpose of the said Directive is to contribute to the proper functioning of the internal market and to achieve a higher level of consumer protection by approximating the law, regulations and administrative provisions of the Member States on unfair commercial practices which harm consumers' economic interests.²⁴⁵ The Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. It does not address the legal requirements related to taste and decency which vary broadly among the Member States.²⁴⁶ In order to fall within the scope of the Unfair Commercial Practice Directive,²⁴⁷ Member State legislation has to regulate commercial practices directly connected with the promotion, sale or supply of the product. The assumption is, if National legislation regulating the commercial practice is not directly related to matters which influence consumers' transactional decisions, they do not fall within the harmonisation remit of the Unfair Commercial Practice Directive. However, if a direct relationship does exist, the National legislation falls within the scope of the Unfair Commercial Practice Directive²⁴⁸ and needs to be read with the fairness test.²⁴⁹

The UCPD constitutes the overarching piece of EU legislation which regulates unfair commercial practices in business-to-consumer transactions. It applies to all commercial practices that occur before, during and after a business-to-consumer transaction has taken place. Any authoritative reading of the law derives from the UCPD and other applicable legal acts or principles. Only the Court of Justice of the European Union is competent to interpret authoritatively Union law. The assessment of whether a commercial practice is unfair under

²⁴⁵ Article 1, UCPD, 2005/29/EC.

²⁴⁶ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 122. Foot note 77.

²⁴⁷ 2009/29/EC.

²⁴⁸ 2009/29/EC.

²⁴⁹ Stuyck, *supra* note 190, at 123.

the UCPD is performed on a case-by-case basis, except in the case of the practices listed in Annex I to the UCPD. The power to make this assessment rests with the Member States.²⁵⁰ Article 3(1) relates to the scope of the UCPD. The UCPD is horizontal in nature and protects the economic interests of consumers. The principle-based provisions address a wide range of practices and are sufficiently broad to catch fast-evolving products, services and sales methods.²⁵¹

The UCPD does not cover national rules intended to protect interests which are not of an economic nature. Therefore the UCPD does not affect the possibility of Member States setting rules to regulate commercial practices for reasons of health, safety or environmental protection. Also existing national rules on marketing and advertising based on “taste and decency” are not covered by the UCPD. This restriction is clearly stated in Recital 7 of the UCPD. Therefore, in the context of commercial practices the UCPD does not cover national rules protecting human dignity, preventing sexual, racial and religious discrimination or on the depiction of nudity, violence and anti-social behaviour. On the other hand, national rules that aim to protect the economic interest of consumers, in conjunction with other interests, do fall within its scope. Business-to-business commercial practices do not fall within the scope of the UCPD. Member States, under their national laws, may extend protection granted under the UCPD to business-to-business commercial practices. National provisions do not fall within the scope of the UCPD if they are aimed solely at regulating relations between competitors and do not aim to protect consumers. The UCPD is based on the principle of full harmonisation. A uniform regulatory framework harmonising national rules had to be established at the EU level in order to remove internal market barriers and to increase legal certainty for both consumers and businesses.²⁵²

Joint Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium*, and *Galatea BVBA v Sanoma Magazines Belgium NV*, Judgement of 23 April 2009, paragraph 52: In these cases the court clarified the above statement. It held that ‘the Directive fully harmonises those rules at the

²⁵⁰ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses. {COM(2016) 320}, page 5.

²⁵¹ *Ibid* page 6.

²⁵² *Ibid* page 9-12.

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’.

Article 3(5) and (6) of the UCPD laid down a temporary derogation from full harmonisation for 6 years starting from 12 June 2007, but creating an expectation of full harmonisation. Since 12 June 2013 these articles no longer are applicable. Recital 14 of the UCPD clarifies that the full harmonisation does not preclude Member States from specifying in national law the main characteristics of particular products, the omission of which would be material when an invitation to purchase is made. It further clarifies that the UCPD is without prejudice in relation to provisions of EU law which expressly afford Member States a choice between several regulatory options for the protection of consumers.²⁵³

Article 3(4) read together with Recital 10 clarifies the interplay between the UCPD and other EU law. Where there is conflict between the provisions of the UCPD and other Community rules regulating specific aspects of unfair commercial practices, the latter will prevail and apply to those specific aspects. Further, it is necessary to ensure that the relationship between the UCPD and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. Furthermore, the UCPD will apply only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices. The UCPD provides for the protection of consumers where there is no specific sectorial legislation at Community level which prohibits traders from creating a false impression as to the nature of products. This is a key feature of the UCPD, as it functions as a safety net by ensuring that a high common level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law. Where a sector specific or other EU law is in place and its provisions overlap with the provisions of the UCPD, the corresponding provisions of the specific law

²⁵³ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses. {COM(2016) 320}, page 13-14

prevail.²⁵⁴ Thus, Article 3(4), read in conjunction with Recital 10 implies that the provisions of EU law prevail over the UCPD if all of the following three conditions are met:

- a) it has the status of EU law;
- b) it regulates a specific aspect of commercial practices; and
- c) there is a conflict between the two provisions or the content of the other EU law provisions overlaps with the content of the relevant UCPD provisions.

If all the conditions are fulfilled, the UCPD does not apply to the specific aspect of the commercial practice regulated and the specific EU law is applicable. The UCPD remains relevant with respect to other possible aspects of the commercial practice not covered by the sector specific provisions.²⁵⁵

Article 2(b) defines a Trader as follows:

‘any natural or legal person who, in commercial practices covered by the UCPD, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name or on behalf of the trader’

Thus, a trader can be held jointly liable with another trader for an infringement of the UCPD committed by anyone acting in the name of or on behalf of the trader. Whether a seller qualifies as a trader or a consumer is to be assessed on a case-by-case basis.

Article 2(d) defines a commercial practice as follows:

‘business-to-consumer commercial practices are 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’

The sole criterion in this article is that the trader’s practice must be directly connected with the promotion, sale or supply of a product or service to consumers.

²⁵⁴ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses. {COM(2016) 320}, page 14-15.

²⁵⁵ See above.

Article 2(k) defines a transactional decision as follows:

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

The UCPD general provisions cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers’ economic behaviour, thereby causing or being likely to cause them to take a transactional decision that they would not have taken otherwise. The wording of article 2(k) should be interpreted in a broad manner and the concept of a transactional decision should cover a wide range of decisions made by the consumer in relation to a product. Case C-281/12 Trento Sviluppo srl, Central Adriatica Soc. Arl v Autorita Garante della Concorrenza e del Mercato, 19 December 2013, paragraphs 35, 36 and 38,²⁵⁶ states: ‘any decision taken by a consumer concerning whether, how and on what terms to purchase’ is a transactional decision. That concept therefore covers not only the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop. Article 2(k) of the directive must be interpreted as meaning that any decision directly related to the decision whether or not to purchase a product is covered by the concept of ‘transactional decision’.

Note that there is a wide spectrum of transactional decisions a consumer may take in relation to a product or a service other than the decision whether to purchase.

The UCPD’s general provisions cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers’ economic behaviour. These provisions use slightly different wording to express these requirements of to ‘materially distort the economic behaviour of consumers’.

Under article 5(2) read in conjunction with Article 2(e) of the UCPD, a commercial practice is unfair if it is contrary to the requirements of professional diligence and ‘materially distorts or is likely to materially distort’ the economic behaviour of an average consumer. Articles 6, 7 and

²⁵⁶ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses. {COM(2016) 320}, page 37.

8 prohibit a misleading or aggressive commercial practice if it causes or is likely to cause the average consumer to 'take a transactional decision that he would not have taken otherwise'. The material distort test is not limited by the UCPD.

'Average consumer'

As mentioned in Chapter 2 regarding the definition of an average consumer in terms of the CPA, Recital 18 and the UCPD take as a benchmark an average consumer, someone who is reasonably well-informed, reasonably observant and circumspect, taking into account social, cultural and linguistic factors as interpreted by the Court of Justice. It also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a group, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. Thus, the average consumer test is not a statistical test.²⁵⁷

The average consumer under the UCPD is somebody who needs only a low level of protection, because such a consumer is always in a position to acquire the available information and to act wisely. The test is based on the principle of proportionality, which was adopted in order to strike the correct balance between the need to protect consumers and the promotion of free trade in an openly competitive market.

The study on consumer vulnerability in key markets across the European Union:²⁵⁸ a recent study on consumer vulnerability looked into the concepts of the 'average' and the 'vulnerable' consumer as they have been developed by the Court of Justice with reference to the UCPD.

The study investigated the concept of the 'average consumer' in two ways:

- a) in relation to the indicators developed by the study to conceptualise consumer vulnerability and

²⁵⁷ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses. {COM(2016) 320}, page 40.

²⁵⁸ http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm

- b) in relation to the definition of the average consumer in the UCPD.

In relation to the notion that an average consumer is 'well-informed' the study found that an average consumer feels quite informed and does not rely on information from advertisements only. With regard to the concept of the consumer being 'observant' and 'circumspect' the study found consumers not overly willing to take risks and are in disagreement with the statement that advertisements report objective facts.²⁵⁹

The 'vulnerable consumer'

Article 5(3) which is to be read in conjunction with Recital 19 indicates, although it is appropriate to protect all types of consumers from unfair commercial practices, consumers who qualify as members of one of the groups listed in article 5(3) should be ensured a higher level of protection than 'the average consumer' as mentioned in article 5(2). The study defined a 'vulnerable consumer' as 'a consumer who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation or market environment:

- a) is at higher risk of experiencing negative outcomes in the market;
- b) has limited ability to maximise its well-being;
- c) has difficulty in obtaining or assimilating information;
- d) is less able to buy, choose or access suitable products; or
- e) is more susceptible to certain marketing practices.'

Consumer vulnerability therefore is multi-dimensional.²⁶⁰ The 'vulnerable consumer' criterion applies if a commercial practice distorts the economic behaviours of a group of consumers who are particularly vulnerable 'in a way which the trader could reasonably be expected to foresee'. Thus, the 'foreseeability' factor becomes relevant each time one needs to establish whether a given trader could have reasonably expected this practice to appeal in particular to vulnerable groups.

²⁵⁹ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses. {COM(2016) 320}, page 44.

²⁶⁰ *Ibid* page 46-47.

The General clause – the requirement of professional diligence: Article 5(2) provides a general clause setting two cumulative criteria for assessing whether commercial practices should be deemed unfair. These criteria function as a safety-net to catch any unfair commercial practice not caught under the other provisions of the UCPD. The notion of ‘professional diligence’ encompasses principles already well-established in the laws of the Member States before the adoption of the UCPD. These principles, such as ‘honest market practice’, ‘good faith’ and ‘good market practice’, are examples of well-established practice. ‘Misleading actions’ are defined in Article 6 of the UCPD. ‘Misleading omissions’ are defined in Article 7 of the UCPD. Article 7(1) and (2) establishes in general terms a positive obligation on traders to provide all the information which the average consumer needs to make an informed purchasing decision.²⁶¹

Aggressive commercial practices are defined in Articles 8 and 9 of the UCPD. The UCPD provides a single definition of aggressive commercial practices which applies across the EU and blacklists certain commercial practices in Annexure I to Article 5(5) read in conjunction with Recital 17. The blacklist is provided to give greater legal certainty.

General Unfair Commercial Practices (Article 5(1) & (2) [Prohibition of Unfair Commercial Practices]

The general clause prohibits a commercial practice that is contrary to the requirement of “professional diligence” and that “materially distorts or is likely to materially distort the economic behaviour with regard to the product of an average consumer or the average member of a targeted group”.²⁶² Any commercial practice which is likely to materially distort the economic behaviour of a clearly identifiable group of consumers who are vulnerable to the practice or the product in a way which the trader could reasonably be expected to foresee shall be assessed. This prohibition is not to be taken lightly.²⁶³ Ramsay states that the UCPD is regarded as one of the most significant European Consumer Directives.²⁶⁴ The Directive is

²⁶¹ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses. {COM(2016) 320}, page 55-69.

²⁶² Ramsay, *supra* note 156, at 164.

²⁶³ Ramsay, *supra* note 156, at 137.

²⁶⁴ *Idem* 156.

intended to establish uniform rules in accordance with Articles 5 and 6 of the Preamble as well as Article 1 in order to constitute a high level of consumer protection.²⁶⁵ The aim of the UCPD is maximal harmonisation.

Article 5 of the Directive is regarded as being its central provision. It sets out the ‘grand’ general clause as well as the two lesser general clauses. Article 5(1) clearly states unfair commercial practices shall be prohibited.²⁶⁶ The ‘grand’ general clause in Article 5(2) describes the general prohibition on unfair commercial practices. Article 5(2) defines an unfair commercial practice as one which is contrary to the requirements of professional diligence,²⁶⁷ and if it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reached or to whom it is addressed or of the average member of the group when a commercial practice is directed at a particular group of consumers.²⁶⁸

This ‘grand’ general clause is elaborated on in the two lesser general clauses which outline the commercial practices that are misleading and aggressive. Commercial practices are unfair if they are misleading as set out in Articles 6 and 7²⁶⁹ or they are aggressive as set out in Articles 8 and 9.²⁷⁰ Article 5(5) of the directive refers to a list of the commercial practices which in all circumstances are regarded as unfair; the list applies to all Member States and may be modified only by a revision of the Directive.²⁷¹ Under the ‘grand’ general clause a commercial practice is unfair if it is contrary to professional diligence and materially distorts the consumer’s economic behaviour, therefore it is important to understand the meaning of “professional diligence” and of “material distortion of the consumer’s economic behaviour”.

Stuyck, Terry & Van Dyk define professional diligence as:²⁷²

*The standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest business practices and/or the general principle of good faith in the trader’s field of activity.*²⁷³

²⁶⁵ *Idem* 160.

²⁶⁶ Article 5(1), UCPD, 2005/29/EC.

²⁶⁷ Article 5(2)(a), UCPD, 2005/29/EC.

²⁶⁸ Article 5(2)(b), UCPD, 2005/29/EC.

²⁶⁹ Article 5(4)(a), UCPD, 2005/29/EC.

²⁷⁰ Article 5(4)(b), UCPD, 2005/29/EC.

²⁷¹ Article 5(5), UCPD, 2005/29/EC.

²⁷² Stuyck, *supra* note 190, 125.

²⁷³ Article 2(h), 2009/29/EC.

This view is confirmed in Article 2(h) of the UCPD, so it may be assumed that professional diligence means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers with honesty or the general principle of good faith in the traders' field of activities. This is a normative standard. According to Stuyck, Terryn & Van Dyk, and confirmed by Article 2(e) of the UCPD, the material distortion of the consumer's economic behaviour means:²⁷⁴

*The ability to make an informed decision is appreciably impaired, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.*²⁷⁵

The test for 'material distortion' is defined in Article 2(c) of the Directive as impairing the consumers ability to make an informed decision, causing the consumer to make a transactional decision that he would not have taken otherwise.²⁷⁶ Ramsay confirms the above statement, with which I am in agreement.

The provisions above are the basis for the general fairness test or, in other words "*economic behaviour = ability to make an informed decision*".²⁷⁷ The assumption derived from the equation is that a consumer behaves economically and that economic behaviour relies on the ability to make informed decisions. The consumer may ignore all information and take a wrong decision on condition that the consumer's ability to take an informed decision was not appreciably impaired.²⁷⁸

Article 5 provides a safety net against practices not found under Articles 6, 7, 8 and 9. Thus, a practice which cannot be placed under the headings of misleading or aggressive practices is captured by the general prohibition if it meets the criterion in the general clause.²⁷⁹

Misleading Unfair Commercial Practices Section 1 UCPD (actions and omission) & Aggressive Commercial Practices Section 2 UCPD

²⁷⁴ Stuyck, *supra* note 190, at 125.

²⁷⁵ Article 2(e), 2009/29/EC.

²⁷⁶ Ramsay, *supra* note 156, at 168.

²⁷⁷ Stuyck, *supra* note 190, at 125.

²⁷⁸ *Ibid.*

²⁷⁹ Ramsay, *supra* note 156, at 164.

An important topic in the EU for many years has been the search for market fairness.²⁸⁰ However, the structure of the regulation continues to be controversial.²⁸¹ Aggressive commercial practice calls into question a consumer's freedom of choice.²⁸² The two lesser general clauses are seen as "catch-all" clauses in relation to the 'grand' general clause.²⁸³ For a practice to be prohibited under the lesser general clauses it is not necessary to prove that a practice is contrary to the requirement of professional diligence, but it is necessary to prove that the practice caused or was likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.²⁸⁴ Both these concepts indicate a significant impairment of a consumer's freedom of choice and will be described in detail.

The Directive classifies misleading practices in terms of misleading actions and misleading omissions.²⁸⁵ With regard to misleading omissions the Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision.²⁸⁶

Section 1 of the Directive consists of Article 6, which deals with misleading actions, and Article 7 which deals with misleading omissions.

Section 1, Article 6: Misleading Commercial Practice – Misleading Actions:

A commercial practice shall be regarded as misleading if it contains false information and therefore is untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.²⁸⁷

²⁸⁰ *Idem* 188.

²⁸¹ *Idem* 137.

²⁸² *Idem* 195.

²⁸³ Stuyck, *supra* note 190, at 127.

²⁸⁴ Stuyck, *supra* note 190, at 127.

²⁸⁵ UCPD, 2005/29/EC, L149/24.

²⁸⁶ UCPD, 2005/29/EC, L149/24.

²⁸⁷ Article 6(1), UCPD, 2005/29/EC.

One or more of the following elements will indicate to a consumer whether or not a commercial practice is an unfair commercial practice:²⁸⁸ The existence or the nature of the product;²⁸⁹ the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale consumer assistance and complaint handling; the method and date of manufacture or provision; delivery; fitness for purpose; usage; quantity; specification; geographical or commercial origin; the results to be expected from its use or the results and material features of tests or checks carried out on the product;²⁹⁰ the extent of the trader's commitments; the motives for the commercial practice and the nature of the sales process; any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;²⁹¹ the price or the manner in which the price is calculated or the existence of a specific price advantage;²⁹² the need for a service, part, replacement or repair;²⁹³ the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, affiliation or intellectual property rights or his awards and distinctions;²⁹⁴ the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees or the risks he may face.²⁹⁵

A commercial practice shall be regarded as misleading if, in its factual context taking account all of its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.²⁹⁶

This practice involves the following: any marketing of a product, including comparative advertising, which creates confusion in relation to any product, trademarks, trade names or other distinguishing marks of a competitor;²⁹⁷ and non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be

²⁸⁸ Stuyck, *supra* note 190, at 128.

²⁸⁹ Article 6(1)(a), UCPD, 2005/29/EC.

²⁹⁰ Article 6(1)(b), UCPD, 2005/29/EC.

²⁹¹ Article 6(1)(c), UCPD, 2005/29/EC.

²⁹² Article 6(1)(d), UCPD, 2005/29/EC.

²⁹³ Article 6(1)(e), UCPD, 2005/29/EC.

²⁹⁴ Article 6(1)(f), UCPD, 2005/29/EC.

²⁹⁵ Article 6(1)(g), UCPD, 2005/29/EC.

²⁹⁶ Article 6(2), UCPD, 2005/29/EC.

²⁹⁷ Article 6(2)(a), UCPD, 2005/29/EC.

bound.²⁹⁸ In this case it is a firm commitment and not merely aspirational and is capable of being verified,²⁹⁹ and if the trader indicates in a commercial practice that he is bound by the code,³⁰⁰

Section 1, Article 7: Misleading Commercial Practice – Misleading Omissions:

A commercial practice shall be regarded as misleading if, in its factual context, taking account all of its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.³⁰¹

If a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as is referred to in that definition, or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and if, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, it shall also be seen as a misleading omission.³⁰²

Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.³⁰³ Section 1 Article 7(4) discusses the issue whether there is an invitation to purchase and lists the information which is material if it is not apparent from the context.³⁰⁴

Section 2, Article 8: Misleading Commercial Practice – Aggressive Commercial Practices

A commercial practice shall be regarded as aggressive if, in its factual context taking account all of its features and circumstances, by harassment; coercion, including the use of physical force; or undue influence, it significantly impairs the average consumer's freedom of choice or

²⁹⁸ Article 6(2)(b), UCPD, 2005/29/EC.

²⁹⁹ Article 6(2)(b)(i), UCPD, 2005/29/EC.

³⁰⁰ Article 6(2)(b)(ii), UCPD, 2005/29/EC.

³⁰¹ Article 7(1), UCPD, 2005/29/EC.

³⁰² Article 7(2), UCPD, 2005/29/EC.

³⁰³ Article 7(3), UCOD, 2005/29/EC.

³⁰⁴ Stuyck, *supra* note 190, at 129.

conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision he would not have taken otherwise.³⁰⁵

Section 2, Article 9: Misleading Commercial Practice – Use of Harassment, coercion and undue influence

In order to determine whether or not a commercial practice uses harassment; coercion, including the use of physical force; or undue influence, the following elements as set out in Article 9 will be taken into consideration:³⁰⁶ the timing, location, nature or persistence;³⁰⁷ the use of threatening or abusive language or behaviour;³⁰⁸ the exploitation by the trader of any specific misfortune or circumstances of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;³⁰⁹ any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;³¹⁰ any threat to take any action that cannot legally be taken.³¹¹

Annexure 1, the blacklist

Schedule [Annexure] 1 to the UCPD contains a list of 31 commercial practices that in all relevant circumstances are declared to be and are considered unfair,³¹² the practices on the list are presumed to be unfair either because they are misleading or because they are aggressive. Their prohibition is not to be taken lightly.³¹³ This list applies to all Member States and may be modified only by a revision of the Directive. It is quite clear that the Unfair Commercial Practice Directive³¹⁴ does not allow any room for national laws when it comes to the blacklist.³¹⁵ Stuyck, Terryn & Van Dyk correctly argue that the blacklist is the ultimate in practices that *per se* are unfair. Some of the practices on the list clearly are illegal in most

³⁰⁵ Article 8, UCPD, 2005/29/EC.

³⁰⁶ Article 9, UCPD, 2005/29/EC.

³⁰⁷ Article 9(a), UCPD, 2005/29/EC.

³⁰⁸ Article 9(b), UCPD, 2005/29/EC.

³⁰⁹ Article 9(c), UCPD, 2005/29/EC.

³¹⁰ Article 9(d), UCPD, 2005/29/EC.

³¹¹ Article 9(e), UCPD, 2005/29/EC.

³¹² *Idem* 198.

³¹³ *Idem* 137.

³¹⁴ 2005/29/EC.

³¹⁵ Stuyck, *supra* note 190, at 130.

Member States, and thus are forbidden. Their illegality creates legal certainty,³¹⁶ however there is a level of uncertainty because of the way the practices listed in the blacklist are worded.³¹⁷

A fundamental question asked by Stuyck, Terryn and Van Dyk relates to how the 'grand' general clause, the two lesser general clauses and the blacklist will be integrated to assure the highest level of harmonisation. The reason for raising this question is that some blacklisted practices are not unfair under the general fairness test. The fact remains that if it is a blacklisted practice it is seen as an unfair commercial practice in all circumstances, regardless of whether or not it passes the unfairness threshold.³¹⁸ Of further concern is the fact that the lesser general clauses go beyond the scope of the 'grand' general clause because they do not require the practice to be contrary to the requirement of professional diligence. A certain misleading or aggressive practice under the lesser general clauses might not be seen as unfair when measured under the 'grand' general fairness test.³¹⁹ The author concurs with the view of Stuyck, Terryn & Van Dyk.

The suggestion the author makes to eliminate unfair commercial practices is the introduction of a reversed test. One starts with a blacklist because, if a practice is listed, it automatically is unfair and no further test is needed. If the practice is not on a blacklist, the next step is to apply the general fairness test in relation to the two lesser general clauses, and only then the 'grand' general clause as the last resort in prohibiting unfair commercial practice.

CASE C-220/98, ESTEE LAUDER COSMETICS GMBH & CO. OHG LANCASTER GROUP GMBH, [2000] ECR I-117 in which the court reached the following conclusion:

It has fallen to the courts to weigh the risk of misleading consumers against the requirements of the free movement of goods, it has held that, in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed

³¹⁶ Stuyck, Terryn and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 131.

³¹⁷ *Ibid* 132.

³¹⁸ Stuyck, *supra* note 316, at 132 & 133.

³¹⁹ Stuyck, *supra* note 316, at 133.

*expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect. It is a test based on the principle of proportionality.*³²⁰

The benchmark for the average consumer according to the Estee Lauder case is:³²¹

the Court has held that the criterion of the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect also applies in the context of the marketing of [a product]...

The UCPD is based on maximum harmonisation and, accordingly, further limits the room for manoeuvre of Member States in adopting national consumer laws. The UCPD is based on the assumption that, in principle, many commercial practices of traders are lawful and that, as a result, national measures which consistently condemn these practices are not permitted. It should be pointed out that the EU harmonisation measures dealing with consumer matters are not of a protective nature (see footnote 44). Many national consumer rules that are based on a strong protective view and that do not respect the notion of the circumspect consumer are not in line with the thinking in the UCPD. Recital 34 highlights the significance of taking into account the special needs of vulnerable consumers. In conclusion, the consumer harmonisation measures, which were adopted by the EU over time, are based on principles set by cases like *Dansk Supermarked en Guimont*.³²²

The UCPD is renowned for recognising all “business-to-consumer practices” which have an effect before, during and after a commercial practice with relation to a certain product. This is a broad definition of a “business-to-consumer practice” as it mentions “any” act, omission, course of conduct or representation, and commercial communication. According to Recital 6 to the Preamble, this Directive does not take over from or affect national laws on unfair commercial practices. The unfairness of a “business-to-consumer practice” is tested against three phases:

1. A blacklist of 31 automatically misleading or aggressive practices found in Annexure 1 to the UCPD;

³²⁰ Landmark Cases of EU Consumer Law, in Honour of Jules Struyck. Evelyne Terryn, Gert Straetmans, Veerle Colaert (eds.) 2013 Cambridge Antwerp Portland, page 13.

³²¹ Landmark Cases of EU Consumer Law, in Honour of Jules Struyck. Evelyne Terryn, Gert Straetmans, Veerle Colaert (eds.) 2013 Cambridge Antwerp Portland, page 18.

³²² Landmark Cases of EU Consumer Law, in Honour of Jules Struyck. Evelyne Terryn, Gert Straetmans, Veerle Colaert (eds.) 2013 Cambridge Antwerp Portland, page 340-342.

2. General prohibition of misleading or aggressive practices, found in Articles 6, 7, 8 and 9 of the UCPD;
3. A generalised catch-all prohibition of practices contrary to the requirements of professional diligence and likely materially to distort the economic behaviour of the average consumer.

As the UCPD is a maximum harmonisation directive, all member states have to adopt provisions which replicate exactly the standard set by the Directive as regulated and therefore they have to amend or repeal national provisions that go further than the Directive. It means if they have to deregulate their own laws, they have no other choice than to set a standard of protection equal to the Directive or higher.³²³

The UCPD contains provisions on redress. The core of the UCPD lies in Article 5 which is seen as the 'safety net'. Unfair commercial practices consist of two elements:

- 1) The potential for material distortion of consumers' transactional decision-making, and
- 2) The normativity yardstick of professional diligence.

'Material distortion' is defined as the impairment of the ability to make an informed decision, thereby causing an average consumer to take a transactional decision he would not have taken otherwise. 'Professional diligence' refers to 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. In practice the 'grand' general clause prohibition of unfair commercial practices may be less important than the more concrete subcategories of misleading and aggressive practices. If a particular practice fits the description of being either misleading or aggressive there is no need to test whether the practice according to the 'grand' general clause is unfair.³²⁴

Misleading practices are divided into two categories:

- 1) Misleading information;

³²³ Landmark Cases of EU Consumer Law, in Honour of Jules Struyck. Evelyne Terryn, Gert Straetmans, Veerle Colaert (eds.) 2013 Cambridge Antwerp Portland, page 466-467.

³²⁴ The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems. Ed Willem van Boom, Amandine Garde & Orkun Akseli 2014, page 2-3.

This consists of those utterances which contain incorrect information and are therefore untruthful or which in any way deceive or are likely to deceive the average consumer, even if the information is factually correct.

2) Misleading omissions;

This consists of the practice of omitting or hiding material information, including the provision of such information in an unclear, unintelligible, ambiguous or untimely manner, which the average consumer needs to take an informed transactional decision, thus causing distortion in the transactional decision-making process of this average consumer.

Aggressive practices involve actual harassment, coercion and the use of physical force or the use of more subtle techniques involving undue influence, such as exploitation of vulnerability or the use of obstacles discouraging consumers from asserting their rights.

The blacklist is applicable in all Member States and may be modified only by a revision of the UCPD. If a practice is listed, there is no need to assess whether it is contrary to the rules of professional diligence and whether it has materially distorted or would have been likely materially to distort the economic behaviour of the average consumer. The UCPD includes an obligation on traders positively to disclose certain information at a certain stage of the marketing and sales process. The UCPD also encourages the use of a code of conduct to support the dissemination of fair commercial practices.³²⁵

The UCPD models its regulations upon the 'average consumer'; this model of a human being is not a statistical average and serves as a normative yardstick. The framework assumes that consumers are rational-choice actors who are reasonably well-informed and reasonably observant and circumspect. Thus, the average consumer is neither credulous nor easily impressed or quickly deceived. One could argue that all consumers are vulnerable and merit some form of protection against traders who have superior knowledge of consumer behaviour and how to use human weakness. The UCPD is based on the maximum harmonisation principle, but is subject to limited exceptions. The underlying rationale is that this principle

³²⁵ The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems. Ed Willem van Boom, Amandine Garde & Orkun Akseli 2014, page 4.

guarantees a fair balance between a trader's duties and consumers' rights, and creates legal certainty and a pan-European level playing field.³²⁶

All commercial practices on the blacklist, are considered to be unfair and are prohibited without a case-by-case assessment against the provisions of Articles 5 to 9 of the UCPD. The blacklist has application in all Member States; it is a complete list which can be modified only through a revision of the UCPD. The Member States are not empowered to amend the list themselves. Any assessment of a commercial practice is made against the blacklisted prohibitions. If the commercial practice is not on the list, it may be examined with regard to its compliance with the lesser general clauses in Articles 6 to 9 of the UCPD. Should the commercial practice not fall within the ambit of misleading or aggressive practices, as a last resort, it will be evaluated on the basis of the 'grand' general clause set out in Article 5 of the UCPD.³²⁷ The 31 prohibited commercial practices on the blacklist are divided into 23 misleading and 8 aggressive practices.

The concept of the 'vulnerable consumer' is relatively new to European Consumer Law. From the Latin 'vulnerare' (to injure), vulnerability means 'likely to be injured, to be attacked' and characterises the person in a position of weakness. European Consumer Law has followed a liberal approach to the law in which the market is the appropriate regulatory tool. This approach considers the consumer to be a rational economic agent who, when properly informed, optimises his interests and reaps the benefit from the realisation of the internal market. The model is referenced as being the 'average consumer'. An average consumer is someone who is reasonably well-informed and reasonably observant and circumspect, as defined by the European Court of Justice (ECJ).³²⁸

3 CONCLUSION

In conclusion, it is clear from the discussion and explanation above that there are a number of relevant factors to consider when confirming whether or not a commercial practice is seen as

³²⁶ The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems. Ed Willem van Boom, Amandine Garde & Orkun Akseli 2014, page 6-8.

³²⁷ The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems. Ed Willem van Boom, Amandine Garde & Orkun Akseli 2014, page 67-68.

³²⁸ The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems. Ed Willem van Boom, Amandine Garde & Orkun Akseli 2014, page 89-90.

unfair. The fifth chapter of the dissertation gives an overview of similarities and differences between the CPA and the UCPD.

CHAPTER 5

A COMPARATIVE DISCUSSION OF UNFAIR COMMERCIAL PRACTICE IN TERMS OF THE CPA AND UCPD

1 INTRODUCTION

The method in this dissertation has been a comparative analysis of unfair commercial practice as addressed by the CPA and the UCPD in the European Union. The dissertation expresses recommendations which would harmonise the implementation and regulation of the CPA with the highest international standards.

The aim was to critically analyse the provisions of the CPA in relation to unfair commercial practice with the core focus on sections 40 and 41 of the CPA. The dissertation presents the rationale behind the comparison with the UCPD and how it assists in addressing issues that the critical analysis of the unfair commercial practice provisions in the CPA elucidates so as to find solutions to the shortfalls. By examining how these pieces of legislation (CPA and UCPD) reveal correspondences as well as differences an indication can be given of how the CPA might be amended or kept as it is, ultimately, the comparison adds value to its interpretation.

In chapter 2 the author explains the purpose, scope and application of the CPA in detail. The comparative analysis of the CPA and the UCPD requires the presentation of an outline of the application, scope and purpose of each. Further, attention had to be paid to concepts and definitions. The chapter highlighted similarities as well as differences in the comparison between the CPA and UCPD which are central to the critical discussion of the provisions in respect of unfair commercial practices.

Chapter 3 focuses on the conduct of the supplier and is limited to sections 40 and 41. The focus in the discussion of section 40 is on unconscionable conduct. What in the CPA is referred to as “unconscionable conduct” is similar to what the UCPD terms “unfair commercial practices”.

Chapter 4 explains the treatment of unfair commercial practices in the UCPD and offers an overview of the relevant Articles read together with the Recitals. Definitions, concepts and case law are examined to provide a clear understanding of unfair commercial practices in terms of

the Directive, and the prospect is presented of greater harmonisation through a specific series of directives.³²⁹

The dissertation employs an analytical and critical approach. Attaining the research aims depended on examining national and international legislation and relevant case law (where applicable and possible) from South Africa, the European Court of Justice (ECJ) and of Member States. As well, a literature study was undertaken of the work of legal scholars in this area, including academic textbooks, journal articles and other scholarly material.

The unfair commercial practices presented by the CPA and UCPD were critically discussed and compared to show similarities, the level of consumer protection and ultimately, how the interpretation of the provisions in one might solve interpretational issues in the other. I discuss the similarities and differences in order to provide a clear understanding.

The similarities were comprehensively covered in chapter two of this dissertation; however, the next section offers an overview.

2 SIMILARITIES IN THE PROVISIONS OF THE CPA AND UCPD

Purpose & Application

The purpose of the CPA is stated in Preamble as well as in section 3 as being to promote a fair, accessible and sustainable marketplace for consumer products and services and with the purpose of establishing national norms and services relating to consumer protection. The CPA is to protect the economic interest of consumers, as well as to promote economic participation on many levels.

The purpose in the UCPD is to eliminate the barriers to the functioning of the internal marketplace presented by national laws on unfair practices and to provide consumer protection at a community level, so as to contribute to the proper functioning of the internal market and to protect consumers' economic interests.

³²⁹ Hereafter referred to as the UCPD.

A question was asked as to why the vulnerability threshold in Article 5(3) of the UCPD did not encompass factors such as education, race and ethnicity and level of income.^{330 331}

Clearly, there are similarities between the CPA and the UCPD in terms of the application, scope purpose of each. However, the UCPD seems to be more comprehensive than the CPA. The South African legislators need to create further protection mechanisms in order to reach the level provided by the UCPD. The CPA achieves a higher level of protection by taking into consideration factors such as education, race, ethnicity and level of income and should continue to support that level of protection in the future.

Interpretation

Section 2 deals with the interpretation of the CPA. South African Consumer law has evolved to protect consumers and their rights as the common law has become fragmented and outdated. In the past the example of international laws was dismissed and consumer rights were restricted to the protection provided by the common law and the legislation available at the time. This no longer is the case, international law, pre-existing legislation and the common law can be used to protect consumers.

Unfair Commercial Practices & Vulnerable Consumers

Van Eeden quotes the House Conference Report on the Federal Trade Commission Act which states:³³²

It is important to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would at once be necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

³³⁰ 2005/29/EC.

³³¹ Stuyck, Terryn and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 121.

³³² Van Eeden *Consumer Protection Law in South Africa* (2013) 113.

I argue that this should be the view legislators follow in order to define provisions that protect consumers and regulate conduct towards consumers. In that case protection will be more comprehensive and practice properly regulated in the future. (my italics)

Unconscionable conduct³³³ is prohibited in terms of section 40 of the CPA. A supplier may not use against a consumer physical force, coercion, undue influence, pressure, duress, harassment, unfair tactics or any other similar conduct³³⁴. Section 40 of the CPA focuses on the many wrong ways in which a consumer's wishes can be influenced by a supplier. Du Plessis correctly states that, in other words, this section is concerned with procedural unfairness in obtaining consent rather than substantive unfairness.³³⁵ Du Plessis further notes that the term "unconscionable conduct" is not well-known in South African law, but was inspired by the common law and by consumer legislation.³³⁶ The term is a vague description of various forms of conduct however no other or new term has been created or used since.

It cannot have been the intention of the legislator that section 40(1) should apply to a broadly-defined attempt to influence consumers. Section 40(1) expresses no indication of what is the state of mind of the supplier in acting unconscionably.³³⁷ Section 40 does not state to what extent a consumer is expected to display constancy or resilience when subjected to

³³³ "Unconscionable conduct. –

- (2) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any –
- (a) marketing of any goods or services;
 - (b) supply of goods or services to a consumer;
 - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods and services to a consumer;
 - (d) demand for, or collection of, payment for goods or services by a consumer; or
 - (e) recovery of goods or services.
- (2) In addition to any conduct contemplated in subs (1). It is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disabilities, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factors.
- (3) Section 51 [sic] applies to any court proceedings concerning this section."

³³⁴ Du Plessis 'Section 40' in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) 40-1.

³³⁵ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 26.

³³⁶ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 27.

³³⁷ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 33.

unconscionable conduct by a supplier. Nor does this section explicitly state what the supplier's conduct has to show to impair the consumer's freedom of choice or freedom of conduct.³³⁸

Section 40(1)(a) - (e) lists activities where a supplier is not allowed to use a particular form of conduct: section 40 clearly widens the ambit of unconscionable conduct that might or could influence the validity of an agreement. When determining the impact of the unconscionable conduct it does not matter if transfer was due or not.³³⁹

Section 40(1) of the CPA defines conduct that is unconscionable in terms of settings and context,³⁴⁰ specifically four sets of activities: the marketing and supply of goods and services; negotiation, conclusion, execution or enforcement of an agreement to supply goods and services; any demand for, or collection of, payment for goods or services by a consumer and, lastly, to recover goods from a consumer. It is clear from section 40(1) of the CPA that it focuses on aggressive conduct in the broadest sense, whereas in terms of the common law redress is by way of a delict. Physical force and coercion are evidence of duress.³⁴¹

The terms of Section 40(2) of the CPA apply in addition to the conduct mentioned in section 40(1)³⁴² and highlight the conduct of a supplier who knowingly takes advantage of a consumer who is not in a position to protect his interests because of listed factors in section 40(2) of the CPA. These consumers are viewed as vulnerable.³⁴³ In the context of the 'vulnerable consumer' the disability that unconscionable conduct exploits involves several factors: the fact that the consumer is unable to protect his interests because of the disability and the supplier must knowingly take advantage of the consumer. Section 40(2) gives fair notice to the supplier that he cannot take his victim as he finds him and should consider, where there is a possibility of any disability, whether or not these factors impair the consumer's ability to protect his interests.³⁴⁴

³³⁸ Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 THRHR 26-42 34.

³³⁹ Du Plessis J, *supra* note 337, at 34.

³⁴⁰ Van Eeden *Consumer Protection Law in South Africa* (2013) 115.

³⁴¹ *Ibid* 116.

³⁴² Van Eeden, *supra* note 340, at 116.

³⁴³ Groups that are vulnerable are children, the elderly and the ailing.

³⁴⁴ Van Eeden, *supra* note 340, at 117.

The CPA gives a wide and broad definition of unconscionable conduct. The use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct are outlawed in the contract dynamic. An innovation is found in section 40(2) in which exploitation of a consumer's inability to protect its own interests as the result of factors such as illiteracy, ignorance, the inability to understand the language of the agreement or mental or physical disability are also declared unconscionable. Section 41(1)(a), (b) and (c) mirror the common law and do not constitute a superfluous repetition, but emphasise the fact that they form part both of the common law and the consumer protection regime.³⁴⁵

The UCPD applies to business-to-consumer commercial practices and it mainly intends to foresee and secure total harmonisation.³⁴⁶ Member States had to implement the Unfair Commercial Practice Directive³⁴⁷ by 12 June 2007. The laws of Member States relating to unfair commercial practices showed exclusive differences which generated appreciable distortions in competition and created obstacles to the smooth functioning of the internal market.³⁴⁸ In an historical context the laws of the Member States reveal at least three fundamental divergences that underpin technical differences in regulation.³⁴⁹ The author mentions these approaches but does not discuss them in detail. The first fundamental distinction is between the Private Law versus a Public Law approach. The second distinction relates to the structural approach³⁵⁰ and the last fundamental distinction is the degree to which Member States resort to the use of a general fair-trading clause.³⁵¹

This Directive sets out a single general prohibition against unfair commercial practices that distort the consumers' economic behaviour. Harmonisation of regulation among Member States will increase legal certainty for both the consumers and business.³⁵² In order to secure consumer confidence the general prohibition applies equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or which

³⁴⁵ Public governance: Unpacking the Consumer Protection Act 68 of 2008. L Hawthorne. THRHR. 345 – 370, page 358-359.

³⁴⁶ Stuyck, Terry and Van Dyk 'Confidence through Fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Law Market Review* 107.

³⁴⁷ 2005/29/EC.

³⁴⁸ UCPD, 2005/29/EC, L149/22.

³⁴⁹ Stuyck, *supra* note 346, at 111.

³⁵⁰ *Ibid.*

³⁵¹ Stuyck, *supra* note 346, at 112.

³⁵² UCPD, 2005/29/EC, L149/24.

follows the conclusion of a contract and during its execution.³⁵³ The general prohibition is elaborated on in the rules governing the two types of commercial practices which are the most common - misleading commercial practices and aggressive commercial practices.³⁵⁴ The Directive co-exists with the Community law which expressly affords the Member States choice between several regulatory options for the protection of consumers in the area of commercial practices.³⁵⁵ Where Community law sets out information requirements it is considered as material under the Directive. Member States may retain or add information requirements.³⁵⁶ In situations where Member States have introduced information requirements over and above what is specified in Community law, the omission of extra information will not constitute a misleading omission under the Directive.³⁵⁷

The consumer who is protected by the Unfair Commercial Practice Directive³⁵⁸ is the “average consumer”.³⁵⁹ ³⁶⁰ The term “average consumer” is not defined in the Directive although guidelines are offered. The test is based on the jurisdiction of the European Court of Justice. The Directive takes as a benchmark the average consumer who is reasonably well-informed and reasonably observant, incorporating social, cultural and linguistic factors as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.³⁶¹ The Unfair Commercial Practice Directive³⁶² provides protection to particular groups of vulnerable consumers on two levels: it protects against certain commercial practices aimed at vulnerable consumers included in the blacklist of Annexure I as well as against occasions where a trader could reasonably foresee that a commercial practice is likely to distort the behaviour of a particular group of consumers, specifically vulnerable consumers, because of their mental or physical infirmity, age or credulity.³⁶³ Courts and authorities have to exercise their own faculty of judgment, having regard to the case law of the Court of Justice, to

³⁵³ UCPD, 2005/29/EC, L149/24.

³⁵⁴ UCPD, 2005/29/EC, L149/24.

³⁵⁵ UCPD, 2005/29/EC, L149/24.

³⁵⁶ UCPD, 2005/29/EC, L149/24.

³⁵⁷ UCPD, 2005/29/EC, L149/24.

³⁵⁸ 2005/29/EC.

³⁵⁹ An average consumer is a consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice.

³⁶⁰ Stuyck, *supra* note 346, at 121.

³⁶¹ UCPD, 2005/29/EC, L149/25.

³⁶² 2005/29/EC.

³⁶³ Stuyck, *supra* note 346 at 121.

determine the typical reaction of an average consumer in any given case.³⁶⁴ The test is not a statistical one, but is based on the norms of the average consumer or group.³⁶⁵ I agree with Ramsay's argument that the test should be based on the norm of an average consumer.

In Recital 18 of the UCPD the benchmark is an average consumer, someone reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors as interpreted by the Court of Justice, but it also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is aimed at a specific group it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. Thus, the average consumer test is not a statistical test.³⁶⁶

Consumer vulnerability is viewed multi-dimensionally.³⁶⁷ The 'vulnerable consumer' criterion applies if a commercial practice distorts the economic behaviour of a group of consumers who are particularly vulnerable 'in a way which the trader could reasonably be expected to foresee'. Thus, the 'foreseeability' factor becomes relevant each time one needs to establish whether a given trader could have reasonably expected this practice to appeal in particular to a vulnerable group. The CPA does not specifically define the vulnerable consumer in the detailed manner of the UCPD, however it does provide for the protection of such consumers.

Article 5 of the Directive is seen as its central provision: it sets out a 'grand' general clause and two lesser general clauses. Article 5(1) clearly states that an unfair commercial practice is prohibited:³⁶⁸ the 'grand' general clause of Article 5(2) sets out the general prohibition of unfair commercial practices.

³⁶⁴ UCPD, 2005/29/EC, L149/25.

³⁶⁵ Ramsay, *supra* note 156, at 166

³⁶⁶ Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices. Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses. {COM(2016) 320}, page 40.

³⁶⁷ *Ibid* page 46-47.

³⁶⁸ Article 5(1), UCPD, 2005/29/EC.

Article 5(2) defines an unfair commercial practice as a practice contrary to the requirements of professional diligence³⁶⁹ and, with regard to the product, if it materially distorts or is likely to materially distort the economic behaviour of the average consumer whom it reached or to whom it is addressed, or of the average member of the group when a commercial practice is directed at a particular group of consumers.³⁷⁰

This 'grand' general clause is further elaborated on in two small general clauses which outline the commercial practices that are misleading and aggressive. Commercial practices are unfair if they are misleading as set out in Articles 6 and 7,³⁷¹ or when they are aggressive as set out in Articles 8 and 9.³⁷² Article 5(5) of the Directive refers to a list of commercial practices which in all circumstances are regarded as unfair, apply in all Member States and may be modified only by a revision of the Directive.³⁷³ Under the 'grand' general clause a commercial practice is unfair if it is contrary to professional diligence and material distorts a consumer's economic behaviour. It is important to understand the meaning of the terms "professional diligence" and "material distortion of the consumer's economic behaviour".

These Articles of the Directive can be seen as similar to sections 40 and 41 of the CPA in their description of what is viewed as an unfair commercial practice in general terms.

3 DIFFERENCES BETWEEN THE CPA AND THE UCPD

As mentioned in the paragraphs above the UCPD definition of a vulnerable consumer differs from that in the CPA.

The CPA does not have a specific list which indicates what commercial practices are unfair by default, whereas the UCPD has a blacklist. All commercial practices on the blacklist, are considered to be unfair and are prohibited without a case-by-case assessment against the provisions of Articles 5 to 9 of the UCPD. The blacklist is applicable in all Member States, is a complete list and can be modified only through a revision of the UCPD. The Member States are not empowered to amend the list themselves. Any assessment of a commercial practice has to be made against the blacklisted prohibitions. If a commercial practice is not on the blacklist, it

³⁶⁹ Article 5(2)(a), UCPD, 2005/29/EC.

³⁷⁰ Article 5(2)(b), UCPD, 2005/29/EC.

³⁷¹ Article 5(4)(a), UCPD, 2005/29/EC.

³⁷² Article 5(4)(b), UCPD, 2005/29/EC.

³⁷³ Article 5(5), UCPD, 2005/29/EC.

may be examined with regard to its compliance with the lesser general clauses in Articles 6 to 9 of the UCPD. If the commercial practice does not fall in the category of misleading or aggressive practices, as a last resort, it is evaluated on the basis of the 'grand' general clause set out in Article 5 of the UCPD.³⁷⁴ The 31 prohibited commercial practices blacklisted divide into 23 misleading and 8 aggressive practices.

Below, I offer a few thought in conclusion of the dissertation.

³⁷⁴ The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems. Ed Willem van Boom, Amandine Garde & Orkun Akseli 2014, page 67-68.

CHAPTER 6

CONCLUSION

A consultation of the literature and the legal opinions of scholars led to the conclusion that consumer protection involves the consideration of time and the evolution of law. I argue that the CPA is a developing process which will offer opportunities to be interpreted against international practice so as to move the protection of consumers in the direction of the harmonisation of consumer rights and the intentions and rights of suppliers. I am of the view that the notion of 'vulnerability' always will have a powerful effect on the interpretation and application of the CPA and is not to be taken lightly.

My argument is in favour of the application of the interpretation in the UCPD in order to create a principle which is stable and is foundational in taking into consideration the test of an unfair commercial practice, the definition of a vulnerable consumer and declares the type of practice deemed to be unfair by default.

The result will be that the consumer has greater confidence in the protection the law provides and which offers a similar level of redress to consumers so that they are not discouraged that the law has only face value. Instead, consumers will be encouraged to defend their rights and will be educated as to what they are entitled.

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