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Addressing aggressive commercial practices: Some critical aspects of its regime in the Unfair Commercial Practices Directive

Abordando las prácticas comerciales agresivas: Algunos aspectos críticos de su régimen en la Directiva de prácticas comerciales desleales

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Abstract

Aggressive commercial practices are a type of conditioning factor imposed by businesses on consumers to modify their freedom of choice. Today, no-one is in any doubt about the financial and social impact aggressive commercial practices can have on consumer wellbeing. In fact, this type of unfair practices has caused, and continues to cause, significant damage to the interests of consumers, as evidenced by the financial crisis which has recently beset Europe. Aware of this problem, European institutions have made consumer protection from unfair commercial practices a priority in their legislative policies. Some of these initiatives have already been in place long enough to allow their results to be analysed (for instance, Unfair Commercial Practices Directive). Others, on the other hand, are still at an early stage (for instance, the New Deal of Consumers legislative proposals), but nevertheless invite reflection. In the light of current trends which argue in favour of greater protection for consumers than has been the case to date, this study will review the European regime of aggressive commercial practices, and analyze the most relevant decisions, especially focused on the financial sector.

Keywords: Aggressive practices; Unfair competition; Consumer protection; Financial sector.

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Resumen

Las prácticas agresivas son una forma de condicionamiento al que somete el empresario al consumidor para alterar su libertad de elección. En la actualidad, nadie discute el impacto económico y social que pueden tener las prácticas comerciales agresivas sobre el bienestar del consumidor. En efecto, se trata de prácticas desleales que han causado, y siguen causando, graves perjuicios para los intereses de los consumidores, tal y como demuestran las consecuencias de la crisis financiera que ha vivido Europa recientemente. Las instituciones europeas, conscientes del problema, han priorizado en su política legislativa la tutela del consumidor frente a las prácticas comerciales desleales. Algunas de sus iniciativas ya

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llevan un recorrido considerable para poder analizar los resultados (por ejemplo, la Directiva de prácticas comerciales desleales). Otras, en cambio, están en estadios embrionarios, pero aconsejan una reflexión (por ejemplo, el paquete de medidas anunciadas en el Nuevo Marco Europeo para los Consumidores). A la luz de las tendencias actuales que defienden una mayor protección para los consumidores que hasta la fecha, este estudio revisará el régimen europeo de prácticas comerciales agresivas y analizará las decisiones más relevantes, especialmente centradas en el sector financiero.

Keywords: Prácticas agresivas; Competencia desleal; Protección del consumidor; Sector financiero.

1 Introduction

In 2005 it was approved the Directive concerning unfair business-to-consumer commercial practices (hereinafter, UCPD), which expressly identifies aggressive practices as unfair and aims to harmonise the systems available to deal with such practices in all Member States. This Directive allows Member States significant leeway for the adoption of appropriate instruments and remedies to comply with the minimum standards set (art. 11). The only condition imposed for the Member States was that they “shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive” (art. 13). As a result, the debate has focused on the most effective enforcement to comply with the standards of the Directive¹ and the most effective, proportionate and dissuasive penalties to tackle the unfair commercial practices².

On the basis that there is no single valid formula to achieve the effectiveness in the application of the UCPD, the EU legislator has recently moved to another step towards complete harmonization against unfair commercial practices and has announced a set of measures that will help consumers to assert their rights against unfair entrepreneurs³.

2 The UCPD and its three levels of protection

It is well known that the UCPD provides three levels of protection against unfair commercial practices in businesses to consumers relationships⁴.

First, an exhaustive list of thirty-one misleading and aggressive practices that must be deemed unfair “in all circumstances” (Annex I UCPD)⁵. To consider these practices unfair is not necessary the case-by-case exam proposed by arts. 5-9 UCPD.

If the practice is not in the “Blacklist” of unfair commercial practices (Annex I), to consider it unfair, we will have to examine the specific ban on misleading (arts. 6-7 UCPD) and aggressive (arts. 8-9 UCPD) practices.

The third level of protection is the general ban on unfair commercial practices provided in

1 On this aspect, see the considerations of [Micklitz \(2007\)](#). Also, [Klöhn \(2010\)](#) and [Poelzig \(2016\)](#)

2 About the private law of the infringement of the prohibitions of the UCPD, see [de Cristofaro \(2011\)](#)

3 We are referring to the New Deal for Consumers adopted by the Commission on 11 April 2018 composed of two proposals for Directives and a Communication. One of these proposals contemplates to amend the UCPD.

4 [Caronna \(2018\)](#). As Caronna said in p. 886, the three-tier UCPD regime is of a unitary nature, in the sense that the specific ban of misleading and aggressive practices (arts. 6-9) and the Blacklist (Annex I) fall within the broader remit of the general ban (art. 5) and must always fulfil the requirements set out in the general ban. However, since misleading and aggressive practices are normally also unfair, the UCPD establishes a presumption that these practices under the specific ban also constitutes an unfair practice under the general ban. This presumption is rebuttable in the case of conduct falling within the specific ban. In contrast, the presumption is not rebuttable in the case of blacklisted conducts.

5 [Namysłowska \(2016\)](#) refers to that the exhaustive character of the blacklist is strengthened by the fact that it can be modified only through a revision of the UCP Directive. Consequently, the Member States are not empowered to amend Annex I by themselves and to apply the blacklist not similar, but not identical cases.

art. 5 UCPD. According to this article, a commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) likely to materially distort the economic behaviour of the average consumer or of the average member of the group when a commercial practice is directed to a particular group of consumers.

As we have already announced in the title of this article, of the two categories of practices that the UCPD expressly recognizes as unfair, namely misleading and aggressive practices, we will deal with aggressive commercial practices.

3 The aggressive commercial practices regime

3.1 Legal definition

According to the UCPD, we could define aggressive commercial practices as a type of conditioning factor imposed by businesses on consumers to modify their freedom of choice. Notwithstanding this definition that we believe it summarizes the concept of unfair aggressive practice, the specific ban on aggressive commercial practices (art.8 UCPD) establishes two conditions to consider an aggressive practice as unfair. First, the practice must amount to harassment, coercion or undue influence. Secondly, the practice must be apt to significantly impair the average consumer's freedom of choice regarding the product. In other words, it must be capable of influencing the consumer's choice in a way that he adopts – or might adopt – a decision that he would otherwise no have taken.

In addition, the art. 9 UCPD also concrete that to determine whether a commercial practice uses harassment, coercion, or undue influence, it is taken into account a series of circumstances, for instance, “its timing, location, nature or persistence; the use of threatening or abusive language or behaviour; the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product; any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; any threat to take any action that cannot legally be taken”.

3.2 Harassment, coercion or undue influence as unfair competition

Harassment is not a concept defined by the UCPD. Nevertheless, we could define harassment as an unfair offence, as the basic concept of harassment⁶ although referring to the circumstances contemplated by the UCPD and based on its unfairness. Then, harassment is a behaviour based on persecuting, annoying, upsetting, inconveniencing or urging consumers⁷ as means to obtain their attention or their decision regarding an offer or a contractual behaviour. However, based on the fact that we have to elaborate a proper concept in the field of UCPD, we could also borrow some of the elements that have traditionally defined harassment with criminal relevance, for instance, “serious intimidation” or “situation hostile or humiliating”⁸, because we consider that they perfectly describe the scenario that the entrepreneur seeks to create when he uses this aggressive selling practice on the consumer to force him to adopt a decision that he would not otherwise have made.

6 According to Cambridge Dictionary harassment is a behaviour that annoys or upsets someone.

7 Fernández Carballo-Calero (2016) has defined harassment as an aggressive practice as “pursuing, bombarding or pestering the consumer with inconveniences or requests with the aim of influencing their purchasing decision or their way of acting within the framework of a previously established commercial relationship”.

8 See art. 184 of the Spanish Criminal Code that defines sexual harassment.

In particular, the Blacklist of the UCPD consider unfair for harassment in all circumstances “conducting personal visits to the consumer’s home ignoring the consumer’s request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation” (Point 25 Annex I UCPD) or “Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation” (Point 26 Annex I UCPD).

The commercial practice consisting of personal visits to the consumer’s home, namely, door-to-door sale method, or commercial calls, are two commercial strategies in which the trader has typically used harassment to impair the average consumer’s freedom of choice⁹. Aware of this problem, the EU legislator recognized these strategies as unfair in all circumstances in the Annex I UCPD, although subject to certain conditions. Thus, repeated visits; the insistence of the agent ignoring the requests of the consumer to leave his home or the special characteristics of the public to which the practice is directed, such as elderly people¹⁰, children or sick people, are the circumstances that will be taken into account to consider these behaviours unfair.

A good example of harassment as unfair competition are some practices developed by funeral homes that “hunted” clients in hospitals and nursing homes, after the death of a family member. This was the case described by the Higher Regional Court of Madrid on 23 June 2009. In the aforementioned case, despite that the Court recognizes that the professional’s behaviour can be considered as an aggressive practice according the provisions of the UCPD, as the facts happened when the Directive had not yet been transposed to the Spanish legal system, the Higher Regional Court of Madrid, considered this practice contrary to the general clause of good faith recognized in the old art. 5 of the Spanish Unfair Competition Law. A similar practice was handed down by the Higher Regional Court of Frankfurt on the Main, 29 January 2009, case n° 6 U 90/08 that considered the advertising campaign carried out by a gravestones company contrary to the professional diligence because it sent letter to the relatives of a deceased person shortly after the death had taken place¹¹.

Regarding the concept of coercion, the only remark that the UCPD makes when defining the aggressive commercial practices is that the use of physical force is also included. Note that the UCPD makes no reference to the fact that it is only accepted a physical force, therefore, allowing, any type of force, including a psychological force or moral coercion. Thus, two types of coercion can occur with relevance to the UCPD. On the one hand, that which is derived from the use of physical force, which is what the legislator implicitly recognizes and, by contrast, coercion in which physical force is not used. We considered coercion with physical force as unfair commercial practice the most problematic element in the regime of aggressive practices

9 For instance, the practices developed over the years by publishers with the door to door method have been considered unfair in some circumstances. According to the Italian Competition Authority in the Utet-Enciclopedia non richiesta case (Proc. n° 23551, PS4791, 9.5.2012 and Federico Motta editore-modalità di vendita case (Proc. n° 23816, PS7557, 8.8.2012), the unfairness of the conduct of the publisher is endorsed by the special vulnerability of consumers due to their advanced age or their delicate health conditions. In both cases, the professional also completes the aggressive sale, without leaving a copy to the client of the order that he had signed, with the sending of payment reminders related to orders that the consumers had not subscribed to and ignoring their requests for withdrawal presented after have received the request for payment, in addition to not providing any information on the existence of the right of withdrawal of the consumer. In relation to this *modus operandi* the Higher Regional Court of Madrid on 25 January 2011, has also been pronounced and found void the contract signed by an elderly and sick person for the acquisition of cultural books for a high amount concluded by the aggressive sales techniques of the trader.

10 About the unfairness of the aggressive door-to-door selling methods in elderly people, see EUROPEAN COMMISSION, Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices, 25.5.2016, p. 48.

11 Case analysed by [Fernández Carballo-Calero \(2016\)](#).

as it clearly refers to a criminal concept.

Regarding coercion as an aggressive practice, we are interested in highlighting the case known by the Cour de Cassation, Chambre Criminelle, 1 April 2014, in which it was considered illegal the practice developed by an entrepreneur who sold his products among elderly people using aggressive selling practices based on moral coercion¹².

We would like to report, that coercion as an aggressive practice has been happening between some debt collection agencies who force consumers to pay debts, although debts are not clear. Among the pronouncements on coercion with unfair relevance, we wanted to note two cases from the Italian Competition Authority (hereinafter, ICA). We are referring to the Eurorec-recupero crediti case and the Ge.ri.manage rischi-recupero crediti case¹³. In these two cases, the *modus operandi* was similar. The entrepreneur used coercive practices that significantly reduced the consumer's economic behaviour, for the collection of debts, which, in many cases, had prescribed or simply did not exist. The aggressive practice was to urge the consumer before judicial bodies manifestly unmeritorious for the payment of a presumed debt that was not sufficiently detailed or that, in many cases, had prescribed, to intimidate the consumer and to proceed with the immediate payment of the debt, in order to avoid the costs and inconveniences derived from a judicial process.

In recent times, especially after the approval of the new regulation of the data protection in Europe¹⁴, the techniques used by some debt collection agencies have been questioned by consumers. These agencies threaten the consumer to immediately include him in a debtors' list if he does not pay the debt. On this aspect has also been pronounced the ICA, 1 August 2018, intervention number 27287, 27288 and 27289, in which ICA imposed a fine of 3.2 million euros to the main telephone operators in Italy for aggressive practices consisting of threatening their customers with the inclusion in a debtors' list if they did not agree with the payment of the amounts claimed. According to the criteria of the ICA intervention, the referred practice, led the consumer to believe that, regardless of the validity of his debt, it would be desirable to pay the requested, because if the company included the consumer in the aforementioned database, it could not resign a contract with any telephone operator. We would like to notice that this penalty is extremely harmful to the consumer's interest because the telecommunications service is an essential one.

The above considerations do not mean that the entrepreneur cannot advise the consumer that he will be included in a debtors' list if he does not fulfil his payment obligation. It will be the circumstances in which it occurs that determine its disloyalty. Circumstances such as consumer misinformation; the threatening or abusing language of the entrepreneur; the exploitation by the trader of the consumer's financial crisis or the inclusion in a list that does not respect the sufficient guarantees, may consider an illegitimate pressure to pay, namely, an aggressive commercial practice. Regarding this, a Slovakian court, 27 October 2011, *Krajsky sud v Presove Case*, held that informing a consumer who is not complying with his financial obligations that his name will be published as a default payer in local media is an aggressive commercial practice¹⁵.

12 The French option to pursue certain aggressive practices by resorting to Criminal Law may lead the repression of the unfair commercial practices on a theoretical level. About this idea, CHANTEPIE, G., "La détermination de sanctions effectives, proportionnées et dissuasives des pratiques commerciales déloyales", en TERRY, E., y VOINOT, D., *Droit européen des pratiques commerciales déloyales. Evolution et perspectives*, Ed. Larcier, Belgium, 2012, p. 91.

13 We refer to the Proc. Num. 24117 (PS8215 - eurorec-recupero crediti) 12 December 2012 and num. 25033 (PS6549 - ge.ri.manage rischi-recupero crediti) 17 July 2014 of the Italian Competition Authority.

14 We refer to the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

15 This is a case cited in the Commission staff working document guidance on the implementation/application of directive

More explicit than in the case of harassment or coercion as an aggressive commercial practice, was the EU legislator regarding the concept of undue influence as unfair competition. The art. 2 j) UCPD establishes that the undue influence is “exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision”.

Thus “undue influence” can be defined as an abuse of a position of power in relation to a consumer to limit his commercial freedom¹⁶. This situation would be the case in which the trader demands immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer. This practice is considered unfair per se in point 29 of Annex I UCPD. Regarding this, the CJEU has recently ruled¹⁷ that the commercialization of SIM cards containing pre-installed and pre-activated payment services, such as internet browsing and voicemail, is an aggressive practice when consumers are not informed about it previously. Moreover, behaviours such as those described, constitutes an “unsolicited supply” and therefore, according to the UCPD (point 29 of Annex I), an unfair practice, more specifically, an aggressive practice in any circumstance.

Due to their particular vulnerability, we consider convenient to pay special attention to the undue influence on children, expressly considered unfair per se in point 28 of the Annex I of the UCPD, which states that “Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them”. This has been one of the most widespread illicit practices among those considered unfair per se with consumers and for which the authorities have shown greater sensitivity to tackle the problem¹⁸.

Regarding this prohibition, the UK Advertising Standards Authority has considered illegal two online games providing in-app purchases containing direct exhortations to children. Initially, participation in the game as such was free. However, certain activities required participation in a paid membership system, which entitled members to additional benefits. The authority found that several statements promoting membership or the purchase of in-game currency were phrased as commands to the players. These were statements such as ‘JOIN NOW’, ‘The Super Moshis need YOU’ and ‘Members are going to be super popular’, which the authority considered as putting pressure on children to make a purchase¹⁹.

It could also be an unfair aggressive practice for undue influence on children²⁰, their participation in drawing competitions, sponsored by private entities, whose “prize” must be collected in an exhibition in which all the winning drawings are exposed, and to be awarded, the child must go through a promotional offer of books or other educational material.

An example of aggressive practice in relation to children in the financial sector was the decision of the Finnish Consumer Ombudsman who considered unfair the fact that a bank sent

2005/29/EC on unfair commercial practices, published 25.5.2016.

16 To study some examples, [Palau Ramírez \(2010\)](#).

17 See, Judgment of the Court (Second Chamber) 13 September 2018, Joined Cases C 54/17 and C 55/17.

18 Among the initiatives of national authorities to tackle the problem of aggressive practices in relation to minors in advertising, OFFICE OF FAIR TRADING, The OFT’s Principles for online and app-based games, published on 30 January 2014.

19 See other examples in the Commission staff working document guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices, published on 25 May 2016.

20 This example is taken from the paper of MARTORELL ZULUETA, P., presented in Jornada sobre Protección de consumidores y usuarios en el ámbito civil y mercantil desde la perspectiva de la unión europea y nacional, held at the Judicial School of Madrid, from 29 to 31 January 2018.

a letter inviting children to obtain a personal Visa Electron card in order to commemorate the tenth anniversary of the entity. In particular, the Finnish Consumer Ombudsman considered this behaviour an aggressive practice due to undue influence. According to the Consumer Ombudsmen Decision: ‘Traders must not directly exhort or invite children to buy or persuade their parents or other adults to buy the traders’ products. Whether the marketing exhorts or invites children to buy must be assessed in each case. Such assessment must be made from the individual child’s perspective by taking into consideration its age, development and other factors rendering children particularly vulnerable’²¹.

3.3 A critical overview of the regime of aggressive commercial practices

The criteria that have been followed for the current classification of unfair aggressive practices are based on the principles of annoying advertising (*belästigende werbung*) developed in Germany. However, the European legislator took a step further and it has integrated into the concept of aggressive commercial practice, harassment, coercion and undue influence. Case study demonstrates, that the elements that constitute the concept of unfair aggressive practices, based on these three elements, as factors conditioning consumers’ economic freedom, tend to overlap each other, so that in practice it is difficult to justify the unfairness of a given aggressive practice on the basis of just one of these factors. Moreover, recourse to such concepts, which lie outside the sphere of competition law or consumer law, depending on the discipline in which Member States have integrated unfair commercial practices, makes them difficult to apply²². The assumptions on which the notion of an aggressive commercial practice is based tend to distance it from the reality of competition law or consumer law and bring it closer to criminal legislation systems. It is therefore necessary to define a specific and differentiated concept of harassment, coercion and undue influence in relation to the UCPD without altering the fundamental nature of the concept of aggressive practice as contemplated in that law, that is, as a means of conditioning the consumer’s commercial freedom.

Based on the analysis of the elements of aggressive commercial practices, we could define an aggressive entrepreneur as one who invades the private sphere of the consumer in the taking of a decision to buy a product or purchase a service, so that, contrary to the professional diligence that should be expected, the consumer is forced to take an economic decision in relation to a commercial transaction that has not been sufficiently considered and that may be detrimental to the consumer’s economic interests. Aggressive commercial practices, understood in this way, brings us closer to the well-known system of defect of consent. It is the same issue, that is, banning the undue interference in the consumer’s commercial freedom (also contractual)²³.

Despite the diverse nature of aggressive practices, an analysis of the grounds on which they may be deemed unfair leads in turn to two conclusions. On the one hand, the fact that the entrepreneur is, to a certain extent, taking advantage of the particularly vulnerable situation of the consumer. This evidences the need to stress that the classification of aggressive practices as unfair is not concerned with the avoidance of situations of mere inconvenience or annoyance for the consumer when contracting goods or services, but rather that in order for such conduct to be considered unlawful there must be a situation where the consumer’s economic behaviour has or could have been materially distorted. On the other hand, what is important in such

21 See, the Commission staff working document guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices p. 102.

22 About the deficient regime of aggressive practices in the UCPD, see [Howells \(2005\)](#).

23 See [Whittaker \(2007\)](#).

cases is that the entrepreneur has acted in such a way as to reduce the options available to the consumer in connection with a specific commercial transaction, given that the legislation does not limit the consideration of unfair competition to instances where a single option is offered to the consumer.

As a result of the heterogeneous nature of aggressive practices and their increasing sophistication in concealing their unfair nature, it has not been thought advisable that this article draw up a list of aggressive practices which could potentially be considered unfair. The most frequent in practice are those specified by the legislator in Annex I, for instance, persistent calls from telephone operators proposing new offers to users²⁴, despite continued reticence on the part of the latter to receive new commercial proposals; home visits from sellers who refuse to leave the premises of the consumer despite being requested to do so; a trader who unreasonably hampers a consumer's right to withdraw from a transaction; or the inclusion in an electricity or telephone bill of a service which the user has not requested and asking for the immediate payment or creating the false impression that the consumer has already won a prize and to claim the prize the consumer has to incur in costs. However, the latter is a subject-matter that has been somewhat eclipsed by the no less unfair misleading practices, which have enjoyed a longer legal tradition and a simpler regulatory framework than aggressive practices²⁵.

4 The new European regulation against unfair commercial practices: again, a missed opportunity?

²⁶

Having identified the aggressive commercial practices as a factor which causes significant market distortions, and without a specific mandate for Member States to achieve their best results of their regulation²⁷, lawmakers now face the redoubtable task of identifying the most appropriate tools for dealing with such a damaging phenomenon, which is increasingly present in business-to-consumer relationships. One of the most significant problems posed by such practices is how to repress them. However the current legal framework providing no satisfactory solutions²⁸.

Being aware of this problem, European institutions have made consumer protection from unfair commercial practices a priority in their legislative policies. Some of these initiatives, for instance, the UCPD have already been in place long enough that their results can be analysed. Others, such as the proposal of the New Deal for Consumers of the European Commission, are still at an early stage.

We consider positive some of the measures of the New Deal for Consumers, for instance, the possibility of terminating a contract concluded by a misleading or aggressive practice of the entrepreneur. This idea suggests the relationship between the regime of unfair practices with

²⁴ Indeed, to protect consumers effectively in the case of cold calls there would be some scholars who defend the introduction of public law fines or even criminal law sanctions. See, ROTT, P., "Effective enforcement of consumer law: the comeback of public law and criminal law", in DEVENNEY-KENNY, (Ed.), *European Consumer Protection*, Ed. Cambridge University Press, 2012, p. 81.

²⁵ Köhler (2013).

²⁶ See the well-known paper of Howells (2005)

²⁷ Apart from the provisions of articles 11 and 13 of the UCPD.

²⁸ Therefore, it is necessary to amend the UCPD, see the Proposal for a Directive of the European Parliament and of the council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, 11.4.2018.

the contract law. Many scholars have defended it although the UCPD establishes “This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract” (art. 3.2). We believe, that this measure, together with the others announced in this new framework, for instance, the recognition of financial compensation in the case of suffering unfair commercial practices, may be the keys for the proper functioning of the new regime and for not qualifying it as a missed opportunity.

5 Conclusions

Nowadays, no-one is in any doubt of the financial and social impact aggressive commercial practices can have on consumer wellbeing. In fact, this type of unfair practice has caused, and continues to cause, significant damage to the interests of consumers, as shown by the financial crisis which has recently beset Europe. Indeed, competitors have resorted to dishonest behaviours which need to be curbed if we are to avoid a return to the worst economic scenario in our recent history.

Although some years have elapsed since the approval of the EU legislation on aggressive commercial practices, the regime remains unclear. In this article, we point out that one of its causes could be the notion of aggressive practice on which the UCPD was based. The idea that should predominate in the interpretation of the concept of aggressive practice is that these practices seek to force consumers to take a certain economic decision in relation to a market transaction. However, there is still a long way to go in order to accommodate the prerequisites of unfairness, such as harassment, coercion or undue influence, to the persuasive commercial techniques. To clarify the concepts of harassment, coercion and undue influence, it would be desirable more flexibility for its interpretation. In some cases, it would be advised a re-interpretation of such concepts. This re-interpretation has been aided by the application of contract-law institutions, which tie in with the provisions on unfair aggressive commercial practices as regulated in UCPD, namely, the use of force and intimidation as factors that vitiate consent.

Besides the problem of inaccuracy of harassment, coercion and undue influence as an aggressive practice, to date, the instruments made available for countering such practices, have not worked for the consumers, as evidenced the latest problems that have shaken the European market in recent times, such as the Dieselpgate case regarding misleading advertising. This brings us to the second idea we have pointed out to explain the missed opportunity of the aggressive practices. However, we must note that the non-application of the rules of the aggressive practices, is not common to all Member States. In the article we have dealt with some decisions of the competent authorities to know these types of conducts that we find interesting and that contribute to clarify the obscure concept of aggressive commercial practices.

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