

Cristina Amato

*The Influence of the CJEU's opinions on the Italian Courts
in the Application of the Unfair Commercial Practices Directive*

SUMMARY: Introduction – 2. A Short Acknowledgement of Directive 2005/29/EC and its Implementation into the Italian Consumer Code – 3. Before the CJEU: When a Commercial Practice (or Omission) can be Classified as “Misleading” according to Italian courts – 4. The Experts’ Advice: the Italian Courts Ignore the CJEU’s Opinion – 5. Beyond the CJEU: the Notion of the Average Consumer in the Italian Courts – 6. Pas de deux with the CJEU: the Professional Diligence as a Theoretical Safety Net – 7. Final Remarks.

1. *Introduction*

The dialogue between the Court of Justice of the European Union (“CJEU”) and the national courts represents a crucial matter. The goal of harmonisation pursued by European law is usually balanced with the freedom allowed to national variations (even in the case of Directives adopting a maximum harmonization approach), through the wise interventions of the CJEU interpreting the norms and the national Courts applying them¹. This article aims at highlighting the state and quality of the dialogue between the CJEU and the Italian courts in the restricted domain of the interpretation and application of Directive 2005/29/EC, known as Unfair Commercial Practices Directive (“UCPD”) concerning unfair business-to-consumer commercial practices. After briefly illustrating the implementation of the UCPD into the Italian legal system (1.), the paper shall focus on how Italian judges have anticipated the CJEU directions (2.), or ignored them (3.), or how they have, at times, gone beyond the CJEU’s opinions (4.), or acted according to them (5.). Finally, some conclusions are proposed at para. 6.

¹ The CJEU has clearly drawn the landmark between its interpretive role and the application powers vested on national courts (‘top-down approach’): CJEU Case C-92/11, *RWE Vertrieb AG tegen Verbraucherzentrale Nordrhein-Westfalen eV*, 21 March 2013, ECLI:EU:C:2013:180, para. 48.

2. *A Short Acknowledgement of Directive 2005/29/EC and its Implementation into the Italian Consumer Code*

The UCPD «addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products» (recital 7). Indirectly, it also «protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it» (recital 8). To achieve both goals, the UCPD prohibits unfair commercial practices according to a threefold normative structure² consisting of: a general clause describing the unfairness of a practice, set out in article 5(2); two specific sets of provisions set out in articles 6, 7 (misleading practices and omissions) and 8, 9 (aggressive practices); a blacklist of both misleading and aggressive commercial practices, set out in the Annex, whose role is clear in the light of recital 17: escaping from a case-by-case assessment in order to promote legal certainty. The general clause assessing the unfairness of a commercial practice is, in turn, a two-tier test: the first part refers to a normative notion («A commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence»). The second seems to seek a link with extra-normative criteria, such as economic behavioural studies, psychology and neuroscience («A commercial practice shall be unfair if: (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 a nutshell, the unfairness of a commercial practice can be assessed only when the two cumulative criteria of diligence and distortion of the consumer's economic behaviour have been infringed by the professional³. Therefore, the standard of diligence, though infringed by a professional, cannot be regarded as unfair if it does not materially alter the self-determination of

² C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, 14 January 2010, ECLI:EU:C:2010:12, at para. 7; Case C-428/11 *Purely Creative Ltd et altri v Office of Fair Trading*, 18 October 2012, ECLI:EU:C:2012:651, at para. 6. Cf. J. STUYCK, E. TERRY, T. VAN DYCK, *Confidence Through Fairness? The New Directive on Unfair Business to Consumers Commercial Practices in the Internal Market*, in *Common Market Law Review*, 2006, 43, p. 124 ff.

³ This is an open-textured definition that borrows insights from the notion of 'influence' on behaviour adopted by psychologists: A. L. SIBONY, *Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive*, in *European Review of Private Law*, 6/2014, p. 922 ff.

the average consumer⁴. This is because the goal of the discipline concerning unfair commercial practices is neither to strangle marketing techniques based on consumers' behaviour, nor to recognize absolute contractual self-determination to consumers. Such a discipline aims at re-establishing a balance between the contractual powers of the two parties, thus avoiding the professionals' abuse of their own contractual strength.

In its essence, the UCPD has adopted a flipped perspective on consumer protection and the enhancement of competition law. In the "vertical" *acquis* the European legislator has so far developed level playing field techniques that address consumers, increasing their responsibility in processing information and internalizing mandated or voluntary disclosures when taking purchase decisions. Other different techniques are filling gaps represented by information asymmetries, or empowering consumers as the weaker party through the right of withdrawal or form prescriptions. On the contrary, the UCPD addresses traders through a policy that promotes fair professional diligence, by prohibiting misleading or aggressive practices that materially distort consumers' economic decisions and behaviour.

The UCPD has been implemented by the Italian legislature through two different statutory instruments (*Legislative Decrees* [*"decreti legislativi -D.Lgs."*]), Legislative Decrees 2 August 2007, nos. 145 and 146.

D.Lgs. 2 August 2007, no. 145 has implemented the discipline concerning misleading and comparative advertising, after Art. 14 Directive 2005/29 (which modifies Directive 84/450/EEC on misleading and comparative advertising) and in compliance with Directive 2006/114⁵. D.Lgs. 2 August 2007, no. 146 has implemented the discipline concerning misleading and aggressive commercial practices. In other words, the Italian legislature has formally and substantially separated the discipline of unfair advertising addressing B2B relationships, from that of unfair commercial practices concerning B2C transactions. The latter set of rules has now been incorporated in Articles from 18 through 27-*quater* of the Italian consumer code ("It. Cons. Code", D.Lgs. 06.09.2005, n. 206). Specifically, the title adopted

⁴ Case C-281/12 *Trento Sviluppo s.r.l., Centrale Adriatica Soc. coop. Arl v Autorità Garante della Concorrenza e del Mercato*, 19 December 2013 ECLI:EU:C:2013:859, at paras 30, 32-33. See also: Case C-453/10 *Pereničová and Perenič*, 15 March 2012 ECLI:EU:C:2012:144, at para. 47; Case C-435/11, *CHS Tour Services GmbH v Team4 Travel GmbH*, 19 September 2013, ECLI:EU:C:2013:574, at para. 42.

⁵ On the special discipline of misleading and comparative advertising, see in Italian literature: G. VETTORI, *La disciplina della pubblicità ingannevole e comparativa d.lgs. 2 August 2007, n. 145*, in Id. (ed.), *Il contratto dei consumatori, dei turisti, dei clienti, degli investitori e delle imprese deboli. Oltre il consumatore*, vol. II, CEDAM, Padova, 2013, p. 1845 ff.

by the Italian legislature for the new consumer discipline contained in the UCPD is «*unjust* commercial practices», instead of «*unfair* commercial practices»⁶. The latter expression refers to B2B practices within the multilevel discipline of unfair competition law. Opting for the synonym «unjust» was an Italian linguistic choice, determined by the opportunity to distinguish the two different sets of rules. *Unfair* commercial practices concerning B2B relations are in fact governed by a different set of rules, found both within the Civil Code as a special tort (under Articles 2595–2601 of the civil code - It. Civ. Code); and within the tangled discipline of unfair competition law, as set out in Articles 101 and 102 TFEU and in the Italian Law 10.10.1990, no. 287. On the other hand, the new discipline of ‘unjust’ commercial practices as set out in UCPD and addressing B2C contracts has been coherently introduced into the It. Cons. Code, and it does not overlap with unfair commercial practices in the meaning adopted in the It. Civ. Code and in the TFEU under the discipline of competition law. The complementarity of the two sets of rules is shown by the fact that the same administrative, independent regulatory authority mentioned below is in charge not only of the enforcement of the UCP but also of controlling and sanctioning unfair competition practices and agreements. The powers of the *Autorità Garante della Concorrenza e del Mercato* (“AGCM”) consist in inhibitory provisions along with powers to conduct inquiries and to impose penalties traders in order to promote their compliance with the regulations on unfair commercial practices, as provided by Articles 27 and 27-*quater* It. Cons. Code. The AGCM’s decisions can be overturned by the administrative courts, that is the tribunal of the region of Lazio⁷, and ultimately by the Consiglio di Stato⁸. The present paper mainly refers to the AGCM’s rulings in the next paragraphs.

To complete the Italian scenario on the implementation of the UCPD, it is important to remember that Articles 57 and 67-*quinquiesdecies* of the It. Cons. Code implement, respectively, Article 9 of the UCPD (inertia selling of goods and non-financial services) and Art. 9 of Directive 2002/65/EC

⁶ Although the Italian legislature uses the two different expression as explained in the text, from now on the English expression «unfair commercial practices» shall be preferred in this paper, because it is the official expression adopted by the European legislation.

⁷ The T.A.R. Lazio competence is due to the fact that the AGCM is located in Rome, in the region of Lazio.

⁸ Other administrative, independent authorities are involved in the proceedings concerning the assessment of the unfairness of commercial practices, like the Italian Communications Regulatory Authority (AGCOM). As concerns the relationship and distribution of competences and powers among them see: C. AMATO, G. COMANDÉ, *Unfair Commercial Practices: The Italian Implementation*, in press.

(inertia selling of financial services), as amended by Art. 15 of the UCPD. As regards the scope, the original implementation of the UCPD has been subsequently modified by two main legislative interventions. The first is a statutory instrument (D.Lgs. 23 October 2007, no. 221), that introduced the right to lawful commercial practices among the fundamental consumer rights listed at It. Cons. Code Art. 2, para. 2, letter *c-bis*. The second is Article 7, para. 1, Decree Law 24 January 2012, no. 1, that has broadened the traditional definition of consumer, as restated in the UCPD at Article 2 (a), that is «*natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*». Article 18 It. Cons. Code, letter *d-bis* has in fact extended to Small and Medium Enterprises (so-called “micro-imprese”, SMEs) the scope of the discipline concerning misleading and aggressive commercial practices. Whereas small enterprises are – according to the above-quoted provision: «any partnership, company or association running an economic activity through whatsoever legal form, as individual or family enterprise, having less than 10 employees and an annual gross turnover (or an annual balance sheet) not exceeding €2,000,000»⁹. On the other hand, according to Article 19, para. 1, It. Cons. Code¹⁰ for any controversy concerning misleading and comparative advertising, SMEs would be exclusively subject to the special discipline as provided in D.Lgs. no. 145/2007.

It is worth underlying that in the Italian implementation of the UCPD the areas covered by the discipline of unfair commercial practices include after-sale services¹¹ (within this category, debt collection conducted through personal visits outside the consumers’ premises is also submitted to the AGCM’s jurisdiction¹²), unfair practices concerning immovable-related and financial contracts. The areas not covered by the unfair practice discipline include cases where traders would buy products from consumers. Nevertheless, in certain markets sectors it is not uncommon that consumers

⁹ This statutory national definition complies with the Commission Recommendation of 6 May 2003, no. 361, Annex, Article 2 para. 2: S. ORLANDO, *L'estensione della disciplina delle pratiche commerciali scorrette tra professionisti e “microimprese”*, in G. Vettori (ed.), *Il contratto dei consumatori, dei turisti, dei clienti, degli investitori e delle imprese deboli. Oltre il consumatore*, vol. I, cit., 2013, p. 181 ff.

¹⁰ As modified by Law 24 March 2012, no. 27.

¹¹ AGCM, PS1268, Judgment no. 20266, 3 September 2009; PS1700 Judgment no. 20349, 1 October 2009. In these cases, mobile phone operators (Tele2, Telecom) were fined because their after-sale systems did not provide consumers with easy measures apt to facilitate the migration from one operator to another.

¹² AGCM, PS9042, Judgment no. 24763, 22 January 2014: a tax agency was fined for the misleading and aggressive threatening of the enforcement of payments of debts.

exchange second-hand products or spare parts of a product with a trader, and purchase from the latter a different good. This is the case especially in the market of motor vehicles, bikes and cars. In such circumstances, the UCPD shall apply¹³.

In compliance with the UCPD (Recitals 7, 9) and the CJEU interpretation, health, safety protection, commercial communication aimed at investors, taste and decency are also excluded¹⁴. This is the same as regards measures protecting exclusively competitors' interests (Recital 6)¹⁵, thus confirming the European policy of drawing a line between unfair commercial practices and unfair competition.

3. Before the CJEU: When a Commercial Practice (or Omission) can be Classified as 'Misleading' according to Italian courts

Article 6(1) UCPD (Misleading Actions, corresponding to Art. 21, para. 1, It. Cons. Code) reads: «A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, *deceives or is likely to deceive the average consumer, even if the information is factually correct*, in relation to one or more of the following elements, and in either case *causes or is likely to cause him to take a transactional decision that he would not have taken otherwise*».

The Italian enforcement authorities have ruled on a significant amount of cases on the grounds of misleading practices and misleading omissions¹⁶,

¹³ See Guidance on the Implementation/Application of Directive 2005/29/EC on unfair commercial practices, Commission Staff Working Document, Brussels, 25 May 2016 SWD (2016) 163 final, at 1.1.2., 8.

¹⁴ Case C-559/11, *Pelckmans Turnhout NV*, 4 October 2012, ECLI:EU:C:2014:304; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH*, 9 November 2010 ECLI:EU:C:2010:12.

¹⁵ C-304/08, *Plus Warenhandelsgesellschaft* 14 January 2010 ECLI:EU:C:2010:12: according to the Court, the UCPD must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a prohibition in principle, without taking account of the specific circumstances of individual cases, of commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services; Case C-343/12, *Euronics*, para. 31, Order of 7 March 2013 (same dictum); Case C-288/10 (*Wamo*), para. 40, Order of 30 June 2011; Case C-126/11 (*Inno*), Order of 15 December 2011, para. 29.

¹⁶ In particular, during the years 2009-2014 summing up misleading actions and misleading omissions concerning prices (let. c) arts. 6 and 7 UCPD), the total number of Italian cases amounts to 214 cases during the period indicated in text. These numbers are pro-

especially concerning price, as one of the most relevant elements art. 6(1) refers to: see let. d) art. 6(1), let. c), art. 7(1)¹⁷, and the “black list”, Annex I n. 5¹⁸. It is important to underline that such decisions determine the consumer’s transactional distorted economical behaviours, involving pre- and post- purchase choices, and they may neither have a direct impact on consumers’ legal rights, nor involve legal issues. To enter into a shop, to click on a website, to withdraw from a contract or to terminate it, to switch/not to switch to a different service provider: the genesis of such choices – and their proximity to the unfair commercial practice – belongs to the sphere of neuroscience, or behavioural economic studies,¹⁹ or better to experimental social psychology on influencing techniques²⁰. This is why we may define

vided by a UCP Database jointly created and run by the Liderlab, within the “S.S.S.U.P. S. ANNA” (Pisa), and the University of Brescia. It contains the decisions of the Italian (administrative and judiciary) Authorities: these data are freely available, without third party rights infringement. The UCP database stocks 849 cases, corresponding to all the case law available on official databases of the Italian jurisdictions involved (AGCM, T.A.R., Consiglio di Stato), over the years 2009–2014.

¹⁷ Among the elements listed in Art 6(1), information on prices are one of the most relevant: «the price or the manner in which the price is calculated, or the existence of a specific price advantage» (Article 6, letter (d)); «In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context: c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable».

¹⁸ Annex I, no. 5: «Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising)».

¹⁹ See in particular: D. KAHNEMAN, A. TVERSKY, *Prospect Theory: An Analysis of Decision under Risk*, in *Econometrica*, 47, 1979, pp. 263–291; C.R. Sunstein (ed.), *Behavioural Law and Economics*, Cambridge, Cambridge University Press 2000 (Cambridge Series on Judgment and Decision Making); R. THALER, C. SUNSTEIN, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, London, 2008; R.B. KOROBKIN, T.S. ULEN, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in *California Law Review*, 88, 2008, p. 1051 ff.

²⁰ The connection to economic behaviour refers to the notion of ‘sub-conscious influence’ analysed by specific branches of psychology (J. FREEDMAN, S. FRASER, *Compliance without Pressure: The Foot-in-the-Door Technique*, in *J Pers. Society of Psychology*, 1966, pp. 195–202; R. CIALDINI, *Influence: The Psychology of Persuasion*, New York, 2007) and neuromarketing (P. RENVOISÉ, C. MORIN, *Neuromarketing: Understanding the ‘buy button’ in Your Consumer’s*

as extra-normative the process leading to a transactional decision, described by the legislature with the expression «is likely to». At a first stage, the law requires to detect commercial negligent behaviours, or to encourage virtuous conducts: the normative concept of professional diligence serves this need. At a second stage, the law explores the effects that an unfair practice may have on the average consumers' transactional decisions. The scientific and extra-normative notion of economic behaviour serves the latter need. This is why article 5(2) UCPD requires national enforcement authorities to assess both *in concreto* the facts and circumstances of each single case, and *in abstracto* the impact of certain practices on the transactional decision of the average consumer («a commercial practice shall be unfair if [...] it materially distorts or is likely to materially distort the economic behaviour [...] of the average consumer whom it reaches»)²¹. Coherently, article 6(1) UCPD proposes two steps of the decision-making process which both belong to the scientific/psychological aspect of commercial behaviour: the formation of a deceived consent, leading to a distorted transactional decision.

This is the implied reasoning adopted by the AGCM in the cases concerning misleading practice/omissions related to prices. Hence, the Italian enforcement authority has preferred the assessment *in abstracto* of the impact of misleading practices and omissions. Therefore, the judicial syllogism usually adopted in these cases by the AGCM reads as follows: a deceptive practice/omission distorts, or is likely to distort, the commercial behaviour by inducing consumers to take a transactional decision that they would not have taken otherwise; therefore, such a commercial practice is contrary to professional diligence. This reasoning firstly implicitly admits a broad scope of the concept of «transactional decision» for the purposes of Article 2(k) of Directive 2005/29 (that includes consumers' pre- and post-purchase extra-normative choices) and secondly, a cumulative interaction between false information or consumer's deception and the transactional decision that the consumer would not have taken otherwise. This argument was eventually adopted by the AGCM in a famous case²², appealed to the supreme administrative jurisdictional court, Consiglio di Stato, which decided to stay proceedings and to refer to the CJEU for a preliminary

Brain, Thomas Nelson, Nashville, 2007). On the relevance of social psychology on EU law and UDCP over behavioural economics, see A.L. SIBONY, *Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive*, cit., p. 917.

²¹ Guidance on the Implementation/Application of Directive 2005/29/EC on unfair commercial practices, Commission Staff Working Document, Brussels, 25.5.2016 SWD (2016) 163 final at 2.4, 40.

²² AGCM 29.01.2009, PS 1434, *Provvedimento* n. 19447.

ruling²³. The answer provided by the CJEU²⁴ in *Trento Sviluppo s.r.l., Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato* clearly abides by the interpretation originally adopted by the AGCM in the Italian case (and restated in cases subsequently ruled by the same Authority), also confirmed by the Italian administrative court (T.A.R.) in the case at issue. According to the European judges, «in order to achieve a high level of consumer protection, Directive 2005/29/EC establishes a general prohibition of unfair commercial practices that distort consumers' economic behaviour. Consequently, for a commercial practice to be classified as “misleading” for the purposes of Article 6(1) of Directive 2005/29/EC, the same must *inter alia*, be likely to cause the consumer to take a transactional decision that he would not have taken otherwise» (paras. 32, 33). In addition, the reasoning of the CJEU is completed by the meaning of «transactional decision» (as defined by art. 2, let. K Directive

²³ The question referred to the CJEU by the Italian Consiglio di Stato was: «Is Article 6(1) of Directive 2005/29/EC, as regards the part in which the Italian-language version uses the words “*e in ogni caso*”, to be understood as meaning that, in order for the existence of a misleading commercial practice to be established, it is sufficient if even only one of the elements referred to in the first part of that paragraph is present, or that, in order for the existence of such a commercial practice to be established, it is also necessary for the additional element to be present, that is to say, the commercial practice must be likely to interfere with a transactional decision adopted by a consumer?».

²⁴ Case C-281/12, 19 December 2013 (cit. fn 4). The case involved a special promotion, launched in March 2008 by *Centrale Adriatica* in a number of COOP Italia brand outlets, as part of which a number of products, among which laptops, were put on offer at attractive prices (the advertising leaflet indicated «Reductions of up to 50% and many other special offers»). A consumer complained to the AGCM that the commercial announcement was in his view inaccurate because, when he went to the supermarket in Trento during the validity period of the promotion, the IT product in question was not available, notwithstanding the ongoing promotion. Following that complaint, the AGCM initiated proceedings against Trento Sviluppo and Centrale Adriatica for unfair commercial practices within the meaning of Articles 20, 21 and 23 of Legislative Decree No 206 of 6 September 2005 on the Consumer Code. Those proceedings culminated in the adoption, on 22 January 2009, of a decision imposing a fine on both Centrale Adriatica and Trento Sviluppo on the ground that: «Avuto riguardo agli aspetti essenziali e/o alle informazioni relative ai prodotti offerti dal professionista, il caso in esame appare, pertanto, costituire un'ipotesi di pratica commerciale scorretta[...] nella misura in cui è contraria alla diligenza professionale ed è falsa o idonea a falsare in misura apprezzabile il comportamento economico, in relazione al prodotto, del consumatore medio che essa raggiunge o al quale è diretta ...». This ruling implies that the latter condition (diverting the consumer's transactional decision) is *additional* to the two alternative conditions laid down in the first part of the introductory section – that the information presented must be false or must be likely to deceive the consumer. Both companies contested that decision before the Lazio Regional Administrative Court (“T.A.R.”), which in turn dismissed both actions.

2005/29), interpreted in a broad sense so as to include «not only the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop». That is, as in the Italian AGCM rulings, an important role is recognised to extra-normative factors, whose meaning and scope must be explored also in the light of social behaviours.

4. *The Experts' Advice: the Italian Courts Ignore the CJEU's Opinion*

As illustrated above, Article 5(2) UCPD requires national enforcement authorities to assess both the facts and circumstances of each single case *in concreto*, and the impact of certain practices/omissions on the transactional decision of the average consumer, *in abstracto*. More in detail: the UCPD provisions concerning the consumer's economic behaviour always refer to both normative definitions («deceives»/«distorts»/«impairs», or «causes»), useful to value facts and circumstances, and extra-normative definitions («is likely to» or «is likely to cause»)²⁵, necessary to weigh extra-normative circumstances, that is behaviours and choices whose *rationale* can be explained by resorting to experimental sciences. In the last instance, the best way to assess these extra-normative circumstances is for a court to relate to the opinion of an expert in social, economic or psychologic behaviours. This is a very modern approach adopted by the European legislator, endorsed by the CJEU in two famous cases. In the first one, *Gut Springheide GmbH v Oberkreisdirektor des Kreises Steinfurt*²⁶, the German Federal Administrative

²⁵ Thus: Article 5(2)(b), provides that a practice is unfair if «it materially *distorts or is likely to* materially distort the economic behaviour with regard to the product of the average consumer whom it reaches»; article 6(1) (echoed by article 7(1) on misleading omissions), provides that «a commercial practice shall be regarded as misleading if it [...] *deceives or is likely to deceive* the average consumer [...], and in either case *causes or is likely to cause* him to take a transactional decision that he would not have taken otherwise»; Article 8 provides that «a commercial practice shall be regarded as aggressive if, in its *factual context*, taking account of all its features and circumstances, [...] 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».

²⁶ CJEU, C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paras. 31, 35, 36 and 37: the case concerned the description «six-grain — 10 fresh eggs»: the German administrative Court of appeal ruled that the package labels were likely to mislead a significant proportion of consumers in that they implied falsely that the feed given to the hens is made up exclusively of the six cereals indicated, and that the eggs have particular

Court asked the CJEU which is the proper test to apply in order to assess whether statements designed to promote sales are likely to mislead the purchaser: the view of the informed average consumer, or that of the casual consumer. Although the Court confirmed a well-established law²⁷, according to which the Court took into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect, it also stated that «[...] However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment».

In the second case, *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*²⁸, the CJEU again dealt with the notion of the «average consumer», that is: whether in a certain State a consumer ought not to expect a cosmetic cream whose name incorporates the term «lifting» to produce lasting effects. According to the Court: «it is for the national court — *which may consider it necessary to commission an expert opinion or a survey of public opinion in order to clarify whether or not a promotional description or statement is misleading* — to determine, in the light of its own national law, the percentage of consumers misled by that description or statement which would appear to it sufficiently significant to justify prohibiting its use».

As regards the Italian enforcement authorities, I have already suggested that, as a general trend, they prefer the assessment *in abstracto* of the impact of certain practices, insisting on the distortion of the consumer's behaviour and his transactional decisions neither caused by factual circumstances,

characteristics.

²⁷ Case C-362/88 *GB-INNO-BM* [1990] ECR I-667; Case C-238/89 *Pall* [1990] ECR I-4827; Case C-126/91 *Yves Rocher* [1993] ECR I-2361; Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317; Case C-456/93 *Langguth* [1995] ECR I-1737. In particular, in Case C-470/93 *Mars* [1995] ECR I-1923 and Case C-373/90 *X* [1992] ECR I-131, paras 15 and 16, the Court held, *inter alia*, that it was for the national court to ascertain the circumstances of the particular case.

²⁸ CJEU Case C-220/98: *Estée Lauder Cosmetics GmbH & Co.* ECLI:EU:C:2000:8. This case concerned misleading advertising and the interpretation of articles 1 and 2(2) of Directive 84/450/EEC. In the proceedings against the Lancaster group, Esté Lauder argued that the term «lifting» used as a name of a cosmetic product is misleading «because it gives purchasers the impression that use of the product will obtain results which, above all in terms of their lasting effects, are identical or comparable to surgical lifting, whereas this is not the case so far as the cream in point is concerned». Therefore, according to Esté Lauder, the product could neither be imported nor marketed in France.

nor involving legal issues. Hereinafter I will give evidence of this statement by quoting some data on the AGCM's judgements delivered according to specific provisions of the UCPD between 2009 and 2014, selected by the UCP database (cf fn 16).

A first set of cases (193) concerns transactional decisions involving article 6(1)(d) on misleading actions and article 7(4)(c) on misleading omissions in relation to the price, or the manner in which the price is calculated (corresponding respectively to article 21, para. 1, letter d), and article 22, para. 4, letter c) It. Cons. Code). 177 out of 193 cases were ruled based on extra-normative criteria, (probably) based on social influence²⁹.

A second set of cases refers to Article 6(1)(f) UCPD, (corresponding to Article 21 para. 1, letter f, It. Cons. Code), regarding a misleading commercial practice that contains false information, and is untruthful in relation to «the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions». With reference to the above-mentioned provision, the UCP database has sorted out 30 cases³⁰. Out of these 30 cases, extra-normative criteria only (*is likely to deceive the average consumer, even if the information is factually correct; is likely to cause him to take a transactional decision that he would not have taken otherwise*) are expressly quoted in the judgments. These data confirm that the assessment *in abstracto* has prevailed in the courts' judgments, although no expert's opinion had been sollecited by the Italian regulatory authority.

A third set of cases refers to Art. 7(2) UCPD (corresponding to Art. 22,

²⁹ In particular, the text refers to the six «channels of influence» classified by: R. CIALDINI, *Influence: The Psychology of Persuasion*, Harper Collins, New York 2007. Among them, *commitment* is the most important: it has nothing to do with the legal notion of agreement; it rather describes the link between one first action we decide to take and our natural drive to consistency. This 'channel of influence' explains why once we take an action we tend to prefer subsequent acts coherent with the first action. This tendency can be easily reinforced by marketing experts through simple strategies, like filling a form, or giving consumers the impression of freedom of choice: N. GUÉGUEN, A. PASCUAL, *Evocation of Freedom and Compliance: The "But You Are Free of..." Technique*, in *Current Research in Social Psychology*, 5, 2000, pp. 56–59; ID., *La technique du 'vous êtes libre de ...': induction d'un sentiment de liberté et soumission à une requête ou le paradoxe d'une liberté manipulatrice*, in *Revue Internationale de Psychologie Sociale*, 15, 2002, pp. 51–80; ID., *Improving the Response Rate to a Street Survey: An Evaluation of the "But You Are Free to Accept or to Refuse" Technique*, in *The Psychological Record*, 55, 2005, pp. 297–303.

³⁰ For all of the 30 cases, courts would also include in their argument the infringement of Article 7(1) UCPD (corresponding to Art. 22, para. 1, It. Cons. Code), thus equalizing a (misleading) practice to a (misleading) omission in the cases at stake.

para. 2, It. Cons. Code), a provision concerning of misleading omission referred to the traders' activities: «It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph». The UCP database has sorted out 35 cases. Among them, once again the *minority* refer to the normative criteria (9 cases), while the *majority* (26 cases) refer to extra-normative criteria, though the judgement was not submitted to expert's opinion, nor based on experimental studies.

Lastly, the same observations can be made with reference to aggressive commercial practices (Articles 8 and 9 UCPD, corresponding to Articles 24 and 25 It. Cons. Code). The UCP database has selected 70 cases. Out of 70 cases, only 5 of them refer to a normative criterion («*it causes*»), while the remaining 65 are based on an extra-normative criterion («*are likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*»).

None of the above-mentioned judgements were submitted to an expert's opinion or based on experimental studies. In the end, they are based on the following legal syllogism: a deceptive practice is likely to distort the commercial behaviour by inducing consumers into errors, or by preventing them from making a free and efficient choice; therefore, it is contrary to professional diligence. The weakness of this syllogism lies in its major premise: the qualification of a practice as deceptive, without recourse to an expert's report on behavioral economics or neuroscience³¹. My argument is that inferring professional negligence from the qualification of a practice as deceptive may be tautological, or it may eventually frustrate the normative *rationale*, unless judges take into account the non-legal definition of distortion, by referring to consumer's research polls or to the expert's opinion, as the CJEU has tried to foster.

5. *Beyond the CJEU: the Notion of the Average Consumer in the Italian Courts*

In the UCPD, the standard of diligence is tailored not only to the economic behavioural standard, but also to the “average consumer”.

³¹ On the importance of the expert opinions on behavioral economics and neuroscience, see: J. TRZASKOWSKI, *Behavioral Economics, Neuroscience, and the Unfair Commercial Practices Directive*, in *Journal of Consumer Policy*, 2011, p. 384.

As defined by the European legislature³² and the CJEU³³, the average consumer's definition is not based on a statistic standard but on a qualitative standard that does not take into consideration the weak and vulnerable consumer, but the educated and diligent one (in this sense, see also recital 18 UCPD). Moreover, according to the CJEU, a commercial practice may be misleading in one country but not in another, owing to social, cultural or linguistic factors³⁴. Although in the UCP database 556 judgements (out of 849) explicitly mention the "average consumer", Italian case law does not deal with the definition in the ground of the decisions. This notion has been interpreted by the Italian administrative authority³⁵ as referred to the average (Italian) consumer within a defined commercial context, since the information asymmetry is so deep that it would be impossible for the "average" consumer to bridge it. Therefore, in specific commercial contexts, the consumer cannot be classified as "average", but as "vulnerable"³⁶. Summing up: according to the Italian regulatory and administrative

³² Art. 2 (1)(b) UCPD.

³³ Case C-210/96 cit., para. 31. Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Koln e.V. v Mars GmbH* [1995] ECR I-01923, para. 24. See previously Case C-220/98, cit., opinion of Advocate General Fennelly, para. 28; Case C-99/01 *Criminal proceedings against Gottfried Linhart and Hans Biffel* [2002] ECR I-09375, para 35.

³⁴ Case C-220/98, para. 29. Consequently: «A prohibition of marketing on account of the misleading nature of the trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States»: Case C-313/94 *Flli Graffione SNC v Ditta Fransa* [1996] ECR I-06039, para. 22. Nevertheless, in a more recent case, the CJEU has recognised for the first time that correct and complete information provided by the list of ingredients on packaging, although it is in accordance with the labelling of foodstuffs directive, may constitute misleading advertising, and it is up to the referring national court to assess whether the consumer has been actually misled: CJEU 4 June 2015, Case C-195/14, *Bundesverband der Verbraucherzentralen e. a. vs. Teekanne GmbH*, ECLI:EU:C:2015:361, para. 40, 41, 43; CJEU 26 October 2016, Case C-611/14, *Canal Digital Danmark*, para. 43, 44, ECLI:EU:C:2016:800.

³⁵ TAR Lazio, Sez. I, 29 March 2010, no. 4931; TAR Lazio 19 May 2010, no. 12364; TAR Lazio, Sez. I, 18 January 2011, no. 449; TAR Lazio, Sez. I, 25 March 2009, no. 3722; Consiglio di Stato, Sez. VI, 9 June 2011, no. 3511; *Consiglio di Stato*, Sez. VI, 20 July 2011, no. 4391; TAR Lazio, Sez. I, 1 February 2011, no. 894; AGCM 11 January, 2006, no. 15104 (PI4927).

³⁶ M. FRIANT-PERROT, *The Vulnerable Consumer in the UCPD and Other Provisions of the EU Law*, in W. Van Boom, A. Garde, O. Akseli (eds), *The European Unfair Commercial Practices Directive*, Ashgate, 2014, p. 89 ff.

courts³⁷, the average educated consumer does not exist³⁸. Thus, in one case³⁹ – concerning aggressive commercial practices in the field of insurance contracts – the regulatory authority has clearly ruled that «in determining whether a practice can unduly influence the consumers' will, a decisive role is played by the standard of care, competence and fairness that the average consumer of insurance services legitimately expects from the professional». In other words, the diligence and education of the “average consumer” is embedded into the segment of the market where the commercial practice has taken place. This also means that the average consumer's diligence is – as a matter of fact – weighed against measured onto the professional standard of diligence⁴⁰.

³⁷ B.B. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, Springer, 2015, p. 135: «In general, the AGCM does not regard the average consumer as particularly informed, observant and circumspect». See also: C. ALVISI, *The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices*, in G. Bongiovanni, G. Sartor, C. Valentini (eds), *Reasonableness and the Law*, 86 Springer 2009 (Law and Philosophy Library); R. INCARDONA, C. PONCIBÒ, *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*, in 30 *Consumer Policy*, 2007, pp. 21–38.

³⁸ More clearly, TAR Lazio has admitted that the average consumer does not exist: TAR Lazio, Sec. I, 3 March 2004, no. 2020. Everybody – but the CJEU – seems to agree on that. *Ex plurimis*: B.B. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, Springer, 2015, pp. 236-7: pre-existing knowledge, involvement, culture, play a significant role in consumer behaviour. For a stricter view, see A.L. SIBONY, *Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive*, cit.: «As a standard for consumer protection, the average consumer standard may score less well, as the real average consumer might more aptly be described as reasonably overwhelmed, distracted, and impatient» (p. 904).

³⁹ AGCM, 19 March 2009, PS 317 no. 19655. In the case at stake, following the takeover of an insurance company that provoked several withdrawals from the insurance contracts opted by consumers, the insurance company sent to consumers who exercised the right of withdrawal notices of expiration of the policy, together with payments slips. According to the AGCM: «The practice into account is aggressive because it is likely to mislead the average consumer of insurance services as regards his/her right of withdrawal or cancellation, or about the temporal extent of his/her commitments. Such an error can lead a consumer to take an economic decision inconsistent with the cancellation of the insurance contract. Therefore, the commercial practice is improper as it infringes the professional diligence, and it is likely to materially distort the economic behaviour of the average consumer. In particular, the improper practice is aggressive insofar as the trader imposes to consumers an onerous non-contractual barrier where a consumer wished to exercise the right to terminate a contract».

⁴⁰ The same conclusion seems to be reached by B.B. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, Springer, 2015: «The reasoning seems to be [...] that the trader is responsible for providing clear information rather than

6. *Pas de deux with the CJEU: Professional Diligence as a Theoretical Safety Net*

As stated in para. 1, in the UCPD the standard of professional diligence is a general clause whose function is to provide the national authorities in charge of evaluating the professional's behaviour with a standard capable of striking a balance between the opposite interests of professionals and consumers. This is why the general principle of unfairness expressed in the law consists of two *cumulative* criteria: the standard of professional diligence itself, tailored to the commercial area which the professional belongs to; *and* whether the commercial practice *materially* distorts, or is *likely to materially distort*, the economic behaviour of the average consumer⁴¹ (Article 5, para. 2).

In the European debate, the general standard of professional diligence is considered as a fundamental rule, whereas the special rules (misleading and aggressive practices, whether in their general meaning or as codified in the blacklists) are specific applications of the general principle.⁴² Accordingly, the standard of professional diligence represents a residual criterion (a "safety net"), to be applied only where there is no codified practice⁴³.

the consumer being responsible to critically assess the statements, and to ascertain more concerning the products or claim» (p. 137).

⁴¹ See accordingly: "First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market", Brussels 14.3.2013 COM(2013) 139 final, at. 3.3.1., 12.

⁴² CJEU Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009], paras 54-55; Case C-435/11, *CHS Tour Services GmbH v Team4 Travel GmbH*, 19 September 2013, para. 40; Case C-388/13, *UPC*, 16 April 2015, paras 61- 63. T.H. WILHELMSSON, *Misleading Practices*, in *European Fair Trading Law*, Ashgate, 2006, p. 124; J. STUYCK, E. TERRY, T. VAN DYCK, *Confidence Through Fairness? The New Directive on Unfair Business to Consumers Commercial Practices in the Internal Market*, in 43 *Common Market L. Rev.*, 2006, pp. 132-134; M. LIBERTINI, *Clausola generale e disposizioni particolari*, in P. Genovese (ed.), *I decreti legislativi sulle pratiche commerciali scorrette, Attuazione e impatto sistematico della direttiva 2005/29/Ce*, Padova, 2008, p. 30 ff.; A. BARTOLOMUCCI, *Le pratiche commerciali scorrette e il principio di trasparenza nei rapporti tra professionisti e consumatori*, in *Contratto e impresa*, 2007, p. 1427 ff.

⁴³ H-W. MICKLITZ, *The General Clause of Unfair Practices*, G. Howells, H.W. Micklitz, T. Wilhelmsson (eds), *European Fair Trading Law*, London & New York, 2016, p. 119 ff.; L. GONZALES VAQUE, *La directive 2005/29/Ce relative aux pratiques commerciales déloyales: entre l'objectif d'une harmonisation totale et l'approche d'une harmonisation complète*, in *Revue du Droit de l'Union Européenne*, 2005, p. 796. See also First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market', Brussels 14.3.2013 COM (2013) 139 final, at. 3.3.1., 13. Confirmed by the Guidance on the Implementation/

It is true, though, that a misleading or aggressive practice, which materially distorts, or is likely to materially distort, the transactional decision of the average consumer is unfair *per se*: this means that consumers do not need to provide evidence of the infringement of the professional diligence. Thus, according to the CJEU in the case *CHS Tour Services GmbH v Team4 Travel GmbH*⁴⁴: «In the light of all the foregoing considerations, the answer to the question referred is that the Unfair Commercial Practices Directive must be interpreted as meaning that, if a commercial practice satisfies all the criteria set out in Article 6(1) of that directive for being categorised as a misleading practice in relation to the consumer, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article 5(2)(a) of the directive in order for it legitimately to be regarded as unfair and, therefore, prohibited in accordance with Article 5(1) of the directive». The *rationale* underlying this argument is clearly explained further on in the judgement: «The interpretation above is the only one capable of preserving the effectiveness of the specific rules laid down in Articles 6 to 9 of the Unfair Commercial Practices Directive. Indeed, if the conditions for the application of those articles were identical to those set out in Article 5(2) of the directive, those provisions would have no practical significance, even though they are intended to protect the consumer from the most common unfair commercial practices».

This interpretation leads national courts to assess, in the first place, the misleading or aggressive character of a practice, starting from the black list; where this control does not disclose any misleading or aggressive practice, then the national judge can verify whether the requirement of professional diligence has been complied with⁴⁵. This is meant to be an approach favour-

Application of Directive 2005/29/EC on unfair commercial practices, Commission Staff Working Document, Brussels, 25.5.2016 SWD (2016) 163 final, at p. 3, p. 54 ff.

⁴⁴ Case C-435/11, 19 September 2013, at paras 33-44, 45, 46-48. In its English-language sales brochure for the 2012 winter season, Team4 Travel, the defendant before the referring court, had described certain accommodation establishments as “exclusive”, that is they could not, on the specified dates, be offered by another tour operator. Although when the contracts were concluded, the director of Team4 Travel had checked with those establishments that no pre-bookings had been made by other tour operators, the hotels in question were in breach of their contractual obligations to Team4 Travel. Therefore, the information rendered in the English-language brochure was false. Summarising, this is sufficient to consider the commercial practice of Team4 Travel as unfair and, therefore, prohibited in accordance with Article 5(1) of the UCPD. The ruling has been restated in Case C-388/13, *UPC*, 16 April 2015, paras 61-63. See also Guidance on the Implementation/Application of Directive 2005/29/EC on unfair commercial practices, Commission Staff Working Document, Brussels, 25.5.2016 SWD (2016) 163 final, at 3.2, 54-55.

⁴⁵ Thus, the Advocate General Wals in his opinion in CJEU 19 Sep. 2013, C-435/11, *CHS*

ing more specific rules (contained in the blacklist) and then progressing towards more general rules (like misleading practices and omissions, aggressive practices) and eventually applying the general clause of diligence (the “safety net”). Such an approach would avoid judgements based on generic normative definitions, in favour of decisions connected to experimental social studies, and it corresponds to the Italian courts’ view on the application of the standard of diligence to Italian cases. Commercial practices are, indeed, judged as unfair either because they are misleading or because they are aggressive, and in both instances these practices are implicitly regarded as contrary to the standard of diligence, within the limits of the law (that is: provided that they materially distort, or they are likely to materially distort, consumers’ economic behaviour). The UCP database confirms that, out of 849 cases dealt with between 2009–2014, there are no judicial arguments based on the ‘safety net’ of diligence alone. On the contrary, misleading or aggressive practices, also as classified in the blacklists, are implicitly or expressly defined as «contrary to the required diligence of the case».

Hereunder I propose four samples of judgements, covering the 2009–2012 period: the first two cases are taken from misleading practices; the last two sets are taken from aggressive commercial practices.

- i) In one of the cases a consumer reported a goods retailing company, whose commercial practice consisted in promoting some products within the commercial premises (“Carrefour”) during a limited period (November 22–24) without making such products available to customers. According to the AGCM: «Such practices are misleading – and therefore contrary to the standard of professional diligence – because they are likely to materially distort the economic choices of consumers. In fact, they refer to aspects of essential information on the products offered by inducing consumers into error in their choices or by preventing the adoption of a

Tour, para. 29: «Yet the fact that the Directive does not grant the freedom to make the application of Article 6 subject to additional criteria does not mean that there is no room left for manoeuvre. As the Swedish Government points out, the Directive does not preclude a national court from determining, on a case-by-case basis, first, whether a contested commercial practice falls to be characterised as “misleading” or “aggressive” under Articles 6 to 9 of the Directive, failing which; second, whether the general conditions under Article 5(2) are met. Indeed, the Directive would appear to favour a ‘top-down approach’, that is to say, an assessment which begins with the blacklist, followed by the provisions on misleading or aggressive practices, and ending with the general clause. If one of the first steps indicates the existence of an unfair commercial practice, there will be no need to proceed to the next step, as the contested practice would in any event have to be regarded as unfair». See, accordingly: CJEU 3 April 2014, Case C-515/12, *4Finance*, para. 32. G. HOWELLS, G. STRAETMANS, *Perspectives on Federalism*, Vol. 9, issue 2, 2017, E-195.

conscious business decision».⁴⁶

- ii) Three years later, a case brought by the Italian public Broadcasting service (RAI, “Radiotelevisione Italiana”) against another professional was settled according to the same reasoning. In such case, a message promoting a singing event was published on the website of an advertising company, allegedly aiming at the selection of young talents who were expected to take part in a final “Grand Gala” event. The abovementioned website reported the brand “RAI” on each page, and it stated that the “Grand Gala” event would have been broadcasted on the TV channel RAI2. According to the plaintiff (RAI), such advertising message conveyed misleading information concerning the main characteristic of the sponsored event. In particular: «The advertisement in question is likely to materially mislead consumers and to jeopardize their economic behaviour because, contrary to the truth, it promises a cooperation with RAI in the setting of the final ‘Grand Gala’ event. *Therefore, the spreading of this message infringes the requirement of professional diligence*»⁴⁷.
- iii) In a case concerning aggressive commercial practices⁴⁸, the issue was raised following the takeover of an insurance company that determined several withdrawals from the insurance contracts entered into by consumers. In particular, the commercial practice carried out by the insurance company against consumers who exercised their right of withdrawal consisted in sending - to the insured person’s address - notices of expiration of the policy, together with payment slips. According to the AGCM: «The practice at issue is aggressive because it is likely to mislead the average consumer of insurance services as regards his/her right of withdrawal or cancellation, or about the temporal extent of his/her commitments. Such an error can lead a consumer to take an economic decision which is other than the cancellation of the insurance contract. *Therefore, the commercial practice is improper as it infringes the professional diligence*, and it is likely to materially distort the economic behaviour of the average consumer. In particular, the improper practice is aggressive insofar as the trader imposes on consumers an onerous non-contractual barrier where a consumer wishes to exercise the right to terminate a contract»⁴⁹.
- iv) Three years later, a similar case was ruled on by the AGCM. The

⁴⁶ AGCM 8 January 2009, no. 19394.

⁴⁷ AGCM, 4 May 2011, no. 22738.

⁴⁸ *Consiglio di Stato*, Adunanza Plenaria, 11 May 2012, no. 14; PS8215, decision no. 24117 of 12 December 2012.

⁴⁹ AGCM, 19 March 2009, no. 19655.

professional was active in the area of telephone services and internet access: the commercial practice consisted in hindering the consumers' right of withdrawal and in omitting to provide consumers with clear, accurate and detailed information on how the same should be exercised. Moreover, the professional continued charging consumers with changed rates and sent them invoices even months after they had exercised their right of withdrawal. The AGCM ruled: «As regards the assessment of manifest impropriety of the professional's commercial practices, it is sufficient to say that, according to article 26, letter f, It. Cons. Code, among the aggressive practices listed in the blacklist there are commercial conducts consisting in imposing on consumers immediate or deferred payments for services not solicited by the consumers. *Moreover, the behaviour of the professional infringes the standard of diligence* because the professional should have adopted all the measures and initiatives appropriate to ensure a sufficiently accurate management of the consumers' requests for withdrawal»⁵⁰.

As regards the meaning of the standard of diligence, it is worth underlying that it partially matches the definition provided by the Italian Civil Code with respect to contractual liability⁵¹. In the UCPD (Article 2(h)), as well as in the Italian implementation (article 18, para. 1 letter h), it refers to «the standard of special skill and care ... commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity». In its essence, the standard of diligence refers to the professional expertise, whose main contents are “competence” and “care”, as referred to a special business sector. Consequently, the more a business sector is regulated, the higher the standard of diligence that consumers can reasonably expect from professionals. This is true in particular for insurance contracts, contracts of carriage, digital services contracts. Besides, it is unlikely that this standard of diligence will have a

⁵⁰ AGCM, 14 February 2012, no. 23304.

⁵¹ According to the most relevant opinion in the Italian literature, the standard of diligence (strictly related to the theory of completion of contractual obligations) differs from fair dealing and good faith because the former is tailored to the very content and quality of the obligation assumed by debtor within the contract; whereas the latter, may also take into account interests and values not related to the content and quality of the promised obligation: U. BRECCIA, *Le obbligazioni*, Milano, 1992, p. 460.

uniform implementation⁵², even within the CJEU's case law.⁵³

7. Final Remarks

The short overview of the dialogue between the CJEU and the Italian courts with reference to the UCPD allows some comments.

- a. *The CJEU confirms its role in interpreting European law, thus providing a crucial support to the harmonisation process. This is so even in the case of the UCPD, responding to a maximum harmonisation approach but characterised by the existence of several open norms (“average consumer”, “professional diligence”, “transactional decisions”) that leave freedom to national courts and hence foster the interaction with the CJEU.*
- b. *The dialogue between the CJEU and the Italian regulatory and administrative authorities is not always consistent, as highlighted in paras. 3-4. Nevertheless, this inconsistency cannot be deemed to be a negative result, as it simply derives from the different roles played by the national courts and the European Court: the former are responsible for applying the general concepts in a given geographical and cultural context; the latter is responsible for interpreting them. Hence, in the case of how to classify a commercial practice (or omission) as “misleading”, the Italian regulatory authority has anticipated a European interpretation which was soon after provided by the CJEU. The AGCM has opted for a cumulative interaction between false information, or consumer's deception, and the transactional decision that the consumer would not have taken otherwise, thus both courts confirm the application of the UCPD in the sense of avoiding the abuse of contractual power on the side of the trader. A fruitful dialogue is also evident as concerns the open norm re-*

⁵² B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition law*, Oxford and Portland, Oregon, 2011, p. 275: «Nobody really knows what this concept means. In any event, it must be interpreted autonomously. There is a clear and urgent need for an autonomous Union interpretation. Meanwhile, national Courts and regulatory Authorities shall continue to interpret the professional diligence standard in compliance with their previous case law: renationalization»; H. COLLINS, *Harmonization by Example: European Laws Against Unfair Commercial Practices*, in 73 *Modern Law Review*, 2010, p. 98 ff.

⁵³ A. GARDE, *Can the UCP Directive Really Be a Vector of Legal Certainty*, W. Van Boom, A. Garde, O. Akseli (eds), *The European Unfair Commercial Practices Directive*, Ashgate, 2014, p. 112: according to the A., the CJEU has refused to give precise guidance, with the risk of “renationalizing” the notion. See Case C- 540/08 *Mediaprint*; Case C-206/11 *Kock*; Case C-122/10 *Ving*.

*ferred to the average consumer: in this instance, the application of the notion by national courts beyond the definition of educated and diligent consumer⁵⁴ has led the CJEU to broaden its interpretation, by recognising a possible mismatch between complete information and a misleading practice (see *fn* 34). Lastly, it would certainly be desirable that the Italian courts follow the CJEU's opinion concerning the importance of the experts' report or consumer research polls in assessing the genesis of the consumers' transactional decisions and if any the deceptive nature of the information influencing consumers' choices. It is time to import science into the law, either through submission by the parties of the experts' reports into trials, or by training judges accordingly⁵⁵.*

- c. The top-down approach enhanced by the CJEU favours specific rules contained in the blacklist, progressing towards more general rules such as misleading practices/omissions, aggressive practices/omissions, up to the controversial safety net of the professional diligence. Such a perspective enables to a case-by-case method that empowers national courts and limits the recourse to the general clause of professional diligence that would slow down the harmonisation process.*

⁵⁴ G. HOWELLS, G. STRAETMANS, *The Interpretive Function of the CJEU and the Interrelationship with EU and National Levels of Consumer Protection*, in *Perspectives on Federalism*, Vol. 9, issue 2, 2017, E-205-207.

⁵⁵ In this sense, see A.L. SIBONY, *Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive*, *cit.*, p. 939.