Master Thesis

Unfair commercial practices, consumer and internal market protection: a comparative study

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ABSTRACT

Consumer protection against unfair commercial practices, including misleading advertising, is fostered at European level through the Directive 2005/29/EC (UCPD). The UCPD is based on the principle of maximum harmonisation. The legislator established a mandatory basic regulatory framework with a view to remove obstacles to the functioning of the internal market and with the aim to promote a high level of consumer protection. This research analyses whether the legislation on unfair commercial practices transposed in the Italian and English legal frameworks present relevant and substantial differences in interpretation, in implementation, in compliance assurance and in sanctioning which create legal uncertainty and/or cross border problems and barriers that have a negative effect on the functioning of the internal market. This thesis elaborates that the differences between Member States indeed impede on the internal market, by using Italy and the United Kingdom (UK) as case study. The analysis has shown that the UCPD has several weaknesses in approximating the laws on unfair practices and in contributing the proper functioning of the internal market. In fact, the existent differences can hamper the proposed objective. Therefore, it is discussed how these divergences can be reduced. Suggestions are made on how to bridge the differences between Member States which hamper the markets while maintaining the level of consumer protection that the European legislator aims to achieve.

Key words: unfair commercial practices, maximum harmonisation, internal market, EU consumer protection
SUMMARY

Research Problem

The Unfair Commercial Practice Directive (UCPD) fosters to protect consumers against misleading and/or aggressive marketing practices and ensures them the possibility to make informed choices. Moreover, the UCPD harmonises national laws on unfair commercial practices, which include misleading advertising. The importance of the maximum harmonisation of the UCPD is determined by the fact that it is aimed at establishing a basic regulatory framework to fight disparities in national legislations and reducing uncertainties in the legislation that can create barriers in the internal market. Thus, the maximum harmonisation should have the effect that the basic regulatory framework will eliminate the barriers deriving from the fragmentation of rules. At the same time, the UCPD presents exceptions to the maximum harmonisation (for instance in relation to “rules on the health and safety aspects of products” art. 3(3) UCPD) and aspects of flexibility for the Member States (MS) in relation to the interpretation for instance of the general clause and the average consumers, due to the fact that social, cultural and linguistic factors have to be taken into account. However, relevant and substantial differences among countries in relation to the interpretation, implementation and enforcement of the unfair practices may have an impact on the functioning of the internal market. During the first years of its application, limits related to the approximation of laws were noticed for reasons of vagueness of terms and concepts, for the generic scope of the UCPD that is not well delimited, for the discretion left to national countries to interpret general clauses and for the differences in the enforcement system. These differences can have an impact on the functioning of the internal market and the assurance of a high level of consumer protection.

Research Aims

The present study investigates whether relevant differences exist among MS and specifically between Italy and the United Kingdom (UK) regarding the interpretation of the UCPD, its implementation, enforcement system including compliance assurance and sanctioning, which can obstruct the correct functioning of the internal market. If this is the case, this study will provide solutions in order to promote the smoothness of the internal market and the protection of consumers. The analysis contains a comparative study between Italy and UK in order to identify differences in the legal requirements, interpretation and enforcement system. The choice of those countries is mainly because they have different legislative histories and backgrounds, which is useful for the comparison. Moreover, the Italian legal concepts are familiar to the author of the thesis.

Research Questions

Therefore, in order to reach the objectives of this research I formulated the following research questions.

“The disparities in the implementation of the UCPD in the MS, specifically in Italy and in the UK, regarding the transformation of the rules into national law, the interpretation and the enforcement may create differences in consumer protection and lead to barriers in the internal market. Therefore it is questioned how the legislation on UCPD is implemented and interpreted in Italy and in the UK and how the compliance assurance and the system of sanctioning are organised. Are there any relevant differences that may obstruct the internal market and consumers’ protection? And if so, what are the possibilities to overcome them?”

In order to answer these questions, the following sub-questions guide the research:
Orientation Phase:
1. In which way does European legislation protect consumers within the internal market?
2. How does EU legislation ensure that the consumer is not misled in the EU?

Analytical Phase:
3. How is the UCPD implemented and what problems may arise from a possible different interpretation of the European legislation on unfair commercial practices in the MS?
4. What obligations does national law on unfair commercial practices (in Italy and UK) impose on traders regarding unfair practices and misleading advertising? Are they consistent?
5. How is the system of enforcement and compliance assurance organised in Italy and the UK? What are the differences between these countries?
6. Which sanctions can be imposed if the law is violated? What are the differences between Italy and the UK?

Conclusion:
7. If differences are confirmed from the comparative phase, how can these differences be avoided?

Methodology

A systematic literature review and research is done with a view of investigating the European policy that recognises and ensures the rights of the consumer not to be misled and its protection against unfair commercial practices. In addition, a literature review will be conducted to understand the concept of internal market. It will also address the rules on protection against unfair commercial practices and misleading advertising in Italy and UK. In addition, a legal systematic research on primary and secondary law is conducted for the purpose of analysing the most significant legislation that governs the rights of consumers and the functioning of the internal market. For this reason the European Treaties, the Charter of rights, the General food law (GFL-Reg. 178/2002), the Food labelling regulation (FIC- Reg. 1169/2011) and mainly the UCPD are taken into consideration. Moreover, a study of the Misleading advertising Directive (MCAD-Directive 2006/114/EC) and other directives regarding consumer protection is done, to deepen the topic. British and Italian legislation on unfair commercial practices will be reviewed in order to understand if differences exist in implementation, interpretation, compliance assurance and sanctioning among MS and the impact of these differences in reaching the goals of the UCPD. Finally, an analysis of national case law is performed, in order to understand if differences among countries exist in the interpretation of terms and regarding the consumer benchmark that is used for assessing whether consumers are treated unfairly. The comparison between Italy and the UK has to reveal possible differences in rule-setting, compliance assurance and sanctioning between these two countries which possibly form barriers to the internal market, and find ways to improve the regulatory framework.

Conclusion and Recommendations

This research has shown that the general clause, the black list and the special clauses have been correctly transposed in national law by the two Member States. The duties of the trader in national legislation appear to be the same and consistent. This means that in general in both countries the obligations are to act in accordance with professional diligence and in a way that there is not a material distortion of the economic interest of consumers. However, problems regarding different interpretations of terms and concepts contained in the UCPD have been noticed. As to the interpretation of the protected consumer the analysis has shown that in the UK there is a protection of the average consumer but there is recognition of limitations to consumer information. At the same time, in Italy the protection level appears to be higher than the traditional CJEU delineation of the ‘average consumer’. As far as the compliance assurance is concerned it has been underlined that there are differences in relation to the power of enforcement bodies and procedures.
Differences could be detected with regard to the sanctions as well. These differences could lead to obstructions in the internal market.

Several solutions have been proposed to reduce the problems related to the implementation and interpretation, regarding the system of compliance assurance and finally in relation to the sanctioning. For instance, in relation to the implementation and interpretation some of the options given are the following. Firstly, a clarification of terms is desirable. Thus an additional Annex in the UCPD or additional definitions in article 2 should be added, starting from the notion of what is misleading and by taking into account the interpretation given by the CJEU. Secondly, the European Commission (EC) enhanced a database on unfair commercial practices for a uniform application of the UCPD. This is important, inter alia, because it gives public access to national case law and literature. Therefore, it is relevant for the comparison among decisions, legislations and literature of the MS. However, it is not updated and consequently not very useful. My suggestion is to update it constantly. Thirdly, in order to reduce problems when transposing a directive into national law, which inevitably leads to differences, it would be more effective to use regulations to replace directives. The system of control and compliance assurance can be improved by the insertion of a new regulation which contains and increases basic common rules on the procedures to follow by the enforcement authorities and basic common ideas on their powers. Moreover, it is suggested the insertion of a tool which enables a better communication and a better exchange of information among bodies. Finally, in relation to the sanctioning the legislator could think about the development of a guideline of sanctions against unfair commercial practices in order to have a more coherent imposition of sanctions.
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<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AGCM</td>
<td>Italian Competition and Market Authority</td>
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<td>Art</td>
<td>Article</td>
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<td>ASA</td>
<td>Advertising Standards Authority</td>
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<tr>
<td>BCAP</td>
<td>Broadcast Committee of Advertising Practice</td>
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<td>BTB</td>
<td>Business to business</td>
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<td>BTC</td>
<td>Business to consumer</td>
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<td>BPRs</td>
<td>Business protection from misleading marketing regulations 2008 (Regulation No. 1276/2008)</td>
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<td>CAP</td>
<td>Committee of Advertising Practice</td>
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<td>C.C.</td>
<td>Civil Code</td>
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<td>CCG</td>
<td>Consumer Concurrencies Group</td>
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<td>CMA</td>
<td>Competition and Market Authority</td>
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<td>COPFS</td>
<td>Crown Office and Procurator Fiscal Service</td>
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<td>CPAR</td>
<td>Consumer Protection (Amendment) Regulation 2014 (N.280/2014)</td>
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<td>CPP</td>
<td>Consumer Protection Partnership</td>
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<td>CPUTR</td>
<td>Consumer Protection from Unfair Trading Regulation (No. 1277/2008)</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>Dir</td>
<td>Directive</td>
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<td>EA 02</td>
<td>Enterprise Act 2002</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EU</td>
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<td>FIC</td>
<td>Food Labelling Regulation (Regulation No 1169/2011)</td>
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<td>GCPAR</td>
<td>Guidance on the Consumer Protection (Amendment) Regulations 2014</td>
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<td>GFL</td>
<td>General Food Law (Regulation No 178/2002)</td>
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<td>GUR</td>
<td>Guidance on the UK regulation (2008)</td>
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<td>IAP</td>
<td>Istituto dell’autodisciplina pubblicitaria (Italy’s advertising standards authority)</td>
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<td>ICC</td>
<td>Italian Consumer Code (LD 6 September 2005 No. 206)</td>
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<td>LD</td>
<td>Legislative Decree</td>
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<tr>
<td>MCAD</td>
<td>Misleading advertising Directive (Directive 2006/114/EC)</td>
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<td>MS</td>
<td>Member State/States</td>
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<tr>
<td>OFCOM</td>
<td>Office of Communication</td>
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<td>OFT</td>
<td>Office of fair trading</td>
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<td>PDO</td>
<td>Protected designations of origin</td>
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<td>PHA</td>
<td>Protection from Harassment Act 1997</td>
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<td>Reg</td>
<td>Regulation</td>
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<td>ROIP</td>
<td>Regulation on investigative procedures concerning misleading and comparative advertising, unfair business practices, unfair terms (AGCM 1 April 2015, n.25411. G.U. 23 April 2015, N. 94)</td>
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<td>TAR Lazio</td>
<td>Lazio Regional Administrative Court</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TSI</td>
<td>Trading standard Institute</td>
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<td>TSS</td>
<td>Trading Standards Services</td>
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<td>UK</td>
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CHAPTER 1- Introduction

The European legislator strives to guarantee on the one hand a high level of consumer protection from problems related to the safety and to safeguard their economic interests, on the other hand it aims to ensure the access to the market and the possibility to choose various products.1 Regarding this latter aspect, European law fosters consumers the possibility to make informed choices as well as the fairness of commercial practices. Among other reasons the “asymmetry of information” between consumer and seller makes this necessary.2

The right to make informed choices, without being misled while buying food, is reflected, inter alia, in the Reg. 1169/2011 (Food labelling regulation-FIC), in the Reg. 178/2002 (General Food Law-GFL) and in the Dir. 2005/29/EC (Unfair commercial practice directive-UCPD). The focus of this research is the UCPD, which is next to other products directed at commercial practices related to food. It is of paramount importance for protecting consumers and for ensuring the smoothness of the internal market in relation to all kinds of aggressive and misleading practices “harming consumers’ economic interest”.3 Therefore, it ensures fairness of business to consumer (BTC) practices in the internal market and protects consumers’ economic interests, enhances a system of “correct information” and prevents them to incur in misleading or aggressive marketing activity in a way that the decision of the “average consumers” is coherent with their “preference”.4 The basic instance of unfair commercial communication is the submission of false and misleading information.5

Unfair commercial practices, which include advertising, can be qualified under the general clause of UCPD (art. 5) or can be qualified as misleading actions (art. 6) or misleading omissions (art.7) or may be qualified as aggressive (art. 8-9) or can be prohibited under Annex I (black list).6 Regarding the advertising, apart from the prohibition of “normal” misleading advertising, the discipline also covers the unlawfulness of comparative advertising, through art. 6.2 (a) of the UCPD and art. 4 (a) of the Misleading advertising Directive (MCAD)7, that covers business to business (BTB) relations.

In the same vein, art. 16 GFL establishes that “labelling, advertising and presentation of food [...] shall not mislead the consumer”. Furthermore, the protection against misleading information is equally stated in art. 7(1) FIC, according to which all food information must not be misleading. In addition, art. 7(2) establishes that food information has to be “accurate, clear and easy to understand for the consumer”.

Thus, the consumer protection by correct information and the protection against misleading advertising and unfair commercial practices are guaranteed at European level. Protecting the consumer as well as the internal market is a competence shared with the Member States (MS).8 Therefore, once the European legislation is adopted the level of protection for MS is chosen and they have to implement and enforce it.9

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1 Edinger, (2013), p. 135-136. In addition, this protection is clearly stated in the White paper of food safety, art. 169 TFEU, art. 38
3 Art. 1 UCPD
5 Art. 6 UCPD
6 The black list is a list of practices which are considered unfair per se, without the necessity of applying the “average consumer test”. Velentzas, Broni and Pitoska, (2012), p. 415
7 Directive 2006/114/EC
8 Art. 4 TFEU
9 Valant, (2015), p. 3
The purpose of the UCPD is to “contribute to the correct functioning of the internal market”. In addition, it aims to “achieve a high level of consumer protection” in relation to the economic interests of consumers. The internal market can be defined as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. More in detail, the internal market was included in the European Economic Community (EEC) Treaty in 1986 by the Single European Act Treaty. It introduced harmonisation rules (that now are included in the Treaty on the functioning of the European Union-TFEU) with a view of completing the internal market.

In fact, art. 114 (1) TFEU establishes that the EU Parliament and Council may “adopt measures for the approximation”, (or harmonisation) of national legislations related to the “establishment and functioning of the internal market”. Moreover, as stated by art. 114 (2) if the proposal deals, inter alia, with consumer protection, the EU has to take into account a “high level of protection”. The harmonisation can be of minimum or maximum harmonisation. In this latter case the MS shall not implement rules that deviate from the law harmonised.

The legislation revolving around unfair practices is based on the principle of maximum harmonisation. More in detail the intention of the European legislator was to give a basic level of common rules which guarantees a “level playing field for traders and consumers”. In fact, according to recital 12 of the UCPD the harmonisation is fundamental to “increase legal certainty” for either consumers or business, due to the possibility to “rely on a single regulatory framework” and thanks to the elimination of “barriers arising from fragmentation of rules”. Moreover, the maximum harmonisation aspect is clear in the UCPD, inter alia, from article 4 of the UCPD, namely the internal market clause, which states that MS have not restrict the freedom of services or of goods “for reasons falling within the field approximated by this Directive”. This means that the mandatory requirements have to be implemented as such and therefore MS had to repeal the rules that were in contrast with the UCPD. At the same time the UCPD presents exceptions to the maximum harmonisations (for instance in relation to “rules on the health and safety aspects of products”) and aspects of flexibility for the MS in relation to the interpretation for instance of the general clauses and the average consumers, due to the fact that “social, cultural and linguistic factors” have to be taken into account. However, the possibility to deviate should not impact the objectives proposed. Therefore, according to this purpose and by implementing a legislation that is inspired by the principle of maximum harmonisation it is expected that a basic level of common rules in the MS is in place that guarantees the functioning of the internal market. However, due to the flexibility in interpretation this is not always the case since there could be problems in the application.

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10 Stuyck, (2015), p.724 and art. 1 UCPD
11 Stuyck, (2015), p.724 and art. 1 UCPD
12 Art. 26 (2) TFEU
13 Broberg and van der Velde, (2014), p.194
14 Broberg and van der Velde, (2014), p.194
15 Mańko, (2015), p. 6
16 Mańko, (2015), p. 6
18 Loos, (2010), p.6
19 Willet, (2010), p. 252
21 Art. 3 (3) UCPD
22 Recital 18
First of all the vague nature of the terms used in the European legislation on unfair commercial practices leads to different interpretation of the terms in the MS and different application of the law.\textsuperscript{24} The use of different terms, however, does not mean a completely different legislation, but it might make the application of the law by enforcement agencies harder to implement and it could make compliance with the law by traders harder to achieve, in case of cross-border trade.\textsuperscript{25}

Another problem affecting the interpretation of the directive is related to the fact that the UCPD is composed of a black list and a general clause.\textsuperscript{26} With the exception of the black list, the general clause is interpreted differently in the MS, since the decision of the (un)fairness of a commercial practice is \textit{de facto} taken by national courts.\textsuperscript{27} Consequently the single regulatory framework desired by the European legislator and the elimination of legal barriers are questionable to be achieved due to this flexibility to interpret left by the UCPD.

On the same vein, the objectives of the UCPD might be undermined also in relation to the benchmark of consumer protection. The UCPD protects a particular benchmark of consumer, namely \textit{“the average consumer”}, that in Recital 18 is defined as \textit{“reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factor, as interpreted by the Court of Justice [...]”}. Moreover, the UCPD \textit{“tempers”} the notion of the average consumer with two consumer benchmarks: the target group and the vulnerable group.\textsuperscript{28} The UCPD however does not give a \textit{“real standard of attention or observation”} required for the consumer and therefore the courts have different interpretations in specific cases.\textsuperscript{29} On top of that, Recital 18 establishes the possibility to make references to \textit{“social cultural and linguistic factors”} when applying the average consumer. Thus, there are possibilities to interpret consumer benchmark differently due to the Recital 18 and the MS could use this recital to maintain a stricter level of protection.\textsuperscript{30} However, since the ultimate objective is the functioning of the market those differences should be limited. In fact, an \textit{“extensive recognition”} of those differences can hamper the objectives of removing barriers and ensuring the correct functioning of the internal market.\textsuperscript{31}

Another issue arises from the fact that the enforcement system is left at discretion of MS, although the system described is harmonized.\textsuperscript{32} The term enforcement refers to the act of making sure that a rule or court order is followed and so making sure that there \textit{“is a compliance with a law, rule or obligation”}.\textsuperscript{33} Public enforcement is the enforcement by national authorities whereas private enforcement of the UCPD means the use of the UCPD in solving cases before courts.\textsuperscript{34} When referring to enforcement in this thesis, the focus is on the compliance assurance and sanctioning. Compliance means that there is an observance of the law and compliance assurance refers to the measures adopted to ensure that the provisions of legislation are met.\textsuperscript{35} More in detail, compliance assurance in this research is a term that is used to indicate the promotion of the legislation in a way that there is compliance

\begin{itemize}
\item \textsuperscript{24} Such as misleading practice concept, invitation to purchase and so on.
\item \textsuperscript{25} Ballon (ed.), (2010a), p. 11
\item \textsuperscript{26} Art. 5 UCPD
\item \textsuperscript{27} Stuyck, (2015), p. 751
\item \textsuperscript{28} Poncibò and Incardona (2007), p. 28 and Duivenvoorde, (2015), p.12
\item \textsuperscript{29} Poncibò and Incardona (2007), p. 28
\item \textsuperscript{30} Willett, (2010), p.270
\item \textsuperscript{31} Duivenvoorde, (2015), p.73
\item \textsuperscript{32} Art. 11 UCPD
\item \textsuperscript{34} Poelzig,(2014), p.235
\item \textsuperscript{35} The Law Dictionary. \textit{Compliance assurance}. Available at: http://thelawdictionary.org/compliance-assurance/ (Accessed 24 March 2017)
\end{itemize}
with the obligations and the monitoring of the compliance. Therefore, the procedures followed by the agencies to act against an unfair commercial practice, the possibility to bring a legal action before the authority or court and the powers of the authority are considered. Moreover in the enforcement system the sanctions in case of non-compliance are analysed.

The problem with the enforcement is that it can occur that in one country there is a civil system, in another country a criminal system and in another country there could be both. This situation has as a consequence that a trader which has violated the principle of fairness of commercial practice may be punished in one MS by the ending of the action and the payment of a sanction, whereas in another MS there could be other consequences, such as the invalidation of an agreement or criminal sanctions and so on. 36 Furthermore, the consumer protection against unfair commercial practices is often not only ensured by a system of legal enforcement but also by self-regulatory code which may be broader or narrower in its scope and therefore this may lead to differences in the discipline. 37 Also the relationship between the self-regulatory bodies and enforcement agencies might lead to variations among countries, impacting the functioning of the internal market. 38

Hence, these differences might have implications on the implementation and application of European policies and legislation in the MS, undermining the inherent objectives of the UCPD. Consequently, the system may impact the business because there will be different duties and enforcement in the countries and this can create obstruction to the internal market and in relation to the high level of protection of consumers. 39

Therefore, one of the aims of this research is to find instruments and legal adjustments which can reduce problems of interpretation and which can create a more coherent system of enforcement in order to enhance a high level of consumer protection and to reduce the possibility of obstructing the functioning of the internal market. Thus, a comparative research with respect to compliance assurance, sanctioning and UCPD interpretation and implementation is done between Italy and United Kingdom (UK) in order to understand which kind of differences exist and in what way they have an impact on consumers’ protection and the internal market. The choice of these countries is mainly due to the fact that they have a different system of law, respectively civil and common law. Thus, the differences may also arise from this different legislative basis. In addition Italian legislation is familiar to the author of this thesis. 40

Thus, the research is focused on the UCPD and the discipline of misleading and comparative advertising. Food labelling and food safety legislation are not taken into account as discipline as such in this analysis, but in relation to consumer protection and unfair practices. However, as envisaged by the European Commission (EC) guidance (2016) 41 the UCPD does not affect national rules intended to protect interests which are not of economic nature and therefore MS can set more stringent rules to regulate for instance commercial practices in case of “health, safety and environmental protection”. 41 Thus, safety can be considered as one of the exceptions to the harmonisation system that lead to differences between countries.

The protection of consumers is also envisaged in EU secondary contract law. Some examples of directives that protect consumers within this field are: Directive 90/314 on packaging travel, holidays and tours; Directive 2011/83 on consumer rights which protect the consumer in doorstep and at distance contracts;

36 Stuyck, (2015), p. 738
37 Ballon (ed.), (2010a), p.15
38 Ballon (ed.), (2010a), p.17
40 EC Guidance, (2016), p. 9
41 Art.3 (3) UCPD
Directive 93/2013 (Unfair Contract Terms Directive) on consumer contract, regarding financial services and services in the general economic interest; Directive 99/2004 on the sale of consumer goods; Directive on 2007/65 on Audiovisual Media Services and so on. However, for the aim of this research, they will not be taken into account. This research is limited to the UCPD and misleading (and comparative) advertising discipline protecting consumers.

1.2 Research Problem

The EU deserves a high level of protection for consumers and their decision making. The UCPD recognises and defends their rights to have correct information and prohibits unfair commercial practices which harm their economic interests. Thus, combating misleading advertising and unfair commercial practices helps to obtain a high level of consumer protection, by preventing them to incur in misleading or aggressive marketing strategies and by guaranteeing that any commercial claim made by traders in the EU is clear and accurate enabling consumers to make informed choices. Moreover, the UCPD has as main other purpose the contribution to the functioning of the internal market. In fact, the UCPD harmonises the national laws on unfair commercial practices, which include misleading advertising in order to guarantee the smoothness of the internal market and with the aim to establish a basic regulatory framework that prevents uncertainties in the legislations that can create barriers. Hence, the maximum harmonisation should have the effect that the basic regulatory framework will eliminate the barriers deriving from the fragmentation of rules. At the same time the UCPD presents exceptions to the maximum harmonisations and aspects of flexibility for the MS in relation to the interpretation for instance of the general clause and the average consumers. Therefore, limits related to gaining the objective of contributing to the functioning of the internal market were noticed because of the vagueness of terms and concepts, the scope of the UCPD, the discretion left to national countries to interpret general clauses and the differences in the enforcement system that is not harmonised. These differences can have an impact on the functioning of the market and the assurance of a high level of consumer protection.

1.3 Research Aims

The present research analyses whether relevant and substantial differences exist among MS and specifically between Italy and the UK, regarding the interpretation of the UCPD, its implementation, compliance assurance and sanctioning which can create legal uncertainty, cross border problems and barriers that may have a negative effect on the functioning of the internal market and consumer protection. If this is the case, this study will provide solutions in order to promote the smoothness of the internal market and the protection of consumers. The choice of those countries is made mainly because those countries have different legislative histories and backgrounds, which is useful for the comparison. Moreover, the Italian legal concepts are familiar to the author of the thesis.

1.4 Research Questions

The main research question is:

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42 The primary law for consumer protection is set out in art. 38 of the Charter of Fundamental Rights of the EU and art. 4(2) (f), 12, 114 (3) and 169 Treaty on the functioning of the EU (TFEU). Moreover, UCPD, GFL and FIC guarantee the fairness of information,
43 Velentzas, Broni and Pitoska, (2012), p.411
44 Stuyck (2015), p. 724 and art. 1 UCPD
45 Osuji (2011), p. 438
The disparities in the implementation of the UCPD in the MS, specifically in Italy and in the UK, regarding the transformation of the rules into national law, the interpretation and the enforcement may create differences in consumer protection and lead to barriers in the internal market. Therefore it is questioned how the legislation on UCPD is implemented and interpreted in Italy and in the UK and how the compliance assurance and the system of sanctioning are organised. Are there any relevant differences that may obstruct the internal market and consumers’ protection? And if so, what are the possibilities to overcome them?”

In order to answer these questions, the following sub-questions will guide the research:

**Orientation Phase:**
1. In which way does European legislation protect consumers within the internal market?
2. How does EU legislation ensure that the consumer is not misled in the EU?

**Analytical Phase:**
3. How is the UCPD implemented and what problems may arise from a possible different interpretation of the European legislation on unfair commercial practices in the MS?
4. What obligations does national law on unfair commercial practices (in Italy and UK) impose on traders regarding unfair practices and misleading advertising? Are they consistent?
5. How is the system of enforcement and compliance assurance organised in Italy and the UK? What are the differences between these countries?
6. Which sanctions can be imposed if the law is violated? What are the differences between Italy and the UK?

**Conclusion:**
7. If differences are confirmed from the comparative phase, how can these differences be avoided?

**1.5 Methodology**

With respect to the methodology first of all a systematic literature review and research is performed in order to investigate the European policy that ensures the rights of the consumer not to be misled and its protection against unfair commercial practices. Moreover, the literature review will also be conducted to understand the concept of internal market in Europe. In addition, it will address the rules on protection against unfair commercial practices and misleading advertising in Italy and UK. Secondly, a legal systematic research is conducted for the purpose of analysing the most significant legislations that govern the rights recognised to the consumers and the functioning of the internal market. For this reason the European Treaties, the Charter of rights, the GFL, the FIC and UCPD are taken into consideration. Moreover, a reference concerning MCAD and other directives is done to deepen the topic. In conducting the research, English and Italian legislations on unfair commercial practices will be reviewed in order to understand if differences in the implementation, interpretation and enforcement exist between MS and what the impact is of these differences in reaching the goal of maximum harmonisation. Finally, an analysis of national case law is performed, in order to understand if differences among countries exist in the interpretation of terms and regarding the consumer’s benchmark that is used for assessing whether consumers are treated unfairly. The comparison between Italy and the UK has to reveal possible differences in rule-setting, compliance assurance and sanctioning between these two countries which possibly form barriers to the internal market and find ways to improve the regulatory framework.

**1.6 Structure**
The research is divided in two main parts. The first part analyses the European consumer protection within the internal market and in relation to the unfair commercial practices, whereas the second part analyses national (Italian and UK) law. In the first part, the second chapter gives an overview of the European law on consumer and internal market protection also in respect to the right to correct information and unfair commercial practices. The third chapter gives an outline of the discipline regarding UCPD and misleading advertising in Europe and the protection of consumers within this field. As far as the second part is concerned, the fourth and the fifth chapter are built in the same way. They contain a description of the Italian and the UK legislations which protect the consumer against unfair commercial practices and misleading advertising. The sixth chapter is dedicated to the comparison between the legislation on unfair practices in Italy and UK. The parameters for this comparison are mainly the implementation and the interpretation of the European legislation on UCPD, including the obligations of the trader to comply with, the system of compliance assurance (including the procedures of enforcement, the powers of the enforcement agencies and the consumers’ rights to complain and to get redress) and the penalties imposed. The last chapter is dedicated to a conclusion and recommendations in order to overcome possible problems detected during the analysis. Finally the Annex will contain the Research Framework.
CHAPTER 2- European legislation on internal market and consumer protection

2.1 Introduction

The notion of consumer is very wide and it is not easy to provide a single definition. However, in EU legislation the concept has a “common core”, being defined as “a natural person, who is acting outside the scope of an economic activity”. In the context of food law, it is defined as “the ultimate consumer of a foodstuff who will not use the food as part of any food business operation or activity”.

Consumer protection is reflected in European legislation and policies which aim to preserve their safety, health, economic interests and seek to “empower their rights to make choices based on accurate information”. In conformity with the Treaties European policy incorporates consumer interests into other significant policies, mostly related to “food chain, energy, transport, digital and financial services sectors”. Therefore, this is a “transversal policy”, since it refers to a wide spectrum of sectors regulated by various legislation.

The ratio behind the creation of consumer legislation is the realisation of the internal market and the safeguarding of their protection. Therefore, it is of paramount importance to describe the relationship between consumer protection and internal market. The Court of Justice of the EU (CJEU) plays an important role in this context, thanks to its rulings on free movement of goods, the right of information of the consumer (which guarantees that consumer are not mislead) and in relation to the evolution of the consumer benchmark that is protected at EU level.

Thus, the aim of this chapter is firstly giving an overview of the consumer protection from legal, policy and court perspectives and secondly to summarise the importance of the internal market. This chapter is fundamental for this research which is mainly focused on the UCPD and its national implementation but always has the consumer picture and the functioning of the internal market as background.

In this chapter Section 2.2 summarizes the main European legal instruments used in the EU to protect the consumer and it focuses on the protection of the consumer’s right to not be misled. Section 2.3 gives a brief outline of the primary law which protects the functioning of internal market and the free movement of goods.

This way the consumer policy within the settlement of the internal market is defined. Section 2.4 is a brief overview of the rulings of the CJEU regarding the protected consumer within the internal market. Finally, Section 2.5 gives some preliminary conclusions.

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46 Edinger, (2013), p.135
47 Mańko, (2013), p.1
49 Art. 3.18 GFL
50 Valant, (2015), p. 3
51 EC Agenda, (2012), par. 1
2.2 Consumer Protection in the EU

The primary law for consumer protection is set out in art. 38 of the Charter of Fundamental Rights of the EU and art. 4, 12, 114 (3) and 169 TFEU. Pursuant to art. 4 (2)(f) TFEU consumer’s protection is a competence that is “shared” between EU and its MS. Therefore, when legislation is adopted within the area of consumer protection, there is an obligation for the MS to implement and enforce EU rules. Normally, the enforcement of EU law is done before the “domestic court” and it has to be consistent with national systems already in place. That is the reason of different systems of enforcement throughout the EU. Nevertheless, the EU and its MS have to cooperate and “assist each other” in gaining the objectives prefixed by the Treaties (duty of loyal cooperation). Moreover, the principle of proportionality establishes that “Union action shall not exceed what is necessary to achieve the objectives of the Treaty”. The proportionality principle is valid also with respect to the MS. For instance, if a MS prohibits a product because it is considered to be dangerous for human health, this measure is accepted only if it respects the proportionality principle, otherwise it has to be considered against the law.

Furthermore, according to art. 12 TFEU the protection of consumers has to be taken into consideration in the definition and implementation of European policy. In this same vein, the Charter of Fundamental Rights (art. 38) states that European policies have to ensure a high level of consumer protection. The assurance of the high level of consumer protection is also laid down in art. 169 TFEU which sets out the goals of the European policy, namely the protection of “health, safety and economic interests of consumers” together with the promotion of their right to “information, education and to organise themselves in order to safeguard their interests”. At the same time, art. 114 (3) TFEU provides that the Commission takes the “high level of protection” as core element in its proposals related to the safety, the health, environmental and consumer protection. The European Parliament and the Council will strive to reach this objective as well.

Apart from the legislation, the EU also sets legally non-binding tools in order to improve the protection of consumer and its enforcement. These are guidelines; “market monitoring tools” that evaluate the impact of European policy on consumers, “awareness-raising tools” for empowering consumers knowledge and helping them in making good choices and “tools for the enforcement system”. For instance, whether cross-border violations exist in consumer rights, the “Consumer Protection Cooperation Network” enables the authority of a MS in which there have been violations of consumer protection, to cooperate with the authority of the MS where the business acted unlawfully, to stop his action. These tools are important for the increase of the level of protection.

EU consumer protection is not only reflected in EU primary law or in those tools above mentioned, but also in secondary law. The prevalent legal instrument that was generally designed by EU legislator for the

protection of consumers within this area was the directive. This is because directives were used in order to harmonise national laws of the MS, with a view of being coherent with European policy and legislation. More in detail, art 114 is the most important article of primary law for the harmonisation of rules. This article gives the power to the EU to establish “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States” regarding the functioning of the internal market. In the past years the majority of harmonised areas regarding the protection of consumer interest followed the minimum harmonisation. A minimum harmonisation system does not impede a MS to maintain stricter rules and ensures regulatory diversity and cultural differentiation.

However, in the course of time the EC started to think that this regulatory diversity between countries could represent a problem for the internal market. For this reason there was a shift from minimum to maximum harmonisation. The latter leaves less possibility for adjustment at MS level. The UCPD represents an example of maximum harmonisation. The EU establishes what is allowed in the commercial practices and national law has to follow these rules. Maximum harmonisation is important for removing the barriers in the internal market. Nevertheless, writers have been critical of maximum harmonisation. Specifically, the shift has implied more interest in building the market and a reduction of national autonomy. The protection of consumers within secondary market law is covered, inter alia, by food safety legislation, competition law, food information and unfair practices including advertising. Leaving aside the other areas and also consumer protection within contract law, unfair practices including advertising and fairness of information are of main interest in this research.

The framework of the UCPD can be briefly described as a “three level system”. First of all, there is a general prohibition of unfair commercial practices which are (a) contrary to the requirements of professional diligence, and (b) if they “materially distorts the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers” (art. 5 UCPD). Secondly, there are specific prohibitions of misleading action and omission and aggressive practices (art. 6-7 and 8-9) and lastly, there is the last level of prohibition which is the Annex 1 (black list) that contains a list of those practices that are unfair in any circumstances.

This protection system guarantees consumers, inter alia, their right to information. The right of information is connected with the principle of informed choice expressed in art. 8 GFL. This article protects consumer from “fraudulent or deceptive practice”, “adulteration of food” and “any other practice which may mislead the consumer”. Thus the objective of the correct information (through labelling, advertising and so on) is to impede that the consumer from being misled.

The legislation does not give a definition of misleading but it is stated when a practice has to be considered as such. According to art. 6 of the UCPD a commercial practice is misleading if it contains false, untruthful or deceptive information regarding, inter alia, the nature of the product, its existence, its characteristics, the price and so on. In addition, it is misleading if it causes the average consumer “to take a transactional

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70 Weatherill, (2016), p.292  
71 Unberath and Johnston, (2007) p. 1269  
73 Weatherill, (2016), p.292  
74 Stuyck, (2015), p. 725  
75 Those elements will be further analyzed in the next chapter.
decision that he would not have taken otherwise”.\textsuperscript{76} Moreover, art. 7 defines and prohibits as misleading a commercial practice that “omits material information that the average consumer needs [...] to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise”.

Therefore, within the UCPD fairness is protected and assessed in relation to the BTC practices which may affect their decisions. The UCPD gives general principles on fairness of information which are complemented with specific requirements contained in the FIC.\textsuperscript{77} As envisaged by art. 3 (1) FIC food information has to ensure a high level of protection of consumers’ health and it has to give them the possibility to make informed choices in relation to “health, economic, environmental, social and ethical considerations.” In this same vein, art. 7 FIC requires that food information has to be fair. This means that the information provided should not be misleading and it has to be “accurate, clear and easy to understand”.\textsuperscript{78} Misleading information may be related for instance to the characteristics of the food, by attributing it characteristics that it does not possess or by suggesting the presence of an ingredient within that food when it is not so.\textsuperscript{79} Expressly, the fairness of information practice has to be respected when food is “labelled, advertised and presented.”\textsuperscript{80} The assessment of the unfairness of a commercial practice the analysis of misleading and aggressive practices is further developed in the next chapters.

2.3 Free movement of goods in the internal market and consumer protection

European consumer policy strives to protect consumers and guarantee their rights.\textsuperscript{81} Over the course of time, the EU has implemented rules with a view to strengthen their welfare and their possibilities to make informed choices through clear and consistent information and by endorsing their safety and economic interests.\textsuperscript{82} The official opening of the European policy on consumer protection and information occurred with the Council Resolution of 1975\textsuperscript{83} which provided five fundamental rights, namely “the right to protection of health and safety, the right to protection of economic interests, the right of redress, the right to information and education and the right of representation (right to be heard)”.\textsuperscript{84} After the Council Resolution (1975), the evolution of European policy aimed at protecting the consumer moved forward thanks to the Treaty of Maastricht (1992) which included those rights and which made clear that the European actions should contribute to endorse consumer protection.\textsuperscript{85}

As stated by the Commission the growth of consumer policy was “the corollary” of the settlement of the internal market.\textsuperscript{86} Consumers were protected with the idea of economic integration and the establishment of the internal market. According to art. 26 of the TFEU the EU has to adopt measures aiming at establishing and guaranteeing the functioning of the internal market. The latter has to comprise “an area without internal

\textsuperscript{76} The definition of transactional decision in art 2(k) seems to encompass the majority of decisions that consumer can make. Willett, (2010), p.250
\textsuperscript{77} Edinger, (2013), p. 137
\textsuperscript{78} This is better defined in art. 13 FIC. See: Bremmers and Van der Meulen, (2014), p.375
\textsuperscript{79} Art. 7 FIC
\textsuperscript{80} Meisterernst, (2013), p.95
\textsuperscript{81} Valant, (2015), p.3
\textsuperscript{82} Valant, (2015), p.3
\textsuperscript{83} Council Resolution on a Preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C-092, 25 April 1975.
\textsuperscript{84} Weatherill, (2005), p.6
\textsuperscript{85} Art. 3 Treaty of Maastricht
frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”

Thus, the functioning of the internal market is connected with the free movement of goods in the Union territory and other freedoms. The free movement of goods ensures that the market functioned in a unitary way. The primitive idea that free trade could be advantageous for countries was given by Adam Smith with his “theory on absolute advantage”. According to him, if a country was capable of producing goods at lower cost in comparison to another country and if the latter could produce other products at lower cost, then the best solution was trading with the relatively cheaper goods. The theory was further developed by David Ricardo in 1817 and it is defined as “theory of comparative advantage”. According to this theory, a country should specialize in the production of a specific product that gives it a comparative advantage. In this way the result should be “an efficient allocation of production”, better products and the empowerment of social welfare. Surely, this was intended to be possible if obstacles for the trade were eliminated. Therefore, the EU encouraged legislative measures which aimed at establishing the internal market and at removing barriers.

From a legal point of view, the right to free movement of goods is one of the basic principles of the Treaty (Article 28 TFEU). In the course of time free movement has led to the elimination of the obstacles on trade and at the creation of the internal market, which can be defined as an area free from internal borders in which goods can circulate as in a national territory. Within the internal market, art. 34 TFEU forbids “quantitative restrictions and all measures having equivalent effect” between MS. According to the Dassonville Case measures having equivalent effect are “any rules enacted by MS which are capable of hindering [...] intra-community Trade.”

Derogations to the free movement and to art. 34 can be found in art. 36 TFEU and in the “Cassis de Dijon” case explained in the next section. According to art. 36 there are some defences that can be invoked by the MS to justify national measures that may have an impact on the internal market. A few examples of these justifications are “public morality, public policy, public security, the protection of health and life of humans and animals”. Therefore, this article allows the MS to enact measures which can have an equivalent effect if those justifications exist. However, the latter cannot be interpreted widely, since they cannot represent a questionable discrimination between countries. They have to be coherent with the principle of proportionality. Nevertheless, if a particular sector has been fully harmonized, MS measures shall not

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87 Art. 26 TFEU
88 These are: free movement of persons, services and capital
89 Broberg and Van der Velde, (2014), p. 192
90 Purnhagen, (2014) , p. 317
93 Purnhagen, (2014) , p. 317
94 Purnhagen, (2014) , p. 317
96 Judgment of the Court of 11 July 1974,Procureur du Roi v Benoît and Gustave Dassonville,Case 8/74 (Dassonville), ECLI:EU:C:1974:82
97 Judgement of the Court of 20 February 1979, Rewe- Bundesmonopolverwaltung für Branntwein, C-120/78, ECLI:EU:C:1979:42.
98 Art. 36 TFEU states that: ”The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.
advocate mandatory requirements or make reference to the justifications contained in art. 36 but national laws shall be in line with the obligations arising from the maximum harmonisation.\textsuperscript{100} The EU has the competence to “adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.\textsuperscript{101} For example, if a national rule is within the scope of UCPD, which follows the maximum harmonisation, that measure has to be evaluated in the light of provisions of UCPD and not in the light of what is established by TFEU.\textsuperscript{102}

In the case-law \textit{Tobacco advertising}\textsuperscript{103} the CJEU established that harmonised measures can be put in place only if they are capable of removing obstacles in the internal market.\textsuperscript{104} This means that the EU cannot regulate according to art. 114 only in case of simple divergences between MS laws, but a negative impact on the internal market is necessary.\textsuperscript{105} Thus, the harmonisation uses the justifications of the different national laws as reason of the “fragmentation of the internal market”.\textsuperscript{106} The objective becomes the substitution of the divergences at national level with a system that is more homogeneous.\textsuperscript{107} The harmonisation of national law aimed at improving the functioning of the internal market and at establishing a “level of the playing field” meets the consumer rights to choose between products.\textsuperscript{108}

The CJEU played a decisive role in accomplishing the objective of the internal market. Firstly, through a “negative harmonisation”, aimed at removing rules considered against primary laws.\textsuperscript{109} This means that if consumers were protected by national laws which had an impact on the functioning of the internal market, the result was a deregulation and a “low common denominator” for safeguarding the interests of consumers.\textsuperscript{110} Secondly, by way of “positive harmonisation”. This indicates the adoption of EU rules and implies in general a more “consumer friendly” interpretation.\textsuperscript{111} Some cases of the CJEU are explained below.

### 2.4 CJEU and consumer protection within the internal market

Nowadays the protection of consumers and their possibilities to make informed choices through clear and consistent information are taken into account by the CJEU in order to assess the existence of trade barriers, which could negatively impact the internal market. Moreover, a specific image of the consumer within a specific situation is considered in order to assess whether a rule is violated or not. In the following Section an idea of consumer protection within the internal market is given by looking at several cases.

One of the most relevant rulings of the CJEU for the internal market and consumer protection is the “\textit{Cassis de Dijon}”.\textsuperscript{112} In this case, German authorities did not allow the import of the liquor because the alcohol content was “lower” than permitted in their national technical standards.\textsuperscript{113} According to them, the presence

\begin{itemize}
  \item De Sadeleer, (2014), p. 287-288
  \item Art. 114 TFEU
  \item EC Guidance, (2016), p. 28
  \item Gutman, (2011), p.3
  \item Mańko, (2015), p.6
  \item Leczykiewicz and Weatherill, (2015), p. 6
  \item Leczykiewicz and Weatherill, (2015), p. 6
  \item Leczykiewicz and Weatherill, (2015), p. 6
  \item Unberath and Johnston, (2007), p.1239
  \item Edinger, (2013), p.136
  \item Edinger, (2013), p.136
  \item Judgement of the Court of 20 February 1979, Rewe- Bundesmonopolverwaltung für Branntwein, C-120/78, ECLI:EU:C:1979:42.
  \item Van der Meulen, (2014b), p.203
\end{itemize}
of less alcohol could have as a consequence a quicker “tolerance” for consumers of alcohol in comparison with a higher content.\textsuperscript{114} Therefore, the measure was justified for the protection of consumer health.\textsuperscript{115} However, the Court did not accept the German argument and introduced a general rule, according to which “goods lawfully produced and marketed in one MS”, are in principle accepted into the market of another MS.\textsuperscript{116} This principle is defined as: “mutual recognition”.\textsuperscript{117} This case, however, established also that it is possible for MS to invoke exceptions to the prohibition of measures having an equivalent effect if mandatory requirements exist, such as in case of “fairness of commercial transactions” or in case of “consumer protection”.\textsuperscript{118}

In the Cassis case the Court did not take into account the German line of argument because the assurance of fair information on the packaging of the product would have been enough to guarantee the public health.\textsuperscript{119} The image of the protected consumer appears to be a “confident consumer” which is not considered weak and whose protection is safeguarded within the aim of integration in the internal market.\textsuperscript{120} Moreover, the Court introduced the so-called “information paradigm” by stating that if there are problems within the internal market and there is the necessity of a measure, the choice should be related to “information-related” rules if they can solve the problem.\textsuperscript{121} Thus, in Cassis de Dijon it was clear that, in order to guarantee consumer protection against misleading acts, it was just necessary that the consumer was in the condition of making an informed decision, for instance by appropriate labelling or advertising.\textsuperscript{122}

Consequently, Cassis de Dijon was an important case not only for the internal market but also for the development of the legislation on consumer protection. Similarly, in Mars\textsuperscript{123} the Court established that if a practice related to a packaging is done in a way that “does not mislead a reasonably circumspect consumer” it cannot be prohibited otherwise it would just have an impact on cross-border trade.\textsuperscript{124} The assessment of the practice is done in relation to the perspective of the average consumer.\textsuperscript{125} Thus, the “average consumer” is “the benchmark” for evaluating the consequences of a measure impacting the trade.\textsuperscript{126} The latter is intended to be “confident” and “self-reliant”.\textsuperscript{127}

Another important ruling that is inserted in this context is the Commission v France\textsuperscript{128}. In this case, the French Republic forbade the importation and sale of substitutes for milk powder and concentrated milk, in the name of “consumer protection” and the “protection of human health”.\textsuperscript{129} The Court did not accept those justifications because, according to the principle of proportionality, a MS cannot invoke them or cannot refer to mandatory requirements by restricting the trade if the same protection could be obtained by “any other

\begin{itemize}
\item Van der Meulen, (2014b), p.203
\item Van der Meulen, (2014b), p.203-204
\item Van der Meulen, (2014b), p.204
\item This case established also that it is possible for a MS to invoke exceptions to the prohibition of measures having an equivalent effect if mandatory requirements exist, such as in case of fairness of commercial transactions or in case of consumer protection.
\item Van der Meulen, (2014a), p. 422
\item Purnhagen, (2014), p.29
\item Purnhagen, (2014) p. 11-12
\item Meisterernst, (2013), p. 92
\item Judgment of the Court (Fifth Chamber) of 6 July 1995.Vereingegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH, C-470/93, ECLI:EU:C:1995:224
\item Weatherill, (2016), p. 286
\item Van der Meulen, (2014a), p. 421
\item Van der Meulen, (2014a), p.421
\item Van Boom, (2015), p.10
\end{itemize}
measure which restricts the free movement of goods less”. In fact the Court stated that in this case information provided in the form of proper labelling including “the nature, the ingredients and the characteristics of the product on offer” would protect consumer enough.

Therefore, the labelling and in general a correct information are intended as protected measures that restricts the free movement less. However, the efficacy of this information depends also from the way the consumer understands it. That is why the Court adopted the image of the “average consumer” to solve the problem regarding the kind of information that is necessary to protect consumers.

In the case Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt the Court had to decide if a statement or description designed to promote the sale of eggs was liable to mislead the purchaser and it established that for this evaluation it was necessary to consider “the presumed expectations” which it gives to an average consumer who is “reasonably well informed and reasonably observant and circumspect”.

In Commission v Germany, Germany wanted an additional statement on the label for a product containing an additive “E 160 F” in order to market the product in the country. The Court established that while purchasing goods consumers are expected to read the list of ingredients and, therefore, since the additive was included in the list, the request of the additional statement was not justified and it was just an impediment of free trade. Similarly, in the Darbo ruling the Court stated that an average consumer could not be deceived by the term “naturally pure used on the label simply because the jam contained pectin gelling agent”, because the agent was listed in the list of its ingredients. Therefore, also in this case the information and the average consumer were used as benchmark by the CJEU for assessing the impact of the measure in the trade. Thus, national measures which aim at protecting the consumer have been accepted by the Court only if it was demonstrated “to be sufficient value” to overcome the interest in market relation.

An important case that is not strictly related to the internal market but that is important to mention for understanding the evolution of the image of the protected consumer is the Teekanne case. In this case, the CJEU had to decide if a consumer could be mislead by a packaging which gave the idea that a certain ingredient was contained in it, when it was not so, even if the list of ingredients was accurate. The Court established that while an additive “E 160 F” was included in the list, the request of the additional statement was not justified and it was just an impediment of free trade. Similarly, in the Darbo ruling the Court stated that an average consumer could not be deceived by the term “naturally pure used on the label simply because the jam contained pectin gelling agent”, because the agent was listed in the list of its ingredients. Therefore, also in this case the information and the average consumer were used as benchmark by the CJEU for assessing the impact of the measure in the trade. Thus, national measures which aim at protecting the consumer have been accepted by the Court only if it was demonstrated “to be sufficient value” to overcome the interest in market relation.

132 Edinger, (2013), p. 139
133 Edinger, (2013), p. 139
141 Weatherill, (2016), p. 287
decided that for establishing the misleading of a packaging, the overall labelling (such as the words, depictions, size and colour) should be taken into account and not only the list of the ingredients.\textsuperscript{144} Thus, the CJEU states the importance to take into account the whole package. In this case, the Court started having a different image of the average consumer. The CJEU interpreted it in a more realistic way.\textsuperscript{145} It took into account that consumers have the tendency to pay more attention to visual elements than textual information.\textsuperscript{146} In fact, the Court finally realized that, although consumers are able to understand the information, this does not mean that they will read it. Therefore, even if they might be reasonably well-informed and circumspect, they need protection in any case.

Hence, the idea that all consumers need information in the labelling provided by the business is not always correct and also the image of the average consumer has been criticised because it could discard the interests of other consumers.\textsuperscript{147} This is because consumers are different and their way of processing the information may change from one to another. Therefore, the average consumer has to be interpreted in a more elastic way, by taking into account behavioural assessment and by paying attention to a more realistic consumer.\textsuperscript{148}

Moreover, legislation and consequently the Court in order to give additional protection to consumers discerned other particular groups of consumers, such as children, which are more vulnerable to misleading and unfair practices.\textsuperscript{149} The vulnerable and the target consumers are for instance protected in the UCPD and are further analyzed in this research.

2.5 Conclusion

Along with food safety, the EU ensures the right of consumers to correct information (through labelling, advertising and so on). This is reflected within the European consumer policy, which strives to ensure a high level of consumer protection. The ratio behind the creation of consumer legislation is the realisation of the internal market.\textsuperscript{150} The legal instruments used to protect the consumer are sources of primary law (Treaties), legally non-binding tools and secondary law.\textsuperscript{151} Within this field Directives of minimum harmonisation were mostly used in the past. Nowadays, the maximum harmonisation system and the adoption of Regulations are preferred in order to create basic level of protection within MS that contributes to the smoothness of the internal market and avoids cross-border problems.\textsuperscript{152}

Thus, the growth of consumer protection policy deals with the settlement of the internal market. In fact consumers were protected with a view of establishing an integrated market.\textsuperscript{153} CJEU rulings are of paramount importance within this context. The protection of consumers and the guarantee that they can make informed choices through fair information are taken into account by the CJEU in order to assess the existence of trade barriers, which could have a negative impact on the internal market. Certainly in conducting this assessment a consumer benchmark is taken into account, “the average consumer”. The latter is defined as reasonably well informed and circumspect and its interpretation over the time has been

\textsuperscript{145} Schebesta and Purnhagen, (2016), p.3
\textsuperscript{146} Schebesta and Purnhagen, (2016), p. 14
\textsuperscript{147} Duivenvoorde, (2015), p.177
\textsuperscript{148} Poncibò and Incardona, (2007), p.36
\textsuperscript{149} See also recital 40 FIC
\textsuperscript{150} Weatherill, (2016),p. 285
\textsuperscript{151} Valant, (2015), p.3-5
\textsuperscript{152} Weatherill, (2016), p.291-292
\textsuperscript{153} Leczykiewicz and Weatherill, (2015), p. 6
criticised, in favour of a more realistic approach. The interpretation of the average consumer is left to national courts.

In the subsequent chapter the main focus will be the UCPD. The MS were forced to change existing measures and rules which regulate the unfair practices in the past. In this way the maximum harmonisation of the legislation took place with the aim of creating legal certainty. However, differences in interpretation, in implementation, in compliance assurance and in sanctioning which create legal uncertainty and/or cross border problems and barriers that have a negative effect on the functioning of the internal market can still be present in the MS. Thus, with a view of being as clear as possible, in the next chapter specific elements of the general framework on UCPD and the consumer protection within the UCPD are explained, whereas chapter 4 and 5 analyses national laws (Italy and the UK) and chapter 6 is a comparison between Italy and UK. The elements taken into account for the comparison will be listed in the next chapter.

CHAPTER 3 - EU protection against unfair commercial practices

3.1 Introduction

The UCPD is the cornerstone of EU legislation for what concerns the regulation of unfair commercial practices within the internal market. It was adopted in May 2005 and had to be implemented within national laws by 12 June 2007. The MS had to apply those measures by December 2007.\footnote{Art. 19 UCPD}

The UCPD harmonises national legislation on unfair commercial practices, including unfair advertising which harm the economic interests of consumers. In fact, according to the Recitals of the UCPD\footnote{Recital 3 and 4 UCPD} differences within national legislation on unfair commercial practices create obstacles to the functioning of the internal market and “uncertainty in relation to which national rule applies” regarding the unfair practice which harms the consumer’s economic interest. Therefore, these divergences create barriers that have a negative consequence on consumers. According to Recital 5 of the UCPD, the obstacles to the freedom of goods and services has to be eliminated through the settlement of basic rules in the EU that determines a high level of consumer protection and through the “clarification of legal concepts” for the correct functioning of the internal market.\footnote{Recital 5 UCPD} The overcoming of those differences is done on the basis of “a high level of consumer protection”.\footnote{Recital 5 UCPD} The UCPD made explicit that it has two main general purposes: ensuring the functioning of the internal market and achieving a high level of consumer protection.\footnote{COM(2013) 139 final, p.3} The solution given to reach these objectives is approximating the national laws of unfair practices and advertising that harm the consumer’s economic interest.\footnote{Recital 6 UCPD} Moreover, the UCPD does not concern practices related to taste and decency\footnote{Art. 3 UCPD} nor does it deal with commercial practices in business-to-business (BTB) relations.\footnote{Micklitz, (2009), p. 71}

The goals to obtain the proper functioning of the internal market and a high level of consumer protection through harmonisation is also stated in recitals 11 and 12 where it is clear that thanks to the latter the fragmentation of the internal market can be eliminated as well as the elimination of the trade barriers.\footnote{Paragraph 52} Recital 11 states that the “high level of convergence” obtained through the harmonisation of national legislations “creates a high common level of consumer protection”. The internal market clause of the UCPD (art. 4) embodies the maximum harmonisation character of the UCPD. MS had to check and repeal those legislations which were incompatible with the UCPD. The maximum harmonisation character of the UCPD has been confirmed also by the CJEU. For instance, in the case Total Belgium\footnote{Judgment of the Court (First Chamber) of 23 April 2009. VTB-VAB NV v Total Belgium NV (C-261/07) and Galatea BVBA v Sanoma Magazines Belgium NV (C-299/07), C-261/07), ECLI:EU:C:2009:244} the Court established that “Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection”.\footnote{Paragraph 52}

For the purpose of the comparison done in the next chapters, this chapter provides a general overview of the UCPD. Section 3.2 briefly underlines the scope and the objective of the UCPD. Section 3.3 describes the general prohibition of unfair practices and the UCPD framework. Section 3.4 focuses on the black list. Section 3.5.1 deals with misleading and aggressive practices and contains other sub-sections: 3.5.2 is
dedicated to misleading actions and omissions practices, 3.5.3 points out briefly the main characteristics of the aggressive practice, 3.5.4 deals with the interplay among UCPD and MCAD and sub-Section 3.5.5 describes the main characteristics of the discipline of the self regulatory code within the UCPD. Section 3.6 stresses the image of the consumer within the UCPD whereas Section 3.7 is dedicated to the legal enforcement of the UCPD and the penalties provided. Section 3.8 explains the main issues related to the UCPD and the points of comparison are illustrated. Finally, Section 3.9 gives a conclusion. In this way the further analysis of the implementation, application and enforcement of the UCPD with a special focus on misleading advertising can be done more coherently.

3.2 Scope and objective of the UCPD

Within the UCPD the consumer is defined in a negative sense, namely as a natural person who is “acting for purposes which are outside his trade, business, craft or profession”. According to art. 3 (1) of the UCPD only BTC commercial practices “before, during and after a commercial transaction” are covered by the UCPD. Moreover, in Mediaprint the Court stated that the legislation on unfair commercial practices which harms “only the competitor’s economic interest” and not also the consumers is excluded from the scope of the UCPD.

Limitations to the scope of the UCPD do exist and are listed in the same article 3 of the UCPD. First of all, art. 3 (2) and art. 3(3) state that the UCPD is without prejudice “to contract law and, in particular, to the rules on the validity, formation or effect of a contract” and to European or national rules regarding “the health and safety aspects of products”. This means that if for example a misleading advertising deals with medical equipment, the UCPD does not apply. Secondly, if there is a conflict between a community law which regulates a specific aspect of unfair practices and the UCPD, the national law will prevail. Thirdly, the UCPD is “without prejudice to any conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals”. Fourthly, art. 3(9) allows a MS to have more stringent rules on unfair practice within the area of “financial service”, that is therefore of minimum harmonisation. Thus, in these cases the maximum harmonisation purpose is limited.

As stated in the introduction the UCPD has mainly two purposes. The first one is to contribute to the proper functioning of the market and the second one is to achieve a high level of consumer protection. Its main objectives within consumer protection are protection of its economic interests, “freedom of decision making, market transparency and consumer information”. In particular, protecting consumers against incorrect and unfair information ensures them the possibility to make rational choices. At the same time, whether the information is given or not, the consumer has to be capable to understand it. That is the reason of the existence of a consumer concept and benchmark. These concepts of transparency, freedom of decision making and consumer information are reflected in the system explained below and consists of general

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166 Art. 2(1) UCPD
167 Judgment of the Court (Grand Chamber) of 9 November 2010. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v “Österreich”-Zeitungsverlag GmbH, C-540/08, ECLI:EU:C:2010:660
168 In Judgment of the Court (Grand Chamber) of 9 November 2010. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v “Österreich”-Zeitungsverlag GmbH, C-540/08, ECLI:EU:C:2010:660. Paragraph 21. This case the Court had to judge about a prohibition of combined offers. This is stated also in Recital 6 UCPD.
170 Art. 3 (4) UCPD
171 Art. 3(8) UCPD
172 Art. 1 UCPD
173 Micklitz, (2009), p.71
prohibition of unfair practices (art.5.(2)), specific prohibitions of misleading (action and omission) and aggressive practices (art. 6-7/8-9) and blacklisted practices contained in Annex 1;

This legal framework is visible in art. 5 of the UCPD. Art 5(2) expresses a general prohibition of unfair practices, as explained in the next Section. On another level, art. 5(4) states that a commercial practice is unfair if it is misleading pursuant to art. 6 and 7 or if it is aggressive within the meaning of art. 8 and art. 9. The last level of unfairness (art. 5. (5)) is represented by Annex 1 which lists commercial practices that have to be considered unfair “in all circumstances”.

Moreover, the assessment of a practice to be deemed as unfair is done firstly by evaluating the contrariety to the black list and then, if it cannot be classified in one of those cases, it will be examined according to art. 6-9. If the practice is neither misleading nor aggressive it is then evaluated on the basis of art. 5 (2) UCPD. The assessment of the unfairness of a practice is showed below.¹⁷⁴

Figure 1- The Unfairness of a practice

¹⁷⁴ Unfair commercial practices. Scheme adapted from the one contained in the EC Guidance, (2016), p. 54
3.3 General prohibition of unfair practices

A general prohibition of unfair commercial practices is given in art. 5. This clause was adopted by the legislator with the idea of incorporating all the different national rules which deal with this matter in a harmonised way, in order to create a homogeneous legal framework.175 The text of this article lists the requirements for the unfairness of a practice.

Article 5(2) establishes two cumulative criteria that have to be satisfied to assess whether a commercial practice, including advertising, should be deemed as unfair. In conformity with art 5(2) a commercial practice is unfair if “(a) it is contrary to the requirement of professional diligence” and “(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers”. In this respect, article 5(2) has to be interpreted as a “safety net”, since any unfair practice which does not fit within other provisions of the UCPD can still be prohibited.176 It is considered an open textured clause that is interpreted case by case by national courts. This leads to differences between MS, regarding the way of judging and interpreting some practices as unfair.

First of all, the primary requirement set out in art. 5(2) is the contrariety to professional diligence. This is defined in art. 2(h) as “the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity”. According to the EC (2013)177, the notion of professional diligence has been properly transposed in most of the MS as it was a concept already known in some of them.178 The professional diligence is not relevant when assessing misleading or aggressive practices as will be pointed out in the next Section.

The other requirement to assess the unfairness of a practice is that it “materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer”.179 The material distortion is in place, according to art. 2(e), when a practice impairs the consumer’s possibility to “make an informed decision” by causing the consumer to “take a transactional decision that he would have not taken otherwise”.180

The concept of transactional decision is considered very broad since it covers pre and post purchase decisions. This is also stated in the case law Trento Sviluppo181 where the CJEU established that a transactional decision covers also the decision to enter into a shop or to act as entering there.182 In practice, it deals with any decisions on “how and whether to purchase” or not.183 Due to the fact that the concept is wide, this creates the problem that national courts may interpret the behaviour of the trader as unfair in a variety of cases.

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175 Micklitz, (2009), p.81
176 COM (2013) 139 final, p. 12
177 COM (2013) 139 final, p. 12
178 The concept of professional diligence was mainly intended as honest market place and good faith. EC Guidance, (2016), p. 55
179 Art. 5 (2)(b) UCPD
180 Art. 2 (e) UCPD
181 Judgment of the Court (Sixth Chamber), 19 December 2013. Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato. C-281/28, ECLI:EU:C:2013:859
Moreover, the UCPD requires an assessment also in case the practice is “likely to distort” the transactional decision of the average consumer. Therefore, also in this case it is up to the national enforcement authorities to examine the situation in concreto and “the likelihood of the impact of the practice” on consumer’s economic behaviour.\footnote{EC Guidance, (2016), p. 40} Surely, understanding and evaluating the protected consumer benchmark by national courts in relation to the general clause will help to find out how the assessment in a certain case is done in the MS.

### 3.4 Black listed practices

Annex I of the UCPD comprises a list of commercial practices which are unfair and prohibited in all circumstances. According to Recital 17 of the UCPD, “these are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9”.\footnote{Recital 17 UCPD} This implies that if it is evident that the trader has committed a commercial practice that fits within one of the situations listed, national authorities do not have to investigate if the practice is contrary to the requirement of professional diligence and if it materially distorts the consumer’s economic behaviour, to impose penalties and sanctions.\footnote{COM (2013) 139 final, p. 18} This kind of application is meant to give legal certainty since the MS may not deviate from it. In fact, national laws have to prohibit exactly those listed practices. The black list is intended to be exhaustive and this character is reinforced by the fact that “it is possible to modify it just in case of a revision of the UCPD”.\footnote{Namysłowska, (2014), p. 67} This means that MS cannot modify the list or use those listed practices to cases that are not identical.\footnote{Namysłowska, (2014), p. 67}

The list includes 23 misleading and 8 aggressive commercial practices. Therefore, those commercial practices “considered unfair”\footnote{Namysłowska, (2014), p. 70} per se are subdivided between misleading and aggressive, whereas examples of practices that are unfair but neither misleading nor aggressive are not given.\footnote{Namysłowska, (2014), p. 70} In fact, the general clause of art. 5(2) prohibits commercial practices that in spite of not being misleading and aggressive may still be regarded as unfair.\footnote{Namysłowska, (2014), p. 71} This creates the impression that those are the only unfair commercial practices. Thus its simplicity may present some confusing consequences.

Moreover, the list contains unclear and undefined notions.\footnote{Namysłowska, (2014), p. 71} This means that the blacklist has been interpreted in different ways. One case that deserves to be illustrated is 4Finance\footnote{Judgment of the Court (Second Chamber) of 3 April 2014. «4finance» UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, C-515/12, ECLI:EU:C:2014:211. Paragraph 12}. In this case 4 Finance, the applicant, was a company that concluded contracts by correspondence with consumers for granting consumers small loans.\footnote{Judgment of the Court (Second Chamber) of 3 April 2014. «4finance» UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, C-515/12, ECLI:EU:C:2014:211. Paragraph 10} This company had an advertisement campaign that declared that everyone who subscribed (with a small fee of LTL 0.01) on its website would obtain a credit (a bonus of either LTL 10 or LTL 20) to his account on the basis of each friend brought by them to the registration on the website.\footnote{Judgment of the Court (Second Chamber) of 3 April 2014. «4finance» UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, C-515/12, ECLI:EU:C:2014:211. Paragraph 10} The Lithuanian State Consumer Rights Protection Authority sanctioned the company because it classified such
situation as a pyramid selling scheme by referring to point 14 of the Annex 1 of the UCPD. As 4finance did not agree with this decision, it brought the case before the CJEU.

Pursuant to point 14 of the Annex 1, one of the conditions to list a practice as pyramid scheme is the necessity of the fact that a “consumer gives consideration for the opportunity to receive compensation.” On the contrary, the Court found that the language of the UCPD in Lithuanian did not make reference to this contribution.

Moreover, another requirement listed at paragraph 14 is that the greater part of the compensation results from the payment given for the “introduction of other consumers into the scheme”. However, the CJEU found that the bonus was constituted only for little amount “by the financial consideration required from new members”. Therefore, the Court did not qualify the practice as a pyramid scheme. Nevertheless, the Court stressed that even if a practice cannot be qualified under the scope of Annex 1, it can still be prohibited and declared as unfair (misleading or aggressive), through an assessment conducted by national courts. Therefore, in this case it is for the national courts to evaluate if a conduct that not fulfills the requirement of paragraph 14 Annex 1 is a possible misleading practice.

Another case of importance is Purely Creative. In this case the Court had to interpret point 31 of the Annex 1 in order to qualify a commercial practice as aggressive in all circumstances. In particular Purely Creative were sending addressed advertising, letters inserted into magazines, which informed the consumer that “he was entitled to claim a prize” the value of which could be considerable or a few pounds. The consumer had several options to find out what he was entitled to claim: by telephone, SMS, ordinary post. However, the consumer was unaware about the maximum time and the cost per minute. Moreover, it was not told that in certain circumstances the consumer paid an additional cost for delivery and insurance, which sum was partly used for financing what was claimed.

What is interesting in this case is that the CJEU stated that the practices referred in point 31 of the Annex are forbidden even if the cost imposed on the consumer is de minimis compared with the value of the prize or if the trader did not receive any benefit.

The Court answered finally that national courts have to evaluate if the information given to consumers is...
clear and understandable by the targeted consumer, according to recital 18 and 19 and art 5 (2)(b). Therefore the practice at paragraph 31 is aggressive per se. For the application, however, it is necessary to evaluate if in practice the consumer is mislead or not. From the cases described above two things follow. One is that MS may have implemented the black list in various ways, such as in the case of Lithuania above mentioned. The second thing is that in many cases national courts and agencies have to carefully examine if the practice is misleading for the consumer in order to fulfil the requirement of the Annex 1. Within the analysis between Italy and UK the application of the black list will be evaluated, even if literature seems to retain that it has been correctly implemented. Nevertheless, also if the analysis confirms this theory, this does not imply that this legal instrument does not present issues that have to be solved. The role of the CJEU is fundamental in this sense.

3.5.1 Misleading and aggressive practices

The UCPD identifies misleading and aggressive commercial practices as unfair commercial practices and a description of those is given within the legislation. These types of commercial practices are the ones that are mainly used by MS with regard to the enforcement. During the course of time there were several issues regarding the relationship between the general clause (art. 5 (2)) and the special general clauses (art. 6-7 and 8-9) and in relation to whether the requirements listed in art. 5 (2) were also valid for the misleading and aggressive practices.

In order to clarify this point the case CH Tour Services is relevant. CHS and Team4 Travel were two Austrian travel agencies that operated in Innsbruck. They were competitors in selling skiing lessons and snow holidays in Austria for groups of schoolchildren from the United Kingdom. The defendant (Team 4 travel) depicted in its brochure certain accommodation establishments as “exclusive”, which means that the hotels did not have contractual relationship with other agencies in those days except for Team4 Travel. However, CHS had also bed quotas in the same period and in the same hotel of Team4 Travel, therefore CHS considered the term “exclusive” as unfair because it was incorrect.

The defence of Team 4 Travel was based on the fact that it acted in conformity with the professional diligence, since it was checked that with those establishments any other tour operators had booked. However, the CJEU stated that since the practice could be categorized under art. 6 (1) as misleading, it was

207 Judgment of the Court (Sixth Chamber) of 18 October 2012. Purely Creative Ltd and Others v Office of Fair Trading, C-428/11, ECLI:EU:C:2012:651, Paragraph 55
208 Stuyck, (2015), p. 741
209 COM (2013) 139 final, p.14
210 COM (2013) 139 final, p.14
211 Judgment of the Court (First Chamber), 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH, C-435/2011, ECLI:EU:C:2013:574
212 Judgment of the Court (First Chamber), 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH, C-435/2011, ECLI:EU:C:2013:574, Paragraph 12
213 Judgment of the Court (First Chamber), 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH, C-435/2011, ECLI:EU:C:2013:574, Paragraph 12
214 Judgment of the Court (First Chamber), 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH, C-435/2011, ECLI:EU:C:2013:574, Paragraph 12
215 Judgment of the Court (First Chamber), 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH, C-435/2011, ECLI:EU:C:2013:574, paragraph 18
not necessary to establish the professional diligence.\textsuperscript{216} This is because a misleading practice is prohibited within the UCPD.\textsuperscript{217}

Hence a violation of professional diligence is not necessary in case of a misleading action, omission or aggressive practice. On the contrary, as the EC Guidance (2016) confirms, art.5 has to be understood as a "stand-alone provision, as a safety net" because it guarantees that any unfair practice which does not enter into other provisions of the UCPD (i.e. that is neither misleading, aggressive or listed in Annex I) can still be penalised.\textsuperscript{218}

For the sake of clarity the following sub-sections are structured in this way: the sub-section 3.5.2 gives an overview of misleading actions and omissions; sub-section 3.5.3 points out the main aspect of aggressive practice; sub-section 3.5.4 is dedicated to the interplay of the UCPD and MCAD and sub-section 3.5.5 describes misleading and comparative advertising and the role of self regulatory bodies.

\textbf{3.5.2 The concepts of misleading actions and misleading omissions within the UCPD}

Section 1 of the UCPD identifies misleading actions (art. 6) and misleading omissions (art.7) as misleading commercial practices.

According to art. 6 (1) a commercial practice is misleading if it gives false, untruthful or deceptive information, including thorough presentation, which "deceives or is likely to deceive the average consumer, even if the information is factually correct [...] to take a transactional decision that he would not have taken otherwise". Therefore, not simply the content of the information, but also the manner in which the information is given can influence consumers in their choices.\textsuperscript{219} It is the role of the national courts and administrative authorities to assess the misleading character of commercial practices by taking into account the behaviour of the consumer benchmark.\textsuperscript{220} Art. 6 (1) states that these misleading actions can be related,\textit{ inter alia}, to: (a) the nature or existence of the product; (b) its main characteristics; (c) the motives for the commercial practice; (d) the price or the way to calculate it; (e) the need for a service; (f) trader identity and (g) consumer’s right, including the right to replacement.

For example if a trader misleads a consumer on the geographical (or commercial) origin of a product or its composition, this can be prohibited under art. 6 (1) (b) of the UCPD whether such information is false or deceiving until the point that the consumer takes a decision he would not have taken otherwise.\textsuperscript{221} This is what happened to a company from the Dominican Republic that was selling rum in the EU by referring to Cuba on the bottles and in commercial materials several times. In this case the Court of Appeal of Paris stated that if a famous geographical location is mentioned on a product when the product has nothing to do with that location, this practice has to be considered as misleading commercial practice.\textsuperscript{222} Therefore, such commercial claims can be considered misleading under Article 6(1) (b) of the UCPD.

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\textsuperscript{216} Judgment of the Court (First Chamber), 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH, C-435/2011, ECLI:EU:C:2013:574. Paragraph 49
\textsuperscript{217} Art. 5(1) UCPD
\textsuperscript{218} EC Guidance, (2016), p. 55
\textsuperscript{219} EC Guidance, (2016), p. 58. In the same vein, the Court in Teekanne case expressed the importance of taking into account not only the list of ingredient but the overall package.
\textsuperscript{220} EC Guidance, (2016), p.58
\textsuperscript{221} EC Guidance, (2016), p. 60
\textsuperscript{222} EC Guidance, (2016), p. 60
In addition, art. 6 (2) states that a commercial practice is misleading if “taking into account all its features and circumstances” it influences the transactional decision of the consumer that he would not have taken otherwise. Among those practices the article includes at art 6(2) (b) “any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor”. In this regard, the market court from Sweden assumed that the terms “Taxi” and “Taxi Gothenburg” written in yellow on a taxi had to be classified as unlawful comparative advertising given that they lead to a confusion of the consumer in differentiating the marks.\footnote{EC Guidance, (2016), p. 65}

Equally important is art. 6 (2)(b) which states that a practice shall be deemed as misleading also in case of “non-compliance of the trader” with a code of conduct to which he has committed himself in commercial communications. In this sense, points 1-4 of the Annex I to the UCPD forbids commercial practices in order to enhance a responsible use of codes of conduct in marketing.\footnote{EC Guidance, (2016), p. 67}

On the contrary, according to art. 7 (1) the omission of an information is misleading in case it “omits material information that the average consumer needs […] and causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise”. An “omission” also includes circumstances where the information is provided in an “unclear, incomprehensible, ambiguous or ultimate manner” (art. 7 (2)). Hidden advertising is also prohibited under Annex I, no. 11, 21 and 22.

The meaning of “material information” in art. 7 (1) and (2) is not specified by the UCPD. Therefore, national courts have to assess if important aspects of the information have been omitted by taking into account all the “features and circumstances and the limitations of the communication method”.\footnote{Art. 7(1) UCPD} Moreover, art. 7 (3) states that in establishing if a piece of information has been omitted two kinds of things have to be considered: “the limitations of space or time” of the communication medium used and “any measures taken by the trader to make the information available to consumers by other means”.

On the contrary, art. 7 (4) deals with information that is considered material in the case of an invitation to purchase. The objective of this article is to ensure that when a trader makes a commercial offer he does not mislead the consumer by hiding essential information.\footnote{COM (2013) 139 final, p. 15} Failing to provide consumers with information required by Article 7(4) in the case of an invitation to purchase is a misleading omission, if this failure is likely to cause the average consumer to take a transactional decision he would not have taken otherwise. The term “invitation to purchase” is defined in art. 2 (i) as “a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase”. According to the EC guidance (2016) this term has a wide scope, because differently from pre-contractual information, an invitation to purchase does not necessarily assume that the consumer will enter into a contract with a trader and it also includes services and not only sales.\footnote{Ballon (ed.), (2010a), p. 11 and EC Guidance, (2016), p.52} Moreover, according to some authors this term has been introduced in national versions differently and this can create obstacles to cross border situation.\footnote{Ballon, (ed.), (2010a), p. 11}

The information listed in art 7 (4) refers to: (a) “the main characteristic of the product”; (b) “the geographical address and the identity of the trader”; (c) “the price inclusive of taxes”; (d) “the arrangements for payment, delivery, performance and the complaint handling policy”; (e) “for products […] involving a
right of withdrawal or cancellation”. Finally art. 7 (5) states that information requirements established by national law “in relation to commercial communication, including advertising” have to be disclosed.

3.5.3 The concept of aggressive practice

The harmonisation of the concept of aggressive practices was new at the moment of the application of the UCPD. Article 8 classifies a practice as aggressive if it “limits the consumer’s freedom of choice or conduct with regard to the product, thereby distorting their economic behaviour”. Aggressive commercial practices make use of “harassment, coercion, physical force or undue influence”. The undue influence is defined in art. 2 (j) as an exploitation of a position of power to the consumer. By contrast, harassment and coercion are not defined.

The use of “harassment, coercion, physical force or undue influence” is determined by taking into account several aspects listed in art. 9, such as: (a) “time, location, persistence and nature”; (b) “use of threatening or abusive language or behaviour”; (c) “the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgement, of which the trader is aware, to influence the consumer’s decision with regard to the product”; (d) “any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract”; (e) “any threat to take any action that cannot legally be taken”. Therefore also putting psychological pressure on the average consumer that impairs its freedom of choice is considered to be aggressive.

One of the issues related to aggressive practices is that the EU has still to deal with possible differences among countries in the discipline of the aggressive practices. Part of the problem is the fact that the concept of aggression is influenced by the society, that implies a different perception of that concept and part of it has to do with the fact that there is not a definition of terms that may lead to barriers in the internal market.

3.5.4 The interplay of the UCPD and Misleading and Comparative Advertising Directive

Misleading and comparative advertising are disciplined by the MCAD for what concerns BTB relations. Recital 6 of the UCPD specifies that the UCPD does not affect the Directive on advertising which misleads business, but which is not misleading for consumers and on comparative advertising. Nevertheless as the EC guidance (2016) confirms, the rules contained in the MCAD on comparative advertising continue to represent the general benchmark, for establishing if comparative advertising is lawful in BTC transactions as well.

As already mentioned elsewhere, article 6 (2)(a) of the UCPD qualifies “any marketing of a product, including through comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor” as a misleading practice. Moreover, Recital 6 UCPD states that the UCPD harmonises national laws in relation to “unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitor”. Similarly, Article 4 (a) of the MCAD states that comparative advertising is forbidden in case it is considered misleading under Articles 6 and 7 of the UCPD.

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229 Micklitz, (2009), p. 107
230 Art. 8 UCPD
3.5.5 Self-regulation and misleading advertising

Art. 10 (1) UCPD states that “*this Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organisations referred to in Article 11 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article. Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11*”. At first reading the meaning of this article is not easy to catch. However, a deep analysis enables an interpretation of it.

According to art. 2 (f) a code of conduct indicates a collection of rules or an agreement not imposed by legislations of a MS, which determines the behaviour of a trader which is “*bound by the code*” in connection with one or more commercial practices. Art. 2 (g) defines the “*code owner*” as any entity, including a trader, “*responsible for the formulation and revision of a code of conduct and for monitoring compliance with the code*”.

Those self-regulations are helpful in ensuring compliance with legal standards. This means that self-regulation coexists with legal enforcement and encourages the court and administrative proceedings. MS may encourage self-regulation of commercial practices. However, the UCPD confirms in art. 10 (2) that self-regulation cannot replace judicial or administrative means of enforcement.

The UCPD does not contain specific rules regarding the scope of a code of conduct, but it is based on the fact that misleading statements about the endorsement from a self regulatory body may undermine the trust that consumers have in self-regulatory codes. Therefore, article 6 (2) (b) obliges traders to comply with codes of conduct to which they have adhered. Moreover, Annex I to the UCPD considers certain practices as misleading in all circumstances if the trader does not respect codes of conduct while marketing.

Thus, within MS self regulatory codes are adopted by self-regulatory bodies. Their scope might vary from country to country. In order to improve the “*interplay between this self-regulation and enforcement agencies*” there should be a division of competences. Therefore, these self-regulatory bodies should take care of cases that are easy in order to help legal enforcement authorities to do their best.

In fact, if the code is in conformity with the UCPD when for instance a consumer becomes aware of misleading advertising, he could primarily refer to the self-regulatory body. Moreover, the bodies should provide efficient sanctions to those traders whom are not cooperating. If the system of penalties does not lead with the cooperation of traders, it is necessary to refer to the national enforcement system. Those self regulations may be different from one country to another and this could create differences on the duties of the trader in commercial practices and especially in misleading advertising and thus influence the evaluation of the fairness of a practice. Therefore, a comparison between self regulations in Italy and UK on misleading and comparative advertising can be interesting to evaluate.

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233 COM (2013) 139 final, p. 28
234 COM (2013) 139 final, p. 29
235 Points 1-4 Annex I UCPD
236 Ballon (ed.), (2010a), p. 16
237 Ballon (ed.), (2010a), p. 17
238 Ballon (ed.), (2010a), p. 17
239 Ballon (ed.), (2010a), p. 17
3.6 The image of the protected consumer within the UCPD

The UCPD assures that the information given to consumers during commercial practices is correct and guarantees that their transactional decisions are taken on the basis of their preferences. The unfairness within the UCPD is measured against the “average consumer”.

The genesis of the CJEU rules based on the average consumer can be identified in the 1998 Gut Springenheide case. Gut Springenheide, as already explained in the second chapter, sold packed eggs with the indication “6-grain-10 fresh eggs” due to the fact that the food that was used for the animals was composed for 60% of a variety of different cereals. The CJEU stated that for determining if a statement can be considered as misleading, the national courts should evaluate on the basis of the average consumer who is “reasonably well informed and reasonably observant and circumspect”. This means that the consumer that is less averagely informed, observant and circumspect is not protected from the distortion of their economic behaviour.

Recital 18 clearly refers to the fact that the UCPD protects the average consumer “taking into account social, cultural and linguistic factors” and that it contains disposals intended to prevent “the exploitation of consumers whose characteristics make them particularly vulnerable”. In particular, to demonstrate that a practice is misleading or aggressive it is necessary that “the impact of that practice” would affect the transactional decision of the average consumer. Hence, the transactional decision is measured in relation to the benchmark of the average consumer. This requirement influences whether a practice is unfair or not.

In fact, as envisaged by art. 5 (2) UCPD, the practice is unfair if it does not respect the professional diligence and in case it influences the economic behaviour of the consumer, intended as average. On the same line, misleading and aggressive practices are categorized as such on the basis of the average consumer. Misleading practices prohibit those that have false information, that are untruthful and that “deceive or are likely to deceive the average consumer”. Similarly, the assessment of a practice as aggressive is done by considering the use of harassment, coercion and undue influence that “significantly impairs or is likely to significantly impair the average consumer freedom of choice”. The behaviour that an average consumer has in relation to a commercial practice has to be evaluated case by case by national authorities.

Moreover, Recital 18 makes reference to the “social cultural and linguistic factor” and it implies that MS might consider that their average consumers are not the same as the ones described by the CJEU. In this way MS could introduce a strict level of protection of consumer for some measures based on the UCPD. However, an extensive recognition of those differences can hamper the objectives of removing barriers and achieving the internal market. That is why the EC Guidance (2016) states that the average consumer benchmark “should not be interpreted too strictly” but in line with art. 114.

241 Micklitz, (2009), p.87
244 Willett, (2010), p. 268
245 Art. 6.1 UCPD
246 Art. 8 and Recital 16 UCPD
247 Poncibò, and Incardona, (2007), p. 28
248 Willett, (2010), p. 270
An important case that confirms this was the Lifting\textsuperscript{250} case. In this case the Court admitted that social, cultural and linguistic factors may be taken into consideration by national courts when applying the average consumer benchmark. That is why differences can exist.\textsuperscript{251} In this case the problem was related to the fact that the name of the product could be misleading because it could refer to characteristics (lifting) that in reality the product did not have.\textsuperscript{252} Thus, the Court had to decide whether the term lifting used in the market with a cream was justified. The CJEU recognised the importance of social, cultural and linguistic factors in applying the average consumer test and focused on the term “lifting” that could be intended in different ways in the various countries.\textsuperscript{253} Therefore, it states that it “is for the national court to decide, having regard to the presumed expectations of the average consumer, whether the name is misleading”.\textsuperscript{254}

What is more is that the reference to the social, cultural and linguist factors implies that the legislator within the UCPD recognises the limit of the average consumer that not always analyses the pros and cons when making a decision for purchasing goods, because other external factors may influence consumer decision making.\textsuperscript{255} For instance, social factors are important because consumers may buy goods not just for their need but for showing their social status or because they are influenced by other consumers within that society.\textsuperscript{256} Also cultural factors and pre-existing knowledge create divergences between consumers in different nationalities.\textsuperscript{257} That is why behavioural science is considered to be helpful in better defining the average consumer within the commercial practices.\textsuperscript{258} However, also in this case some problems still remain, since it is not always easy to determine the reaction of the average consumer in a specific case.\textsuperscript{259}

In order to better explain the consumer protection within the UCPD it is relevant to make a reference to the Purely creative\textsuperscript{260} case, interpreting paragraph 31 of the Annex 1 of the UCPD.\textsuperscript{261} The CJEU stated that the practices in question were aggressive because they were referring to a prize which created a “psychological effect in the consumer’s mind” that he could win something and so this idea pushed him to take a decision that he would not have taken otherwise.\textsuperscript{262} That is why the Court, in order to protect consumers, established that the notion of “prize should be preserved” in the sense that if the consumer has to pay for the reward, this cannot be considered as a prize.\textsuperscript{263} The reference to the psychological factor could be interpreted as abandonment by the Court of the concept of average consumer as rational because it also takes into account psychological aspects.\textsuperscript{264} However, this assumption cannot be made since this case refers to a point of the

\textsuperscript{250} Judgment of the Court (Fifth Chamber) of 13 January 2000. Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH, C-220/98, ECLI:EU:C:2000:8

\textsuperscript{251} Duivenvoorde, (2015), p.71


\textsuperscript{254} Judgment of the Court (Fifth Chamber) of 13 January 2000. Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH, C-220/98, ECLI:EU:C:2000:8, paragraph 33

\textsuperscript{255} Poncibò and Incardona, (2007), p. 33

\textsuperscript{256} Poncibò and Incardona, (2007), p. 33

\textsuperscript{257} Duivenvoorde, (2015), p. 165 and 169

\textsuperscript{258} Poncibò and Incardona, (2007), p. 34

\textsuperscript{259} Duivenvoorde, (2015), p. 174

\textsuperscript{260} Judgment of the Court (Sixth Chamber) of 18 October 2012. Purely Creative Ltd and Others v Office of Fair Trading., C-428/2011, ECLI:EU:C:2012:651

\textsuperscript{261} The latter considers an aggressive commercial practices in all circumstances when gives “the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either, there is no prize or other equivalent benefit, taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.”

\textsuperscript{262} Judgment of the Court (Sixth Chamber) of 18 October 2012. Purely Creative Ltd and Others v Office of Fair Trading., C-428/2011, ECLI:EU:C:2012:651. Paragraph 49

\textsuperscript{263} Judgment of the Court (Sixth Chamber) of 18 October 2012. Purely Creative Ltd and Others v Office of Fair Trading., C-428/2011, ECLI:EU:C:2012:651. Paragraph 49

\textsuperscript{264} Stuyck, (2015) p.739

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Annex and not to the general or sub clauses.\textsuperscript{265} Moreover, the fact that the CJEU refers to Recital 18 it implies that national courts have to refer to the reaction of the average consumer in their judgement.\textsuperscript{266}

The specificity of the UCPD is that it “\textit{tempers}” the notion of the average consumer with two average consumer benchmarks: the target group and the vulnerable group.\textsuperscript{267} For what concerns the target group, art. 5 (2) stated that “a commercial practice is unfair if it materially distorts the economic behaviour” of the “average consumer whom it reaches or to whom it is addressed, or to the average member of the group when a commercial practice is directed to a particular group of consumers”.\textsuperscript{268} As can be noticed from the wording of this article, both the average and target benchmark are determined in the light of “\textit{who is reached by the practice or to whom it is addressed}”.\textsuperscript{269}

The characteristic of the targeted group is that it enables the protection of a more vulnerable or expert group in case those groups are “\textit{targeted}” by that practice.\textsuperscript{270} For example the EC guidance (2016) states that most of the time teenagers are a group of consumers that is targeted by traders in their advertising.\textsuperscript{271} This means that if a commercial practice is addressed to a specific group of consumers that is particularly vulnerable or expert, the average member of that group has to be taken into account.\textsuperscript{272}

The difference between the target and the vulnerable group is that the benchmark of the target group is confined to cases where a “\textit{particular group of consumers}” is targeted by the practice, whereas the vulnerable benchmark is referred to “\textit{who}” is concerned by those practices which affect the economic behaviour of a particular group.\textsuperscript{273}

The protection of the vulnerable group can be found, \textit{inter alia}, in Recital 19 which states that if “\textit{certain characteristics such as age, physical or mental infirmity or credulity}” make consumers more “\textit{susceptible}” to a commercial practice it is necessary to guarantee them an appropriate protection. Art. 5(3) refers to age, mental or physical infirmity and credulity as requirements for the vulnerability. Vulnerability by virtue of mental and physical infirmity is defined by the EC Guidance (2016) as “\textit{sensory impairment, limited mobility and other disabilities}”.\textsuperscript{274} For what concerns the age, categories of people that need more protection are in general children, adolescent and elderly people. In particular, children and adolescents are considered vulnerable because they do not have experience and can be influenced more easily.\textsuperscript{275} The UCPD gives a strong protection to children also with the point 28 of Annex 1 which bans practices aimed at pressuring children to buy something or to insist their parents to buy it.\textsuperscript{276} With respect to credulity it is meant to refer to groups of consumers who are more likely to believe specific claims.\textsuperscript{277}

The relationship between those benchmarks has been discussed by scholars. For instance, according to Ponciò and Incardona (2007) the vulnerable consumer is a “\textit{superfluous}” concept and it is not logical.\textsuperscript{278} For them, if a product is directed to a specific target, then the average consumer is specified within that target

\textsuperscript{265} Stuyck, (2015) p. 740
\textsuperscript{266} Stuyck, (2015) p. 740
\textsuperscript{267} Ponciò and Incardona, (2007), p. 28
\textsuperscript{268} Art. 5(2) UCPD
\textsuperscript{269} Duivenvoorde, (2015), p.23
\textsuperscript{270} Duivenvoorde, (2015), p. 24
\textsuperscript{271} EC Guidance, (2016), p. 49
\textsuperscript{272} Duivenvoorde, (2015), p. 23-24
\textsuperscript{273} Duivenvoorde, (2015), p. 24
\textsuperscript{274} EC Guidance, (2016), p. 48
\textsuperscript{275} Duivenvoorde, (2015), p. 182
\textsuperscript{276} Art. 5(3) UCPD
\textsuperscript{277} Duivenvoorde, (2015), p. 189
\textsuperscript{278} Ponciò and Incardona, (2007), p. 29
and the protection of vulnerable consumer does not make sense.\textsuperscript{279} If the product addresses to everyone, then the business should not pay more care than the one that is already reasonably asked for being fair.\textsuperscript{280}

Moreover, one of the conditions listed in art. 5 (3) UCPD for referring to the vulnerable benchmark is that the practice has to materially distort the economic behaviour of a “clearly identifiable group”. The interpretation of what is clearly identifiable and to whom it has to be identified is not clear.\textsuperscript{281} Moreover, it is not easy to understand when among vulnerable consumers there is a group to be protected\textsuperscript{282}.

Therefore within the concept of consumer benchmarks protected in the UCPD there are still important questions to solve. The problems and the discipline discussed above are also important with regard to the evaluation of the relationship between the benchmarks and the goals of the UCPD. The interpretation of the average consumer intended by Italian and UK courts is further investigated in the analysis of this research.

\textbf{3.7 Legal enforcement of the UCPD and sanctions to prevent unfair commercial practices}

In order to make sure that the UCPD reaches its objectives it is necessary that there are equal conditions within the system of enforcement among national legislations.\textsuperscript{283} MS have introduced a different strategy for enforcing the rules, choosing between public or private enforcement. Public enforcement is meant in this case as an enforcement that is done by national authorities on the basis of complaints of citizens or on their own instance.\textsuperscript{284} By contrast, private enforcement can be done before national courts by individuals or collective groups.\textsuperscript{285} Some countries are also adopting a combined system of private and public enforcement.\textsuperscript{286} The UCPD (art. 11-13) establishes rules for enforcing and sanctioning unfair practices.

According to art. 11 (1) UCPD a MS has to ensure that an “adequate and effective means” is in place to fight against unfair commercial practices with a view of enforcing the conformity to the UCPD for protecting consumers. Art. 11 (1) and art. 11 (2) UCPD express clearly that MS can have legal provisions which allows person or organisation to “take legal action against such unfair commercial practices” and/or bring them before the administrative authority. Art. 11 (1) and (3) state that it is for the MS to decide which enforcement system listed in art. 11 (1) and (2) has to be taken into account. In addition, art. 12 is dedicated to the role of national administrative authorities.

Pursuant to art. 13 of the UCPD, MS have to impose penalties for the infringement of national provisions against unfair practices and a system of measures for enforcing them. Thus, this article states that MS are free to decide the kind of penalty to apply (administrative, civil or criminal), provided that they are “effective, proportionate and dissuasive”.\textsuperscript{287} Notwithstanding the clear division between penalties and enforcement within the UCPD, those aspects are clearly linked to each other.\textsuperscript{288} For example, the imposition of an administrative penalty can only be enforced in a proceeding before the administrative court, that is listed in art. 11(1)(2).

\textsuperscript{279} Poncibò and Incardona, (2007), p. 29
\textsuperscript{280} Poncibò and Incardona, (2007), p. 29
\textsuperscript{281} Duivenvoorde, (2015), p. 25
\textsuperscript{282} Duivenvoorde, (2015), p. 25
\textsuperscript{283} Poelzig, (2014), p. 235
\textsuperscript{284} Poelzig, (2014), p. 236
\textsuperscript{285} Poelzig, (2014), p. 236
\textsuperscript{286} Such as France.
\textsuperscript{287} Art. 13 UCPD
\textsuperscript{288} Poelzig, (2014), p. 242
The system of penalties and compliance assurance is not harmonised and is left to the MS. Consequently, those differences in national enforcement systems can create obstacles to cross-border transactions. That is why two enforcement systems (Italy and UK) will be examined in order to understand which kind of differences exist and what is their relevance.

It has to be specified that the European legislator has put in place two pieces of legislation aiming to reduce this kind of problem: the Consumer Injunctions Directive and the Regulation on Consumer Protection Cooperation. The Consumer Injunctions Directive enables foreign associations to take legal actions, among others the injunction, in case the UCPD is not respected with the aim to protect “the collective interests of consumer”. On the other hand, the Regulation on Consumer Protection Cooperation aims at endorsing cooperation among the different national authorities. The adoption of this latter Regulation was due to the fact that in the past there was not any kind of insurance of enforcement system in cross-border situations. Nowadays, art. 4 (1) of that regulation ensures that MS elect the authority and the single office responsible for the investigation and the enforcement and ensure a coordination among those authorities.

Despite this regulation, practical problems are still in place, as confirmed also by the EC. For instance, the process of coordination and communication among authorities and associations is time-consuming. The implication of this system could be that the enforcement may be hindered from the fact that enforcement procedure is complex. Moreover, “infringements occurring simultaneously in several Member States may not be fully addressed under the current Regulation”.

Due to these shortcomings it is interesting to understand if the effective enforcement of the UCPD within the MS is efficient.

### 3.8 Elements for comparison

The implementation of the UCPD within MS has been done with different technical choices in relation to the history and the culture of the law governing unfair commercial practices. Some MS had already legislation on unfair practices and others did not. Thus, in order to be harmonised with the UCPD most of the MS had to revise legislation to ensure a complete implementation. Nowadays, all the MS have implemented the UCPD and several years have passed since its adoption. Therefore, it is now possible to assess how the UCPD has been implemented and approximated in national laws. However, issues related to the UCPD do exist and the main elements of comparison are explained below.

First of all it is interesting to notice whether some UCPD concept may be interpreted in different ways in different countries. This may be related to the vagueness of terms and the different wording in the implementation law, which may create problems in the enforcement and in the recognition of a practice as unfair. Therefore, these elements UCPD may lead to differences among countries and hinder the objective of the legislator. However, it could be that in recent years those differences have been eliminated or that the

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289 Ballon (ed.), (2010b), p. 15
290 Injunctions Directive 2009/22/EC
291 Regulation 2006/2004
292 Art. 3(b)
293 COM(2016) 283 final, p.3-5
294 COM (2013) 139 final, p.27
295 COM(2016) 283 final, p.4
296 COM (2013) 139 final, p. 3
297 In fact, according to several authors there are concepts that are not well defined within UCPD, such as informed decision, material information (Willett, (2010), p. 251) misleading (Stuyck, (2015), p. 736) (art.6), harassment (Osuji, (2011), p.440-441) (art. 9) or in general aggressive practices, including advertisement (Micklitz, (2009), p. 108-109). The same goes for the black list, that has been reported integrally within the national laws but that still has norms opened to interpretation.
CJEU during these years have interfered in clarifying those concepts. This would imply a major coherence among countries. That is why the Court’s rulings have to be evaluated in this analysis as well.

Secondly, the comparison on the interpretation of the UCPD cannot ignore the image of the consumer protected in national laws due to the fact that the assessment of unfairness of a commercial practice (art. 5 UCPD) has to be done in national systems by taking into account the possibility of the practice to mislead the average consumer or the vulnerable and target consumer. According to Recital 18 of the UCPD the average consumer test is done by national courts that have to exercise their own faculties of judgement. This means that the interpretation of the average consumer can lead to differences among MS, for example in relation to what extent the consumer is protected as vulnerable and in relation to the effective application of the target and the vulnerable group. A not limited recognition of those differences can hamper the objectives of removing barriers and achieving the internal market. Therefore, it is necessary to analyse the tendency of the national courts in Italy and UK regarding the interpretation of the protected benchmark consumer within the unfair commercial practices in order to understand the relevance of those differences.298

Thirdly, the enforcement system is not harmonised by the UCPD and art. 11 and Recital 21 of the UCPD do not restrict the enforcement system because the choice is left to the MS. This means that MS may have put in place different enforcement regimes and most of them can have combined aspects of public and private enforcement.299 The influence of those differences is fundamental to evaluate, because they can create disparity among countries in reaching the high level of protection of consumer and the functioning of the internal market much vaunted by the legislator within the UCPD. In fact, if the enforcement and the application of EU rules by authorities differ, true harmonisation is not totally achieved.300 Differences in the enforcement system can be evaluated in a comparative research in relation to the compliance assurance and sanctioning. Therefore, through the procedure, the powers of the bodies, the rights of consumers to redress and the procedure to complain and of course the sanctions imposed.

Fourthly, another point of comparison can be related to the differences on the duties of the trader in commercial practices and especially in misleading advertising. In this sense an evaluation of codes of conduct which can be relevant for the assessment of such practices can also be interesting. In detail, the non-compliance by a trader with a code of conduct to which he is bounded constitutes a forbidden misleading practice (Article 6 (2) (b)). Art. 10 of the UCPD recognises the importance of codes of conduct which may influence the assessment of fairness. Codes of conduct may be different from one MS to another and in order to understand the level of convergence between codes of conduct within MS, it is necessary to compare codes of conduct and the role of self-regulatory bodies in similar sector of activity across the EU, for example in the sector of commercial communication and advertising. Moreover, the relationship between the self-regulatory bodies and enforcement agencies may lead to variation. However, the UCPD confirms in art 10 (2) that self-regulation cannot replace judicial or administrative means of enforcement.301

Other elements of comparison could have been also taken into account by following art. 3 of the UCPD and the exceptions given to the maximum harmonisation. However, due to the scope of this research those aspects are left out.

299 COM (2013) 139 final., p. 26
301 COM (2013) 139 final, p.29
3.9 Conclusion

As has been pointed out above, the UCPD is composed of a three tier system: firstly the general prohibition of unfair practices (art.5.2), secondly specific prohibitions of misleading (action and omission) and aggressive practices (art. 6-7/8-9) and thirdly blacklisted practices contained in Annex 1.

This system involves some issues with it when approximated at national level. For instance, as showed above, art. 5 (2) is an open textured clause that is interpreted case by case by national courts and that can create differences between MS regarding the way of judging and interpreting some practices as unfair. In this same vein, in relation to misleading and aggressive practices (art. 6-7/8-9) there may be problems of interpretation of terms that are still not clear. Finally, also in the case of the black list, that is applicable per se, some doubts and shortcomings have been pointed out.

Moreover, it has been illustrated that in order to demonstrate that a practice is misleading or aggressive it is necessary that the impact of that practice would affect the transactional decision of the average consumer.³⁰² Hence, the transactional decision is measured in relation to the benchmark of the average consumer. The interpretation of it may influence whether a practice is unfair or not. The reference that is made in Recital 18 to the “social cultural and linguistic factor” implies that MS might consider that their average consumers are not the same as the ones described by the CJEU. In this way MS could introduce a strict level of protection of consumers for some measures based on the UCPD, despite the maximum harmonisation.³⁰³ However, the large recognition of those differences can hamper the objectives of removing barriers and achieving the internal market.

Finally the system of penalties, self-regulation and enforcement is left to the MS. Consequently, due to the predictable differences among countries the objectives of the UCPD may be undermined. In fact, among other things, those differences in national enforcement systems can create obstacles to cross-border transactions.³⁰⁴ The table below summarises the main elements of comparison.

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³⁰² Willett, (2010), p. 268
³⁰³ Willett, (2010), p. 270
³⁰⁴ Ballon (ed.), (2010b), p. 15
### Table 1 - Elements of comparison

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CHAPTER 4- Italian law against unfair commercial practices

4.1 Introduction

According to the UCPD the MS had to adopt “laws, regulations and administrative provisions” by 12 June 2007 in order to comply with the EU legislation and had to apply those measures by 12 December 2007. The same deadline was set for the MCAD, with the aim to protect business. Therefore, MS had the possibility to choose among a unique corpus of law comprising both unfair practices and misleading and comparative advertising protecting businesses or they could decide to apply two different pieces of legislation.

The Italian legislator tried to balance the European ambition to harmonise legislation against unfair commercial practices with the discretion to interpret certain norms at national level. The debate about the implementation was not very long in comparison with other countries. In fact Italy was among the first countries that implemented the UCPD before the deadline. The 21st of September 2007, Italy opted for two different decrees: the Legislative Decree No. 145/2007 (LD 145/07) on “misleading and comparative advertisements” that protects BTB relations and the Legislative Decree No. 146/2007 (LD 146/07) on “unfair business to consumer practices”.

Although the legislator preferred the adoption of two different pieces of legislation in order to clarify the different addressees, the enforcement of both LD 145/07 and LD 146/07 is the responsibility of the Italian Competition and Market Authority (AGCM, also called ICA), which has been introduced by law n. 287 of 10 October 1990. The AGCM is an independent administrative authority that is entitled to investigate unfair commercial practices and to inflict big sanctions. Over the years the legislative framework has been improved and new opportunities of enforcement have been given to consumers, for instance through the possibility to have access to documents and to start a class action.

In order to understand the Italian legislation against unfair commercial practices, this chapter is organized as follows. Section 4.2.1 is dedicated to the implementation and interpretation of the European regulative framework. In Sub-section 4.2.2 particular attention is given to the assessment of the unfairness of a practice and to the concept of misleading within the Italian legislation. Section 4.3.1 introduces the protected consumer benchmark. Sub-section 4.3.2 is dedicated to the interpretation of the protected average consumer by the AGCM and the Lazio regional administrative court (hereinafter, TAR Lazio) and Sub-section 4.3.3 shows the protection of the vulnerable and target consumer. Section 4.4 is dedicated to the fairness of information and the self regulation revolving around misleading practices and advertising. In particular the duties of the traders are examined. Section 4.5.1 is completely dedicated to the enforcement system. Within this area the elements that are taken into account are: the enforcement authority and its role (Sub-section 4.5.2), the system of penalties (Sub-section 4.5.3), the class action system (Sub-section 4.5.4), the individual consumer remedies against unfair practices (Sub-section 4.5.5) and a reflection on the relationship among the different ways of enforcement (Sub-section 4.5.6). Section 4.6 provides a conclusion.

305 Art. 19 UCPD
306 For example Denmark, Sweden and Austria have a unique corpus of law applicable to all the unfair commercial practices for protecting consumers and traders. See: COM (2012) 0702 final
307 Such as UK
308 Italian: Autorità Garante della Concorrenza e del Mercato
4.2.1 The implementation of the UCPD in the Italian legislative framework

As mentioned above, the LD 146/07 transposed the European UCPD within the Italian legislative system and the original legislation regulating misleading advertising that harms the consumers has been substituted and included within the framework of the unfair commercial practices legislation.\textsuperscript{311} The rules contained in the LD 146/2007 have been introduced into the Italian Consumer Code (ICC)\textsuperscript{312}. Specifically the third title of the second part\textsuperscript{313} of the ICC is dedicated to unfair practices, aiming at ensuring adequate protection to consumers.

The implementation of the UCPD has been completed with the LD 221/07 that tries to harmonise the text of the ICC and that recognizes a list of rights to the consumers in art. 2. In particular, the right to have commercial practices with respect for “good faith, fairness and loyalty” has been introduced at the letter c-bis. Moreover, the Law 24 March 2012, n. 27 extended the protection against unfair practices, which is limited in favour of consumers at European level, to micro-enterprises as well. These are defined in art. 18 (d-bis) of the ICC as “entities, companies or associations” that exercise an economic activity, employing less than ten persons and that have an annual revenue or total annual balance sheet amount not exceeding two million euro.\textsuperscript{314}

The framework of the ICC containing the rules against unfair practices is described below.

4.2.2 Assessing the unfairness within the Italian Consumer Code.

According to art. 20 of the ICC a commercial practice is unfair if it is contrary to the requirements of professional diligence and if it materially distorts consumer behaviour in relation to the product of “the average consumer whom it reaches or of the average member of the group when a commercial practice is directed to a particular group of consumers”. Evidently, this article reproduces in an identical way art. 5.2 UCPD. However, different from recital 18 UCPD there is not a definition of the average consumer within the ICC.\textsuperscript{315}

For what concerns the interpretation of this article, according to Meli (2011) the objective of maximum harmonisation is difficult to reach when the general clause is constituted of notions opened to national interpretation.\textsuperscript{316} Regarding the notion of professional diligence, the definition appears to be slightly different from the European one. In fact the Italian legislator makes references to the “normal grade” of special skills and care that consumers may expect from traders. On the contrary, the UCPD instead of the normal grade of special skills that a consumer may expect refers to an external person. Nevertheless it seems that the perception of the consumer and the one of the external person leads just to a formal term differentiation. Moreover, Meli (2011) thinks that although the professional diligence is not relevant when assessing misleading and aggressive practices\textsuperscript{317} in concreto in order to classify an action as misleading, the AGCM

\textsuperscript{311} Di Via and Leone (2011), p. 2
\textsuperscript{312} LD 6 September 2005 No. 206
\textsuperscript{313} This part is called: “Education, Information, Commercial Practices and Advertising”
\textsuperscript{314} During the past of the years other decrees have been amended in order to modify the Italian civil code, most recently D.Lgs. 6 August 2015, n. 130 and D.lgs. 15 January 2016, n. 8 have to be remembered.
\textsuperscript{315} Di Via and Leone (2011), p. 3
\textsuperscript{316} Meli (2011), p. 7
\textsuperscript{317} See case law: CH Tour Services. Judgment of the Court (First Chamber), 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH, C-435/2011, ECLI:EU:C:2013:574
shall always demonstrate that the responsibility is upon the trader and that there is an absence of good faith. It seems to be a normal passage of the AGCM when evaluating the duty of the trader.\footnote{Meli, (2011), p.8}

In addition, art. 20 ICC defines two categories of unfair practices: misleading practices (misleading actions or omissions) and aggressive practices. In particular, a commercial practice is misleading if it “contains false information [...] and is likely to deceive the average consumer” (art. 21). In the past there were problems in interpreting the concept of misleading, because the Italian version seemed to suggest that the commercial practice influencing the consumer’s decisions was sufficient for defining the practice as misleading due to the expression “e in ogni caso”\footnote{That can be translated as: “and every time that”}. However, the CJEU clarified in the case Trento Sviluppo\footnote{Judgment of the Court (Sixth Chamber), 19 December 2013. Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato. C-281/28, ECLI:EU:C:2013:859.}, that in order to classify a practice as unfair it is necessary that it combines all the elements of unfairness.\footnote{Stuyck, (2015), p.736 and Judgment of the Court (Sixth Chamber), 19 December 2013. Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato. C-281/28, ECLI:EU:C:2013:859. Paragraph 30} Therefore, the interference of the Court has been necessary to interpret the concept.

Moreover, art. 21(3) ICC extended the unfairness also to those practices that concern products which are “likely to harm the health and safety of consumers, to fail to state this likelihood such that consumers are induced to neglect to observe the normal standards of prudence and vigilance”. This is an important aspect to highlight in comparison with the European legislation, since a level of protection for consumers is specified to be guaranteed also in case of prevention of health and safety problems, whereas this specification cannot be found in the UCPD. The latter in art. 3(3) states that rules “relating to health and safety aspects” are an exception to the maximum harmonisation.\footnote{Van Boom, (2015), p.7} In addition, art. 21(4) gives further attention to those practices that are directed to children and adolescents, which are considered unfair if they threaten their safety. Hence, it seems that the Italian legislator puts effort in protecting the more vulnerable consumers.

A misleading omission occurs when the trader “omits material information that the average consumer needs” for making an informed transactional decision, “thereby causing or being likely to cause the average consumer to take a transactional decision that they would not have taken otherwise”.\footnote{As art. 22.1 ICC} Furthermore, art. 22(2)\footnote{As art. 7.2 of UCPD} establishes that a practice has to be considered as a misleading omission also in case the trader “hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information” in a way that it “causes or is likely to cause the average consumer to take a transactional decision that they would not have taken otherwise”.

An additional provision that is not contained in the UCPD and that has not been introduced with the LD 146/2007 is the one stated by art. 22-bis, which establishes that “advertising regarding prices charged by maritime companies operating from Italy either directly or under code-sharing agreements is deemed deceptive when it advertises the cost of the ticket purchased from the maritime company separately from additional charges, port taxes and from any other charges borne by the consumer, the maritime company being obliged to advertise a single price which includes all of these items”. This article was introduced with the art. 22 of the Law n. 99 (23 July 2009) and protects consumers against misleading advertising of maritime companies.
Following the ICC, the legislator decided to insert the black list linked to practices considered misled *per se* within the principal text and not in the Annex. Specifically it is inserted after the misleading practices and before the aggressive ones. In detail, art. 23 is a reproduction of Annex 1 of the UCPD from 1 to 23. Black listed commercial practices that are contained in art. 26 are a reproduction of the Annex I of the UCPD from 24 to 31.

On top of that, art. 24 considers a commercial practice aggressive if: "*by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise*”. Art. 9 of the UCPD, concerning use of harassment, coercion and undue influence is reproduced integrally in art. 25 of the ICC.

To conclude, the implementation of the UCPD within the ICC has mainly followed EU rules. However, the lack of explanation of some concepts has led to problems of interpretation.

### 4.3.1 The consumer benchmark interpreted by the Italian administrative Court and the AGCM

Differently from the UCPD, the ICC does not define the average consumer. Based on the decisions of the AGCM and the TAR Lazio it seems that the consumer is not always meant as "reasonably well informed, observant and circumspect", since more emphasis is given to the endorsement of good communication and fairness of the trader than rational action made by consumers. Thus, a pro consumer orientation appears to prevail. For what concerns the protection of target and vulnerable groups, it is important to notice that already before the implementation of the UCPD there was a protection of those groups by the Italian Court whereas at EU level it has been explicitly introduced with the UCPD.

In order to better explain this picture the Section 4.3.2 is dedicated to the general interpretation of the average consumer benchmark and Section 4.3.3 is focused on the target groups and vulnerable groups. This last Section is fundamental for understanding the protection ensured to those groups of consumers in comparison to the European one.

### 4.3.2 The average consumer

In relation to the application of the average consumer benchmark, administrative court rulings that endorsed the AGCM decisions are relevant. According to some authors, the general idea is that the administrative Court (TAR Lazio) supported in the majority of the cases the AGCM’s decisions, leaving to the latter the possibility to choose the benchmark of consumers that have to be protected instead of applying the criteria set by the EU.

Already with the old legislation, the TAR Lazio delineated the “average consumer” in the case *Sanremo Giovani*. During two television programs ("Sanremo giovani and Mille lire al mese") there was a TV commercial of the natural water “San Benedetto”. This promotion was inserted while the presenters were

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325 Di Via and Leone, (2011), p.3  
328 Duivenvoorde, (2015) p. 139  
talking.\textsuperscript{331} Therefore, the AGCM classified this as hidden advertising (\textit{pubblicità occulta}), as the intention was clearly a promotion of the product without mentioning that it was an advertisement for consumers. Moreover, the water was described as full of vitamins when it was not the case.\textsuperscript{332} Therefore the message was considered misleading for the consumer.

On the contrary, the defendant considered the reference to the vitamin effect of the water as not misleading, with the justification that it was just a sentence pronounced by the presenter during the show and that could not mislead an average consumer considered reasonably well informed and circumspect.\textsuperscript{333} The Court ruled that if the message influences the economic interest of the consumer, the message has to be coherent with legislation, otherwise considered as misleading. Moreover, in the Court’s opinion the average consumer should not be considered as “\textit{ideal}” given the fact that other factors, such as the comprehensibility of the message in relation to the characteristics of the product, influences their decisions.\textsuperscript{334} Therefore, the TAR Lazio in this case seems to diverge from European case law, since it aims to protect “\textit{the trusting as well as the suspicious}”, more than the “\textit{reasonable consumer}”.\textsuperscript{335} Thus, it appears that the trader is given the responsibility to give fair information more than assessing the reasonability of the consumer.\textsuperscript{336}

Another important old case\textsuperscript{337} regards the decision of the Italian Council of State (\textit{Consiglio di Stato}), a special administrative judge, which had to deal with the notion of average consumer. The issue emerged from a provision of the AGCM which declared the wording “\textit{Oneglia}” (the name of a place) on the label of an extra virgin olive oil as misleading, although the olive oil did not come from that place. The Council of State accepted the misleading decision of the AGCM, by stating that there is a difference among consumers who are aware of PDO (protected designations of origin) products and consumers that are willing to buy food that has a particular value in comparison to the general products put on the market.\textsuperscript{338} It concluded that it is not possible to extrapolate an abstract figure of average consumer, below which there is no protection, but instead it is necessary to operate case by case in order to identify the category of consumer that has been misled.\textsuperscript{339}

In another different case the TAR Lazio had to decide in a case regarding the use of a non-alcoholic beer, which contained a quantitative of alcohol declared in the advertisement, if it was misleading for the consumer.\textsuperscript{340} The TAR Lazio partially agreed with the defence and established that the average consumer is aware of the possible negative consequences deriving from the excessive use of that beer, which is in line with the idea of average consumer at EU level, thus considered well informed and circumspect.\textsuperscript{341}

Differently, in the case \textit{Wind Absolute Tariffa}\textsuperscript{342} the TAR Lazio was of the opinion that the average consumer has to be considered as someone that has little knowledge in a specific sector, such as telecommunication in that specific case.\textsuperscript{343} The reasoning of the Court has been related to social, cultural and linguistic factors and in particular the TAR Lazio analysed the economic scenario and the market where the consumer was acting. Hence, in its reasoning the Court stressed that telecommunication is a particularly

\textsuperscript{335} Meli, (2011), p. 36
\textsuperscript{336} Duivenvoorde, (2015), p. 135
\textsuperscript{337} Cons. stato, Sez. VI, 6 March 2001, n. 1254/99
\textsuperscript{338} Cons. stato, Sez. VI, 6 March 2001, n. 1254/99. Paragraph 4.3
\textsuperscript{340} TAR Lazio, Sez. I, 10 January 2007, n. 3531
\textsuperscript{341} Meli, (2011), p. 39-40
\textsuperscript{342} TAR Lazio, 29 March 2010, n. 4931
\textsuperscript{343}Duivenvoorde, (2015) , p. 135-136
complex and constantly evolving sector that has an impact on potential consumers that allegedly are not well informed. Thus, according to TAR Lazio it is necessary to protect also consumers less informed (in Italian: smaliziati), as they could be the possible average consumer addressees. Therefore, also in this case the TAR has the opinion that it is not possible to limit the protection to the rational and well informed consumer, but it is necessary to perform a case by case assessment. It therefore seems that the average consumer taken into account is not always the well informed one, but sometimes the “novice consumer”, namely the one that did not experience the product before.

One more case shows that the AGCM, as the TAR Lazio, did not consider the consumer to be particularly well informed. In fact, in the case Sacchetti COOP degradabili al 100% the AGCM had to evaluate the possibly misleading advertisement done by the society COOP Italia on the newspapers “La Repubblica” and “Corriere della Sera”. These newspapers promoted the brand COOP through plastic shopping bags available when shopping there, describing them as environmental friendly. The AGCM considered that kind of advertisement as misleading since the bags contained chemical characteristics not easily known for the consumer. Therefore, the latter would be induced to trust the trader and to believe that the bag is completely compatible with nature even if the notions related to the environmental friendly nature of the product (such as biodegradable) require a more complex evaluation, that the consumer cannot do because he does not have a high level of knowledge in this context of recyclability. Thus, the average consumer is not interpreted as the one that acts in a critical way if he does not understand the information. In this latter case, what will guide his decision is the impression that he has from the message more than analytical reasoning.

In other recent cases it appears clear that for the TAR Lazio the legislation on consumer protection of the consumer against unfair practices and misleading advertising wants to guarantee them the freedom of choice through the correct information given by the trader. Therefore, any communication given by the trader has to be evaluated in line with the legislation independently from the assessment of the subjective condition of the average consumer to be well informed and circumspect. Hence, the unfairness has to be evaluated ex ante, before the negative effects that it can have on consumers.

Thus, it seems that more responsibility is given to the producer to provide clear information than to the consumer in critically assessing the fairness of the practice or in this case of the advertisement. Consequently, the average consumer is not always considered well informed and circumspect.

4.3.3 The vulnerable groups and the targeted consumer groups

Despite the fact that the protection of special categories of consumer has been introduced in the European legislation by the UCPD, the Italian legislator already reserved a particular protection to vulnerable groups in the 1990s, as visible from some decisions of the AGCM. The main categories of groups that are protected are: children and teenagers, credulous consumers and elderly people.

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344 TAR Lazio, 29 March 2010, n. 4931. Paragraph 4.1
345 Duivenvoorde, (2015), p. 135
346 AGCM 11 January 2006, No 15104 (PI4927), Boll. 2/2006
348 As Duivenvoorde, (2015), p. 137 says this is confirmed also by other cases. Such as: Cons Stato, Sez VI, 20 July 2011, No 4931 (Mediamarket)
349 TAR Lazio, Sez. 1, 16 June 2014, No 8161 and TAR Lazio, Sez. 1, 9 September 2014, n. 9559
350 AGCM,(2015), p. 244
351 However, this does not imply that every time that a company may exaggerate in its advertisement, the consumer are mislead, since the evaluation should not be literally strict. Duivenvoorde, (2015), p. 147
352 Duivenvoorde, (2015), p. 139
For what concerns the protection of children and teenagers, an important case is Suonerie.it\textsuperscript{353} where the entity Buongiorno, jointly with the Telecom, Vodafone, Wind and H3G in an advertisement on the website www.suonerie.it offered the possibility to download ringtones of the hit of the moment. However, once a consumer followed a particular procedure and downloaded the song, a charged long term service was activated. According to the TAR Lazio the service proposed was targeted to teenagers that are protected by the ICC as a vulnerable group for reasons of ingenuity and age.\textsuperscript{354} Thus, the trader in order to ensure their protection, should have adopted “graphic and linguistic instruments” capable of making the teenager aware of the paid service.\textsuperscript{355} Therefore, the Court emphasised the importance that the trader should act in a way that the vulnerable consumer that is targeted by a service is not misled.

A second category of a protected consumer group concerns the credulous consumers, that need a more substantial protection because they believe in the particular efficacy of paranormal products or health related products.\textsuperscript{356} One example is the decision of the AGCM Mago Anthony Carr\textsuperscript{357}, where “a magician”, that can be considered as trader, spread messages to consumers particularly interested in astrology, with the aim to promote consultancy sessions in which he claimed to be able to solve any kind of problem, such as love, health, money and so on.\textsuperscript{358} During the procedure, the AGCM verified that the magician took advantage of tragic events of the consumer, by influencing their ability to evaluate the economic impact of the practice done by the trader. Consequently, the AGCM sustained that the practice was directed to a target of consumers that are particularly inclined and vulnerable in believing that improvable phenomena do exist.\textsuperscript{359} The AGCM considered the magician guilty for misleading them.

Another category of credulous consumer is represented by the ones who believe that some health related products give “hard-to-believe” results.\textsuperscript{360} Within this group of consumers the protection varies case by case.\textsuperscript{361} In some cases for example the AGCM was of the opinion that the commercial practices were misleading the sensitive consumer, because they were giving solutions for impotence or pain.\textsuperscript{362} In a lot of cases the AGCM had to decide on diet products that promised incredible results in losing weight and it identified the benchmark to protect the average consumers of the group of overweight people.\textsuperscript{363}

A third category is represented by elderly people. In most of the cases, old people have been protected because they are easier to persuade to buy products, above all in doorstep selling.\textsuperscript{364} In these cases they have been considered vulnerable by the AGCM. For example, in the case UTET-Enciclopedia non richiesta\textsuperscript{365} the AGCM accused the company UTET that it sold books directly to consumers’ home, for releasing them without a copy of the bill and for sending payment reminders regarding orders that people did not know to have made and without receiving any information about the possibility to terminate the contract. In other cases they have been considered just as target group, without mentioning the vulnerability.\textsuperscript{366}

\textsuperscript{353} TAR Lazio, Sez I, 2 August 2010, No 29511
\textsuperscript{354} TAR Lazio, Sez I, 2 August 2010, No 29511. Paragraph 3
\textsuperscript{355} TAR Lazio, Sez I, 2 August 2010, No 29511. Paragraph 3
\textsuperscript{356} Duivenvoorde, (2015) , p. 143
\textsuperscript{357} AGCM 26 May 2010, No 21179 (PS2300), Boll. 22/2010
\textsuperscript{358} AGCM 26 May 2010, No 21179 (PS2300), Boll. 22/2010, p.100
\textsuperscript{359} AGCM 26 May 2010, No 21179 (PS2300), Boll. 22/2010, p.102
\textsuperscript{360} Duivenvoorde, (2015) , p. 144
\textsuperscript{361} Duivenvoorde, (2015) , p. 145
\textsuperscript{363} See for instance: Pool Pharma-Kilocal case (2010), AGCM 8 September 2010, No 21539 (PS 1898), Boll. 37/2010
\textsuperscript{364} Duivenvoorde, (2015) , p. 143
\textsuperscript{365} AGCM 9 May 2012, No 23551 (PS4791), Boll. 19/2012
\textsuperscript{366} For instance AGCM 13 March 1997, No. 4781 (PI1084D), Boll. 11/1997
What is clear from the examples above is that in the majority of the cases the responsibility is given more to the trader in giving fair information rather than the consumers to be aware of the information given. Moreover, there is not a clear demarcation among benchmarks, target and vulnerable groups. In fact, most of the time the AGCM and the Courts give protection when it is necessary for those categories, without explicating which benchmark should apply. Therefore, it can be concluded that there is not a strong interest in defending just the rational consumer.

4.4 Misleading and comparative advertising and fairness of information: self-regulation

The rules on misleading and comparative advertising are contained in the LD 145/2007 which is dedicated to the protection of the businesses in commercial relations. However, as the European normative also the LD 145/2007 provides conditions for the permission of a comparative advertisement. In particular, one of the conditions is the fact that the comparative advertisement should not be misleading within the meaning of art. 21, 22, and 23 of the ICC. This means that comparative advertisements are prohibited if they are unfair and if they can deceive the average consumer in their transactional decisions. Therefore, the link with those pieces of legislation can be found in art. 4 of LD 145/2007.

The prohibition of commercial advertising on television and in particular in relation to teleshopping is also contained within the ICC, after the articles that regulate the unfair commercial practices. In particular they are prohibited if they offend human dignity, if they discriminate people (for instance for sex, religion and race) or in case of promotion of cigarettes. Moreover, art. 30(2) of the ICC states that “teleshopping shall not contain declarations or representations that may mislead users or consumers, even by way of omission, ambiguity or exaggeration, especially with regard to the characteristics and effects of the service, the price, conditions of sale or payment, methods of supply, prizes or the identity of those represented”.

One of the interesting aspects related to misleading and comparative advertising and unfair practices concerns the fact that either article 27-ter of the ICC or art. 9 of LD 145/2007 states that consumers, competitors or the interested parties before starting the ordinary enforcement procedure, may apply to the self-regulatory body for prohibiting the unfair or comparative advertising in specific sectors. The analysis of the code of self-regulation regarding misleading advertising is important for understanding in which way the fairness of information towards consumer protection is regulated by self-regulations and which duties are imposed to the traders.

In Italy the Code of self-regulation regarding misleading advertising is enforced by the Istituto dell’autodisciplina pubblicitaria (IAP). The Authority body is composed by the Jury (in Italian: Giurì), a panel of jurists and communication experts which examines and judges communication notified according to the Code and the Review border. The Review border can give opinions (if required by the president of the Jury) that are not binding; it can provide desist orders or advices to the interested parties. Their objective is to ensure that “commercial communications are honest, true and correct”. This code is mandatory for

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367 Duivenvoorde, (2015), p. 147
368 Di Via and Leone, (2011), p. 5
369 Art.4 LD 145/2007
370 Prandin and Caneva, (2010), p. 65
371 Lucchini, (2012), p. 2
Advertisers, agencies and everyone that agree with this code and its content and the greater part of Italian marketing communications are bounded by this Code.374

Art. 2 of the IAP’s code states that communications within the market do not have to contain “statements or representations that could mislead consumers, including omissions, ambiguity or exaggerations that are not obviously hyperbolical”.375 The same article states that in assessing whether or not a marketing communication is misleading, the benchmark is the average consumer belonging to the relevant target group.

Another important article for the protection of the consumer is the 12-bis, according to which marketing communications have to avoid “descriptions or representations that may lead consumers to be less cautious than usual or less watchful and responsible towards their own health and safety, and that of others”. Care is given also to children and young people by stating that “messages should avoid material that could cause psychological, moral or physical harm, and should not exploit the credulity, inexperience or sense of loyalty of children or young people” (art. 11).

The duties imposed on the traders are among others the use of terminology, quotations and references to scientific and technical tests in an adequate way (art. 3), the distinguishable and authentic testimonials (art. 4), the distinguishable marketing communications (art. 7), market communication not based on superstition, credulity or fear (art. 8), market communication not violent, indecent and vulgar (art. 9) nor against moral, civil, religious beliefs and human dignity (art. 10).

Moreover, the advertisers must not suggest that the product gives environmental or ecological benefits if this is not based on truthful, pertinent and scientifically verifiable evidence (art. 12). In addition, the imitation, confusion, exploitations of other marketers has to be avoided as well as the denigration of competitors, even if they are not specifically named (art. 13 and 14).

The procedure is very easy and free of charge. Consumers or anyone interested can send online notification in case there are messages that are not in conformity with the Code. Thus, anyone interested may request the intervention of the Jury and may submit commercials that violate the code to the review border.

Furthermore, the Jury and the Review Board may require and ask for more documentation in order to verify if the data, statements, illustrations furnished are true. They can also call experts in order to evaluate the documentation submitted. The decision of the Jury or the order by the Review Border to desist from publishing the commercial made have an immediate effect and the message has to be out of distribution immediately.376 Their decision is published on the official IAP website.

Evidently the procedure is different from the one done before the AGCM. It is easier and faster and the enforcement body does not have the power to inflict pecuniary sanctions.

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375 Above all in relation to “the characteristics and effects of the product, prices, free offers, conditions of sale, distribution, the identity of persons depicted, prizes or awards”. (art.2)
4.5.1 Compliance and enforcement

In compliance with art. 11 of the UCPD, the LD 146/2007 delegated the enforcement and the implementation of an administrative system responsible for fair competition, fair practices and consumer policy to the AGCM.377 This is an independent, public and collective body and the headquarters are in Rome.378 This Authority was introduced with Law No. 287/1990 in order to foster market conditions and in order to protect the consumer, by guaranteeing lower prices and products of quality.379 The General Division for user’s and consumer's rights (GDPC) is divided from the General Division for Competition, which is entitled to enforce antitrust laws. The main procedure for the enforcement of legislation on unfair practices and misleading advertising is contained within the “Regulation on investigative procedures concerning misleading and comparative advertising, unfair business practices, unfair terms” (ROIP)380

The AGCM may act after the complaints of people involved or ex officio. This means that it can proceed even if it has not received complaints from external interested individuals or associations.381 It is possible to appeal against its decision before the TAR Lazio which is the administrative court of first instance and final parties can appeal to the judgment of TAR Lazio at the Consiglio di Stato (Italian Council of State).382 The registered Consumers associations383 may obtain a concession of participating into the proceedings before the AGCM and in this way they can have access to the documents and present written conclusions. Thus, alongside with the administrative enforcement, interested parties may obtain a judicial protection. Moreover, civil proceedings for claiming damages can be initiated by consumer associations or by class actions.384

In order to be as clear as possible this Section is organised with the following sub-Sections: Sub-section 4.5.2 is dedicated to the activity of the AGCM and the procedure that consumers can follow, Sub-section 4.5.3 is dedicated to the sanctions that can be imposed, Sub-section 4.5.4 shows the other possibilities of enforcement and the class action in detail, 4.5.5 discusses the individual consumer rights and remedies to get redress and Sub-section 4.5.6 contains some considerations on the enforcement system in Italy.

4.5.2 AGCM enforcement procedure in the application of the rules on unfair commercial practices and misleading advertising

In previous years the AGCM had only limited powers in protecting consumers and its only responsibility was to act against misleading and comparative advertising.385 Nowadays, thanks to the implementation of the UCPD within the ICC, the AGCM has an extensive power in the prohibition of unfair commercial practices (art. 27 ICC). The AGCM has the power to investigate the violation of unfair practices either after receiving

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382 Genovese, (2008), p. 210 and art. 27 (13) ICC
383 Their registration is maintained by the Italian Ministry of Economic Development. Art. 139 ICC. Moreover, art. 140 ICC gives to consumer association the possibility to safeguards consumer interests, by asking to the Court to inhibit acts done by traders and to eliminate their negative effects that fall on consumers.
consumers’ complaints or on its own initiative. In case of issues related to European countries, art. 27(2) of the ICC gives the AGCM also the power to act “independently of whether the consumers concerned in the territory of the member state in which the trader is resident, or in another member state”.

Thus, consumers, competitors, consumer’s associations and anyone that is interested can report the presence of unfair practices or misleading advertising to the AGCM, through ordinary mail at their address or electronic communication. Within this request the interested subject has to communicate his identification details, elements that enable the identification of the business, the advertisement or practice denounced, possible complaints already filed to the business and every kind of document that can be useful for the action of the AGCM. The evaluation of their interests is fundamental to determine their position at procedural level as well as their possibility to have access to the documents and to appeal against the AGCM. This interest has to be “current, differentiated and personal”.

Moreover, art. 4 of the ROIP establishes that, with the exclusion of a particularly serious case, if there are sufficient reasons to believe that the practice is unfair, the responsible in charge of the procedure can inform the other members of the Collective body (AGCM) and invite the business to stop the practice (i.e. moral suasion). In this way the procedure is simplified, because there is no need of proceeding anymore. However, the cases are not always easy to solve and therefore a longer procedure is necessary.

As already mentioned, the AGCM has also ex officio investigation powers. In addition, the AGCM has the power to select the complaints received in order to understand if the alert has to be taken into account and if the practice can damage the consumer economic interest and mislead him. Moreover, the AGCM has a call-centre for collecting information by consumers in order to classify the practice and for acting by sectors. On top of that, the AGCM can cooperate with the Guardia di Finanza (Italian Customs and Excise police) to obtain necessary documents in case of misleading advertising or unfair practices and for inspections. Therefore, its powers of inquiry have been considerably extended in comparison with those available in previous years. The AGCM has investigative and executive powers provided by the Regulation 2006/2004/EC with the possibility to impose sanctions in case of the failure to present the required documentations during the inspections. Furthermore, the AGCM can issue an order of “provisional suspension of unfair commercial practices whenever there is a particularly urgent need”.

The initiation of the phase of investigation (pretrial, Italian: fase istruttoria) is performed by the person in charge of the procedure that has to evaluate if there are cases of unfairness and misleading. This phase starts within 180 days from the request to investigate. The initiation of this phase is communicated by the AGCM to the interested parties and can be published on the AGCM authority if there have been more complaints.

Once the investigation phase has started, the AGCM can have access to any relevant documents or information and conduct surveys, statistical and economic analysis and inspections. For what concerns the burden of proof, it is the responsibility of the business to provide justifications that he could not know the negative impact that the practice could have on the consumer. Within 45 days from receiving notice of the

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386 Art. 27.2 ICC  
387 Art.4 ROIP  
390 Call center has been activated in 2007. See Astazi, (2008), p. 5  
391 Art. 27 (2) ICC  
392 Art. 27 (3) ICC  
393 Art. 6 (1.2) ROIP  
394 Art. 11-14 ROIP  
395 Art. 15 ROIP
start of the procedure, the business may present written commitments to the AGCM that can “remove unlawful aspect of the practice or advertisement”. 396

The acceptance of the written commitments is another simplified procedure that can be found in art. 27 (7) ICC. In particular, it is established that if the practice is not “manifestly unfair and of a serious nature”, the AGCM may evaluate the “commitments” presented by the trader and establishes the procedure to be followed without proceeding to investigate the infringement. More in detail, the AGCM will revise them and it can respond in three ways. Firstly, if they are sufficient, AGCM can accept them, by making them mandatory for the trader and it can close the case. Secondly, if it is just partially sufficient, it will establish a deadline for the trader for adjusting them. Thirdly, if they are not sufficient enough for removing the unfairness, the AGCM continues the investigation until a sanction is given in the case of lawfulness of the practice. 397

The duration of the process is 120 days from the communication of the start of procedure but it can last 150 days in case of request of advices (art. 27 1-bis and 6 of the ICC). 398 If the business has its own residence in a foreign country, the duration is of 180 days from the communication instead of 120 and 200 days if advice is required, instead of 120 and 150 days. 399

At the end of the investigation phase the AGCM can take one of the following decisions: lawfulness of the advertisement and fairness of the commercial practice or closing of the procedure for lack of proof. By contrast, it can decide for the unlawfulness of the advertisement and unfairness of the commercial practice, with consequent sanction. Finally, it can accept written commitments presented by the trader. The decision is communicated to all the parties involved in the procedure and is published within 20 days from its adoption, in the bulletin of the AGCM.

4.5.3 Administrative pecuniary sanctions

Art. 13 of the UCPD established that the sanctions should be “proportionate, dissuasive and effective”. The ones imposed by the Italian legislator appear to be high in comparison with the past. Specifically, in case of non-compliance with the AGCM’s request for information, the AGCM can impose a sanction between 2.000 euro and 20.000 euro. On the contrary, if the information or the documentation submitted is not true, the AGCM can impose a fine between euro 4.000 and euro 40.000. 400

Once the violation has been determined the AGCM may prohibit the practice and impose an administrative fine. The amount of the fine has increased over the course of the years and today ranges from 5.000 euro to 5.000.000 euro depending on the seriousness and duration of the infringement. 401 In case the practice is contrary to art 21 (3) and 21 (4), thus if the commercial practice harms the health or the safety of the consumer or if even indirectly may threaten the safety of children and teenagers, the sanction cannot be less than euro 50.000. 402

Moreover, in case the trader does not comply with the AGCM “emergency measures or injunctions or instructions” and in case of non-compliance with the commitments undertaken, the AGCM may impose an

396 Art. 9 ROIP
398 Art. 7(1) ROIP
399 Art. 7(2) ROIP
400 Art. 27(4) ICC
401 Art. 27(9) ICC
402 Art. 27(9) ICC
administrative fine between euro 10,000.00 and euro 5,000,000. In addition, in case of repeated non-compliance the AGCM can “suspend trading for a period which shall not be more than thirty days”.403 The decision of the sanction can be appealed before the TAR Lazio within 60 days and a subsequent appeal can be filed before the “Consiglio di Stato”.404 In table 1 below the main powers of the AGCM are summarised.

Table 2- AGCM’s powers. The table shows the main powers of the AGCM, responsible for the enforcement of the UCPD in Italy

<table>
<thead>
<tr>
<th>AGCM enforcing UCPD. Powers:</th>
<th></th>
</tr>
</thead>
</table>
| **Imposing big sanctions** | - Fines for false or hidden information  
- Fines for unfair practices  
- Fines for non-compliance with the commitments undertaken |
| **Inspections** | - In cooperation with GDF |
| **Acceptance of Commitments** | - Traders may submit commitments and the AGCM may accept them in order to stop or modify an unfair practice, without imposing a fine |
| **Moral suasion procedure** | - If the case is not serious |
| **Precautionary measures** | - Stopping the practice in case it causes serious problems |
| **Publication of final decisions** | - They can be appealed and there is no necessity of another Court decision |

4.5.4 Italian class action system

The ICC contains a possibility for consumer associations to ask for an injunction for the protection of consumers’ collective interests (art. 139 and 140). Moreover, in 2010 the Italian legislator introduced a new tool for the protection of consumers within art. 140-bis of the ICC: the so called “class action” inspired by the American system.405 The reason of this tool was to create an alternative remedy for consumers to protect their rights for instance in relation to unfair commercial or anticompetitive conducts.406 During recent years, this system has been modified and improved. In particular, Article 6 of LD no.1 of January 24, 2012, ratified by Law no. 27 of March 24, 2012 expanded the possibility to take part to class actions, by establishing that class actions’ rights are admissible when the consumers’ rights are “homogeneous”.407 In this way a broader concept was installed to encompass more consumers’ rights.408

Nowadays the matters that can be enforced by the class action are: “the contractual rights of a number of consumers and users who find themselves in the same situation in relation to the same company, including

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403 Art. 27(12) ICC
407 In the past it was required that the consumers’ rights were identical.
the rights relating to contracts underwritten in accordance with Articles 1341 and 1342 of the Civil Code; homogeneous rights in relation to a given product and homogeneous rights to “payment of damages due to these consumers and users and deriving from unfair commercial practices or anti-competitive behaviour”.410

The article does not mention the minimum numbers of consumers to create the class.411 Class actions can be initiated against business or legal entities, when operating within the scope of their business.412 According to art 140 bis (1) (3) consumers or users which have the “homogeneous rights” violated can bring the class action directly or through a consumer association.

For what concerns the procedure, the competence to hear the class action lies with the civil court (tribunal) of the capital of the Region in which the company is based and the claim is done with a “writ of summons”.413 Upon first hearing, the civil court may reject the claim if it is manifestly unfounded, if there is a conflict of interests among class action members, if the rights and claims are not homogeneous, if the claims are not able to pursue the class interests.414 The decision of admission is subject to claim before the Court of Appeal within thirty days from its disclosure or notification, depending on what occurs first.415

Once admitted, the Court establishes terms and methods for giving public notice in a way that interested consumers can join promptly and “opt in”, also without a lawyer, by submitting documentation proving their claim.416 If the action is accepted, the court condemns the company for being liable, by ordering it “to pay damages” to the class action members with a sum or by establishing the criteria for defining the quantum.417 Italian law covers only compensatory damages; this means that the sum will merely compensate “an actual prejudice suffered by the plaintiffs”.418 Moreover, consumers and users who join class action have to renounce any individual restitution or remedial action in relation to the same title.

Negative points have been highlighted by some authors according to which class action could lead to populism able to cause damages for companies.419 Moreover, it was not as successful as in the US. Reasons for this could be the distrust among lawyers considering it extraneous to the national legislative system, the difficulty for an individual consumer to carry the interests of an entire category, since it is more likely that powerful and expert subjects will do it. Finally the insignificant amount of compensation t does not push people into class action.420

The ruling is binding upon the original members and those who correctly opted in. The ones who did not join the class action will not benefit directly from the decision. For them there is the possibility to sue the company individually and not with the class action for the same company and the same facts.422 The final decision can be appealed before the competent Court of Appeal.423

409 Gianni, Origoni and Grippo and Partners (2010), p.1 and art. 140-bis (2) (c)
410 Gianni, Origoni and Grippo and Partners (2010), p.1
413 Art. 140- bis .5
414 Art. 140-bis.6
415 Art. 140-bis.7
416 Gianni, Origoni and Grippo and Partners (2010), p.1
417 Day, (2013), p.4. Moreover, the parties have 90 days for finding an agreement on quantum.
418 Day, (2013), p.4
419 Day, (2013) and Gianni, Origoni and Grippo and Partners (2010), p.1
420 Gianni, Origoni and Grippo and Partners (2010), p.4
422 Art. 140-bis, 14
423 Day, (2013), p.4
To conclude, class action is a new opportunity for the protection of consumer rights, consumers can team together in complaining against companies and for asking the payment of damages they suffered. However, negative points have been pointed out by scholars.

4.5.5 Individual consumer remedies and right to get redress

The consumer has the possibility to get redress by way of class action or before the court. Moreover, if the AGCM or the court judges a practice as unfair, the consumer can bring the order to the court to obtain the invalidity of the contract. In general, it is up to the national court to coordinate the relationship among unfair practices and contract law.

This situation has led to a debate among scholars in relation to the remedies against contracts deriving from unfair practices. Remedies could be for example the invalidity of the contract or the responsibility upon the trader (pre-contractual, extra-contractual or damages).

In this respect, the CJEU states that the assessment of an unfair practice does not imply the invalidity of the contract. Therefore, it will be necessary to evaluate according to national law. Within Italian legislation the invalidity of a contract through nullity (nullità) is evaluated on the basis of the lack of one of the essential requirements for the validity of the contract, on the basis of general interests. Art. 1418 civil code (c.c.) establishes three kinds of nullity. Structural nullity applies in case of defect of one of the constitutive elements of the contract. Textual nullity applies if there is a violation of a specific rule that provides the nullity as consequence and virtual nullity applies when it is not expressed and it is a violation of an imperative rule. According to Girinelli, (2016) textual nullity could be excluded from the remedies, since there is not a specific provision of nullity in the ICC regarding unfair practices whereas the possibility of a virtual nullity could be possible only if there are no other specific remedies, but this is debatable among scholars.

Another possibility could be the invalidity through the annulment of the contract. This happens when for instance there is “incapacity” of the contractor or the consent is vitiated for error, violence or wilful misconduct (dolo in Italian). These situations may be relevant in case of unfair practices. However, error and violence have a completely different meaning within the Italian c.c. in comparison for example with the hypothesis of aggression provided by the ICC. In addition, the elements of wilful misconduct present differences with the rules regarding unfair practices, for instance in case of wilful misconduct, animus decipiendi is necessary, which means the intentionality of the act, whereas in unfair practices it is possible to act “even without proof of actual loss or damage or of intention or negligence on the part of the trader”. Thus, also in this case the applicability is subject to discussion.

For what concerns the remedies that are not related to the invalidation, it is possible to connect the behaviour of the contractor that violates the good faith (according to art 1337 c.c.) with the unfairness of the trader.

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425 The invalidity of the contract in the Italian legislation is divided among: nullità and annullabilità that can be translated as nullity and annulment or voidness of the contract.
426 Judgment of the Court (First Chamber), 15 March 2012, Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o., C-453/10, ECLI:EU:C:2012:144
427 According to art. 1325 c.c. these requirements are: form of the contract, object, the causa (the essence) of the agreement and the agreement among parties.
430 In Italian: errore, violenza e dolo.
432 Art. 11 (2) UCPD
expressed in art. 20 ICC. In case of violation of good faith while stipulating the contract, the consumer has the right to compensation for damage. This right is also allowed in case of extra contractual responsibility and in accordance with art. 2043 c.c. which regulates unjustified damages and that can be linked to the damage of the interests of the consumer.

Thus, in the light of the considerations above it seems clear that the possibility to get redress is given through class action or individual court action. Moreover, there is a fragmented system of individual consumer protection in respect of contracts deriving from unfair practices which can lead to the invalidation of the contract or responsibility of the trader.

4.5.6 Relationship among different enforcement procedures and efficacy of the protection

As mentioned above, the system of enforcement is realized in several ways: at public level, collective level or individual level. Due to this situation, it is interesting to understand the coordination among those systems.

First of all, regarding the relationship among enforcement through self-regulation and the role of the AGCM, art. 27-ter (3) ICC states that if the enforcement has begun before the self-regulatory body, the interested parties may not solicit the AGCM until the final rulings, or they may ask to the AGCM to suspend the proceeding if another interested party has initiated the procedure “by awaiting the ruling of the self-regulatory body”. In this case the AGCM “may decide to suspend the proceeding for a period of not more than 30 days”.433

Secondly, the relationship between the decisions of the AGCM and the possibility to a collective compensation is defined by the legislator. In fact, art 140-bis of the ICC establishes that whenever the phase of investigation is already started before an independent authority as the AGCM, the ordinary judge has to wait until the end of this phase before giving its opinion. There is also a relationship with the AGCM decisions that are used to encourage class actions.434

Another point regards the coordination among the AGCM and other agencies that have powers in specific sectors, such as energy and communication. In the Italian law 2014 which transposed the consumer rights directive it has been clarified that AGCM has exclusive competence in the regulated sector. Therefore, there is a link between public and private enforcement, thanks to the legislative provisions aiming to coordinate those systems and thanks to the instruments made available to consumers that can have access to documents and be part of class action.435 However, there are still problems in relation to the conflict between the Italian normative about unfair commercial practices and the legislation aiming to protect consumer in contracts. This situation may have a negative impact with the enforcement efficacy.436

The importance of the efficacy is important in case of cross-border situations, for example if the unfair practice is done by a trader in a specific country but it damages consumers of other countries. The strong or less strong power of the national enforcement may push the trader in bad faith to opting for of operating in countries where controls are less stringent.437 That is why a comparison of this system is done with the UK.

433 Art. 27-ter (3) ICC
437 Genovese, (2008), p. 256
4.6 Conclusion

LD No 146/2007 transposed the UCPD in Italy and inserted the new discipline in the ICC. Within this legal framework consumers are protected against commercial practice, including advertising that can harm their economic interests and hinder their possibility to make informed choices. The transposition has followed the European imposition, with some exceptions, such as no definition of average consumer. In the course of time some problems related to the interpretation of terms, such as misleading, have been registered.

As far as protected consumers are concerned, the *excursus* of the administrative judgments seems to suggest that the consumer is not always considered well informed, but his lack of knowledge in specific sectors is taken into account and responsibility is given to the trader to give fair information. Moreover there is not a remarkable difference between vulnerable and targeted consumers.

The competent authority is the AGCM, the Italian competition authority, which has the power to investigate unfair practices or misleading and comparative advertising when receiving complaints or acting *ex officio*. Big sanctions, inspections and simplified procedures are established by the AGCM. In addition, instruments for consumers to take part in the process are provided by the legislator and protection through class actions is available. Moreover, the possibility to get redress is not provided at administrative level, but it is given through class action or individual court action. Furthermore, there is a fragmented system of individual consumer protection in respect of contracts deriving from unfair practices which can lead to the invalidation of the contract or responsibility of the trader.

Finally, the system of self-regulation ensures fairness of information, by imposing duties on traders. The table below summarizes the elements of comparison regarding Italy that are taken into account within this research.
<table>
<thead>
<tr>
<th>ELEMENTS OF COMPARISON</th>
<th>SPECIFICATION OF ITEMS</th>
<th>ITALY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>IMPLEMENTATION</strong></td>
<td>Legislation Implemented</td>
<td>LD 146/2007(LD 146/07) on “unfair business to consumer practices” and the LD No. 146/2007 misleading and comparative advertisements” that protects BTB relations. The rules contained in the LD 146/2007 have been introduced into the Italian Consumer Code (ICC).</td>
</tr>
<tr>
<td></td>
<td>Wordings</td>
<td>There are not a lot of differences in wordings in comparison to the UCPD. Few differences are related to the notion of professional diligence and a lack of definition of the average consumer. Due to a lack of definitions of some terms there have been problems of interpretation (see the term misleading).</td>
</tr>
<tr>
<td></td>
<td>Differences with the European UCPD</td>
<td>Protection against unfair commercial practices is extended also to micro-enterprises. There are further specifications for protecting consumers against practices creating health and safety problems and for protecting children and young people.</td>
</tr>
<tr>
<td><strong>INTERPRETATION OF THE PROTECTED CONSUMER BENCHMARK</strong></td>
<td>Is the average consumer protected intended as “reasonably well informed and reasonably observant and circumspect”?</td>
<td>The cases analysed have shown that the average consumer benchmark taken into account in assessing if the practice is unfair is not always considered well informed or an expert. Most of the times the responsibility is given to the trader that is responsible in giving fair information.</td>
</tr>
<tr>
<td></td>
<td>The protection of the vulnerable groups, the target groups and the differentiation among benchmarks</td>
<td>Vulnerable groups and target groups are taken into consideration by the Italian Court since before the UCPD. However there is not a clear differentiation among those groups.</td>
</tr>
<tr>
<td><strong>ENFORCEMENT</strong></td>
<td>Enforcement Body Powers and Procedure</td>
<td>The administrative enforcement is done by the AGCM, General Division for users’ and consumers’ rights. Anyone interested can file a complaint and the AGCM is obliged to proceed if he believes that there is ground to proceed. If not it has to inform the applicant which may appeal it before the TAR Lazio. The main powers are: imposition of big sanctions, inspections, and precautionary measures, acceptance of commitments, moral suasion procedure and publication of final decisions.</td>
</tr>
<tr>
<td><strong>Sanctions</strong></td>
<td>In general the pecuniary sanctions are very high. The amount of the fine has increased over the course of the years and today ranges from 5.000 euro to 5.000.000 euro depending on the seriousness and duration of the infringement. In case the practice harms the health or the safety of the consumer or if even indirectly may threaten the safety of children and teenagers, the sanction cannot be less than euro 50.000.</td>
<td></td>
</tr>
<tr>
<td><strong>Consumer Remedies and Rights</strong></td>
<td>The ICC contains a possibility for consumer associations to ask for an injunction for the protection of consumers’ collective interest (art. 139 and 140) and an alternative remedy for individual consumers to protect their rights is possible in relation to unfair commercial or anticompetitive conducts through a class action. On the contrary, individual right to redress that consumers have against contracts deriving from unfair practices have to be found in the civil legal framework and include invalidity of the contract or responsibility upon the trader.</td>
<td></td>
</tr>
<tr>
<td><strong>Duties of the trader in the Advertising Code</strong></td>
<td>Duties imposed on traders are among others the use of terminology, quotations and references to scientific and technical tests in an adequate way and making commercials honest, true and correct.</td>
<td></td>
</tr>
<tr>
<td><strong>Sanctions</strong></td>
<td>There is a decision to desist from publishing commercials made has an immediate effect and the message has to be out of distribution immediately. The decision is published on the official IAP website.</td>
<td></td>
</tr>
<tr>
<td><strong>Relationship between the enforcement bodies of the UCPD and the enforcement body of the Code.</strong></td>
<td>The Code of self regulation regarding the misleading advertising is enforced by the IAP. The Authority body is composed by the Jury (in Italian: Giuri), a panel of jurists and communication experts. The Giuri does not have the power to impose pecuniary sanction as the AGCM. If the process is already started before the self regulatory body, the process cannot be initiated before the AGCM. However, due to the fact that they have different procedures the decisions of those bodies may be different.</td>
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</tbody>
</table>
CHAPTER 5- UK law on consumer protection against unfair commercial practices

5.1 Introduction

The UCPD was implemented in the UK legal framework by the Consumer Protection from Unfair Trading Regulation (CPUTR) which came into force on 26 May 2008. The transposition of the UCPD within the national system has been more complex than in other countries, such as Italy, as evident from the fact that the CPUTR entered into force later. Eventually in 2006, the English government decided to repeal 23 legislations, partially or wholly, in order to modernize the legislation in favour of consumers and in order to stick with the European purpose of harmonisation.

In 2008 it was established that unfair practices should be considered as a criminal offence. Nevertheless, consumers did not have individual possibilities to act against traders. They could only rely on complex procedures of civil law. Therefore, the system appeared to be inefficient and in 2010 the normative was reviewed for a better protection of consumers. This review led to the Consumer Protection (Amendment) Regulation (CPAR) 2014 which strength consumers’ rights in acting against a trader in case of unfair commercial practices.

In addition, the UK opted for a different legislation for protecting businesses against misleading advertising. Therefore, the protection of consumers and traders is divided in two different pieces of legislation. In fact the protection of businesses from misleading advertising is contained in the Business Protection from Misleading Marketing Regulations (BPRs). This Regulation states the importance of accurate and honest advertisements and establishes that comparative advertisements should not use a competitor’s trademark, or comparing the product with a competitor’s product that’s not the same. Moreover, comparative advertisements are considered misleading if they breach articles 5-6 of CPUTR.

Innovations have also been done in relation to the enforcement body. In fact, until 2014 Local Authority Trading Standards Services (TSS), the Department of Enterprise, Trade and Investment in Northern Ireland and the Office of Fair Trading (OFT) were in charge of enforcing the CPUTR. By contrast, from the 1st of April 2014 the Competition and Market Authority (hereinafter CMA) has obtained enforcement power that belonged to the OFT against unfair practices.

In order to better understand the regulation of unfair practices in the UK this chapter is structured as follows: Section 5.2.1 introduces the way the UCPD has been implemented in the national system. Sub-section 5.2.2 shows how the unfairness is assessed within the CPUTR. Section 5.3.1 is dedicated to the description of the benchmark of the protected consumer, Sub-section 5.3.2 focuses on the average consumer and Sub-section 5.3.3 takes into account the vulnerable consumer and target groups of consumers. Section 5.4 deals with the self-regulatory code and the duty of the trader in case of misleading advertising. On top of that, Section 5.5.1 is an introduction of the compliance and enforcement system. Sub-section 5.5.2 explains the enforcement bodies and the procedure, Sub-section 5.5.3 deals with the system of criminal offences and penalties; Sub-

438 No. 1277/2008
439 This is because in the UK there was an intense debate on the content of the UCPD, its notions and the interpretation of the open textured concepts that the European legislator left to national implementation.
440 Guidance on the UK regulations -hereinafter GUR- (may 2008), p. 8
441 Guidance on the Consumer Protection (Amendment) Regulations 2014 –hereinafter GCPAR-, p. 4
442 GCPAR, (2014), p. 4
443 No.280/2014
444 The Business Protection from Misleading Marketing Regulations 2008 No. 1276
section 5.5.4 explains the remedies that consumers have against unfair practices and Sub-section 5.5.5 is dedicated to the relationship among enforcement bodies. Finally, Section 5.6 gives the conclusion.

5.2.1 The implementation and interpretation of the UCPD in the UK legislative framework

Before the UCPD, the UK legislative framework did not have a unique corpus of legislation for fighting against unfair practices. There were different pieces of legislations and it was regulated on the basis of precedent case law, but without specific sanctions aimed at a better enforcement of consumers’ rights.

The English legal background is different from the majority of the European countries. The way of regulating is more “a way of juridical thinking than a determined corpus of rules”. In fact, the UK system is constituted of three parts: firstly “Common law”, based on precedent cases. Secondly “Equity”, which is used to fill the gap left by Common law and finally “Statute laws” that are interpreted in the view of Common law. Therefore, the various branches of law have been developed through the activity of the courts. Before the entry into force of the CPUTR the relationship among consumers and traders was mainly regulated by the tort that is defined as “a body of rights, obligations, and remedies that is applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others”.

Thus, the UK faced the problem that jurisprudence did not recognise the abstract concepts such as professional diligence and this led to a long discussion before the implementation of the UCPD. This lasted until 2008 when the CPUTR was transposed. The general assessment follows the rules of the EU legislation and in this case the professional diligence (that is intended as an evolution of the duty of care) sticks with the European definition. The UK legislation reflects the UCPD but extended the scope also to situations where a consumer sells goods to a trade. In 2014 another important piece of law for defending consumers against unfair practices was adopted. The government made the CPAR. The latter attributes new rights to consumers that only apply if the trader has committed a misleading or aggressive practice under the CPUTR. The assessment of the unfairness of a practice is explained below.

5.2.2 Assessing the unfairness in the UK CPUTR

The first part of the CPUTR contains the definition of important notions, such as the average consumer, commercial practice, goods and invitation to purchase. The second part is dedicated to the prohibition of unfair practices, which scheme and wording follow the European implementation.

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445 Luchetti, (2012), p.49
447 Luchetti, (2012), p.50
449 GCPAR, (2014), p. 4
450 Luchetti, (2012), p.142-144
452 GCPAR, (2014), p. 4
453 Average consumer. Art.2.2 CPUTR: “In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect”.
454 Commercial practice. Art. 2.1 CPUTR: “commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product”.

57
According to art. 3 CPUTR an action by a trader is misleading if it “contravenes” the professional diligence and if it “materially distorts” (or is likely to materially distort) the economic behaviour of the average consumer. For instance, if the average consumer purchases a product because of the incriminate practice, this is considered unfair if he had not bought the product otherwise.  

Alongside with the general clause, the CPUTR defines misleading actions (art. 5) as the ones that contain false information or if they are likely to mislead the average consumer in its “overall presentation”. Thus the CPUTR considers misleading information as a misleading action and also if the practice concerns the marketing of a product “including comparative advertisement” which creates confusion with the trademark or does not distinguish the brand of a competitor. The practice is even considered as misleading action when the trader fails to respect codes of conducts and the consumer takes a decision that he would not have taken as a result thereof.

For what concerns the omission, the guidance on the CPAR-GPAR (2014) highlights as omissions appear to be “more uncertain in scope” than actions. This is the case when there is the omission of material information but the presentation of the product is not misleading. In this sense, there is not a possibility for consumers to see their rights recognised in case of “pure” omissions.

The CPUTR also prohibits aggressive practices (art. 7). In particular, a practice is aggressive if it significantly (or is likely to) hampers the “average consumer’s freedom of choice” and it causes him to “take a transactional decision he would not have taken otherwise”. These practices make use of harassment, coercion or undue influence. As already mentioned elsewhere the UCPD does not have a definition of harassment and Osuji, (2011) explains how the lack of explanation of concepts may represent a problem for the harmonisation. For example, harassment is regulated in the UK under the Protection from harassment Act 1997 (PHA) and its provisions can impede maximum harmonisation, since there is no relationship between the CPUTR and PHA. This can have consequences in the practice as happened in the Ferguson case where the High Court condemned a company for harassment even though there was not a material distortion of a transactional decision. Therefore, the ambiguity of concepts still represents a problem at national level.

Finally, as the UCPD, the CPUTR (Schedule 1) prohibits 31 commercial practices which are unfair in all circumstances. In order to better explain the assessment of unfairness within the CPUTR the table below summarizes it.

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455 Goods. Art. 2.1 CPUTR: ““goods” includes ships, aircraft, animals, things attached to land and growing crops”
456 Invitation to purchase. Art.2.1 CPUTR: ““invitation to purchase” means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase”.
457 GUR. (2008), p.10
458 Art. 5 (3)(a)
459 Art. 5(3)(b)
460 GCPAR. (2014), p.5
462 Ferguson v British Gas Trading Ltd. Reference [2009] EWCA Civ 46
463 The table has been taken and modified from the GUR (2008), p. 18
### Table 4: The unfairness within the CPUTR

<table>
<thead>
<tr>
<th>Article of CPUTR</th>
<th>Conduct and effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 3</td>
<td>Practice is contrary to the requirements of professional diligence, impairs the average consumer’s ability to make an informed decision and causes (or is likely to cause) the average consumer to take a different (transactional) decision.</td>
</tr>
<tr>
<td>Art. 5</td>
<td>False or deceptive practice that causes (or is likely to cause) the average consumer to take a different (transactional) decision.</td>
</tr>
<tr>
<td>Art. 6</td>
<td>Omission of material information that causes (or is likely to cause) the average consumer to take a different (transactional) decision.</td>
</tr>
<tr>
<td>Art. 7</td>
<td>Aggressive practices that significantly impair the average consumer’s freedom of choice or conduct and that causes (or is likely to cause) the average consumer to take a different (transactional) decision.</td>
</tr>
<tr>
<td>Schedule 31</td>
<td>Black list. No transactional decision test.</td>
</tr>
</tbody>
</table>

### 5.3.1 The consumer benchmark interpreted by the UK Court

Before the entry into force of the CPUTR several regulations were in place for the protection of consumers. From the oldest cases it appears that the consumer was not expected to be particularly well informed and the decisions were more consumers friendly. However, some cases related to traders giving misleading information of products and prohibited under the Trade Description Act 1968 seem to protect an average consumer in line with the interpretation furnished by the CJEU.\(^{464}\)

With the introduction of the CPUTR the average consumer definition has been included and the UK court has taken it into account in its decisions. The vulnerable consumer is also defined within the CPUTR and in this case is protected the average member of that group as well.

In order to understand the protected consumer benchmark, Section 5.3.2 is dedicated to the average consumer and Section 5.3.3 deals with the vulnerable consumer and target consumers.

\(^{464}\) Such as *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81 and *Burleigh v Van den Berghs and Jurgens Ltd* [1987] BT LC 337. In the latter it was established that in order to have a violation of the Trade Descriptions Act 1968 a description must mislead “*the average member of the shopping public*” and that “*it is not enough that we should be sure that an unusually careless person might be misled...[or] a person who is dyslexic, short-sighted, or of less than average intelligence.*” In this sense see:
5.3.2 The average consumer

Consumer protection was guaranteed within the UK legislation also before the CPUTR. For instance, track of protection of the consumer can be found in cases of brand confusions that were disciplined under the “tort of passing off”. One of the relevant cases in this sense is Reckitt and Coleman Products Ltd v Borden Inc. In this case two producers of lemon juice were marketing the product in similar packages. The complainant that was the first at using it, argued that the similar product was confounding consumers regarding the brands. The Chancery Division of the High Court was of the opinion that in order to judge it was necessary to understand if an “ordinary average shopper, under the usual conditions under which such a purchase is likely to be made” would be misled. The defendant sustained that a careful shopper would have noticed the differences of the packages, without any problem of confusion. However, the Court stated that surely a careful shopper would have noticed it, but that the careful consumer could not be the average consumer and so the Court decided to punish the defendant for not taking measures for diversifying the products. Therefore, in this case the Court did not consider the consumer as the rational or careful one, but more attention was expected from the trader.

Nevertheless, another case seems to be closer to the CJEU cases. The case Lewin v Purity Soft case dealt with two kinds of fruit drinks sold by the same business company. The package was composed of pictures and names of fruits and the ingredients clearly stated the presence of 13% and 25% of fruit. However, the plaintiff stated that the product was misleading because the consumer was expecting to buy a product with 100% of fruit. Notwithstanding, the British Court rejected the reasoning of the claimant because a reasonable consumer was expected to read the whole package, including the list of ingredients.

With the entry into force of the CPUTR, the notion of the average consumer was included in Section 2. In fact, it is established that if the trader commits an unfair practice the CPUTR can be applied only in case the average consumer signs the contract or pays for the good or services. One example that shows a definition of the average consumer taken into account in the CPUTR, can be found in the GCPAR, (2014). This describes a case of an online seller, who purchased I Pads for £10, by requiring the buyer to send money to a specific address. The average consumer would never do it, because he would be conscious of the fact that “the deal is too good to be true”. One of the famous cases promoting consumer protection is the Office of Fair Trading v Purely Creative Industries. The case was presented before the CJEU for interpreting art. 31 of the black list. What is interesting to highlight in this context is that the High Court recognised that the average consumer is intended as the one that “take reasonable care” of itself. However, the average is not the one that would “read the entirety of the print of a particular promotion”. Moreover, one of the promotions of the company was contained in scratch cards which stated that people could win, among other things, a holiday

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465 Duivenvoorde,(2015), p. 105
466 Reckitt and Coleman Products Ltd v Borden Inc and others [1990] 1 WLR 491
467 Duivenvoorde,(2015), p. 106
468 Duivenvoorde,(2015), p. 106
470 Duivenvoorde,(2015), p. 111
471 This reasoning is visible also in the recent case from the CJEU, Teekanne
475 Office of fair trading v Purely Creative Ltd Industries [2011] EWHC 106
476 According to the court this is in contrast also with the Darbo case which was related in the wordings of the CJEU “to the application of the average consumer test to particular facts”. Judgment of the Court (First Chamber) of 4 April 2000. Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG., C-465/98, ECLI:EU:C:2000:184”
for two to a Greek island. However, this prize was excluding the flights and it was limited in the dates of departures. The counterpart sustained that the consumer familiar with this promotion would have understood that the price excluded some services. The High Court however did not accept this defence, since it is not the habitual consumer that has to be taken into account for understanding the violation of fair practices. Hence, consumers that “lack experience” are also protected. According to Duivenvoorde, (2015), it seems that in this specific case the High court is protecting the credulous consumer more than the average one.

Another relevant case is Office of fair trading v Ashbourne Management Services Limited. Ashbourne, a gym company, was accused by the OFT of acting in an unfair way because it was offering a subscription of 36 months to its members without possibilities for them to end the contract, except in extreme cases, such as illness. The Court was of the opinion that most of the time consumers subscribe for the gym and end it after a few months. Therefore, the service proposed was judged imbalanced since the Court recognised limitation in consumer behaviour. Thus in this case the consumer is not considered rational and circumspect but its behaviour is taken into account.

Therefore, it can be concluded that in general the court recognises the limits in the information process that consumers have. The consumer taken into account appears to be the “ordinary one”, without high of expectation on his knowledge. Thus, the case Lewin v Purity Soft case is an exception since the image of the average consumer reflects the European one.

5.3.3 The vulnerable groups and the targeted consumer groups

For what concerns the vulnerable and targeted consumer, the GCPAR (2014) states that the average consumers test cannot be applied in case the practice targets vulnerable groups. That is why the CPUTR makes a difference in protecting particular groups of consumers targeted by a practice and groups of consumers that are vulnerable for “mental or physical infirmity, age or credulity”. The OFT (2008) states that if a commercial practice violates the CPUTR, this will be judged “by reference to the ‘average consumer’, the ‘average member’ of a targeted group of consumers and the ‘average member’ of a vulnerable group of consumers”. The OFT (2008) gives examples of those groups. For instance, the consumer using wheelchairs can be considered vulnerable in case there is an advertisement promoting the possibility to have “easy” access to a holiday place. Among the other examples, there is also a reference to advertisements on burglar alarm directed to old people and advertisements devoted to people that for some reasons are influenced by specific claims.

Regarding the other category of protected consumers, the OFT (2008) states that the average targeted consumer is safeguarded when “a commercial practice is directed to a particular group of consumers”. Among the characteristics which implies that a group is targeted the OFT mentions “the way advertising is

479 Office of fair trading v Ashbourne Management Services Limited [2011] EWHC 1237
480 Office of fair trading v Ashbourne Management Services Limited [2011] EWHC 1237, Paragraph 164
482 Koutsias and Willett (2013), p. 39
486 Art. 2(5)(a) CPUTR
487 GUR, (2008), p. 68
488 GUR, (2008), p. 70
489 GUR, (2008), p. 70
490 GUR, (2008), p.69
placed, the language of a commercial communication, the nature of the product and the context”.\textsuperscript{491} For instance, television claims broadcasted during cartoons can be addressed to kids or their parents.

Their application within UK case law is still unclear since this term does not belong to the traditional legal dictionary of the UK.\textsuperscript{492} For example, in the case R v X Ltd\textsuperscript{493}, the company X Ltd sold a “domestic security systems” to an old customer. Despite his vulnerability, the case did not apply specifically to vulnerable consumers but to the average one.\textsuperscript{494} Therefore, in the UK legislation vulnerable and target consumers are defined and protected. However, their protection through cases is still unclear.

5.4 Misleading and comparative advertising and fairness of information: self-regulation

The CPUCR prohibits in line with the UCPD, \textit{inter alia}, those practices that furnish misleading information or that have deceptive presentations in a way that influences the choices of the consumer. This influence brings the consumer to take different decisions which would not have been taken otherwise. Among the types of misleading action, art. 5 (3) (b) of the CPUCR lists the case in which the trader violates obligations contained in a code of conduct that he has signed. When required from the situation, enforcement bodies can receive the aid of the authorities responsible for self-regulatory codes of conduct.\textsuperscript{495}

The sector of advertisement is regulated by the Advertising Standards Authority (ASA) but the Committee of Advertising Practice (CAP) is responsible for writing and maintaining the codes. More in detail, the CPUCR forbids unfair (misleading and aggressive) advertising. If this is the case, ASA will refer to the elements of the CPUCR in order to understand if the advertisement is contrary to the codes of conduct, since there is a relationship between those pieces of legislation.\textsuperscript{496}

More in detail, ASA is responsible for TV and radio advertisement under the Broadcast Committee of Advertising Practice (BCAP) and it also has powers in non-broadcast media\textsuperscript{497} under the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code). The importance of this system is due to the fact that it can be helpful to ensure even more that consumers are not mislead in advertising since businesses have the same rules to respect. ASA works within the legal framework of those codes and within the respect of the rules contained in the CPUCR. Therefore, ASA is defined as “established means” that guarantees compliance of the CPUCR and the BPRs in non-broadcasting advertising.\textsuperscript{498} The role of this body is primarily to catch any breach of the advertising codes since it is not common that the case is presented before the courts.\textsuperscript{499} For broadcast advertising, the ASA (Broadcast) and BCAP cooperate with the Office of Communication (OfCOM), which regulates TV, radio, video on-demand communications in the UK.\textsuperscript{500}

\textsuperscript{491} GUR, (2008), p.69
\textsuperscript{492} Duivenvoorde, (2015), p. 11
\textsuperscript{493} R v X Ltd [2013] EWCA Crim 818
\textsuperscript{495} GUR, (2008), p. 52
\textsuperscript{496} CAP Broadcast (2016), p. 140
\textsuperscript{497} Such as print, posters, cinema, direct marketing
\textsuperscript{498} GUR, (2008), p. 52
Those codes appear to be very detailed and the key advertisement rules refer to the fact that advertisements should not be misleading and claims should be backed up with evidence. They should be true in a way that the consumer can make the right choice. Advertisers should treat consumers in an honest way and should think about the possible perception by the consumers of advertisements. Moreover, the advertiser should take into account the audience reached by his advertisements. Evidently those rules are in conformity with the content of the CPUTR, but beyond the general principles additional protection is guaranteed to children and specific sectors are taken into account (for instance food, alcohol, environment and so on).

For what concerns the process, any interested party can submit a complaint to ASA in different ways - by email, telephone and online - and once received ASA has to verify the relevance of the advertisement in question. First of all, it will verify if the case falls within its competence and if the advertisement is a real risk according to the rules contained within the code. Secondly, ASA will conduct an investigation and will try to solve the situation in an informal way, for instance by reaching a consensus with the trader. If the case is more complex, there will be a formal investigation where the advertiser has to defend himself with documents in his defence and all the parties involved are informed about the process.

The ASA Council gives a recommendation if it decides to accept the complaint and the final rulings are published on the website. In case of broadcast advertisement “any advertisements that break the Code are disqualified from industry awards, denying advertisers and the agencies that created the ads the opportunity to showcase their work”. Within the non-broadcasting system, the majority of advertisements are coordinated with the CAP which can give alerts for suspending them if necessary. Other sanctions can be the revocation, withdrawal of advertisement and pre-vetting. In case advertisers have published offending advertisement, they can be asked to have their materials controlled. If the advertiser does not change or withdraw the commercial, the case is given to the CAP for the enforcement. Moreover, in case the advertisement is against the law, there can be a prosecution. In case of non-broadcast advertisements the ASA can refer the advertiser to Trading Standards for legal proceeding to be taken against them.

### 5.5.1 Compliance and enforcement

Until 2014 the TSS, the Department of Enterprise, Trade and Investment in Northern Ireland and the OFT were responsible for the enforcement of the CPUTR. They promoted the compliance of the rules contained in the CPUTR in accordance with their enforcement powers and sources.

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506 Persistent offender can have the material vetted before publication.
510 GUR (2008), p. 51
On 1 April 2014, there was a radical change in the enforcement bodies of the CPUTR since the OFT was abolished and many of its duties were conferred to the CMA. This process of simplification which has led to the suppression of the OFT started already in 2013 when its roles in enforcing consumers’ rights, for instance in relation to consumer education, were transferred in April 2013 to the Citizens Advice Service and Citizens Advice Scotland (Citizens Advice services) and the Trading Standards Institute (TSI). This because there were the necessities of improving consumer’s rights through a simplification of bodies and making the system more cost-effective.

In the course of time, the CMA has taken over those powers that OFT kept in 2013, above all in relation to problems that consumers had within the market and in relation to making informed decisions. One of the differences in comparison to the OFT is that the CMA does not have a direct hotline to advise the consumer. This is possible now through the “Citizens Advice Consumer Service” that can be contacted for receiving counsels and suggestions on consumer matters. The CMA has the power to enforce the CPUTR and the TSS now has the duty of enforcing the CPUTR.

With the aim of being as clear as possible this chapter is organised as follows: Sub-section 5.5.2 contains enforcement procedures regarding the rules on unfair commercial practices; Sub-section 5.5.3 is dedicated to the criminal offences and penalties; Sub-section 5.5.4 contains remedies of the consumer against unfair practices and Sub-section 5.5.5 is related to the relationship among the enforcement bodies.

5.5.2 Enforcement procedures in the application of the rules on unfair commercial practices and misleading advertising

In the UK legislative framework there is a connection between consumer and competition policies. This is because consumers and businesses have a special bond that consists in the fact that on the one hand, if the market is competitive consumers can have a variety of choices while purchasing within the market and on the other hand, if consumers are confident in buying products, traders are willing to compete.

Following the reforms of simplification desired by the UK legislator, new ways for the consumer bodies in protecting consumers have been created through the possibility to share opinions, advices and to coordinate their roles in order to prevent an overlapping of rules and in order to guarantee an efficient protection for consumers. For what concerns the enforcement of the CPUTR, compliance is ensured with “education, advice and guidance, codes of conduct, civil and criminal enforcement”.

With respect to the enforcement authorities, alongside the CMA there are also TSS and the Department for the Economy (Northern Ireland). By contrast in Scotland the enforcement body is the Crown Office and Procurator Fiscal Service (COPFS) on behalf of the Lord Advocate. The CMA works with those bodies to boost compliance, consumer trust and complaints and to ensure their protection. In particular, as delineated within the Review of the enforcement provision (2014), the TSS has the duty to enforce the CPUTR,

511 CMA (2016), p. 2
512 CMA (2014), p. 2
513 CMA (2014), p. 8
514 CMA (2016), p.6
515 CMA (2014), p.9
516 See: Enterprise and Regulatory Reform Act 2013
518 GUR. (2008), p. 51
519 CMA (2016) , p.33
whereas the CMA is empowered to do so.\footnote{Government UK (2014), p. 10} However, those bodies “\textit{have complementary powers and will work in partnership}”.\footnote{CMA (2014), p. 47}

The CMA has preventive, investigative and enforcement powers aiming to fight the unfair practice. The CMA furnishes guidance and clear information to business in order to foster their compliance with the legislation. In the same way it gives information to consumers in order to make them aware of their rights and duties. Alongside with this powers, the CMA has also investigatory and enforcement powers.\footnote{Soilleux-Mills, A. (2016) \textit{Consumer protection rules: What are your enforcement risks? - articles - Olswang LLP. Available at: http://www.olswang.com/articles/2016/03/consumer-protection-rules-what-are-your-enforcement-risks/ (Accessed: 27 January 2017)}

Within the investigatory powers, the CMA has the power to gather information from the trader and it can verify compliance with the CPUTR by testing the products. Within the general investigatory powers the enforcement authorities can entry premises without a warrant in order to check goods in order to understand if there has been a violation, ask documents of the trader’s business or to seize and detain goods when it is clear that the violation has been committed and the goods are used for verifying it.\footnote{CMA (2014), p. 34} Moreover, the investigation can be done if there is a warrant that is granted by a justice of the peace who thinks that several conditions are met, such as the presence of goods that can demonstrate the unfairness or when “\textit{the occupier is absent and it might defeat the object of the entry to await his return}”.\footnote{GUR, (2008), p.61}

When the phase of investigation is concluded, the CMA can decide to use its enforcement powers against businesses. The principal enforcement powers in relation to the CPUTR are civil and criminal. Within the civil power Part 8 of the Enterprise Act 2002 (EA02) is relevant. This part 8 gives powers to enforcement bodies to request an enforcement order to the Court, to admit undertakings and to stop businesses in their activity when they are impacting on collective interests. These violations are also called domestic or Community infringements.\footnote{CMA, (2016), p. 15} In this case the breach must affect, or have the potential to affect a group of consumers and the authority of the enforcement should demonstrate the negative impact of the practice on consumers.\footnote{CMA, (2014), p.33}

Before applying for an enforcement order, the authority may consult the business in order to stop the incriminated practice. This is not mandatory, but this usually happens.\footnote{CMA, (2016), p.15} In case of presentation of undertakings, the authority may accept them without proceeding at court level if the statements are satisfactory. If the practice cannot be stopped through the acceptance of undertakings or if there are reason of urgency, the case is presented before the House Court or the County Court.\footnote{CMA, (2016), p. 16-17}

The enforcement order should contain the practice that is violating the legislation and if there is no compliance with the order, the trader can be imprisoned or a fine can be imposed.\footnote{Art. 217 EA02} Generally, the trader is informed about the procedure and he can have the possibility to bring the case before the Court.\footnote{CMA, (2016), p. 18} On top of that, the court can make a temporary “\textit{interim order}”\footnote{Art. 218 EA02} which enables the trader to carry on its activity until the pronouncement of the court which can decide for the cessation of the activity. In case the enforcement
authority is not the CMA, any enforcer shall notify the results, the identity of people involved and possible failures of the trader to the CMA 14 days before the request of the order. 532

In addition to civil consumer enforcement provided by part 8 of the EA02, the enforcers also have criminal powers. In particular whenever civil proceedings are not likely to stop the unfairness or whenever the violation is serious, the use of criminal powers is preferred.533 However, if during the proceeds the violation appears to be less strong than in the beginning, which means that criminal enforcement is not adequate anymore, the CMA may deal with civil enforcement. The criminal offences contained within the CPUTR are the violation of requirements of general prohibition, misleading actions, misleading omissions, aggressive practices and particular unfair practices.534

Criminal prosecution is done in compliance with the “Code for Crown Prosecutors” which indicates two different stages: the evidential and the public interest.535 The evidential stage is very important for the prosecution against the suspect. In particular, it is necessary that there is admissible and reliable evidence for considering the prosecution. Whether this test is passed, the enforcer will evaluate the public interest.536 The enforcer determines the charge.

On top of that, there are possibilities for the prosecuted to present defences which demonstrate that there was no violation. These defences are due diligence and innocent publication. Regarding the due diligence, the defendant should furnish proofs on the fact that “the offence was due to a mistake, reliance on information given by another person, the act or default of another, an accident, or another cause beyond his control, and, in addition, that he took all reasonable precautions and exercised all due diligence to avoid committing the offence or to avoid someone under his control committing it”.537 Thus, there will be due diligence in case the precautionary system worked.538

Another possibility of defence is the innocent publication provided at art. 18 CPUTR. This takes place when the defendant proves that “he is a person whose business is to publish or arrange publication of advertisements, he received the advertisement in the ordinary course of business, and that he did not know and had no reason to suspect that the publication would amount to an offence”.539 This defence deals for instance with newspaper who publish advertisements or that organizes the publication of advertisements that amount to an offence. The system of penalties is explained below.

5.5.3 Criminal offences and penalties

Nowadays, criminal offences are provided against misleading and aggressive practices and against unfair blacklisted practices. Those violations are in general of strict liability, this means that there is no mens rea (a juridical term which implies that there is no necessity of proving mental element in the offence, such as negligence).540 However, in order to have a criminal prosecution a mens rea is required. This means that the trader is guilty when he is reckless “in engaging in a commercial practice which fails to comply with the requirement of professional diligence”.541

532 Art. 230 EA02
533 CMA, (2016), p. 33
534 GUR, (2008), p. 56
535 CMA, (2014), p. 50
536 CMA, (2016), p. 25
537 Art. 17 CPUTR and Koutsias and Willett, (2013), p.242
538 Koutsias and Willett, (2013), p. 29
539 Art. 18 CPUTR and GUR, (2008), p.58
540 Koutsias and Willett (2013) , p.27
541 GUR, (2008),p.56
For what concerns the penalties, these consist of a fine of any amount\textsuperscript{542} (on summary conviction) and an unlimited fine or imprisonment not exceeding two years or both (on conviction on indictment). Moreover, the CMA could ask to the Court to make a confiscation order if appropriate.\textsuperscript{543}

There are limits for the time of the prosecution, namely three years since the offence took place, or one year after the discovery of the offence by the prosecutor.\textsuperscript{544}

The figure below shows the compliance and enforcement powers of the authorities.

\textbf{Figure 2- Compliance and Enforcement Powers}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{compliance_and_enforcement_powers}
\caption{Compliance and Enforcement Powers:}
\end{figure}

\begin{itemize}
\item Civil action
\item Criminal Action
\item Sanctions
\item Warnings
\item Dialogue
\item Information
\item Advices
\end{itemize}

\subsection{5.5.4 Individual consumer remedies and right to get redress}

The CPAR 2014 gives possibilities to consumers to have remedies against an unfair practice. More in detail the consumer has the right to get redress if “the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a “business to consumer contract”)
\textsuperscript{543}”, if “the consumer enters into a contract with a trader for the sale of goods to the trader (a “consumer to business contract”)”, or if “the consumer makes a payment to a trader for the supply of a product (a “consumer payment”)
\textsuperscript{543}”. The other condition is that the trader “engages in a prohibited practice”.\textsuperscript{545} The last condition is that the unfair practice influenced the decision of the consumer to conclude the contract.

\textsuperscript{542} In 2015 the £5000 that was the maximum amount was removed. See: CMA, (2016), p. 25
\textsuperscript{543} This is done under the Proceed of Right Act. See CMA (2016), p. 25
\textsuperscript{544} GUR, (2008), p.57
\textsuperscript{545} Art. 27A (2) CPAR
\textsuperscript{546} Art. 27A (4) CPAR
Those remedies can be divided into Standard and Damages. Regarding the Standard remedies consumers have the rights to unwind a contract and to recover the full price or a percentage of the price paid for the good. Otherwise, they can ask for a discount of the price.

First of all, if the consumer wants to opt for the right to unwind, there are requirements to fulfil. In fact, the consumer has to complain within 90 days from the delivery of the good or the performance of the service or “when the lease begins or the right is first exercisable”. Therefore, when he can still give back the goods or reject the services. The possibility to have a full price back is reduced in case the contract was for a continuous supply of products and the consumer used it for more than one month.

Secondly, if the consumer lost his right to unwind, he can still apply for the right of receiving a discount, with a fixed percentage for goods that cost £5,000 or less. If they cost more the discount is calculated on the basis of the price of the product on the market when stipulated the contract and the price paid.

For what concerns the possibility to obtain rights for damages, this applies when the consumer has lost more than the price paid for the good. In fact, in case consumers’ losses “exceed the price paid” they can ask for damages. In this case damages can be claimed if there is proof of “actual loss, or distress and inconvenience”. Distress and inconvenience can be invoked when the consumer has suffered discomfort, anxiety due to the unfair practice.

To conclude, new simple remedies have been ensured to consumers against unfair practices done by traders. This is a new opportunity for consumers to protect their rights.

5.5.5 Relationship among enforcement bodies

The CMA works with other enforcement authorities to protect consumers in their economic interests. This cooperation can better identify problems and whoever acts in contrast to the law. In the course of time platforms that enable the enforcement authorities to share issues and solutions have been created, in order to simplify the process, by avoiding overlapping of bodies. Therefore, from the 1st April 2014, the Consumer Protection Partnership (CPP) has been created “to ensure coherent and strategic delivery of enforcement, information provision and education across the consumer landscape”. In the practice the CPP guarantees that partners cooperate.

Besides the bodies that are part of the CPP, a form of cooperation exists between CMA and TSS in enforcing consumer policies. However, nowadays TSS that is constituted by local authorities focuses more on national cases. What is more, they enforce particular sectors such as, food safety, health, sales to minors of alcohol, tobacco and so on. On the contrary, the CMA has a “strategic role” in the enforcement due to its ability to choose the case they want to enforce.

In addition, apart from the relationship with the TSS, the CMA works with other agencies with a view of optimizing the protection of consumers. The creation of the Consumer Concurrency Group (CCG) enables
the CMA and other agencies to “improve clarity” in the enforcement system.\textsuperscript{555} In the same way CMA cooperates with self-regulatory bodies.

\underline{5.6 Conclusion}

The UCPD has been implemented within UK legislation under the CPUTR which amended 23 old legislations. In 2014 the CPAR took place and it brought a lot of innovations in relation to consumers’ possibilities to enforce their rights individually. The UCPD has been transposed without meaningful differences in comparison to the European text wordings. However, the interpretation of some articles has led to problems due to the lack of clarity of some terms and due to the overlapping of legislations, as in the case of harassment.

From the cases analysed it seems that the Court took into account for the average consumer the ordinary person, without a lot of expectative on its knowledge. The vulnerable groups and the target groups are protected within the CPUTR. However, their application within UK case law is still unclear since this term does not belong to the traditional legal dictionary of the UK.\textsuperscript{556} The enforcement system is guaranteed by the TSS in cooperation with other bodies such as the CMA. The enforcement powers include, among other things, civil and criminal actions and imposition of sanctions. Moreover, there is cooperation between legal enforcement bodies and the ASA for fighting against misleading advertising affecting consumers. The table below summarizes the elements taken into account for the comparison.

\textsuperscript{555} CMA, (2016), p. 37
\textsuperscript{556} Duivenvoorde, (2015), p. 11
<table>
<thead>
<tr>
<th>IMPLEMENTATION</th>
<th>SPECIFICATION OF ITEMS</th>
<th>THE UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislation Implemented</td>
<td>The UCPD was implemented in the UK legal framework by CPUTR which came into force on 26 May 2008. This was reviewed by the CPAR 2014, which strengthens consumers’ rights in acting against a trader in case of unfair commercial practices.</td>
<td></td>
</tr>
<tr>
<td>Wordings</td>
<td>There are not a lot of differences in wordings in comparison to the UCPD. Due to a lack of definitions of some terms there have been problems of interpretation (such as harassment).</td>
<td></td>
</tr>
<tr>
<td>Differences with the European UCPD</td>
<td>There are no big differences. Protection against unfair commercial practices is also extended to situations where consumers sell goods to trade.</td>
<td></td>
</tr>
</tbody>
</table>

| INTERPRETATION OF THE PROTECTED CONSUMER BENCHMARK | | |
|-----------------------------------------------------|----------------------------------------------------------|
| Is the average consumer protected intended as “reasonably well informed and reasonably observant and circumspect”? | The cases analyzed have shown that the consumer benchmark taken into account in assessing if the practice is unfair is the average one. However, there is recognition of limitations to consumer information. Some exceptions have been illustrated (see Lewin v Purity Soft case). |
| The protection of vulnerable groups, target groups and the differentiation among benchmarks | They are recognised within the CPUTR. However, their application within UK case law is still unclear since this term does not belong to the traditional legal dictionary of the UK. There is not a clear differentiation between those groups. |

<table>
<thead>
<tr>
<th>ENFORCEMENT</th>
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</thead>
<tbody>
<tr>
<td>Enforcement Body Powers and Procedure</td>
<td>Enforcement is done by the TSS, CMA and other agencies. Anyone interested can file a complaint and bodies are not obliged to proceed. The main powers are: civil action: request of enforcement order to the Court, to admit undertakings and to stop businesses in their activity when they are impacting on collective interests; criminal action, educational powers and warrants to enter premises.</td>
</tr>
<tr>
<td>Sanctions</td>
<td>The penalties consist of a fine of any amount (on summary judgment) and an unlimited fine or imprisonment not exceeding two years or both (on conviction on indictment).</td>
</tr>
</tbody>
</table>
| Consumer Remedies and Rights | Consumers have rights to redress through civil courts when consumers enter into a contract with the trader or when making a payment. Secondly, if the trader acts unfairly and thirdly, if that unfair practice influenced the decision of the consumer to conclude the contract.

Remedies can be divided into Standard and Damages. Regarding Standard remedies the consumers have the rights to unwind a contract and to recover the full price or a percentage of the price paid for the good. Otherwise, they can ask for a discount of the price. |
| Duties of the trader in the Advertising Code | Advertisers should treat consumers in an honest way and should think about the possible perception by the consumers of their advertisements. Moreover, the advertiser should take into account the audience reached by his advertisements. |
| Sanctions | Sanctions can be revocation, withdrawal of advertisement and trading privileges. In case advertisers have published offending advertisement, they can be asked to have their materials checked. Moreover, in case the advertisement is against the law, there can be a prosecution. |
| Relationship between the enforcement bodies of the UCPD and the enforcement body of the Code | The sector of advertisement is regulated by the Advertising Standards Authority (ASA) but the Committee of Advertising Practice (CAP) is responsible for writing and maintaining the codes. More in detail, the CPUTR forbids unfair (misleading and aggressive) advertising. If this is the case, ASA will refer to the elements of the CPUTR in order to understand if the advertisement is contrary to the codes of conduct. CMA gives ASA the opportunity to deal with cases in the first instance. |
CHAPTER 6-Comparison

6.1 Introduction

The consumers’ protection against unfair commercial practices is extremely important for the EU legislator. As has been pointed out in this research, the UCPD strives to harmonise the national legal frameworks revolving around the unfair practices. Consequently, the MS have been asked to stick to the rules provided by the UCPD while introducing them within their legal systems. They should have implemented the UCPD without substantial differentiations that impede the functioning of the internal market and they should have eliminated all the existent rules that are in contrast with the UCPD. The method used in conducting this analysis has been the same, namely literature studies of important authors and scholars, review of the pieces of legislation transposing the UCPD in the national legal frameworks, selection and examination of national case law and investigation of the powers of enforcement bodies through their websites and guidelines.

The elements that have been highlighted and that are now taken into account for making the comparison are: the implementation, interpretation and the assessment of the unfairness of a practice (Section 6.2), interpretations of the protected consumer benchmark taken into account by national courts (Section 6.3). The self regulatory system and the duties of the trader in comparison to the legal enforcement are taken into account as well (Section 6.4). The compliance assurance and specifically the enforcement bodies powers and procedure (Section 6.5) and the rights and remedies of consumers (Section 6.6). Then the system of penalties is compared (Section 6.7). Those elements will be compared in the next Sections and will be followed by a conclusion (Section 6.8).

For reaching the objective of this research this comparison is structured in a way that in each Section provides a summary of the system in Italy, the system in the UK and then some reflections on possible differences and similarities are given.

6.2 Implementation, interpretation and assessment of the unfairness

The implementation of the UCPD in Italy and UK occurred at different moments, in a different legislative context and in different pieces of legislations.

The LD 146/07 transposed the European UCPD within the Italian legislative system. The original legislation regulating misleading advertising that harms consumers has been substituted and included within the framework of unfair commercial practices legislation. The rules contained in the LD 146/2007 have been introduced into the ICC. The implementation has followed the European legislation, above all in relation to the wording of the rules. The general clause, the black list and the special clauses have been correctly implemented. However, different from the EU, there is not a definition of the average consumer and the definition of professional diligence appears to be formally different from the European one. The importance of the interpretation of professional diligence is due to the fact that it is taken into account in every AGCM decision, although a strict interpretation of the UCPD does not enable to perform it in case of black list or special clauses. The scope is extended to micro-enterprises as well. Moreover, extra

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557 Di Via and Leone (2011), p. 2
559 Meli (2011), p.7-8
protection is guaranteed for consumers against misleading advertising done by maritime companies, against
dangerous products for the health and safety of consumers when information of danger is missing and
against practices directed at children and adolescents.\textsuperscript{561}

For what concerns the UK, the debate about the implementation has been longer due to a total absence of a
unique \textit{corpus} of legislations against unfair practices before the UCPD.\textsuperscript{562} The CPUTR 2008 has
implemented the EU legislation on unfair practices. In 2014 another important piece of law to defend
consumers against unfair practices was adopted, the CPAR. Also in this case the wording is mainly the same
and the European rules and the general clause, the black list and the special clauses have been correctly
implemented. The general assessment follows the rules of the EU legislation and in this case professional
diligence (that is intended as an evolution of the duty of care) sticks with the European definition.\textsuperscript{563} The
scope is also extended to cases of consumer to business contracts and consumer payments.\textsuperscript{564} However, there
is a lack of specification of concepts that has led to interpretation problems (for instance regarding
harassment).

Thus, first of all, the technical choices of the two MS in implementing the UCPD are different: Italy
transposed it in a pre-existing codification that is its consumer law code and the UK has created a new
regulation which is a pure copy of the UCPD, with the consequence that the absence of concepts in its pre-
existing background have led to interpretation problems. Another difference is that the UK legal framework
contains a definition of the average consumer and the scope is different. In Italy the scope is extended to
micro enterprises, whereas in the UK it also comprises the cases of consumer business practices. This
difference arises from the fact that the UCPD gives the opportunity to the MS to extend it. Moreover, it
seems that an extra form of protection is guaranteed in Italy and introduced in the national systems due to the
fact that norms dedicated to the protection of children and young people against misleading practices are
emphasised. This flexibility left by the UCPD to the MS can create legal uncertainty in the internal market
since there are less chances of a \textit{“high degree of common interpretation by MS”}.\textsuperscript{565}

Thus, in general the UCPD has been transposed in those countries with similar terms but with different
technical choices. There are no substantial differences with the UCPD regarding the general clauses, the
special clauses and the black list.

\textbf{6.3 The interpretation of the protected consumer benchmark against unfair commercial practices}

The assessment of the unfairness of a practice has to be done on the basis of the possibility that the practice
can mislead the average consumer and by taking into account the vulnerable groups and the target groups.
The average consumer is tested by national courts case by case and this leads to differences between
countries. Those differences may have as a consequence that consumers are protected better in one country
than in another and this can impact the ultimate objective of a realisation of the internal market.

The Italian AGCM and the TAR Lazio applied the average consumer in a flexible way in some of the cases
mentioned in chapter 4. However, it has been underlined that the decisions were more inclined to highlight

\textsuperscript{560} Art. 18 d-bis
\textsuperscript{561} Art 21(3) and 22-bis UCPD
\textsuperscript{562} Luchetti, (2012), p.49
\textsuperscript{563} Luchetti, (2012), p.142-144
\textsuperscript{564} Ballon, (ed.) (2012), p. 20
\textsuperscript{565} Willett, (2010), p. 251
the importance of the behaviour of the trader to act fairly and to provide information than the responsibility of the consumer while purchasing food.\textsuperscript{566}

Although the average consumer at EU level is considered to be well informed and circumspect, some of the Italian cases nevertheless show the tendency of the Italian court to interpret the average consumer as vulnerable more than well informed. For instance, the TAR Lazio in the case Sanremo Giovani\textsuperscript{567} seems to diverge from European case law, since it aims to protect “the trusting as well as the suspicious”, more than the “reasonable consumer.”\textsuperscript{568} On the contrary, other cases such as Sacchetti COOP degradabili al 100\%\textsuperscript{569} have taken into account the average consumer but this has been interpreted as the one that does not have information in specific sector (in that case recyclable plastic bags) and that cannot be critical if there is information that he cannot understand.\textsuperscript{570} Therefore, more attention is given to the way traders give information and the choice of the average consumer is not considered to be based on systematical reading of advertising or information.\textsuperscript{571}

For what concerns the categories of vulnerable consumers and target consumers, it seems that a difference between those groups is not well underlined.\textsuperscript{572} However, the TAR Lazio as well as the AGCM safeguards the rights of the consumers that have a particular exigency to be protected because of their age, beliefs and so on. Protection is guaranteed to children, elderly people and credulous people. Therefore, high protection of consumers is furnished within Italian legislation.

On the other hand, with respect to the UK in the case Lewin v Purity Soft Drinks\textsuperscript{573} the court seems to give a closer interpretation of the average consumer to the European one. However, this case refers to labelling. In cases on unfair practices, in the Office of Fair Trading v Purely Creative Industries\textsuperscript{574} the Court seems to protect more a credulous than an average consumer.\textsuperscript{575} Therefore, it seems that the court paid more attention to the actual behaviour of the consumer than its rational choice. In the same vein, in the case Office of Fair Trading v Ashbourne Management Services the judge also considers the average consumer benchmark as less aware of the one interpreted at EU level.

For what concerns the vulnerable groups and the targeted ones it can be said that their protection is not very clear due to the fact that those concepts were not part of the English legal background. Certainly, in the Office of Fair Trading v Purely Creative Industries\textsuperscript{576} protection is given to credulous consumers and not to average consumers, despite the fact that the Court specified that the applied benchmark was the average and not the vulnerable consumers.

To conclude, the Italian legislator appears to furnish a higher level of consumer protection by putting the responsibility on the trader in comparison to the traditional interpretation of the CJEU. The consumer taken into account in assessing unfair practices is not always considered to be an expert and well informed. Moreover, the vulnerable and target groups are protected even if differentiation among those groups cannot be easily detected. The English legislation also protects the average consumers against unfair practices but the consumer is not considered to study details in relation to a practice. Therefore, also in the UK protection

\textsuperscript{566} Duivenvoorde, (2015), p. 147
\textsuperscript{567} TAR Lazio, Sez.I, 3 March 2004, n. 2020
\textsuperscript{568} Meli, (2011), p. 36
\textsuperscript{569} AGCM 11 January 2006, No 15104 (PI4927), Boll. 2/2006
\textsuperscript{570} Duivenvoorde, (2015), p. 137
\textsuperscript{571} Duivenvoorde, (2015), p. 137
\textsuperscript{572} Duivenvoorde, (2015), p. 147
\textsuperscript{573} Lewin v Purity Soft Drinks plc [2005] A.C.D. 81
\textsuperscript{574} Office of fair trading v Purely Creative Ltd Industries [2011] EWHC 106
\textsuperscript{575} Duivenvoorde, (2015), p. 123
\textsuperscript{576} Office of fair trading v Purely Creative Ltd Industries [2011] EWHC 106
appears to be higher than the traditional CJEU opinion on the average consumer. However, in the UK there is still an unclear protection of vulnerable categories.\textsuperscript{577} Thus, in both countries the image average consumer differs from the image depicted by the UCPD and most of the time MS have introduces stricter level of protection of consumers also for the possibility given by the UCPD to take into account “social, cultural and linguistic” factors.\textsuperscript{578} There are also divergent applications of target and vulnerable groups. This creates problems to gaining the objectives of the UCPD since traders who market products in another MS may deal with differences in the legislation due to a different application of the benchmark protected.\textsuperscript{579}

6.4 Self regulation in the advertisement sector and duties of the trader

Self regulation that is in conformity with the principles contained in the UCPD can help in gaining the objectives of the European legislator. On the contrary, a lack of compliance and differences among codes can jeopardise the possibility of harmonising the system. That is why during the analysis of the two countries the advertising national self regulatory bodies and codes have been taken into account. Therefore, in this comparative phase the importance of the UCPD in the codes of conduct in the field of advertising and the duties of the traders will be pointed out.

In Italy the role of the IAP and its Code in the advertising sector are fundamental in helping the national enforcement agency since the values for judging the fairness of a trader have been used by the Courts to evaluate professional diligence in its activity.\textsuperscript{580} Within the code misleading and hidden advertising are prohibited and the consumer taken into account is the average one. Thus, there is coherence between the code and the UCPD. For what concerns the duty of the trader, besides the general prohibition to mislead the consumer, it is established that the trader has to use terminology, quotations and references to scientific and technical tests in an adequate way, that market communications are not based on superstition, credulity or fear nor violent, indecent and vulgar nor against moral, civil, religious beliefs and human dignity.\textsuperscript{581} Moreover, special attention is given to children and young people. Thus, in this case there is a connection with the UCPD and the duties of the traders are similar to the ones contained in the UCPD. The decision of the Jury or the order by the Review Border to desist from publishing the commercial made have an immediate effect and the message has to be out of distribution immediately.\textsuperscript{582} Evidently, the procedure is easier and faster in comparison to the one of the AGCM and the enforcement body does not have the power to inflict pecuniary sanctions.

In the UK the ASA is defined as “established means” as far as the observance of the CPUTR in non-broadcasting advertising is concerned.\textsuperscript{583} ASA (and the CAP) will refer to the elements of the CPUTR in order to understand if the advertisement is contrary to the codes of conduct, since there is a relationship among those pieces of legislation.\textsuperscript{584} For what concerns the duty of the traders, it is stated that they should treat consumers in an honest way and should think about the possible perception by the consumers of its advertisement. Moreover, the advertiser should take into account the audience reached by his advertisements. As evident those rules are in conformity with the content of the CPUTR, beyond the general principles

\textsuperscript{577} Duivenvoorde, (2015) , p. 137  
\textsuperscript{578} Recital 18 UCPD  
\textsuperscript{579} Duivenvoorde, (2015), p. 204  
\textsuperscript{581} Art. 3-14 IAP Code  
\textsuperscript{583} GUR (2008), p.52  
\textsuperscript{584} CAP Broadcast, (2016), p. 140
additional protection is guaranteed to children and specific sectors are taken into account (for instance food, alcohol, environment and so on). In case of broadcast advertisement “any advertisements that break the Code are disqualified from industry awards, denying advertisers and the agencies that created the ads the opportunity to showcase their work”Another sanction can be revocation, withdrawal of advertisement and trading privileges. In case advertisers have published offending advertising, they can be asked to have their materials checked. In case of non-broadcast advertisements the ASA can refer the advertiser to Trading Standards for legal proceeding to be taken against them.

There are no relevant differences between those codes that may impact the objective of maximum harmonisation. In fact, consumers can easily file complaints, the duties of the traders are fair in both countries and consumers that need more protection are taken into account. However, differences do exist in relation to the sanctions, which are stricter in the UK and in relation to the procedure of self regulation that is faster than the enforcement procedure of the unfair commercial practices.

6.5 Compliance and enforcement: Procedures and Enforcement bodies’ powers

The importance of analysing the compliance and the enforcement system in the two countries is due to the fact that in order to ensure the harmonisation and the effectiveness of the UCPD and in order to simplify problems in cross border situations, it is necessary that the enforcement within the MS is complete and coherent in protecting the interests of the consumer. The debate of some scholars has been concentrated on the division between public and private enforcements. The public enforcement is done by national authorities ex officio or on the basis of complaints of citizens. On the contrary, private enforcement is done before the national courts by individuals or a group of consumers. The MS have implemented different strategies. The Sections below are dedicated to enforcement bodies and procedures, private consumer’s rights against unfair practice and penalties.

The enforcement system in Italy is done by the AGCM, which is responsible for fair competition, fair practices and consumer policy. This is an independent and public body. The AGCM may act after the complaints of people involved or ex officio. It is possible to appeal against its decision before the TAR Lazio and it is possible to appeal to the judgment of TAR Lazio at the Consiglio di Stato. The main enforcement powers of the AGCM are inspections, moral suasion procedure, adoption of precautionary measures and acceptance of commitments and imposition of big sanctions. Consumers, competitors and anyone that is interested can report the presence of unfair practices or misleading advertising to the AGCM, through a letter or electronic communication. The duration of the process is 120 days but it can last 150 days in case of request of advice (art. 27 1-bis and 6 of the ICC). Moreover, civil proceedings for claiming damages can be initiated by consumer associations or class actions. Therefore, it can be said that in Italy the

main enforcement procedure is public. Forms of private enforcement within the ICC are recognised mainly for groups of consumers.

Regarding the UK, the TSS and CMA work in cooperation and they are responsible, *inter alia*, for the enforcement of consumer legislation against unfair commercial practices. If anyone interested retains that a company could be breaching the CPUTR, he can contact the Citizen Advice Service that will report the trader to the enforcement body.\(^{593}\) More in general, enforcers have several possibilities for ensuring the compliance with the CPUTR. The main possibilities are education, advice and guidance, investigative powers, established means, civil and criminal enforcement.\(^{594}\) Regarding the civil enforcement part 8 gives powers to enforcement bodies to request an enforcement order to the Court, to admit undertakings and to stop businesses in their activity.\(^{595}\)

If civil proceedings are not likely to stop the unfairness or whenever the violation is serious, the use of criminal powers is preferred. Criminal offences contained within the CPUTR are violations of requirements of the general prohibition and in case of misleading actions, misleading omissions, aggressive practices and particular unfair practices.\(^{596}\) There are possibilities of defence against the charges. Therefore also in this case there is mainly a public enforcement procedure, constituted of administrative enforcement order and criminal sanctions. However, as will be shown below, in 2014 the CPAR has given consumers private rights to redress.\(^{597}\)

Thus, both in Italy and in the UK the method of enforcement is mainly public and there are some similarities in the enforcement powers. For instance both enforcement bodies can act *ex officio* or after a complaint, both have investigative powers, both can accept commitment (or undertaking) and both can invite the trader to stop the practice.

However, there are also important differences between the countries. In Italy there is mainly one enforcement body\(^{598}\) whereas in the UK more bodies are involved. Secondly, some enforcement powers are different. For example, within the UK the enforcement system also includes criminal proceedings. This implies a different judgment on the unfairness of a practice between countries, above all because the ICC does not provide a Section dedicated to criminal offences. In addition UK enforcers, alongside with the prosecution powers have also the power to educate and advice traders. Finally, the AGCM in Italy is obliged to investigate any complaints that it receives, whereas enforcement authorities in the UK are not obliged to investigate administrative complaints, but they can choose to do so.\(^{599}\)

**6.6 Compliance and enforcement: Consumer rights and remedies**

For what concerns the rights and the remedies of consumers against unfair commercial practices, the EU legislator does not provide nor impose the same private remedies for all the consumers in case of unfair

593 CMA, (2015), p. 38
594 GUR, (2008), p. 51
596 Part 3 CPUTR
597 GCPAR, (2014), p. 15
598 It is one but the AGCM cooperates in the phase of investigation with the GdF
practices. Therefore, differences among countries do exist. These differences can lead to different possibilities for consumers to have their rights recognised.

The ICC contains a possibility for consumer associations to ask for an injunction for the protection of consumers’ collective interests (art. 139 and 140) and an alternative remedy for individual consumers to protect their rights is possible in relation to unfair commercial or anticompetitive conducts through a class action. This is a new opportunity for the protection of consumer rights because consumers can team together in complaining against companies and for asking payment of damages they suffered due to the unfair commercial practice addressed to them.

On the contrary, there is a fragmented system of individual consumer protection in respect of contracts deriving from unfair practices. Therefore, it is up to the national court to coordinate the relationship among unfair practices and contract law. In general, if the AGCM or the Court considers that the trader is acting unfairly consumers can use their decisions to assert their rights and to have the contract declared invalid via Court action.

Before 2014, the UK did not have any form of individual redress for consumers but there was just a system of civil and criminal enforcement in place. Nowadays, the CPAR 2014 provides possibilities to consumers to have individual remedies. More in detail, the remedies available to consumers can be divided into Standard and Damages.\textsuperscript{600} Regarding the Standard remedies the consumers have the rights to unwind a contract and to recover the maximum price or a percentage of the price paid for the good. Regarding the damages, they cover damages for distress and inconvenience.\textsuperscript{601} These remedies can be achieved if several conditions are fulfilled. Firstly, the consumer has to be misled when entering into a contract with a trader (business to consumer and consumer to business contract) or when making a payment. Secondly, consumer has the right to redress to the civil courts if the trader committed an unfair practice. Thirdly, in order to have the right to redress it is necessary that the unfair commercial practice influenced the decision of the consumer to conclude the contract.

Therefore, in Italy redress is possible with an individual court action or a class action. In the UK simple and standardised remedies are in place. The possibility to unwind the contract in the UK in comparison to the invalidity of the contract is an easier solution.

6.7 Enforcement and Sanctions

According to art. 13 UCPD MS have to impose penalties on companies for the infringement of national provisions against unfair practices and a system of measures to enforce these penalties. The measures have to be \textit{“effective, proportionate and dissuasive”} and MS are free to choose which penalties can be applied.\textsuperscript{602} This situation leads to differences among countries. This difference can imply that the same violation can be sanctioned differently and consequently a trader would rather act unfairly in one country more than in another and this can lead to cross border problems.

Beyond the other measure that can be imposed by the AGCM if a trader violates the prohibition of an unfair practice, the system provides administrative pecuniary sanctions. In case of non compliance with the AGCM’ request for information, the AGCM can impose a sanction between 2.000,00 euro and 20.000,00 euro. On the contrary, if the information or the documentation submitted is not true, the AGCM carries a fine.

\textsuperscript{600} GCPAR, (2014), p.11 
\textsuperscript{601} GCPAR, (2014), p.11 
\textsuperscript{602} Art. 13 UCPD
of between 4.000 euro and 40.000 euro. Once the violation has been determined the AGCM may prohibit the practice and impose an administrative fine. The amount of the fine has increased over the course of the years and today ranges from 5,000 euro to 5,000,000 euro on the basis of the seriousness and duration of the infringement. In case the practice harms the health or the safety of the consumer or if even indirectly may threaten the safety of children and teenagers the sanction cannot be less than 50,000 euro. Moreover, in case the trader does not comply with the AGCM “emergency measures or injunctions or instructions” and in case of non-compliance with the commitments undertaken, the AGCM may impose an administrative fine between 10,000 euro and 5,000,000 euro. In addition, in case of repeated non-compliance the AGCM can “suspend trading for a period which shall not be more than thirty days” Therefore, it seems that within the Italian legislation several pecuniary sanctions are provided by the AGCM on the basis of the gravity of the infringement. A major protection for children and teenagers is also guaranteed by the sanction applicable in case their safety is threatened and finally a penalty for violations of UCPD is up to 5 million euro.

Penalties within the UK legislative system consist of a fine of any amount (on summary judgment) and on conviction on indictment, an unlimited fine or imprisonment not exceeding two years or both. Moreover, the CMA could ask the Court to make a confiscation order if appropriate. This means that the penalty is variable case by case and that the judge does not have to stick to a specific amount.

Hence, there are big differences within the system of sanctions in the two countries. First of all, the possibility of imprisonment is not provided in Italy within the ICC. Secondly, in the UK the sum of the sanction is not defined. Thirdly, in Italy there is a grade of sanction on the basis of the gravity of the infringement. Therefore, it can be concluded that although in the UK the possibility of imprisonment is provided, Italy appears to have heavier and delimited sanctions, with a maximum penalty of 5 million euro. Therefore the trader acting in an unfair way knows that there are severe consequences for him if he acts unfairly. These differences can imply that a trader prefers to act unfairly more in one country than in another and consequently there can be cross border problems.

### 6.8 Conclusion

The points of comparison have been the implementation and the assessment of the UCPD, the protected consumer benchmark, the self-regulation, the compliance assurance system (including enforcement bodies and procedures and the rights and the individual remedies of the consumers) and the sanctioning.

In general the UCPD has been implemented in these countries in a uniform way, since the wording and the practices prohibited are the same. However, problems have been detected in the phase on interpretation since this is up to national courts. For what concerns the protected consumer benchmark, in both countries the consumer is not always interpreted as reasonably well informed and circumspect, there is a lower expectative of the information of consumers while purchasing goods. In Italy the courts have mainly emphasised the importance of the trader’s obligation to provide fair information than the responsibility of consumers. What is different is that in the UK there is no a strong consideration of the vulnerable categories and there is no a special attention for protecting consumers in specific sectors.

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603 Art. 27.4 ICC
604 Art. 27.9 ICC
605 Art. 27.9 ICC
606 Art. 27.12 ICC
607 In 2015 the £5000 that was the maximum amount was removed. See: CMA, (2016), p. 25
608 This is done under the Proceed of Right Act. See CMA, (2016), p. 25
For what concerns the self regulation there are no relevant differences between the codes that may impact the objective of maximum harmonisation. In fact, consumers can easily file complaints, the duties of the traders are fair in both countries and consumers that need more protection are taken into account. However, differences do exist in relation to the sanctions, which are stricter in the UK.

The main differences that have been discovered are related to the compliance assurance and the system of penalties. The principal differences are the inclusion of criminal offences in the UK system and the possibility of prosecution of the trader, big administrative sanctions in Italy, possibility of imprisonment in UK, possibility to unwind the contract in UK. To conclude, a lot of similarities have been detected but differences are still in place.

The following scheme shows the entire phase of analysis conducted in this research.
### Table 6- Elements of comparison among Italy and UK

<table>
<thead>
<tr>
<th>ELEMENTS OF COMPARISON</th>
<th>SPECIFICATION OF ITEMS</th>
<th>ITALY</th>
<th>THE UK</th>
<th>COMPARISON</th>
</tr>
</thead>
<tbody>
<tr>
<td>IMPLEMENTATION</td>
<td>Legislation Implemented</td>
<td>LD 146/2007(LD 146/07) on “unfair business to consumer practices” and the LD No. 146/2007 misleading and comparative advertisements” that protects BTB relations. The rules contained in the LD 146/2007 have been introduced into the Italian Consumer Code (ICC).</td>
<td>The UCPD was implemented in the UK legal framework by CPUTR which came into force on 26 May 2008. This was reviewed by the CPAR 2014 which strengthens consumers’ rights in acting against a trader in case of unfair commercial practices.</td>
<td>The technical choices of the two MS in implementing the UCPD are different: Italy transposed it in a pre-existing codification that is its consumer law code and the UK has created a new regulation. However, the UCPD has been correctly implemented in both countries.</td>
</tr>
<tr>
<td>Wordings</td>
<td>There are not a lot of differences in wordings in comparison to the UCPD. Few differences are related to the notion of professional diligence and a lack of definition of the average consumer. Due to a lack of definitions of some terms there have been problems of interpretation (see the term misleading).</td>
<td>There are not a lot of differences in wordings in comparison to the UCPD. Due to a lack of definitions of some terms there have been problems of interpretation (such as harassment).</td>
<td>In general similar wordings in both national legislations. Few differences have been registered (such as the definition of the average consumer that is present in the UK legislation but not in the Italian one). In both cases there were problems of interpretation.</td>
<td></td>
</tr>
<tr>
<td>Differences with the European UCPD</td>
<td>Protection against unfair commercial practices is extended also to micro-enterprises. There are further specifications for protecting consumers against practices creating health and safety problems and for</td>
<td>There are no big differences. Protection against unfair commercial practices is also extended to situations where consumers sell goods to trade.</td>
<td>The scopes are different. Moreover, there is no emphasis on the protection of children and young people in the UK legislation.</td>
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### Interpreting the Protected Consumer Benchmark

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<tr>
<th><strong>Is the average consumer protected intended as “reasonably well informed and reasonably observant and circumspect”?</strong></th>
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<tbody>
<tr>
<td><strong>The cases analysed have shown that the average consumer benchmark taken into account in assessing if the practice is unfair is not always considered to be well informed or an expert. In a lot of cases the responsibility is given to the trader in giving fair information.</strong></td>
</tr>
<tr>
<td><strong>The cases analyzed have shown that the consumer benchmark taken into account in assessing if the practice is unfair is the average one. However, there is recognition of limitations to consumer information. Some exceptions have been illustrated (see Lewin v Purity Soft case).</strong></td>
</tr>
</tbody>
</table>

### The Protection of Vulnerable Groups, Targeted Groups and the Differentiation among Benchmarks

<table>
<thead>
<tr>
<th><strong>Vulnerable groups and target groups are taken into consideration by the Italian Court since before the UCPD. However there is not always a clear differentiation among those groups.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>They are recognised within the CPUTR. However, their application within UK case law is still unclear since this term does not belong to the traditional legal dictionary of the UK. There is not a clear differentiation between those groups.</strong></td>
</tr>
</tbody>
</table>

### Enforcement Body’ Powers and Procedure

<table>
<thead>
<tr>
<th><strong>Enforcement is done by the AGCM, General Division for users’ and consumers’ rights. Anyone interested can file a complaint and the AGCM is obliged to proceed if he believes that there is ground to proceed. If not it has to inform the</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Enforcement is done by the TSS, CMA and other agencies. Anyone interested can file a complaint and bodies are not obliged to proceed. The main powers are: civil action: request of enforcement order to the Court, to admit undertakings and to</strong></td>
</tr>
</tbody>
</table>

In both countries the legislations implementing the UCPD protect vulnerable and targeted consumers. However, in case law there is not a clear differentiation between those groups. In addition, in Italy the vulnerable and targeted groups are more taken into account by the courts.

In both countries the average consumer protection is higher than indicated by the CJEU.

In Italy there is one enforcement body whereas in the UK more bodies are involved. Secondly, in the UK the enforcement system includes also criminal proceedings. In addition UK enforcers have also the power to educate and advice traders. Finally, the AGCM in Italy is obliged to investigate
<table>
<thead>
<tr>
<th>Section</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant which may appeal it before the TAR Lazio. The main powers are: imposition of big sanctions, inspections, and precautionary measures, acceptance of commitments, moral suasion procedure and publication of final decisions.</td>
<td>Stop businesses in their activity when they are impacting on collective interests; criminal action, educational powers and warrants to enter premises.</td>
</tr>
<tr>
<td>Sanctions</td>
<td>In general the pecuniary sanctions are very high. The amount of the fine has increased over the course of the years and today ranges from 5.000 euro to 5.000.000 euro depending on the seriousness and duration of the infringement. In case the practice harms the health or the safety of the consumer or if even indirectly may threaten the safety of children and teenagers, the sanction cannot be less than euro 50.000. The penalties consist of a fine of any amount (on summary judgment) and an unlimited fine or imprisonment not exceeding two years or both (on conviction on indictment). The possibility of imprisonment is not provided in Italy within the ICC. In Italy there are heavy and delimited sanctions, with a maximum penalty of 5 million euro.</td>
</tr>
<tr>
<td>Consumer Remedies and Rights</td>
<td>The ICC contains a possibility for consumer associations to ask for an injunction for the protection of consumers’ collective interest (art. 139 and 140) and an alternative remedy for individual consumers to protect their rights is possible in relation to any complaints that it receives, whereas enforcement Authorities in the UK are not obliged to investigate administrative complaints, but they can choose to do so.</td>
</tr>
<tr>
<td>Consumers have rights to redress through civil courts when consumers enter into a contract with the trader or when making a payment. Secondly, if the trader acts unfairly and thirdly if that unfair practice influenced the decision of the contract, in Italy redress is possible with an individual court action or a class action. In the UK simple and standardised remedies are in place. The possibility to unwind the contract in the UK in comparison to the invalidity of the contract appears to be an easier solution.</td>
<td></td>
</tr>
</tbody>
</table>
### Self Regulation

<table>
<thead>
<tr>
<th>Duties of the trader in the Advertising Code</th>
<th>Duties imposed on traders are among others the use of terminology, quotations and references to scientific and technical tests in an adequate way and making commercials honest, true and correct.</th>
<th>Advertisers should treat consumers in an honest way and should think about the possible perception by the consumers of their advertisement. Moreover, the advertiser should take into account the audience reached by his advertisements.</th>
<th>The duties of the trader in the Italian and British advertising codes are not different. In general there is the obligation to make commercials in honest way and fairly. These codes appear to be coherent with the legislation on unfair practices.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanctions</td>
<td>There is a decision to desist from publishing commercials made and it has an immediate effect. The message has to be out of distribution immediately. The decision is published on the official IAP website.</td>
<td>Sanctions can be revocation, withdrawal of advertisement and trading privileges. In case advertisers have published offending advertisement, they can be asked to have their materials checked. Moreover, in case the advertisement is</td>
<td>The sanctions are more detailed in the UK. In Italy there is just the decision to put the message out of distribution. By contrast in the UK there is also the possibility of a prosecution.</td>
</tr>
<tr>
<td>Relationship between the enforcement bodies of the UCPD and the enforcement body of the Code</td>
<td>The Code of self regulation regarding misleading advertising is enforced by the IAP. The Authority body (Jury), does not have the power to impose pecuniary sanction as the AGCM. If the process is already started before the self regulatory body, the process cannot be initiated before the AGCM. However, due to the fact that they have different procedures the decisions of those bodies may be different.</td>
<td>The sector of advertisement is regulated by the Advertising Standards Authority (ASA) but the Committee of Advertising Practice (CAP) is responsible for writing and maintaining the codes. More in detail, the CPUTR forbids unfair (misleading and aggressive) advertising. If this is the case, ASA will refer to the elements of the CPUTR in order to understand if the advertisement is contrary to the codes of conduct. CMA gives ASA the opportunity to deal with cases in the first instance.</td>
<td>In general there is cooperation between the enforcement bodies of the UCPD and the enforcement body of the Codes. The procedure included in the codes and the ones contained in the legislations on unfair practices are coordinated. Certainly, the procedures of the self regulations are faster and the sanctions are lighter.</td>
</tr>
</tbody>
</table>
CHAPTER 7-Conclusions and suggestions for improvement

This research had two objectives. The first objective was to identify relevant differences between Italy and the UK regarding the interpretation of the UCPD, its implementation, compliance and sanctioning, which can obstruct the correct functioning of the internal market. The second objective was, if such relevant differences existed, to suggest improvements to reduce these disparities in order to promote the smoothness of the internal market and the protection of consumers. A comparative study between two countries, Italy and UK, with different legal histories and backgrounds has been conducted in order to evaluate the existence of differences in the implementation and interpretation of the UCPD, interpretation of the protected consumer benchmark, the compliance assurance (including powers of the enforcement bodies, procedures and rights of consumers) and sanctioning.

This chapter (7) will provide an answer to the research questions introduced at the beginning of this thesis. Furthermore, final conclusions and suggestions for the improvement of the system are given (7.3). Finally, limitations of the study are delineated.

7.1 Answer to the sub questions of the orientation phase

In which way does European legislation protect consumers within the internal market?

The answer to this question can be found in Chapter 2. The Charter of Fundamental Rights (art. 38) states that European policies have to ensure a high level of consumer protection. Moreover, art. 12 TFEU states that the protection of consumers has to be taken into consideration in the definition and implementation of the European policy. The assurance of the high level of consumer protection is also laid down in art. 169 TFEU which sets out the goals of the European policy, namely the protection of “health, safety and economic interests of consumers” together with the promotion of their right to “information, education and to organise themselves in order to safeguard their interests”. The ratio behind the creation of consumer legislation is the realisation of the internal market and the safeguarding of their protection. 609 The Single European Act Treaty included the internal market in the EEC Treaty in 1986 and it introduced harmonisation provisions (that now are included in the TFEU) with a view of removing barriers to the internal market. On top of that, art. 114 (3) TFEU provides that the Commission takes the “high level of protection” as core element in its proposals related to the safety, the health, environmental and consumer protection. The European Parliament and the Council will strive to reach this objective as well.

In addition, the EU also sets legally non-binding tools in order to improve the protection of consumer and its enforcement, such as guidelines. Along with those tools and the treaties the EU legislator strives to protect the consumer trough directives and regulations as well. The protection of consumers within secondary market law is covered, inter alia, by food safety legislation, competition law, food information and unfair practices including advertising. Finally, the protection of consumers and their possibilities to make informed choices through clear and consistent information are taken into account by the CJEU in order to assess the existence of trade barriers, which could negatively impact the internal market.

How does EU legislation ensure that the consumer is not misled in the EU?

610 Broberg and van der Velde (2014), p.194
The protection of consumers from not being misled is assessed in Chapter 2 and 3. First of all, Chapter 2 explains that EU legislation is composed of a system that guarantees to consumers rights to correct information. This is connected with the principle of informed choice (art. 8 GFL), that protects consumers from “fraudulent or deceptive practice”, “adulteration of food” and “any other practice which may mislead the consumer”. In fact, along with food safety, the GFL prohibits food fraud and ensures the consumer’s right to correct information.

Moreover, as envisaged by art. 3 (1) FIC food information has to ensure a high level of protection of consumers’ health and it has to give them the possibility to make informed choices in relation to “health, economic, environmental, social and ethical considerations”. On the same vein, art. 7 FIC requires that food information has to be fair. This means that the information provided should not be misleading and it has to be “accurate, clear and easy to understand” (art. 13 FIC). Misleading information may be related for instance to the characteristics of the food, by attributing it characteristics that it does not possess or by suggesting the presence of an ingredient within that food when it is not so.

In Chapter 3, it is stated that the UCPD does not give a definition of misleading but explains when a practice has to be considered as such. In particular, protecting consumers against incorrect and unfair information ensures them the possibility to make rational choices. According to art. 6 of the UCPD a commercial practice is misleading if it contains false, untruthful or deceptive information regarding, inter alia, the nature of the product, its existence, its characteristics, the price and so on. It is also misleading if it causes the average consumer “to take a transactional decision that he would not have taken otherwise”. The protection against misleading practices within the UCPD deals also with misleading omission in case the practice “omits material information that the average consumer needs [...] and causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise”. It is the role of the national courts to assess the misleading character of commercial practices by taking into account the behaviour of the consumer benchmark.

7.2 Answer to the sub questions of the analytical phase

How is the UCPD implemented and what problems may arise from a possible different interpretation of the European legislation on unfair commercial practices in the MS?

Chapter 4 (Italy), 5 (the UK) and 6 (comparison) are dedicated to the analytical phase.

Chapter 3 explains that the UCPD harmonises the national legislation on unfair commercial practices, including unfair advertisings which harm the economic interests of consumers. One of the main problems due to the differences within national legislation on unfair commercial practices is the creation of obstacles to the functioning of the internal market. The divergences can create legal uncertainty, cross border problems and barriers that have a negative consequence on consumer’s protection.

The implementation of the UCPD within the Italian system was done by the LD 146/07 on unfair BTC commercial practices. On the same time the LD 145/07 on misleading advertising protecting businesses was approved. The old legislation regulating misleading advertising that harmed the consumers has been included within the framework of the unfair commercial practices legislation. The rules contained in the LD 146/2007 have been introduced into the ICC. Other legislations have been put in place for adjusting the system in conformity with the EU law.
Chapter 5 explains that in the UK there was a long discussion before the implementation of the UCPD. This lasted until 2008 when the CPUTR was transposed. The UK legislation reflects the UCPD. In 2014 another important piece of law for defending consumers against unfair practices was adopted. The government made the CPAR 2014. The latter attributes new rights to consumers that only apply if the trader has committed a misleading or aggressive practice under the CPUTR.

Chapter 6 compares, *inter alia*, the implementation and the interpretation of the UCPD among Italy and the UK. In particular it is stated that in general the UCPD has been transposed in those countries with similar terms but with different technical choices. There are not substantial differences with the UCPD regarding the implementation of the general clauses, the special clauses and the black list. The main difference is that the ICC emphasises more than the CPUTR the protection of children and young people.

During the research, the interpretation of the consumer benchmark has also been taken into account. In Italy, the image of the consumer that comes out when assessing unfair practices and misleading advertising is the one of a person that is not always considered to be an expert and well informed. Moreover, the vulnerable and target groups are protected even if differentiation among those groups cannot be easily detected. The UK legislation also protects consumers against unfair practices but there is recognition of limitations to consumer information. Therefore both in Italy and in the UK the protection appears to be higher than the traditional CJEU opinion of the average consumer. However, in the UK a less consideration of the vulnerable categories has been registered and there is not a special attention for protecting consumers that do not have knowledge of specific sectors, as in Italy. Thus, there are possibilities to interpret consumer benchmark differently due to the Recital 18 and the MS could use this recital to maintain a stricter level of protection. However, since the ultimate objective is the functioning of the market there should be more coherence within the EU.

**What obligations does national law on unfair commercial practices (in Italy and UK) impose on traders regarding unfair practices and misleading advertising? Are they consistent?**

The obligations that national laws impose on traders regarding unfair practices and misleading advertising are delineated in Chapter 4 and 5. Consequently, the evaluation of the consistency among them is evaluated in Chapter 6.

The duties of the trader in the pieces of national legislations that transposed the UCPD appear to be the same and consistent since the legislation was correctly implemented. This means that in both countries the obligations are to act in accordance with professional diligence and in a way that there is not a material distortion of the economic interest of consumers. Moreover, the trader has to omit any of the practice listed in the black list and in case of aggressive and misleading practices the traders have to be fair when giving information and not make use of “*harassment, coercion, physical force or undue influence*”.

The duties of the trader have been analysed also within the self regulation on misleading advertising. This was because if there would have been differences with the UCPD the realisation of the maximum harmonisation would have been hampered. However, also in this case the duties were consistent and consisted of a general prohibition of misleading the consumer and in both cases it is established that traders should treat consumers in an honest and fair way.

**How is the system of enforcement and compliance assurance organised in Italy and the UK? What are the differences between these countries?**
The enforcement system in Italy is done by the AGCM that is responsible, *inter alia*, for consumer policy. This is an independent and public body. The AGCM may act after the complaints of people involved or *ex officio*. The main powers are imposition of big sanctions, inspections, adoption of precautionary measures, acceptance of commitments, moral suasion procedure and publication of final decisions.

Regarding the UK, the TSS has the duty to enforce the legislation against unfair commercial practices and the CMA has the power to do so. The main enforcement powers include civil actions for an enforcement order, criminal proceedings and warrants to enter domestic premises.

For what concerns the private rights and the remedies of consumers against unfair commercial practices the ICC contains a possibility for consumer associations to ask for an injunction for the protection of consumers’ collective interest (art. 139 and 140) and an alternative remedy for individual consumers to protect their rights is possible in relation to unfair commercial or anticompetitive conducts through a class action. On the contrary, individual civil right to redress that consumers have against contracts deriving from unfair practices have to be found in civil law, through invalidity of the contract or responsibility of the trader (including damages).

In relation to the consumer rights and remedies in the UK, the CPAR 2014 gives possibilities to consumers to have remedies if the consumer is misled when entering into a contract or when making a payment. The consumers have rights to redress through the civil courts. The remedies available to consumers can be divided into Standard and Damages. In particular, the CPAR 2014 gives possibilities to the consumers have the rights to unwind a contract and to recover the full price or a percentage of the price paid for the good. Alternatively they can ask to cover damages for distress and inconvenience.

In Italy and the UK there are some similarities in the enforcement powers. However, there are also important differences among those countries. In Italy there is one enforcement body whereas in the UK more bodies are involved. Secondly, some enforcement powers are different. For example, within the UK system the enforcement body has also criminal powers. In addition UK enforcers, alongside with the prosecution powers have also the power to educate and advice traders. Moreover, the AGCM is obliged to investigate any complaints that it receives, unless it believes that there is no ground for proceeding. On the contrary enforcement authorities in the UK are not obliged to investigate administrative complaints, but they can choose to do so. In relation to the individual consumers rights the remedies in the UK system appear to be more standardised and the possibility to unwind the contract represents a good solution for protecting consumers.

**Which sanctions can be imposed if the law is violated? What are the differences between Italy and the UK?**

For what concerns the administrative pecuniary sanctions in Italy, the amount of the fine has increased over the course of the years. In general the pecuniary sanctions are very high. In case of non-compliance with the AGCM’s request for information, the AGCM can impose a sanction between euro 2.000 and euro 20.000.\(^{611}\) On the contrary, if the information or the documentation submitted is not true, the AGCM can impose a fine between euro 4.000 and euro 40.000.\(^{612}\) In case of non-compliance with the commitments undertaken, the AGCM may impose an administrative fine between euro 10.000,00 and euro 5.000.000.

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\(^{611}\) Art. 27 (4) ICC
\(^{612}\) Art. 27 (4) ICC
If there has been the violation of the legislation, the amount of the fine ranges from 5.000 euro to 5.000.000 euro depending on the seriousness and duration of the infringement. In case the practice harms the health or the safety of the consumer or if even indirectly may threaten the safety of children and teenagers, the sanction cannot be less than euro 50.000.

In the UK, the penalties consist of a fine of any amount (on summary conviction) and an unlimited fine or imprisonment not exceeding two years or both (on conviction on indictment).

Therefore, there are differences within the system of sanctions in the two countries. First of all, the possibility of imprisonment is not provided in Italy within the ICC. Secondly, in the UK the sum of the sanction is not defined. These differences can have as consequence that a trader would rather act unfairly in one country more than in another and this can lead to cross-border problems.

7.3 Answer to the main research question and suggestions

“The disparities in the implementation of the UCPD in the MS, specifically in Italy and in the UK, regarding the transformation of the rules into national law, the interpretation and the enforcement may create differences in consumer protection and lead to barriers in the internal market. Therefore it is questioned how the legislation on UCPD is implemented and interpreted in Italy and in the UK and how the compliance assurance and the system of sanctioning are organised. Are there any relevant differences that may obstruct the internal market and consumers’ protection? And if so, what are the possibilities to overcome them?”

This research has shown that the general clause, the black list and the special clauses have been correctly implemented. The duties of the trader in national legislation that have been transposed in the UCPD appear to be the same and consistent. This means that in general in both countries the obligations are to act in accordance with professional diligence and in a way that there is not a material distortion of the economic interest of consumers. However, some differences could be detected in relation to the European legislation and between Italy and UK. The main differences were related to problems of interpretation, in the compliance insurance and in relation to the penalties. The differences detected could lead to barriers into the internal market and divergences in consumer protection. On the contrary, if there is an integrated system of consumer protection the internal market is less blocked. Hence, what can be done to improve the system? In my opinion a universal solution is not easy to establish, since countries have too many differences in their legal frameworks. However several things can be suggested to improve what has been done so far and for solving the problems above detected. In the sections below several options are given for what concerns the problems related to the implementation and interpretation, then regarding the system of control and finally in relation to the sanctioning.

Implementation and Interpretation of the legislation

As illustrated above, the possibility to deviate from the rules established in the UCPD are limited, since there is a common target to achieve. However there are spaces left to the MS for interpretation of general clauses and consumers’ benchmark. In fact, the analysis has revealed that problems were detected for instance regarding interpretations and implementation of terms, the interpretations of general clauses and the interpretation of the average consumer. Regarding this latter aspect, the definition of an average consumer has been codified by the UCPD in order to give national authorities equal criteria and with a view of

613 Art. 27(9) ICC
614 Art. 27(9) ICC
reducing divergences in the assessment, as explained in the EC Guidance (2016). On top of that, Recital 18 established the possibility to make references to “social cultural and linguistic factors” when applying the average consumer concept. However, an extensive recognition of those differences can hamper the objectives of removing barriers to the internal market.

Thus, what are the options to reduce disparities in relation to the implementation and the interpretation of the legislation? First of all, a clarification of terms is desirable. The European legislator has provided a guidance document to clarify concepts and terms. However, this is not enough. In my opinion, a lot of terms can, if not clarified, still lead to divergences that can create barriers. Thus an additional Annex in the UCPD or additional definitions in article 2 should be added, starting from the notion of what is misleading and by taking into account the interpretation given by the CJEU. In this way there are more possibilities of common interpretation by different MS. Secondly, the EC enhanced a database on unfair commercial practices for a uniform application of the UCPD. This is important, *inter alia*, because it gives public access to national case law and literature. It is relevant for the comparison among decisions, legislations and literature of the MS. However, it is not updated. Therefore, it is not very useful. In order to improve this important system I would suggest updating it every year. Thirdly, in order to reduce problems when transposing a directive into national law, which inevitably leads to differences, it would be more effective to use regulations to replace directives. In fact, if the objective is to have a basic level of common rules on unfair commercial practices in the whole EU, the better legal instrument is a regulation that leaves less space to the legislator of the MS to adjust the national rules to its own purposes. They can take direct effect without transposition and therefore enhance European law in a better way. This regulation should be clearer than the existent directive, concerning definition of concepts, scope, controls and sanctions. In this way the ambiguities are reduced and the objectives of the UCPS are realised. Fourthly, for what concerns the interpretation of the average consumer, the CJEU should strive to interpret the average consumer in a more realistic way, by taking into account the facts and the way the consumer acts. Consumers have a different way of reasoning due to their education, background and so on. Therefore it is not always easy to predict their behaviour. At the same time the possibility to refer to social, cultural and linguistic factors should be always considered in the view of the achievement of the internal market. Thus it could be useful to create surveys or consumer pools in each country in relation to typical situations, in order to understand the average way of thinking. In this way, more uniformity in protecting the average consumer could be expected and this ensures that the internal market is not blocked.

In my opinion all these options are valid and the applications of those can improve the system. The easiest option is the clarification of concepts in article 2 or in the Annex. A long-term solution is provided by using regulations as secondary regulation instead of directives. In this way the basic level of common rules and protection is guaranteed.

*Enforcement-Compliance assurance*

The other differences have been detected in the compliance assurance. In fact, the UCPD has not harmonised the national enforcement systems. The differences among countries have firstly led to cross border problems for reasons of language or for the different procedures. In this sense, the regulation 2006/2004 obliges MS to set up administrative authorities to enforce consumer laws cross-border. However, there have been still shortcomings for instance because infringements occurring simultaneously in several MS could not be fully addressed under the regulation or other problems were due to a lack of communication among authorities.

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615 EC Guidance (2016), p.42
and commission or the process of coordination and communication among authorities appears to be time-consuming.\footnote{On the same vein Reg. Rome II states that if there are problems of unfair practices among countries at international level, it will prevail the legislation of the country where the interests of consumers are affected (art. 6). Nevertheless, if there are multiple infringements in different countries it is not easy to detect the applicable law. Thus, even if the UCPD is harmonised questions remains in terms of legal certainty in ensuring the same level of consumer protection among countries.}

Therefore it is still necessary to create a modern and effective system to reduce those problems and disparities and guaranteeing that enforcement authorities achieve similar results in the same situations. Hence which options can be given to make the system of controls more uniform? First of all, there should be a new regulation which increments basic common rules on the procedures to follow by the enforcement authorities and basic common ideas on their powers.\footnote{The EC has also the opinion of having a new legislation. In this sense see: COM(2016) 283 final} Certainly, this should be done in accordance with the principles of subsidiarity and proportionality. This means that the regulation should not impact the competences of the national authorities but it should give more detailed rules on the basic powers that they should have and on the basic step of the procedures to follow.

Secondly, in order to improve cross-border purchases and information exchange among MS a new tool that enables the demolition of language barriers, for instance by putting as mandatory one common language for the dialogue, should be inserted. The choice of partners in the enforcement bodies that have no problems with languages will surely facilitate the cooperation and reduce the differences. The tool should improve the communication among bodies in different MS.

\textbf{Enforcement-Sanctioning}

As to the sanctioning the analysis has shown that differences do exist between Italy and the UK. Also this aspect can have a negative impact on the functioning of the internal market. The lack of specification of civil, administrative, and criminal sanctions as a consequence of misleading, aggressive or black-listed practices creates problems in achieving the wanted harmonisation.

What can therefore be done to solve this? The European legislator could create a guideline for the sanctions in case of unfair commercial practices. This guideline should not establish prefixed sanctions but providing detailed directions for the authorities in order to impose sanctions in a consistent way overall the EU. For instance, the guideline could contain some typical unfair practices (such as the ones that make use of harassment) and basic range of sanctions available by the enforcement authorities. In this way more coherence is ensured.

The suggestions given above are summarised in the table below.
### Table 7 Suggestions for improvement

<table>
<thead>
<tr>
<th>Suggestions for improvements</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rules implementation and interpretation</strong></td>
<td>• Clarification of concepts in the existent legislation through art. 2 or new Annex</td>
</tr>
<tr>
<td></td>
<td>• Revision and actualisation of the existent database</td>
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<td></td>
<td>• Substitution of Directives with Regulations</td>
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<tr>
<td></td>
<td>• Guideline on the interpretation of the average consumers based on consumers pools done in each MS to understand the average way of acting of consumers in determined situations</td>
</tr>
<tr>
<td><strong>Checking and procedures</strong></td>
<td>• Basic common rules on the powers of enforcement authorities</td>
</tr>
<tr>
<td></td>
<td>• Tool for a demolition of language barriers</td>
</tr>
<tr>
<td><strong>Sanctions and fines</strong></td>
<td>• Guidelines on sanctions</td>
</tr>
</tbody>
</table>

### 7.4 Limitation of the research

The present research has some limitations mainly due to a limited time. Firstly, it takes into account just two countries and therefore, more or less differences could be detected and other solutions could have been given. Secondly, some aspects have not been taken into account, such as the norms of minimum harmonisation contained in the UCPD which could have an important impact on the analysis. Thirdly, the research has not taken into account the situation after Brexit in the UK, since the thesis was an evaluation of the current application of the UCPD. So the Brexit was not relevant. Whether EU law will be applicable after Brexit depends on the UK legislation. Finally, the self-regulation has been analysed only in relation to misleading advertising and it can be possible that by analysing it in other sectors there could be less coherence with the UCPD.
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ANNEX I- Research Framework

**Literature Study**
- European policy and legislation protecting the consumer rights and the internal market
- UCPD and the maximum harmonisation principle
- Fairness of information and misleading advertising
- Italian and UK legislation on unfair commercial practices

**Gathering information**
- Comparison between Italy and UK on the implementation and interpretation of the UCPD
- Comparison between Italy and UK on the duties of the traders and consumer rights in commercial practices and misleading advertising

**Harvesting**
- Results, conclusion and recommendation

**Comparison between Italy and UK on compliance assurance, self regulatory system and penalties**