

The role of comparative law in consumer protection law: A South African perspective

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Jacolien Barnard*

Associate Professor, Department of Mercantile Law, University of Pretoria

Abstract

This article illustrates the role of comparative law as a possible law reform mechanism in consumer protection law from a South African perspective. The South African legislature introduced very comprehensive legislation in the area of consumer protection law in the form of the Consumer Protection Act 68 of 2008. Certain provisions in the Act mimic core European Union (EU) directives on consumer protection. This article aims to establish why elements of a foreign law model were introduced as part of law reform in South African consumer law, how this was done, and whether it could assist in the effective interpretation and enforcement of consumer protection measures. The focus is on a general discussion of unfair commercial practices regulated by the EU Unfair Commercial Practices Directive 2005/29/EC. It is argued that comparative law plays a significant role in the effective interpretation and enforcement of consumer protection law in South Africa. However, cognisance must be taken of South Africa's unique position, as well as its societal and economic needs.

Keywords: comparative law; consumer protection; Consumer Protection Act; European Union; law reform; legal transposition; unfair commercial practices; interpretation.

I Introduction

Perhaps the best way to start a contribution on comparative law and its role in consumer protection, is to align oneself with the specific stance or 'frame of reference' from which critical research on the topic was conducted.¹ In this regard the statement by [f_rücü is instructive:

'Comparative law is an enigmatic, paradoxical and elusive subject in that, just as one thinks one has mastered it, another puzzle appears on the horizon. The puzzle starts with the name of the subject, continue with its definitions, aims, objectives, methodology and its

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use in practice and culminate in its value and significance for legal science. Comparative law is at times in accord and at times in discord with other branches of law. It embodies harmony and disharmony and syncopation. It is stimulating yet routine. It is enabling yet frustrating. It is poised to become a science of tomorrow, the tool for understanding laws and cultures in the globalizing world of the twentieth century and yet it is still not taken seriously by many scholars. Its functions and malfunctions, conceptions and misconceptions, advantageous and disadvantageous are under perpetual discussion.'²

Comparative law is indeed an enigma. The debate has shifted from its recognition as an important legal science, to determining whether it is something that is perhaps 'too big and too broad to properly define and utilise taking into account traditional tools of classification and teaching'.³ For purposes of this contribution, the focus is on comparative law as a possible mechanism for efficient law reform in a particular legal system. It has been argued that this is also one of the most important purposes of comparative law today.⁴ It should, however, be noted at the outset that using comparative law models for purposes of law reform should be undertaken with caution. [f_rücü states that even though borrowing, transposition, and reciprocal influence are the essence of law reform, there are significant differences of opinion among comparative lawyers as to whether such borrowings work; whether movements are one-way only, or reciprocal; and, most importantly, why law reform should be based on foreign models.⁵ She observes that law reform by way of comparative law can be considered successful if the reform is beneficial to the recipient and is done without disturbing the domestic socio-culture.⁶ Unsuccessful transpositions should serve as cautionary examples when law reform based on foreign law is undertaken.⁷

The aim of this article is to illustrate the role of comparative law as a law reform mechanism in consumer protection law from a South African perspective. The South African legislature introduced very comprehensive legislation in the area of South African consumer

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protection law through the Consumer Protection Act (CPA).⁸ Certain provisions in the Act mimic core European Union (EU) directives on consumer protection. The research aims to establish why elements of a foreign law model were introduced as a law reform mechanism in South African consumer law, how this was done, and whether it could assist in the effective interpretation and enforcement of consumer protection measures. Though many examples may be used, the focus in this article is on a general discussion of unfair commercial practices regulated by the EU Unfair Commercial Practices Directive 2005/29/EC (UCPD).

Many jurists and comparative lawyers appear to favour either the term 'legal transposition' or 'legal transplant'. There are various opinions on what transplantation is or should be. Watson defines it as the moving of a rule or a system of law from one country to another⁹ with the notion that most changes in most legal systems occur as the result of borrowing.¹⁰ In contrast, Berkowitz, Pistor and Richard distinguish between transplants with (receptive) and without (unreceptive) a demand for the new law;¹¹ while Legrand states that legal transplantation is impossible.¹² The view of [f_rücü that the law should be approached as a series of transpositions and tuning, and that the concept of legal transplantation should rather be replaced with legal transposition, is supported.¹³ The reason given by the writer is that the legal transplant theory requires refinement.¹⁴

It appears that comparative law scholars use the terms 'borrowing' and 'transplant' interchangeably. Ellis refers to the 'borrowing' or 'transplanting' of rules between legal systems and their pertinence to general principles of international law.¹⁵ The writer explains borrowing in its simplest form by stating that 'bodies of law are not closed systems but are better regarded as traditions, embedded in cultures. Because cultures, including legal cultures, are in constant contact and communication

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with one another, they will inevitably 'borrow' and learn from one another in various ways.'¹⁶

Wiener traces the 'borrowing' of legal ideas from national law to international law, and observes that 'vertical legal borrowing' is related to but different from 'horizontal legal borrowing' across national legal systems.¹⁷ Watson states that borrowing may be from within a legal system by analogy, or from a different legal system, and that the act of borrowing is usually simple.¹⁸ He argues, however, that to build a theory of borrowing appears extremely complex.¹⁹ No such attempt is made in this contribution, and the meaning given to the above terms should be construed as the meaning of the referenced author(s) unless otherwise stated. This explanation of the relevant concepts above, serves as a background to the discussion which follows.

II Transposition and harmonisation of EU directives within EU member states

The EU is founded on and modified by multilateral treaties, rather than by a single constitutive document, and these treaties form the primary sources of written EU Law.²⁰ A number of treaties are significant for consumer protection. Article 8A of the Single European Act²¹ (SEA)

provides that the aim of the Act is progressively to establish an internal market or single market in which the free movement of goods, persons, services, and capital (the so-called four freedoms) between member states is ensured. ²² Unberath and Johnson explain that the EU Commission suggested that an advantage of a single market and harmonising the laws applicable to consumer transactions across the EU, would be an increase in 'consumer confidence' in contracting for services and goods beyond national boundaries. ²³ According to the EU Commission this increased 'consumer confidence' would facilitate intra-community

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trade and therefore serve the functioning of the internal market. ²⁴ Consumer confidence was one of the main drivers for the implementation of consumer directives such as the EU's Unfair Commercial Practices Directive, 2005 (UCPD) discussed below. However, reliance on the concept of 'consumer confidence' and its effectiveness in establishing a single market in the EU has been criticised. Unberath and Johnson, for example, align themselves with the arguments of Roth that 'the protection of the "confident consumer" may have a very weak and unreliable basis in Community law.' ²⁵ It is further argued that interventions (such as legislative interventions) in market activity are normally limited to correction of market failures, but if a fairly 'healthy' market environment exists in a particular member state, the consumer may not need this additional protection and, consequently, laws on consumer protection may impose extra costs without in fact improving the position of the consumer. ²⁶ Another issue (raised by Ramsay) regarding consumer confidence is that more often than not consumers are not even aware of their own laws or rights. ²⁷

The Treaty of Lisbon, ²⁸ in the main, reforms EU institutions and came into force in December 2009. Article 6 of the Treaty of Lisbon declares the Charter of Fundamental Rights of the European Union ²⁹ to have the same binding legal force as a treaty. ³⁰ Article 38 of the Charter of Fundamental Rights provides that EU policies should ensure a high level of consumer protection. The Treaty on the Functioning of the European Union (TFEU) ³¹ also guarantees a high level of consumer protection. Article 12 provides that consumer protection requirements should be considered in defining and implementing other EU policies and activities. Article 169 of the TFEU provides that the EU must contribute to the

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protection of the health, safety, and economic interests of consumers, as well as promote their rights to information, education, and to organise themselves in order to safeguard their interests. This includes the implementation of measures to achieve EU objectives. ³² These objectives include the adoption of regulations and directives which, together with decisions by the EU Council, are considered secondary sources of EU law. While EU regulations have direct application in member states and do not need to be transposed into national regulations, EU directives must be transposed. This raises questions as to how one ensures that the regulations implementing EU legislation are fully aligned with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU internal market, avoid 'gold plating', or place unnecessary burdens on business and consumers. ³³

Transposition is the process by which EU member states implement directives by passing appropriate implementation measures, such as the enactment of national legislation. The EU Commission monitors this closely to ensure that transposition is timely, correct, and implemented to achieve the intended results. ³⁴ Unfortunately, despite the EU Commission's best efforts, such monitoring is not always a guarantee of timely and effective transposition. Kurpas et al observe that other than delays in transposition, member states can engage in other 'bad practices' such as 'gold plating', 'double-banking', or 'regulatory creep', which essentially lead to 'over-implementation' of EU legislation. ³⁵ 'Gold-plating' is described as going beyond the requirements of the directive when transposing it into national law, while 'double-banking' occurs when there is an overlap between national legislation and the newly-transposed directive. ³⁶ 'Regulatory creep' refers to overzealous enforcement or the existence of a state of uncertainty as to the status of the regulation. ³⁷

Apart from the implementation of directives, other mechanisms have also been used to harmonise the legal order in member states. Koopmans discusses the development of the European Community's legal order, and states that, in the main, treaties establishing the European

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Community consist of rules on economic and social law. ³⁸ He further refers to the European Parliament, the EU Commission, the implementation of directives, and the European Court of Justice (ECJ) as mechanisms within this legal order. ³⁹ Koopmans attempts to establish the nature of the relationship between the Community's legal order and the diverging legal traditions of its member states. ⁴⁰ He refers to various ECJ judgments and comments that the ECJ makes use of comparative material and in this way national legal traditions influence Community law. ⁴¹ He states that these traditions also contribute in less conspicuous ways to the development of Community law and the working of Community institutions. ⁴² Koopmans observes that the ECJ is one of the major sources of legal innovation in Europe, not only because of its position as a judicial institution, but also because of the intellectual strength of its comparative methods. ⁴³ National courts take note of the ECJ's way of reasoning and as a result (in certain instances), legal principles which originate from national legal systems are incorporated into ECJ case law — which is, in turn, transformed into principles of Community law — and so make their way back to the national courts. ⁴⁴ Koopmans further comments that it is not always appropriate to study legal developments on two different levels — the Community and the national — but that one should 'rather look at it as one global process being a progressive construction of a many-sided legal edifice'. ⁴⁵

Zimmermann ⁴⁶ highlights the problems raised by harmonisation in his analysis of the various EU mechanisms ⁴⁷ which aim to establish a uniform private-law framework within the EU. (This is also closely related to consumer protection law within the EU.) One such problem is that the variety of legal documents and sources relating to sales law are only partially coordinated or based upon each other. ⁴⁸ He argues that even though the harmonisation of sales law as part of the private-law

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framework has a long tradition, a number of issues remain unresolved. ⁴⁹ These include that the common frame of reference within which to represent the 'common core' of European law is inadequate, and the fact that a number of branches of private law have been unaffected by the European legal harmonisation debate. ⁵⁰ Ultimately, Zimmermann is of the view that the different areas of a private-law framework within the EU require genuine European — as opposed to national — legal scholarship, based on historical and comparative study. ⁵¹

The EU aims to achieve uniformity and legal certainty within its member states by introducing directives and requiring the harmonisation of national law within the parameters of these directives. There is a significant move from minimal harmonisation in the implementation of directives by member states, to full harmonisation. Ramsay observes that the EU Commission justifies full harmonisation by the reduction of transaction costs for business, and the creation of consumer confidence in cross-border shopping which will lead to greater competition and productivity. ⁵² He further explains that the move from minimal harmonisation, where member states may have higher national protection, to full harmonisation where a member state may not adopt a higher or lower level of protection, is a significant policy change. ⁵³ The writer points to the UCPD as the first real example of full harmonisation. ⁵⁴ According to Ramsay 'the strategy of full harmonization is inevitably controversial, and moves the decisive political decision-making to Brussels'. ⁵⁵ It therefore should not be surprising that businesses favour full harmonisation while consumer groups oppose it. ⁵⁶ Ramsay highlights the most prominent arguments against full harmonisation. ⁵⁷ These include: (a) there is no empirical evidence to support the argument regarding the costs of legal transactions because language and culture are more important than costs; (b) the actual measures proposed will have minimal impact on consumer confidence in cross-border transactions; and (c) EU directives create a false sense of harmonisation. ⁵⁸ 'Full harmonization by the EU Commission may fit however with a public choice analysis where business interests (who presumably are

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interested in a reduction in costs) have significant influence on decision making within the EU.' ⁵⁹ It is clear from the discussion above that the aim of a single market in the EU and the drive to full harmonisation of consumer protection measures — although commendable in its aim (free movement of goods etcetera between member states, legal certainty, and uniformity) — has its limitations. These challenges should be taken into account when EU consumer protection measures (such as the UCPD) are considered as an example on which to base law reform in other jurisdictions, for example in South Africa.

III The need for law reform in the area of consumer protection law in South Africa

South Africa has a mixed legal system based on Roman-Dutch law (also known as the common law), but current South African law is not limited thereto and includes other sources. South African law has developed through court decisions, custom, and a vast number of legislative enactments.⁶⁰ In addition, The Constitution of the Republic of South Africa, 1996 (the Constitution), many statutes passed because of the Constitution, and modern commercial legislation such as the CPA, have introduced important new principles into our legal system. The customary law of the indigenous peoples of South Africa also forms part of South African law and is expressly endorsed by the Constitution.⁶¹ There has been a conscious drive by the legislature in recent years to bring South African legislation and policies into line with international norms and standards. Comparative analyses of foreign and international law to determine the intended purpose and application of South African law and legislation are not new in the South African context. This is clear from the wording of statutes, judicial decisions, and legal writings.⁶² Statutes such as the Competition Act,⁶³ the National Credit Act,⁶⁴ and

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the Companies Act⁶⁵ are not only attempts to align South African law with international standards, but also mimic the content of applicable foreign legislation and international law.

The question has been asked why something as important as consumer protection has only come to the fore in the South African context more than 15 years after the introduction of the Bill of Rights. Sachs J answered this unequivocally in *Barkhuizen v Napier*.⁶⁶ He stated that 'given the scale of injustice in the past, it was not surprising that the theme of consumer protection had not loomed as large in South Africa as it had in other parts of the industrialised world'.⁶⁷ He added that:

'[A]s the South African society normalized itself, issues that were once relatively submerged now surfaced to claim full attention and in this way achievement of the larger constitutional freedoms enabled the attention to and development of the smaller freedoms so necessary for enabling ordinary people to live dignified lives in an open and democratic society.'⁶⁸

According to Sachs J, one of these freedoms is the adequate protection of consumers.⁶⁹

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Before the enactment of the CPA, there were various dispersed pieces of legislation aimed at different areas within consumer protection law.⁷⁰ A single, overarching piece of legislation was required to bring certainty and uniformity. In recent years, jurists and judges have repeatedly called for the unequal bargaining position between suppliers⁷¹ (as the dominant party) and consumers (often the vulnerable and uninformed party) to be corrected.⁷² This unequal bargaining position is a result of, amongst others, the stringent application of our common law, conflicting court decisions, and the enforcement of legislation that is not in line with our Constitution or international standards. Law reform was clearly needed.

(a) Foreign and international law in the reform of South African consumer protection law

In terms of section 2 of the Constitution, all legislation in South Africa must be consistent with the Constitution. Section 233 of the Constitution provides that when interpreting any legislation (such as the CPA), every court must prefer any reasonable interpretation of the legislation that is *consistent with international law* over any alternative interpretation that is inconsistent therewith.⁷³ Sutherland draws attention to the fact that the Constitution has bolstered the role of international law in the interpretation of statutes.⁷⁴ He remarks that:

'[I]n this sense, international law includes customary law and treaties. It has been accepted that the case law of other jurisdictions, in interpreting provisions based on treaties, may be particularly

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important in South Africa if similar legislation is considered here. Accordingly there can be little doubt that international law may now be considered in the process of interpreting legislation even without having established any form of ambiguity.'⁷⁵

In interpreting the Bill of Rights a court must consider international and may consider foreign law.⁷⁶ The preamble to the CPA confirms this by stating that the CPA was (amongst other reasons) specifically implemented 'to give effect to the international law obligations of the Republic'. The Act further provides that when interpreting or applying the CPA, a person, civil court, the National Consumer Tribunal (NCT), or the National Consumer Commission (NCC) may consider appropriate foreign and international law, as well as appropriate international conventions, declarations, or protocols relating to consumer protection.⁷⁷ The Constitution gives the legislature a mandate to use international and foreign law (and models) in reforming consumer protection law in South Africa. The legislature also grants courts and other enforcement institutions (such as the NCT) a mandate to interpret reformed consumer legislation (such as the CPA) and consumer law in a manner which takes account of international and foreign law.⁷⁸

A correct interpretation is vital as many other jurisdictions in Southern Africa, for example, Namibia and Botswana, look to South African law to draft their own laws and determine how these laws should be implemented and interpreted. One of the reasons for this is the inter-relationship between these countries as members of the Southern African Customs Union (SACU) and the Southern African Development Community (SADC).⁷⁹

(b) The choice of European Union law

Since the end of the apartheid regime in South Africa, EU-SA relations have flourished, with a 'Strategic Partnership' being established in

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2007.⁸⁰ In 1999 the two parties signed a Trade, Development and Cooperation Agreement (TDCA) which came into force in 2004, with some provisions applying retrospectively from 2000. The TDCA covered a wide range of issues including political cooperation, development, and the establishment of a free-trade area (FTA).⁸¹ The trade provisions of the TDCA were replaced by the regional Economic Partnership Agreement EU-SADC in June 2016.⁸² 'The trade in goods between the EU and South Africa has increased by more than 120 percent, and foreign direct investment has grown five-fold.'⁸³ This indicates the importance of consistency between the two bodies in the enforcement of consumer protection legislation.

This longstanding relationship was, in all likelihood, the reason why the South African Department of Trade and Industry not only used EU law (and directives) as a law-reform model, but also allows the consideration of directives when applying the CPA in the South African context.⁸⁴

IV Law reform as a comparative law mechanism in the area of consumer protection law: unfair commercial practices

(a) The Unfair Commercial Practices Directive 2005 (UCPD) (foreign model)

(i) Implementation and purpose

Following an extensive consultation process, the UCPD was adopted by the EU on 11 May 2005 and replaced the previous multiple volumes of national legislation and court rulings with a single set of common rules. The UCPD aims to achieve uniformity and transparency across the EU to reassure consumers when they purchase goods and services.⁸⁵ The aim of the UCPD is to contribute to the proper functioning of the

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internal market and achieve a high level of consumer protection by approximating the laws, regulations, and administrative provisions of the

member states dealing with unfair commercial practices that harm consumers' economic interests. ⁸⁶ Recitals 3 and 5 of the UCPD provide that 'common rules and principles aim to give consumers the same protection against unfair practices and rogue traders whether they are buying from their corner shop or purchasing from a website based abroad'. Before the adoption of the UCPD, each member state had its own national laws governing specific unfair commercial practices and these differed from country to country. ⁸⁷

A controversial aspect of the UCPD is, according to Ramsay, its 'maximal' nature which has been confirmed by ECJ case law. ⁸⁸ The directive aims at maximum harmonisation of the law of member states. ⁸⁹ Ramsay states that the extent to which the UCPD will create a level playing field through maximal harmonisation, depends in part on the uniform interpretation and application of the central concepts of market fairness in the directive. ⁹⁰ Maximal harmonisation is justified as it reduces business costs for cross-border marketing and creates consumer confidence. ⁹¹ This discussion provides a concise summary of the UCPD's scope of application and core provisions to highlight how these provisions are reflected in the South African model (the CPA) as discussed below.

(ii) Application and scope

The UCPD addresses business to consumer (B2C) commercial practices. ⁹² These are practices 'before, during, or after a commercial transaction, and include any act, omission, course of conduct, or representation, as well as commercial communication, including advertising and marketing by a trader which is directly connected with the

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promotion, sale, or supply of a product to consumers'. ⁹³ Case law brought greater clarity by giving specific examples of what would be included in B2C commercial practices. ⁹⁴ These include commercial acts that originate from a trader and which form part of an operator's commercial strategy, relate directly to the promotion thereof and its sales development, for example, advertising, marketing, commercial communication, sales promotions, discounts, liquidation sales, sale methods such as doorstep selling or itinerant sales, as well as the use of standard terms. ⁹⁵ A 'trader' is regarded as any natural or juristic person who is acting for purposes related to his trade, business, craft, or profession. ⁹⁶ A 'consumer' is regarded as any natural person who acts outside of his 'trade, business, craft, or profession'. ⁹⁷ The ECJ has stated that this includes any individual not engaged in commercial or trade activities before, during, and after a 'commercial transaction'. ⁹⁸ Unfortunately, the phrase 'commercial transaction' is not defined, but is likely to mean B2C transactions that lead to the delivery of goods or the provision of services for remuneration. The EU Commission Working Document 2009 commented that there is a need to broaden both the application of the UCPD beyond B2C transactions, and the definition of a 'consumer'. ⁹⁹ The EU Guidance Document (2016) identified examples of a broader application, such as trade-in agreements for motor vehicles and the sale and re-sale of gold. ¹⁰⁰ The UCPD does not address legal requirements relating to taste and decency which vary widely among the member states. ¹⁰¹ Therefore, national rules on commercial practices, including marketing and advertising, the regulation of the protection of

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human dignity, the prevention of sexual, racial, and religious discrimination, or the depiction of nudity, violence, and anti-social behaviour, are not covered by the directive. ¹⁰²

(iii) Average and vulnerable consumers

The general clause in article 5 prohibits unfair commercial practices. ¹⁰³ Article 5(2) further states that a commercial practice shall be unfair if: '(a) it is contrary to the requirements of professional diligence; and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed at a particular group of consumers.' It appears that the general clause serves as a safety net to catch any current or future practices that cannot be categorised as misleading or aggressive. ¹⁰⁴ Ramsay remarks that this statement mirrors the rationale for the development of the broad jurisdiction conferred by the United States Federal Trade Commission (US FTC) on policing 'unfair acts or practices' where general clauses pose questions rather than provide answers. ¹⁰⁵ He states further that a particular challenge is to develop an EU standard of fairness from the concept of professional diligence. The standard of professional diligence 'represents a political compromise, and the political choices in elaborating fairness were delegated to the ECJ'. ¹⁰⁶ The US model envisages a central administrative agency that might develop the fairness standard, provide interpretive guidance, or adopt rules based on the general prohibition. ¹⁰⁷ Ramsay's argument is supported in that while the EU Commission may be the administrative agency that provides guidance, the development of fairness depends ultimately on judicial interpretation. ¹⁰⁸ Article 5 of the UCPD replaces member states' existing, divergent general clauses and thus removes internal market barriers.

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The average consumer test under of article 5(1) and (2) of the UCPD provides that if a commercial practice is directed at a particular group of consumers, an average member of that group is the benchmark. ¹⁰⁹ The fairness or unfairness of a commercial practice is then assessed against this benchmark. The ECJ refers to the 'average consumer' in its case law. ¹¹⁰ The average consumer is 'reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural, and linguistic factors'. ¹¹¹ In terms of recital 18 of the UCPD the average consumer test is based on the principle of proportionality. ¹¹² The directive adopted this notion to strike the correct balance between the need to protect consumers and to promote free trade in an open and competitive market. ¹¹³ The interpretation by the member states of the term 'average consumer' provides guidance, for example, as to how an average consumer should be identified within a certain group. The EU Commission Working Document, 2009, discusses a judgment by the Italian Administrative Tribunal as an example of this approach at national level and confirms that

'the level of knowledge of the average consumer cannot be assessed in merely statistical terms but that the relevance of the characteristics of the goods or services together with the specifics of the relevant market sector must also be taken into account'. ¹¹⁴

The social, linguistic, and cultural characteristics unique to a particular member state may justify a different interpretation by the relevant dispute resolution authority or court. ¹¹⁵ When assessing the unfairness of a particular practice and its effect on vulnerable groups, all relevant factors must be taken into account, including the circumstances in which products are sold, the information given to consumers, the clarity of such information, the presentation and content of advertising

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material, and the risk of error in relation to the group of consumers concerned. ¹¹⁶

Apart from the general clause, article 5 also refers to a clearly identifiable group of particularly vulnerable consumers. Article 5(3) provides that commercial practices 'which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.' Infirmity (mental or physical) includes sensory impairment, limited mobility, and other disabilities. For example, consumers who need to use wheelchairs might be a vulnerable group in relation to advertising claims about ease of access to a holiday destination or entertainment venue. ¹¹⁷ Similarly, consumers with a hearing impairment may be a particularly vulnerable group in relation to advertising claims about 'hearing aid compatibility' in a telephone advertisement. ¹¹⁸ With regard to age, it may be appropriate to consider a practice from the perspectives of both older and younger consumers. ¹¹⁹ The EU Working Document, 2009, provides that the concept of 'credulity' includes groups of consumers who may be more inclined to believe specific claims, and observes that this is also the reason why the term is 'neutral' in the directive. ¹²⁰ Ramsay refers to the transposition of the UCPD into United Kingdom law and comments that

'under broader equitable conceptions of substantive fairness one of the objectives of such national regulation might also be protecting the vulnerable and the poor, maintaining integrity in marketing and furthering values of risk-sharing and loss-distribution'. ¹²¹

The EU Commission Report, 2013, states that the experience gained and data gathered show that further efforts should be made to strengthen

categories of citizens who find themselves in a situation of weakness. ¹²² However, the Synthesis Report, 2011 on the application of the UCPD, ¹²³ states that member states appear to recognise that a very general obligation not to abuse vulnerability is insufficient to protect vulnerable consumers and that there must be clear and specific rules that prohibit certain practices that typically affect the most vulnerable. ¹²⁴

(iv) Interplay with other EU law and self-regulation

Because of its general scope, the directive applies to many commercial practices also regulated by other general or sector-specific EU legislation. Article 3(4) states that in the case of conflict between the provisions of the UCPD and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects. Recital 10 confirms that 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. In terms of the EU Guidance Document, 2016, the UCPD works as a 'safety net' to ensure that a high level of consumer protection against unfair commercial practices is maintained across the board. This includes complementing and filling gaps in other EU law. ¹²⁵ For this reason, the UCPD will (depending on the type of commercial practice) be interpreted together with the Consumer Rights Directive, ¹²⁶ the Misleading and Comparative Advertising Directive, ¹²⁷ the e-Commerce Directive, ¹²⁸ the Data Protection Directive, ¹²⁹ and the e-Privacy Directive. ¹³⁰ As regards the information requirements in certain sectors, the UCPD will complement provisions governing financial services, health, telecommunications, and transport. ¹³¹

The interplay between the UCPD and The Unfair Terms in Consumer Contracts Directive ¹³² (UTCCD) was clarified in *Pereničov and*

Pereničá which concerned a credit agreement where two different annual percentage rates were indicated. The court held that the incorrect information provided in the terms of the contract was 'misleading' within the meaning of the UCPD, if it caused, or was likely to cause, the average consumer to take a transactional decision that he or she would not otherwise have taken. The Guidance Document, 2016, comments that finding a commercial practice unfair is one factor that can be considered when assessing the unfairness of contractual terms under the UTCCD. ¹³⁴ In the UK, in *OFT v Ashbourne Management Services*, ¹³⁵ it was found that it was contrary to the UCPD to include an unfair term in a contract, and also unfair to seek to enforce it by demanding sums payable under the term. A further important comment in the EU Guidance Document, 2016, is that only a few member states' consumer protection authorities have similar powers to outlaw unfair commercial practices and unfair contract terms, aimed at prohibiting the use of non-negotiated standard contract terms which they consider unfair without having to take the trader to court. ¹³⁶

The UCPD recognises the importance of self-regulation mechanisms and clarifies the role that codes of conduct and self-regulatory bodies can play in enforcement. Member states may encourage such bodies to check for unfair commercial practices, in addition to enforcing the UCPD. ¹³⁷ When the rules in self-regulatory codes are strict and rigorously applied, they may reduce the need for judicial enforcement. ¹³⁸ Moreover, when the standards are high and industry operators comply with them, such rules may be a useful for national authorities as well as (national) courts in assessing whether a commercial practice is unfair. ¹³⁹

(v) Categories of unfair commercial practices (synopsis)

Ramsay ¹⁴⁰ observes that the structure of the UCPD follows a mixed approach by adopting a model of regulation ¹⁴¹ which includes a general unfairness clause, ¹⁴² clauses addressing misleading ¹⁴³ (including misleading

omissions) and aggressive ¹⁴⁴ commercial practices, and a 'laundry-list' of specific prohibited practices. ¹⁴⁵ Annexure I to the UCPD contains the list of practices which shall be regarded unfair in all circumstances, and are thus banned without applying the average consumer test. These are referred to as 'blacklisted terms'. ¹⁴⁶ The EU, therefore, has a three-pronged approach to curb unfair commercial practices. First, the listed practices that are considered unfair under all circumstances; secondly, a general prohibition on misleading and aggressive practices; and finally, a general prohibition on unfair practices.

Article 6 of the UCPD specifically prohibits misleading advertising or providing false information or representations. Article 6(2)(a) provides that 'a commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves: (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor.' Advertising as a B2C commercial practice is 'regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct.' ¹⁴⁷ 'This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.' ¹⁴⁸

The determination or test of what exactly a 'transactional decision' would entail as referred to in article 6 has been criticised. ¹⁴⁹ The Synthesis Report, 2011, states that such a test 'imposes an additional burden on authorities, consumer organisations, individual consumers, or other claimants who challenge special commercial practices in court or before other bodies.' ¹⁵⁰ Those challenging the practice, who are satisfied with evidence of non-compliance with the traditional rule, must also establish that the practice is likely to affect the 'transactional

decision making' of the average consumer. ¹⁵¹ The Synthesis Report, 2011, notes that due to the difficulty of proving compliance with the 'transaction decision test', many member states with regimes that predate the UCPD 'have maintained them simply because they have been developed over a long period on the basis of experience, and because they work well'. ¹⁵² Often, these regimes are more detailed than the open-ended provisions of the UCPD that are yet to be concretised by case law, and, most importantly, generally avoid the application of the so-called 'transactional decision making' test. ¹⁵³ In terms of article 6(1)(g), traders should not mislead consumers as to their consumer rights. This would include information on the consumer's right of withdrawal or cooling-off right.

A misleading omission can also amount to an unfair commercial practice. ¹⁵⁴ A B2C commercial practice in terms of article 7 of the UCPD is misleading if 'in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits, hides or provides in an unclear, unintelligible, ambiguous or untimely manner, material information that the average consumer needs, according to the context, to take an informed transactional decision'.

Where article 8 of the UCPD refers to aggressive commercial practices, concepts such as harassment, coercion (including physical force) and undue influence are included. Of all the concepts mentioned in article 8, only 'undue influence' is defined as 'exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed choice'. ¹⁵⁵ The Synthesis Report, 2011, states that aggressive practices involve conduct that has already been covered in other legislation in the member states, including contract and criminal law. In this respect, the directive has added an 'additional layer of protection that can be activated by public enforcement means, but without necessarily having to institute criminal or civil law proceedings'. ¹⁵⁶ With regard to undue influence, examples have crystallised in the member states where, for instance, telecommunication operators unduly delayed the migration of consumers to other

providers, ¹⁵⁷ or energy providers made it difficult for consumers to exercise their right of withdrawal (cooling-off right or right of cancellation). ¹⁵⁸ The European Consumer Centres (ECCs) which deal with many individual complaints, often encounter aggressive practices in the timeshare

sector (holiday clubs and related practices) and, to a lesser extent, in the off-premises sale of consumer goods (such as furniture, electronic outlets, and health or food products). ¹⁵⁹ Article 9 lists a range of factors to be taken into account when determining whether a trader is guilty of an aggressive commercial practice. Although it is a non-exhaustive list, factors include 'timing, location, nature or persistence, the use of threatening or abusive language or behaviour, the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, any onerous or disproportionate non-contractual barriers imposed by the trader, and any threat to take any action that cannot legally be taken'. ¹⁶⁰ In terms of article 9, inertia selling (demanding payment for or the return or safekeeping of products not solicited by the consumer) is also a commercial practice that is prohibited in all circumstances under the UCPD. Article 27 of the Consumer Rights Directive ¹⁶¹ complements the UCPD on the consequences of such practice. It provides that, in the case of inertia selling, the 'consumer shall be exempted from the obligation to provide any consideration' and in such cases 'the absence of response from the consumer shall not constitute consent'.

(b) A South African perspective: Unfair commercial practices and the Consumer Protection Act 68 of 2008 (South African model)

(i) Implementation and purpose

As explained above, the CPA was implemented to effect comprehensive consumer protection over a broad spectrum of consumer transactions previously regulated by scattered consumer legislation and self-regulation. The preamble to the CPA states that it is necessary to develop and employ innovative means to:

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'fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers; (b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and (c) to give effect to internationally-recognised customer rights. Emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services in South Africa. It is therefore desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation, and enhanced performance.' ¹⁶²

The CPA was implemented incrementally and Chapter 2 of the Act which contains the eight fundamental rights of the consumer, came into effect on 31 March 2011. The purpose of the CPA is further to 'promote fair business practices and to protect consumers from (a) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (b) deceptive, misleading, unfair or fraudulent conduct'. ¹⁶³ The Act aims to 'improve consumer awareness and information, and to encourage responsible and informed consumer choices and behaviour'. ¹⁶⁴

(ii) Application and scope

As a general statement concerning the application of the CPA, it could be said that the Act is applicable to suppliers who supply goods and services in the ordinary course of business to consumers for consideration. Each of these concepts has its own particular definition in section 1 of the CPA. Barnard aptly remarks that 'the CPA provides protection throughout the supplier-consumer relationship'. ¹⁶⁵ 'Consideration' includes money or credits (gift vouchers or customer loyalty points as part of a customer loyalty programme) or any other valid form of counter performance. ¹⁶⁶ Section 5(6) provides that for greater certainty other types of arrangements are also regarded as transactions between consumers and suppliers. These arrangements include the solicitation of offers to enter into a franchise agreement and the conclusion of a

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franchise agreement itself, as well as the supply of goods and services between a trade union, club, association or society and its members, whether or not a charge or economic contribution is demanded. ¹⁶⁷ 'Ordinary course of business' is not defined in the Act, but has been the subject of interpretation in the field of insolvency, where it was found that the test is an objective one and regard must be had to all the circumstances, including the actions of both parties to the transaction. ¹⁶⁸ This approach was confirmed in *Eskom Holdings Ltd v Halstead-Cleak* and in the NCT decision of *Doyle v Killeen and Others*.

Most of the concepts within the general application guideline expressed above have specific definitions in section 1 of the CPA. Although 'supplier' is defined as a person who markets any goods or services, it is also used as an overarching term to include producers, importers, retailers and service providers. 'Consumer' is a wide concept and includes natural persons, certain juristic persons, as well as the users or beneficiaries of the goods supplied or services rendered. In *Eskom Holdings Ltd v Halstead-Cleak* the court held that a consumer/supplier relationship had to be present for the CPA to apply and in that case the respondent was not a consumer as he (a) had not entered into any transaction with Eskom (the appellant) as a supplier or producer of electricity in the ordinary course of Eskom's business; and (b) was not at the time utilising the electricity, or a recipient or beneficiary thereof.

'Goods' include 'anything marketed for human consumption, tangible objects (movables), immovable property, music, data, software, water, gas and electricity' to name but a few. 'Service' includes any work or undertaking, the provision of information, education, advice or consultation, entertainment, access to any premises or right to immovable property. This definition also applies to franchise agreements. 'Supply' in relation to goods includes to sell, rent, exchange and hire in the ordinary course of business for consideration. In relation to services it includes the sale of services, or to perform services or cause them to be performed.

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(iii) Ordinary and vulnerable consumers

Section 22 deals with the consumer's right to plain and understandable language and refers to an ordinary consumer. In terms of section 22(1) the producer of a notice, document, or visual representation that is required to be produced, provided, or displayed to a consumer must do so either in the form prescribed by the CPA or any other legislation; or in plain language, if no form has been prescribed for that notice, document or visual representation. Section 22(2) provides that 'a notice, document or visual representation is in plain language if it is reasonable to conclude that an *ordinary consumer* of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort'. On analysing the opinions of legal writers ¹⁷³ regarding section 22, it becomes clear that to determine who qualifies as an 'ordinary consumer' is not as simple as it appears. This becomes even more apparent when one considers that, aside from the ordinary consumer or group of consumers, there are also particular groups who need additional protection in terms of the CPA, namely, vulnerable consumers as described in section 3(1)(b) of the Act. ¹⁷⁴ The groups mentioned in section 3(1)(b) include for example minors, seniors and illiterate consumers. ¹⁷⁵ It therefore becomes necessary not only to take into account ordinary consumers of a group or class but also vulnerable

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consumers in the determination of compliance of the plain language requirement in terms of section 22.

(iv) Interplay with other legislation, self-regulation

Because of its broad application, the CPA will, in most instances apply together with other pieces of legislation and at the very least also with the common law. Section 2(9) provides that if there is an inconsistency between any provision of the CPA and a provision of another Act ¹⁷⁶ 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 to the extent that the Acts cannot apply concurrently, the provision that extends greater protection to a consumer prevails over the alternative provision'. Examples of legislation that will apply concurrently (depending on the type of consumer agreement) with the CPA include the NCA; ¹⁷⁷ the Electronic Communications and Transactions Act; ¹⁷⁸ the Protection of Personal Information

Act; ¹⁷⁹ the Alienation of Land Act; ¹⁸⁰ and the Property Time-Sharing Control Act. ¹⁸¹

One of the aims of the CPA in terms of section 3 is to provide a harmonised, effective and sufficient system of redress and enforcement. There is a significant focus on consensual dispute resolution as is clear from the preamble, purpose and section 69 of the Act. ¹⁸² As part of this comprehensive enforcement framework the CPA also provides for Accredited Industry Ombuds in terms of section 82(6) as well as industry codes, for example, the Motor Industry Ombud and the Consumer Goods and Services Ombud. In terms of section 70 a

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consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent. ¹⁸³ The avenues of redress available in terms of section 69 further imply that alternative dispute resolution agents (which include self-regulatory bodies) must be approached before judicial redress may be obtained.

(v) Unfair Commercial Practices in terms of the CPA (synopsis)

Taking into account the above comparative analysis, the contents of certain unfair commercial practices in terms of the CPA are explained below. Section 16 contains the consumer's cooling-off right and includes the duties of the supplier when the consumer exercises this right. Section 16 should be read together with the consumer's fundamental right to privacy (Part B), section 32 (direct marketing), and section 20 (right to return goods) for an accurate interpretation. ¹⁸⁴ Section 21 governs unsolicited goods and regulates inertia selling. Section 21(5) provides that if a person lawfully retains any unsolicited goods, the property in those goods 'pass unconditionally to the person, subject only to any right or valid claim that an uninvolved third party may have with respect to those goods'. ¹⁸⁵ The consumer's cooling-off right and unsolicited goods fall under Part C: The consumer's fundamental right of choice.

The consumer has a fundamental right to fair and honest dealing (Part F) which includes protection from unconscionable conduct in terms of section 40, and false, misleading and deceptive representations in terms of section 41. Section 1 defines 'unconscionable' as any conduct that has: (a) a character as referred to in section 40; or (b) being 'unethical or improper to a degree that would shock the conscience of a reasonable person'. The right to fair and responsible marketing is closely

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linked to false, misleading, or deceptive representations, while the general standards for marketing goods and services in terms of section 29 refers to section 41 ¹⁸⁶ and should be interpreted together. In terms of section 40(1) 'a supplier or an agent of the supplier must not use physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct' against a consumer in connection with any marketing or supply of any goods or services or during the negotiation, conclusion, execution or enforcement of a consumer agreement. Section 40(1) also prohibits such unconscionable conduct in situations where the supplier demands payment or recovers goods from the consumer. It is furthermore unconscionable 'for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect his or her own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor'. ¹⁸⁷

Section 41(1) provides that '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 allow or require any other person to do so on behalf of the supplier'. The conduct of a person acting on behalf of a supplier is also regulated. ¹⁸⁸

Both section 40 and 41 refer to the application of section 51 in any court proceedings concerning these sections. Section 51 gives quite a comprehensive (although not exhaustive) list of transactions, agreements, terms and conditions that are prohibited in terms of the CPA. A supplier, for example is prohibited to make a consumer agreement subject to a contractual term or condition that is contrary to or defeats the purpose of the CPA. Such provisions may furthermore not mislead or deceive consumers and the supplier may also not mislead the consumer by prohibited conduct. ¹⁸⁹ Section 48 governs unfair, unreasonable and unjust contract terms and, read with regulation 44, provides

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a non-exhaustive list of contract terms which are presumed not to be fair and reasonable. ¹⁹⁰ There is link between unfair terms and unfair commercial practices in the sense that the one may induce or be a result of the other.

(c) Critical comparative discussion: Foreign model and South African model

The implementation of uniform legislative measures and interventions to increase legal certainty and provide consumer confidence and economic growth is certainly commendable. This is clearly the aim of the consumer confidence argument raised in the EU (and the implementation of the UCPD) and also a driving force underlying the implementation of the South African model. However, the criticisms raised and discussed above should be noted, which include additional costs, lack of accurate empirical studies and market research, and the reality that many consumers are not aware of their own national law or consumer rights. ¹⁹¹

With regard to the general scope of application of the UCPD and the need to broaden B2C commercial practices, the South African model could be of assistance in that the CPA is given a broader scope of application. The South African model recognises the fact that consumers may use goods (for example, a laptop computer) for dual purposes (business and private). It also recognises that small juristic or legal persons may need protection as consumers from large traders and business enterprises monopolise a particular industry. This suggests a possible reciprocal application of South African law to the foreign model.

The UCPD's exclusion of legal requirements related to taste and decency is an important factor to consider when interpreting the South African model. The reason is that the CPA specifically includes the

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protection of the consumer's right to equality in the consumer market (Part A), and goes so far as to provide concurrent jurisdiction of the Equality Court with other consumer enforcement institutions in this regard. ¹⁹² All legislation must also be in line with the Constitution, as explained above, which would include the protection of the rights in the Bill of Rights. A study of the overlap between the constitutional law and consumer protection law of each member state (if such an overlap exists), would be necessary but falls beyond the scope of this contribution.

Political compromise will always be present in assessing fairness in the EU, and in particular the UCPD. This is and always will also be the case in the South African context. The arguments made with regard to the UCPD and the role of the EU Commission as an administrative agency which provides guidance, while the development of fairness depends ultimately on judicial interpretation, are important factors that resonate in South Africa. There is a constant tension between enforcement agents or institutions such as the National Consumer Tribunal (NCT), the National Consumer Commission (NCC), and the judiciary in assessing the fairness of commercial practices involving consumers. ¹⁹³ In South African law this is complicated by the fact that the common law will always be considered by the judiciary. Section 2(10) of the CPA preserves the common-law rights of the consumer by providing that the Act must not be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.

The interpretation of concepts such as the 'average consumer' and the 'vulnerable consumer' in EU Reports (2009, 2013, 2016) and the interpretation of these concepts in judicial decisions, as discussed above, will definitely offer further guidance for South Africa. This would include guidance as to the correct interpretation of the plain-language test, the concept of the 'ordinary consumer' in terms of section 22, and the vulnerable groups of consumers in terms of section 3(1)(b) of the CPA.

A comparative study of the UCPD elucidates all the applicable provisions of the CPA that should be seen as a whole in order to give proper

that a very general obligation not to abuse vulnerability does not adequately protect vulnerable consumers and that there must be clear and specific rules prohibiting certain practices that typically affect the most vulnerable consumers. This approach could assist in the South African model not only to identify the vulnerable consumer or vulnerable groups of consumers, but also in the interpretation of section 40 of the CPA and the role of the vulnerable consumer where the supplier is guilty of unconscionable conduct.

As is the case with article 8 of the UCPD, harassment, coercion, physical force and undue influence are included in the South African model by way of section 40 of the CPA. Although concepts such as 'undue influence' in the South African model have pre-existing common-law meanings established by case law, it is very important to consider their interpretation in light of the UCPD. This will assist in establishing their true meaning (in the context of consumer agreements) and enable the South African legislature to align the provisions of section 40 with the duty in section 2(10) of the CPA to develop the common-law rights of the consumer. The same could be argued regarding the non-exhaustive list of aggressive market practices in article 9 of the UCPD. These should serve as examples for South Africa and provide guidance on how the concept of undue influence should be interpreted under the CPA.

As with the interplay between the UCPD and other EU law, the CPA should also be seen as a safety-net to complement existing legislation and fill the gaps where such legislation is lacking or unclear. In the case of ambiguity, an interpretation that is most beneficial to the consumer should be followed (which may not necessarily be the CPA).

The interplay between unfair commercial practices and unfair contract terms should be noted. The interpretation of the UCPD in conjunction with the Unfair Contract Terms Directive in the EU courts, serves as guidance as to how unfair commercial practices can be the result of unfair contract terms and vice versa. In the South African model this would necessitate an analysis of the provisions regulating fair and honest dealing (Part F of the CPA) and the consumer's right to fair, just, and reasonable terms and conditions (Part G of the CPA) in light of the purpose of the Act as a whole. This is of particular importance with regard to standard-form contracts that are so often used in consumer agreements and would assist in determining whether standard clauses within standard-form contracts are not only unfair and unreasonable contractual terms, but also amount to unconscionable conduct by the supplier in a particular situation.

Self-regulation plays an important role in both the UCPD and the CPA and may provide guidance concerning specific unfair commercial practices in particular industries. Unfortunately, the decisions of the self-regulatory bodies are not always easily accessible or publicly available. In the South African model, the Consumer Goods and Services Ombud serves as a prime example of not only the highlighting of repetitive unfair commercial practices, but also of disclosure and awareness in that the decisions are made available to the public. ¹⁹⁴

V Final remarks

From the discussion above it is apparent that the EU has experienced problems with the harmonisation and implementation of directives within its member states. ¹⁹⁵ There are various reasons for this, but the most prominent appears to be the transposition of a particular directive into national law. ¹⁹⁶ The maximum harmonisation in the case of the UCPD has been criticised by many authors. ¹⁹⁷ Once implemented, a directive also creates problems of enforcement and interpretation within existing national law or a specific legal system. This is also the case in South African consumer protection law and the implementation of the CPA regarding existing law. ¹⁹⁸

In the context of consumer protection law the focus in this contribution has been on the UCPD, but the content of the Consumer Sales Directive 1999/44/EC (CSD) may also be noted to illustrate the above problems. Parisi states that the enactment of this directive likely represents the most significant step towards the harmonisation of European sales and consumer law, as it intervenes in important issues

concerning a core category of contract law. ¹⁹⁹ He argues that although some form of legal intervention might have been necessary, the directive 'promulgates a mandatory minimum warranty protection scheme that is questionable when viewed in light of the economic model on which it is based'. ²⁰⁰ A controversial remark by Parissi is that the CSD 'wisely' adopts a choice of remedies that leaves some uncompensated exposure for consumers as the directive does not provide the 'specifics that a micro-instrument of legal intervention would necessitate'. ²⁰¹ This choice, according to Parisi, complies with European constitutional principles, but has the added benefit of shifting the 'burden of wisdom' to the national legislators. ²⁰² This approach has been criticised by scholars within certain member states and highlights the danger of incorrect transposition onto a member state. ²⁰³ This, of course, illustrates the delicate balance needed in the South African context in order to align South African consumer protection with international standards without jeopardising legal certainty in our own sources of law and unique legal system.

One of the main issues that crystallised from the comparative research for purposes of this contribution, is the concept of a 'consumer'. ²⁰⁴ It is important to identify not only the 'average' or 'ordinary consumer', but also 'vulnerable consumers' or 'vulnerable consumer groups'. It may be argued that effective transportation and successful application of law reform models in terms of consumer protection laws, are significantly reduced by the fact that the EU represents all kinds of consumer and businesses. The spectrum of consumers varies from first-world, highly-educated and informed consumers who are descendant-citizens of a particular member state, to illiterate, low-income, vulnerable consumers who are not originally from a member state but are now part of the EU consumer market. This would include informal workers, ²⁰⁵ refugees,

or victims of displacement. ²⁰⁶ Although a controversial topic, it is argued that refugees in the EU should be regarded as consumers because they take part in the consumer market and therefore also deserve protection and access to certain consumer rights. In Germany, for example, the recent influx of refugees sparked debate in this regard. Altman states that 'refugees are consumers before they are workers' and can be an impetus to the German workforce and consumer base. ²⁰⁷ German consumer associations have started to react to the special demands of refugees who behave as particularly inexperienced consumers suffering under extensive cultural and language barriers. ²⁰⁸ Germany is but one example of a member state of the EU faced with a wide diversity of consumers. Sirkeci observes that as the speed of communication and transportation increases, local consumers and organisations are ever more connected but not identical, despite the blurring of national boundaries. ²⁰⁹

As indicated above, South Africa experiences similar problems regarding the application and enforcement of new consumer protection laws within a mixed legal system heavily influenced by the common law and the Constitution. South Africa is also home to the same wide spectrum of consumers who vary from the well-educated, high-income consumer to the low-income, vulnerable consumer who may also be a refugee from other African countries or abroad. It is for this reason, in the case of law reform, that comparative law is paramount and also why reciprocal reform would be beneficial to the EU and its member states. It would therefore not be unrealistic to include the pitfalls of unsuccessful law-reform mechanisms and incorrect application or enforcement of consumer protection legislation in this comparison.

The comparative discussion above has highlighted the important role that EU directives have served as a foreign model for law reform in South Africa (the CPA in particular). The research has illustrated *why* the EU as a foreign law model was introduced into South African law, but also critically discussed the *manner* in which it was introduced, with specific

reference to the application of the UCPD and unfair commercial practices under the CPA. Whether or not the law reform has indeed been successful in developing consumer protection law in South Africa remains to be seen. The guidelines provided by the UCPD and their judicial

interpretation are important for the South African model.

Although there is a global move to align countries by way of 'harmonisation' and the implementation of 'best practices' in a particular area, this should be approached with circumspection. The 'bad practices' regarding transposition of EU legislation in member states were discussed above, ²¹⁰ and the South African legislature should take note of these negative results and avoid repeating them in our own dispensation. Of particular concern is the concept of 'regulatory creep' which results in legal uncertainty as to the status and enforcement of regulations in an existing legal system. Pistor warns of the dangers of standardisation of law and its effect on developing countries. ²¹¹ His arguments are relevant to the position in South Africa as a developing country and the drive to standardise and internationalise consumer protection laws. The writer observes that instead of improving domestic legal systems, standardisation or harmonisation may undermine the development of effective legal systems. ²¹² The reasons for this argument are the interdependence of legal rules and concepts that comprise a legal system, and the fact that the law is a 'cognitive institution'. ²¹³ Any interpretation of a foreign model should be approached objectively so that problems which surfaced within the foreign model itself, and how to avoid them in the legal system in which the model has been adopted, can be recognised. The unique background, and our mixed legal system, as well as existing law in the South African model, must be taken into account. However, it must also be acknowledged that, as is the case in EU member states, law reform is necessary.

The world has become a global community. The consumer market within specific continents (in this instance Africa and Europe) and their countries, is represented by all classes or groups of consumers. This varies from the high-income, formally-educated consumers on the one hand, to minimum-wage, low-income and often illiterate (vulnerable) consumers, on the other. Any consumer legislation in a particular country should offer protection for all of these groups without adversely

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affecting free trade, competition, and economic freedom for businesses. This has always been a balancing act in South Africa, and could provide guidance and reveal pitfalls for other jurisdictions.

Ramsay recognises that a particular jurisdiction's interpretation of general clauses such as 'good faith' will vary; there is always more than one institution tasked with implementation and enforcement; and the implementation of new consumer measures are often 'parachuted into a landscape of existing private law rights and remedies'. ²¹⁴ These are very relevant issues for consumer protection measures in both the EU and South Africa, and unless they are addressed, effective consumer protection measures will remain beyond our reach.

* LLB (UP) LLM (Unisa) LLD (UP).

- 1 This research focuses on basic comparative-law concepts which may apply in the realm of consumer protection law. An in-depth discussion of the legal discipline of comparative law is beyond the scope of this contribution.
- 2 |f_rücü, *The Enigma Of Comparative Law – Variations On A Theme For The Twentieth Century* (Martinus Nijhoff Publishers 2004) 1.
- 3 |f_rücü, (Martinus Nijhoff Publishers 2004) 2.
- 4 Blakesley, 'Law, language, crime, and culture: The value and risks of comparative law' (2013) *Crim L Bull* 49.
- 5 Örüçü, (Martinus Nijhoff Publishers 2004) 92.
- 6 Örüçü, (Martinus Nijhoff Publishers 2004) 92.
- 7 Colombo, 'Japan as a victim of comparative law' (2013–2014) 22 *Mich St Int'l L Rev* 731 at 755.
- 8 Act 68 of 2008. The CPA is also referred to as the 'South African model' throughout this contribution.
- 9 Watson, *Legal Transplants: An Approach to Comparative Law* (University of Virginia Press 1974) 22.
- 10 Watson, (University of Virginia Press 1974) 22.
- 11 Berkowitz, Pistor & Richard, 'Economic development, legality, and the transplant effect' (2003) 47.1 *Eur Econ Rev* 195.
- 12 Legrand, 'The impossibility of legal transplants' (1997) 4 *MJEC* 111.
- 13 Örüçü, 'Law as transposition' (2002) 51 *Int'l & Comp LQ* 206.
- 14 Örüçü, (1997) 4 *MJEC* 111. An in-depth analysis of the concepts 'transposition' and 'transplant' warrants a contribution on its own and is beyond the purpose and scope of this contribution.
- 15 Ellis, 'General principles of comparative law' (2011) 22 *European Journal of International Law* 950, 971.
- 16 Ellis, (2011) 22 *European Journal of International Law* 966.
- 17 Wiener, 'Something borrowed for something blue: legal transplants and the evolution of global environmental law' (2000–2001) 27 *Ecology LQ* 1295.
- 18 Watson, 'Aspects of reception of law' (1996) 44 *Am J Comp L* 335.
- 19 Watson, (1996) 44 *Am J Comp L* 335.
- 20 'A Citation Manual for European Union Materials 2010–2011 Edition' (2010–2011) 34 *Fordham International Law Journal Treaties*–10.
- 21 Single European Act 1987 *Official Journal of the European Union* 169/1.
- 22 Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2004) 21. See also Ramsay, 'Regulation and the constitution of the EU single market: The contribution of consumer law' (2011) 50 *Can Bus LJ* 322–355.
- 23 Unberath & Johnson, 'The double-headed approach of the ECJ concerning consumer protection' (2007) 44 *Common Market L Rev* 1237 at 1254
- 24 Unberath & Johnson, (2007) 44 *Common Market L Rev* 1254.
- 25 Unberath & Johnson, (2007) 44 *Common Market L Rev* 1254–1255; Roth, 'Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co KG Judgment of 12 March 2002 (Sixth Chamber), ECR 2002 I-2631' (2003) 41 *Common Market L Rev* 937 at 944.
- 26 Unberath & Johnson, (2007) 44 *Common Market Law Review* 1237 at 1254–1255; Roth, 'Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, Judgment of 12 March 2002 (Sixth Chamber), ECR 2002, I-2631' (2003) 41 *Common Market Law Review* 937 at 944.
- 27 Ramsay, (Hart 2012) 162. This argument is not unique to member states of the EU and also rings true for other jurisdictions such as South Africa. It emphasises the importance of educating and informing consumers about their rights.
- 28 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at, <http://www.refworld.org/docid/476258d32.html>, accessed on 1 August 2017.
- 29 Charter of Fundamental Rights of the European Union 2012/C 326/02.
- 30 'A Citation Manual for European Union Materials 2010–2011 Edition' (2010–2011) 34 *Fordham International Law Journal Treaties*–18.
- 31 Consolidated Version of the Treaty on the Functioning of the European Union art [169], 2012 *Official Journal of the European Union* C 326/47.
- 32 Article 169 TFEU.
- 33 OECD (Organisation for Economic Co-operation and Development) Working Document 'Better Regulation in Europe: Ireland 2010' Chapter 7 at 143 available at, <http://www.oecd.org/ireland/betterregulationineuropeireland.htm>, accessed on 1 August 2017.
- 34 Available at, http://ec.europa.eu/governance/better_regulation/glossary_en.htm, accessed on 1 August 2017.
- 35 Kurpas et al, *Policy-Making in the EU: Achievements, Challenges and Proposals for Reform* (CEPS Paperbacks Brussels, 2009).
- 36 Kurpas et al, (CEPS Paperbacks Brussels, 2009) 76.
- 37 Kurpas et al, (CEPS Paperbacks Brussels, 2009) 76–77.
- 38 Koopmans, 'The birth of European law at the cross roads of legal traditions' (1991) 39 *Am J Comp L* 493 at 495.
- 39 Koopmans, (1991) 39 *Am J Comp L* 495–496.
- 40 Koopmans, (1991) 39 *Am J Comp* 495–496.
- 41 Koopmans, (1991) 39 *Am J Comp L* 499.
- 42 Koopmans, (1991) 39 *Am J Comp L* 499.
- 43 Koopmans, (1991) 39 *Am J Comp L* 505.
- 44 Koopmans, (1991) 39 *Am J Comp L* 505.
- 45 Koopmans, (1991) 39 *Am J Comp L* 505.
- 46 Zimmermann, 'The present state of European private law' (2009) 57 *Am J Comp L* 479.
- 47 Zimmermann, (2009) 57 *Am J Comp L* discusses mechanisms such as Principles of European Contract Law (581), the Acquis Principles (484), the Draft Common Frame of Reference (490), and the Consumer Sales Directive (486).
- 48 Zimmermann, (2009) 57 *Am J Comp L* 511.
- 49 Zimmermann, (2009) 57 *Am J Comp L* 511.
- 50 Zimmermann, (2009) 57 *Am J Comp L* 511.
- 51 Zimmermann, (2009) 57 *Am J Comp L* 512.

- 52 Ramsay, 2011 *Can Bus LJ* 333.
- 53 Ramsay, 2011 *Can Bus LJ* 333.
- 54 Ramsay, 2011 *Can Bus LJ* 336.
- 55 Ramsay, (2011) *Can Bus LJ* 333.
- 56 Ramsay, (2011) *Can Bus LJ* 333.
- 57 Ramsay, (2011) *Can Bus LJ* 333–334.
- 58 Ramsay, (2011) *Can Bus LJ* 333–334.
- 59 Ramsay, (2011) *Can Bus LJ* 337.
- 60 Nagel, (ed) *Commercial Law* (LexisNexis 2015) 7.
- 61 Nagel, (ed) (LexisNexis 2015) 7.
- 62 See, for example, Hawthorne, 'Concretising the open norm of public policy: Inequality of bargaining power and exploitation' (2014) 77 *THRHR* 401 who outlines the positive law's identification and acknowledgement of the doctrine of legality and its norm of public policy as the benchmark for not enforcing unfair and unjust contracts. As part of this analysis, she discusses the content of public policy within the law of contract with reference to national and EU consumer initiatives and argues that these instruments provide guidelines that keep the application of public policy within the ambit of the rule of law and independent of 'the personal idiosyncrasies of the individual judge' (408).
- 63 Act 89 of 1998; Sutherland *Competition Law of South Africa* (Lexisnexis 2016 update) FD-3 observes that: 'The chief source from which concepts in South Africa's Competition Act, 1998 regarding restrictive practices and abuse of dominance were drawn is the Treaty of Rome of 1957, the founding document of the European Economic Community, which has evolved into the European Community.' He adds that 'member states of the EC have their own national competition systems, existing alongside the EC system, and it is often useful, when considering South African competition issues, to consult the national laws' (FD-3). However, he draws attention to the difference between the EC and South African position (FD-4). See also *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C) 1033.
- 64 Act 34 of 2005 (NCA). Similar to s 2 of the CPA, s 2(2) of the NCA provides that appropriate foreign and international law may be considered by any person, court, or tribunal when interpreting or applying the Act. See also Scholtz et al, *Commentary on the National Credit Act* (Lexisnexis 2016 update) 2.4 'Interpretation of the National Credit Act' confirm that '[t]he trend of considering foreign law gained impetus with the adoption of the Constitution of 1996. This trend may well continue in respect of the National Credit Act, especially since the draughtsmen of the Act had particular regard to foreign credit legislation. While a comparative approach can be very beneficial, foreign law ought to be considered and followed with circumspection lest the trend of incorporating definitions and concepts foreign to or inconsistent with our common law a process that began with the writing of the Act be perpetuated'. See also *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 (3) All SA 644 (WCC).
- 65 Companies Act of 2008; See Delpoort & Esser 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1 who confirm the significant role of the *King Reports* and *Code of Good Practice* on aspects of company law and the Companies Act in South Africa. See also Olson, 'South Africa moves to a global model of corporate governance but with important national variations' 2010 *Acta Juridica* 219; See also *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* 2015 (6) SA 338 (WCC).
- 66 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 184.
- 67 *Barkhuizen v Napier* 184. Other parts of the world such as the EU, for example.
- 68 *Barkhuizen v Napier* 184.
- 69 *Barkhuizen v Napier* 184.
- 70 For example, the Consumer Affairs (Unfair Business Practices) Act 71 of 1988; the Alienation of Land Act 66 of 1981; and the National Credit Act 34 of 2005. See Woker, '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' (2010) 31 *Obiter* 231.
- 71 Businesses, traders and enterprises are used interchangeably with the term 'supplier(s)' throughout this contribution.
- 72 Woker, (2010) 31 *Obiter* 231; see also Hawthorne, 'Materialisation and differentiation of contract law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention' (2008) 71(3) *THRHR* 453; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); Barnard, 'Consumer rights of the elderly as vulnerable consumers in South Africa: Some comparative aspects of the Consumer Protection Act 68 of 2008' (2015) 39(3) *International Journal of Constitutional Studies* 223; Barnard & Kok, 'A consumer's fundamental right to equality in terms of the Consumer Protection Act and the role of the Promotion of Equality and Prevention of Unfair Discrimination Act' (2015) 78(1) *THRHR* 3–23; Barnard, 'In search of the ordinary consumer and plain language in South Africa' (2014) 4 *JCLL* 4; *Standard Bank of South Africa Limited v Dlamini* 2013 (1) SA 219 (KZD).
- 73 Section 2 of the Constitution.
- 74 Sutherland, (Lexisnexis 2016 update) paras 4.2, 4–15.
- 75 Sutherland, (Lexisnexis 2016 update) paras 4.2, 4–15.
- 76 Section 39 of the Constitution; see also Seluqini-Celini & Hutchison, 'Constitutionalism, good faith and the doctrine of specific performance: Rights, duties and equitable discretion' (2016) 133 *SALJ* 73.
- 77 Section 2 of the CPA.
- 78 See, for example, the consideration of foreign law in *Tshwale (obo True Harvest College) v Faitzan Properties* [2014] ZANCT 32 (30 September 2014) in relation to the CPA where Australian, Canadian, and English law were considered.
- 79 The SACU is a customs union among five Southern African countries, namely, Botswana, Lesotho, Namibia, South Africa and Swaziland whereas the SADC is an inter-governmental organisation consisting of 15 Southern African countries with socio-economic cooperation and integration as well as political and security cooperation as its main aims.
- 80 European Commission Website "Trade Policy, Countries and regions — South Africa" <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/>, accessed on 06 June 2017.
- 81 European Commission Website <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/>.
- 82 European Commission Website <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/>.
- 83 European Commission Website <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/>.
- 84 Section 2 of the CPA.
- 85 Recitals 2 & 4 of the UCPD.
- 86 Article 1 of the UCPD.
- 87 Recitals 3 & 5 of the UCPD.
- 88 Ramsay, *Consumer Law and Policy* 2 ed (Hart 2012) 160–162. See the joined cases of C-261/07, *VTB v Total Belgium and Galatea*; & C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2009] ECR I-2949.
- 89 Joined cases C-261/07, *VTB v Total Belgium and Galatea*; & C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2009] ECR I-2949.
- 90 Ramsay, (Hart 2012) 162.
- 91 Ramsay, (Hart 2012) 162; Note also the criticism of the concept of 'consumer confidence' in section II above.
- 92 Recital 8 of the UCPD.
- 93 Article 2(d) of the UCPD. See also Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Hart 2011) 272.
- 94 Joined cases C-261/07, *VTB v Total Belgium and Galatea*; & C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2009] ECR I-2949.
- 95 Joined cases C-261/07, *VTB v Total Belgium and Galatea*; & C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2009] ECR I-2949. See *Report from The Commission to the European Parliament, The Council and the European Economic and Social Committee*, Brussels, 14.3.2013 COM(2013) 139 final (hereafter EU Commission Report 2013) at 8. See EU Commission Staff Working Document *Guidance On The Implementation/Application Of Directive 2005/29/EC On Unfair Commercial Practices*, Brussels, 3.12.2013 SEC (2009) 1666 (hereafter EU Commission Working Document 2009) at 7–9; *Guidance On The Implementation/Application Of Directive 2005/29/EC On Unfair Commercial Practices* Brussels, 25.5.2016 SWD (2016) 163 final page 8 (hereafter the EU Guidance Document 2016).
- 96 Article 2(b) of the UCPD.
- 97 Article 2(a) of the UCPD.
- 98 OJ 271/16 of 9 October 2002.
- 99 EU Commission Working Document 2009 at 10.
- 100 EU Guidance Document 2016 at 8.
- 101 Recital 9 of the UCPD.
- 102 EU Commission Working Document 2009 at 13.
- 103 Article 5(1) of the UCPD.
- 104 Abbamonte, 'The Unfair Commercial Practices Directive and its general prohibition' in Weatherill & Bernitz (eds), *The Regulation of the Unfair Commercial Practices Directive: New Rules and New Techniques* (Hart 2007) 20.
- 105 Ramsay, (Hart 2012) 164.
- 106 Ramsay, (Hart 2012) 164. Political compromise has also been part and parcel of the development of South African law and legislation in particular.
- 107 Ramsay, (Hart 2012) 164.

- 108 Ramsay, (Hart 2012) 165. A similar approach could be argued in the case of South Africa with the National Consumer Commission as the 'central administrative agency' and the role of South African courts in this regard.
- 109 Article 5(2)(b) of the UCPD.
- 110 Case C-220/98 *Est, e Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] ECR I-00117, para 29; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Koln eV v Mars GmbH* [1995] ECR I-01923, para 24; Decision of 4 July 2012 of the Marknadsdomstolen available at [http://www.marknadsdomstolen.se/Filer/Avg"randen/Dom2012-7.pdf](http://www.marknadsdomstolen.se/Filer/Avg), accessed on 06 June 2017.
- 111 Recital 18 of the UCPD; Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657 para 31.
- 112 EU Commission Working Document 2009 at 26.
- 113 EU Guidance Document 2016 at 42.
- 114 Tribunale Amministrativo Regionale del Lazio, Sezione I, Sentenza del 25 Marzo 2009 caso *Enel SpA contro Autorit... Garante della Concorrenza e del Mercato* (Ud 26/11/2009).
- 115 EU Commission Working Document 2009 at 27.
- 116 The EU Commission Working Document 2009. See Case C-313/94 *F.lli Graffione SNC v Ditta Fransa* [1996] ECR I-06039 para 26.
- 117 The EU Commission Working Document 2009. See Case C-313/94 *F.lli Graffione SNC v Ditta Fransa* [1996] ECR I-06039 para 26.
- 118 EU Commission Working Document 2009 at 30.
- 119 EU Commission Working Document 2009 at 30.
- 120 EU Commission Working Document 2009 at 30.
- 121 EU Commission Working Document 2009 at 176.
- 122 EU Commission Report 2013 at 10.
- 123 See *Final Report — Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU — Part 1: Synthesis Report*, EU Commission — DG Justice, Civic Consulting, 22.12.2011 (hereafter Synthesis Report 2011) 8.
- 124 Synthesis Report 2011 at 8.
- 125 EU Guidance Document 2016 at 14.
- 126 2011/83/EU.
- 127 2006/114/EC.
- 128 2000/31/EC.
- 129 95/46/EC.
- 130 2002/58/EC.
- 131 EU Guidance Document 2016 at 18.
- 132 93/13/EEC.
- 133 Case C-453/10 *Perenièov and Pereniá*, 15 March 2012 par 46.
- 134 Council Directive 93/13/EEC.
- 135 *Office of Fair Trading v Ashbourne Management Services Ltd* 2011 EWHC 1237 (Ch).
- 136 EU Guidance Document 2016 at 21.
- 137 EU Guidance Document 2016 at 30.
- 138 EU Guidance Document 2016 at 30.
- 139 EU Guidance Document 2016 at 31.
- 140 Ramsay, (Hart 2012) 164.
- 141 Stuyck, 'EC competition law after modernisation: More than ever in the interest of consumers' (2005) 28(1) *Journal of Consumer Policy* 1–30.
- 142 The UCPD art 5.
- 143 The UCPD arts 6 & 7.
- 144 The UCPD arts 8 & 9
- 145 Annexure I to the UCPD.
- 146 EU Guidance Document 2016 at 87.
- 147 The UCPD art 6(1).
- 148 The UCPD art 6(1). This is also referred to as 'puffing'.
- 149 Willett, 'Fairness and consumer decision making under the unfair commercial practices directive' (2010) 33 *Journal of Consumer Policy* 247 at 255.
- 150 Synthesis Report 2011 38-39.
- 151 Synthesis Report 2011 38-39.
- 152 Synthesis Report 2011 38-39.
- 153 Synthesis Report 2011 38-39.
- 154 Article 7(1)-(2) of the UCPD.
- 155 Article 1(j) of the UCPD.
- 156 Synthesis Report 2011 18.
- 157 Italy, AGCM, 2009, PS1270 — *Vodafone — Ostacoli alla migrazione e retention ingannevole*, Provvedimento n 19756.
- 158 Italy, AGCM, 2008, PS91 — *Enel Energia — Richiesta cambio fornitore*, Provvedimento n 18829.
- 159 The EU Commission Working Document 2009 18.
- 160 Article 9 of the UCPD.
- 161 2011/83/EU.
- 162 Preamble to the CPA.
- 163 Section 3(1)(c) & (d) of the CPA.
- 164 Section 3(1)(e) of the CPA.
- 165 Barnard, (2015) 39 (3) *Intl J Cons Studies* 223 at 225. See also The CPA ss 2, 4 & 5.
- 166 The CPA ss 1 & 4.
- 167 The CPA s 5(6).
- 168 *Gazit Properties v Botha NO* (873/10) [2011] ZASCA 199; *I-Kharafi and Sons and Another v Pema and Others NNO* (2008/12359) [2008] ZAGPHC 273; and *Van Zyl and Others NNO v Turner and Another NNO* 1998 (2) SA 236 (C).
- 169 2017 (1) SA 333 (SCA) para 20.
- 170 NCT/12984/2014/75(1)(b) CPA.
- 171 2017 (1) SA 333 (SCA) paras 22 & 23.
- 172 Own emphasis.
- 173 Gouws, 'A consumer's right to disclosure and information: Comments on the plain language provisions of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 79–94; Stoop, 'Section 22' in Naude & Eiselen (eds) *Commentary on the CPA* (Juta 2014) 22–1 to 22–14; Barnard, 'In search of the ordinary consumer and plain language in South Africa' (2014) 4 *JCCL* 1; Newman, 'The influence of plain language and structure on the readability of contracts' (2010) 31 *Obiter* 735–745; Stoop, 'Plain Language and Assessment of Plain Language' in Kierkegaard (ed) *Private Law: Rights, Duties and Conflicts* (International Association of IT Lawyers 2010) 636–648.
- 174 Section 3(1)(b) clearly states that 'the purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa by reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers:
- (a) Who are low-income persons or persons comprising low-income communities;
- (b) who live in remote, isolated or low-density population areas or communities;
- (c) who are minors, seniors or other similar vulnerable consumers; or
- (d) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.'
- (a) Who are low-income persons or persons comprising low-income communities;
- (b) who live in remote, isolated or low-density population areas or communities;
- (c) who are minors, seniors or other similar vulnerable consumers; or
- (d) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.'
- 175 Section 3(1)(b).
- 176 Excluding the Public Finance Management Act 1 of 1999 or the Public Service Act 103 of 1994 in terms of s 2(8) of the CPA.
- 177 Section 5(2)(d) of the CPA provides that the Act does not apply to a transaction that constitutes a credit agreement under the NCA, but that the goods or

services that are the subject of the credit agreement are not excluded from the ambit of the CPA. However, the practical implication of this section has not been successful as can be gleaned from the case *MFC (a division of Nedbank Ltd) v Botha* (6981/13) [2013] ZAWCHC 107 (15 August 2013) and the critical discussion of the case by Stoop, 'The overlap between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: A comparison with Australian law' (2014) 77 *THRHR* 135–143; and Otto, Van Heerden & Barnard, 'Redress In Terms Of The National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in terms of an Instalment Agreement' (2014) 2 *SA Merc LJ* 247.

178 of 2002.
 179 of 2013.
 180 of 1981.
 181 of 1993.
 182 Preamble to the CPA; s 3(1)(g) and s 69 — "Enforcement of rights by consumer".
 183 The examples listed in s 70(1) are an ombud with jurisdiction, an industry accredited ombud, a person providing conciliation, mediation or arbitration services and provincial consumer courts.
 184 Section 16 is discussed extensively by Barnard, 'An appraisal of section 16 of the Consumer Protection Act 68 of 2008' (2016) 79 *THRHR* 1–9; and Barnard, 'The virtue of cooling-off rights to consumers: 'Be in the habit of choosing the mean' — A comparative discussion of South Africa, the United Kingdom and Belgium' (2016) 39 *CILSA* 1–23.
 185 Unsolicited goods are discussed comprehensively by Van Heerden, 'Unsolicited goods or services in terms of the Consumer Protection Act 68 of 2008' (2011) 4(4) *Int J Private Law* 533–545; Gouws, 'Unwanted goods: The consumer's right to choose' (2009) April *De Rebus* 16; Stoop & Taylor, 'Aspects of unsolicited goods or services in terms of the Consumer Protection Act 68 of 2008: An analysis' (2014) 77 *THRHR* 296–305; Barnard, 'Ongevraagde goedere ingevolge die Wet op Verbruikersbeskerming in regsvergelykende perspektief' (2015) 2 *TSAR* 268–285.
 186 Section 29(1)(a) of the CPA provides that 'a producer, importer, distributor, retailer or service provider must not market any goods or services in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41'.
 187 S 40(2).
 188 The CPA s 41(2).
 189 The CPA s 51.
 190 Unfair contract terms have been analysed quite extensively. See, for example, the commentary on s 48 and reg 44 in Naud, & Eiselen, *Commentary on the Consumer Protection Act* (LexisNexis 2016 Revision Service 1); Sharrock, 'Judicial control of unfair contract terms: The implications of the Consumer Protection Act' (2010) 2 *SA Merc LJ* 295–325; Jacobs, Stoop & Van Niekerk, 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008' (2010) 13 *PER* 302–405.
 191 Ramsay, (2011) 50 *Can Bus LJ* 322; Unberath & Johnson, 'The double-headed approach of the ECJ concerning consumer protection' (2007) 44 *Common Market Law Review* 1237 at 1254–1255; Roth, 'Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, Judgment of 12 March 2002 (Sixth Chamber), ECR 2002, I-2631' XL (4) *Common Market Law Review* 937–951; ; Barnard, 'In search of the ordinary consumer and plain language in South Africa' (2014) 4 *JCCL* 4; *Standard Bank of South Africa Limited v Dlamini* 2013 (1) SA 219 (KZD).
 192 Barnard & Kok, (2015) 78 *THRHR* 3.
 193 See the arguments made by Woker regarding the core role of the NCC in consumer protection enforcement in Woker, 'Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress' (2017) 2 *SA Merc LJ* 1.
 194 www.cgso.co.za. Decisions are available on www.safflii.org accessed on 20 January 2017.
 195 See Zhelyazkova, 'Complying with EU Directives' requirements: the link between EU decision-making and the correct transposition of EU provisions' (2013) 20(5) *J Eur Public Policy* 702–721.
 196 In the consumer protection law context, for example, where a directive was given minimum transposition in the UK but maximum harmonisation in Belgium.
 197 See the discussion under sections II and III above.
 198 There is an extensive list of contributions highlighting enforcement and interpretational problems after the implementation of the CPA, including Naude & Eiselen, (Juta 2014); Barnard, (2014) *JCCL* at 1; Otto, Van Heerden & Barnard, 'Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement' (2014) 26 *SA Merc LJ* 248–281; Hawthorne, 'Public governance: Unpacking the Consumer Protection Act 68 of 2008' (2013) 75 *THRHR* 345–369; Du Plessis, 'Towards Better Service Delivery by Consumer Courts' (2008) 20 *SA Merc LJ* 74–88; Mupangavanhu, 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' 2012 *PELJ/PER* 320–346; Sharrock, 'Judicial control of unfair contract terms: The implications of the Consumer Protection Act' (2010) 2 *SA Merc LJ* 295–325; Van Eeden, *Consumer Protection Law in South Africa* (LexisNexis 2013).
 199 Parisi, 'The harmonisation of legal warranties in European sales law: an economic analysis' (2004) 52 *Am J Comp L* 403.
 200 Parisi, (2004) 52 *Am J Comp L* at 426.
 201 Parisi, (2004) 52 *Am J Comp L* at 426.
 202 Parisi, (2004) 52 *Am J Comp L* at 431.
 203 Stuyck, Terryn, & Van Dyck, 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market' (2006) 43(1) *Common Market Law Review* 107 152; Cauffman, 'De nieuwe wet op de consumentenkoop' (2005) 42 *Tijdschrift voor Privaatrecht* 787 792; Steennot, *De Nieuwe Wet Marktpraktijken* (WP 2011–5) Working Paper Series, Financial Law Institute, University of Ghent.
 204 See discussion in Section IV (b)(iii) and (c) above.
 205 Andrews, S nchez & Johansson, 'Towards a Better Understanding of the Informal Economy' Economics Department Working Papers 5 No 873 (OECD 2011).
 206 Cohen & Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press 2012) 325.
 207 Altman, 'We should all be competing to take in refugees', in *The Foreign Policy Group foreignpolicy.com*/2015/09/08, accessed 6 June 2017. See also Nienaber, 'Consumer and refugees seen driving German growth' in *Reuters US edition*, available at <http://www.reuters.com/article/us-germany-economy-growth-IdUSKCN0S81XC20151014>, accessed on 6 June 2017.
 208 Consumer Group *Verbraucherszentrale, Flüchtlinge brauchen Verbraucherschutz* (Refugees need consumer protection) available at <http://www.vzhh.de/vzhh/408281/fluechtlinge-brauchen-verbraucherschutz.aspx>, accessed on 07 June 2017.
 209 Sirkeci, *Transnational Marketing and Transnational Consumers* (Springer 2013) 4.
 210 See Section II (a) above.
 211 Pistor, 'The standardization of laws and its effect on developing countries' (2002) 50 *Am J Comp L* 97.
 212 Pistor, (2002) 50 *Am J Comp L* 97 at 120.
 213 Pistor, (2002) 50 *Am J Comp L* 97 at 120.
 214 Ramsay, (2011) 50 *Can Bus LJ* 322 at 334.