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## The Modernization of European Consumer Law: A Pig in a Poke?

Marco B.M. LOOS\*

**Abstract:** This article discusses the European Commission’s proposal for a directive regarding the modernization and better enforcement of European consumer protection rules, and the relation between this proposal and the Commission’s recent Communication ‘A New Deal for Consumers’. In the second part of this article I will discuss to what extent the proposal does justice to the outcomes of the *fitness check* carried out in 2017, which was intended to examine the extent to which the consumer *acquis* is still sufficiently equipped for the protection of consumers and allows traders to take advantage of the internal market.

**Résumé:** Cet article examine la proposition de la Commission européenne pour une directive concernant la modernisation et une meilleure application des règles de protection des consommateurs européens et la relation entre cette proposition et la récente Communication de la Commission « Une nouvelle donne pour les consommateurs ». Dans la deuxième partie de cet article, j’aborderai dans quelle mesure la proposition rend justice au bilan de qualité concernant le droit des consommateurs effectuée en 2017, qui visait à examiner la mesure dans laquelle l’acquis est encore suffisamment équipé pour la protection des consommateurs et permet aux traders de tirer parti du marché intérieur.

**Zusammenfassung:** Diesen Aufsatz behandelt der Vorschlag der Europäischen Kommission für eine Richtlinie zur Modernisierung und besseren Durchsetzung der EU-Verbraucherschutzvorschriften und die Beziehung zwischen diesem Vorschlag und der jüngsten Mitteilung der Kommission „Neugestaltung der Rahmenbedingungen für die Verbraucher“. Im zweiten Teil dieses Aufsatzes untersuche ich, inwieweit der Vorschlag die Ergebnisse des Fitness-Tests gerecht wird, der 2017 durchgeführt wurde. Der Fitness-Test soll prüfen, ob das Verbraucher-Acquis noch ausreichend ist, um Verbraucher zu schützen und um sicherzustellen, dass die Händler den Binnenmarkt nutzen können.

**Keywords:** Consumer protection, new deal, Modernization Directive, fitness check.

**Mots-clés:** protection des consommateurs, « new deal », Directive de Modernisation, bilan de qualité.

**Schlüsselbegriffe:** Verbraucherschutz, New Deal, Richtlinie Modernisation, Eignungsprüfung.

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## 1. Introduction

1. Over the past decade, the review of the consumer *acquis* has prominently featured on the European Commission's political agenda. The review of the consumer *acquis* was first announced in the Consumer Policy Strategy 2002-2006<sup>1</sup> and has been accomplished in several stages, typically shifting from minimum to full harmonization. In the past ten years, most of the directives and regulations in the field of consumer law have been revised. The main exceptions are the Product Liability Directive,<sup>2</sup> the Unfair Contract Terms Directive (UCTD),<sup>3</sup> the Consumer Sales Directive (CSD),<sup>4</sup> the Price Indication Directive (PID)<sup>5</sup> and the Unfair Commercial Practices Directive (UCPD).<sup>6</sup> A proposal to revise the CSD had been submitted, initially limited to distance sales contracts,<sup>7</sup> but later extended to fully replace it.<sup>8</sup> In addition, a proposal for a Digital Content Directive is pending.<sup>9</sup> Apart from the Product Liability Directive, the existing directives were subject of a so-called *fitness check* in order to determine whether a review is desired or necessary. Because of their interrelationship with these directives, also the Injunctions Directive (InjD)<sup>10</sup> and the Consumer Rights Directive (CRD)<sup>11</sup> were included in the fitness check. The European Commission indicated that on the basis of the results of the fitness check, if necessary, it would submit proposals for the adaptation of the *acquis*.<sup>12</sup>

2. The fitness check has led to a series of reports. The extensive main report of Civic Consulting was published in May 2017.<sup>13</sup> It was accompanied by a consumer

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- 1 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM (2002) 208 final, *OJ* 2002, C 137/2.
  - 2 Directive 85/374/EEC, *OJ* 1985, L 210/29.
  - 3 Directive 93/13/EEC, *OJ* 1993, L 95/29.
  - 4 Directive 1999/44/EC, *OJ* 1999, L 171/12.
  - 5 Directive 98/6/EC, *OJ* 1998, L 80/27.
  - 6 Directive 2005/29/EC, *OJ* 2005, L 149/22.
  - 7 COM (2015) 635 final. On this original proposal M.B.M. LOOS, 'Not good but certainly content. The proposals for European harmonization of online and distance selling of goods and the supply of digital content', in I. Claeys and E. Terry (eds), *Digital content & Distance sales. New developments at EU level* (Cambridge: Intersentia 2017), pp 13-27.
  - 8 COM (2017) 637 final.
  - 9 COM (2015) 634 final. On this proposal: Loos 2017, pp 28-48.
  - 10 Directive 2009/22/EC, *OJ* 2009, L 110/30.
  - 11 Directive 2011/83/EU, *OJ* 2011, L 304/64.
  - 12 REFIT Fitness Check of consumer law, Evaluation and Fitness Check (FC) Roadmap, December 2015, p 1. The roadmap, [ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_just\\_023\\_evaluation\\_consumer\\_law\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf) (accessed 19 September 2018).
  - 13 Civic Consulting, Study for the Fitness Check or EU consumer and marketing law, Final report, Part 1 - Main report, 2017 (hereinafter: Civic Consulting 2017). With Van Boom and Van Schagen I was responsible for the Dutch country report; I have not been involved in the drafting of the report itself. The report, [ec.europa.eu/newsroom/document.cfm?doc\\_id=44840](http://ec.europa.eu/newsroom/document.cfm?doc_id=44840) and publications.

market study carried out by GfK Belgium.<sup>14</sup> In addition, two reports by ICF on the CSD were published regarding the costs and benefits of minimum harmonization in this field<sup>15</sup> and the costs and benefits of the possible extension of certain rights.<sup>16</sup> Finally, the requirements set by the CRD were evaluated.<sup>17</sup> The main conclusion of the fitness check was that the bulk of the existing consumer *acquis* was adequate for dealing with both the digital environment and off-line transactions, and that no major reform was required.<sup>18</sup> Nevertheless, a closer look at the recommendations made reveals that in several areas a step forward seemed feasible.

3. In 2018, the Communication ‘A New Deal for Consumers’<sup>19</sup> (hereinafter: A New Deal) on the future of consumer *acquis* was published, together with two proposals for directives. The first concerns the improvement of the possibility for consumer organizations to start a representative action, including a mass claim for compensation of consumer detriment.<sup>20</sup> This proposal will not be discussed in this article. The second proposal (hereinafter: Modernization Directive) aims at amending the UCTD, the UCPD, the InjD and the CRD.<sup>21</sup> In the first part of this contribution the proposals set out in the Communication and the Modernization

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europa.eu/en/publication-detail/-/publication/f7b3958b-772b-11e7-b2f2-01aa75ed71a1/language-en (accessed 19 September 2018).

- 14 GfK Belgium, Consumer Market Study to support the Fitness Check of EU consumer and marketing law, Final Report, 2017 (hereinafter: GfK 2017). This study, ec.europa.eu/newsroom/document.cfm?doc\_id=44817 (accessed 19 September 2018).
- 15 ICF, Study on the costs and benefits of the minimum harmonization under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonization and alignment of EU rules for different sales channels, EUR 2017.2801 EN, 2017. This study, ec.europa.eu/newsroom/document.cfm?doc\_id=44638 (accessed 19 September 2018).
- 16 ICF, Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC, EUR 2017.2800 EN, 2017. This study, ec.europa.eu/newsroom/document.cfm?doc\_id=44803 (accessed 19 September 2018).
- 17 RPA, CSES & EPRD, Study on the application of the CRD 2011/83/EU, Final Report, 2017 (hereinafter: RPA 2017). This study, ec.europa.eu/newsroom/document.cfm?doc\_id=44637 (accessed 19 September 2018).
- 18 See also C. TWIGG-FLESNER, ‘From REFIT to a Rethink: Time for fundamental EU Consumer Law Reform?’, *EuCML (Journal of European Consumer and Market Law)* 2017/5, p 185.
- 19 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 11 April 2018, A New Deal For Consumers, COM (2018) 183 final.
- 20 Proposal for a directive of the European Parliament and of the Council of 11 April 2018 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final.
- 21 Proposal for a directive of the European Parliament and of the Council of 11 April 2018 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 modernizing the rules for consumer protection in the EU, COM (2018) 185 final.

Directive are discussed. In the second part I will contrast these proposals with the recommendations made in the course of the fitness check. Do the Communication and the Modernization Directive do justice to the outcomes of the fitness check, given the fact that the fitness check was intended to examine the extent to which the consumer *acquis* is still sufficient equipped for the protection of consumers and allows traders to take advantage of the internal market?

## 2. A New Deal for Consumers?

4. The title of the Communication – A New Deal for Consumers – seems to indicate a serious change of course in European consumer law. The Commission states that with the Communication it aims at, *inter alia*,

- (1) Modernizing existing rules and filling gaps in the current consumer *acquis*;
- (2) Providing better redress opportunities to consumers;
- (3) Supporting effective enforcement and greater cooperation of public authorities.<sup>22</sup>

I will focus on these three main points in the following sections.

5. In addition, measures are announced to improve communication, capacity-building and knowledge of consumers, traders, practitioners<sup>23</sup> and consumer organizations.<sup>24</sup> To this end, the European Commission will launch a campaign to increase consumers' knowledge of European consumer law, in particular in Member States where consumers appear to have little knowledge thereof law.<sup>25</sup> The *ConsumerLawReady* project, available as of March 2018, offers small and medium-sized businesses a training program in European consumer law in order to help them to more easily comply with their obligations under European consumer law.<sup>26</sup> In August 2018, a beta version of the new *Consumer Law Database* has been added to the e-Justice portal, providing practitioners and enforcement bodies with access to national rules implementing key EU consumer law directives and relevant case-law of national courts and the Court of Justice.<sup>27</sup> The Commission also announces to support an initiative by European traders based on self-regulation in order to improve the presentation of information (including

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22 A New Deal, pp 3-4.

23 A New Deal, p 4.

24 A New Deal, p 14.

25 A New Deal, pp 12-14.

26 A New Deal, p 13, and [www.consumerlawready.eu](http://www.consumerlawready.eu) (accessed 9 July 2018).

27 A New Deal, p 13.

standard contract terms) to consumers. In addition, in 2019 a Guidance Document for the interpretation and application of the UCTD will be published.<sup>28</sup>

### 3. Modernizing Consumer Acquis

6. The first measure contributing to the modernization of the consumer *acquis* is also relevant to the improvement of possibilities for consumer redress: the European Commission indicates that consumers that have fallen victim to unfair commercial practices should be entitled to an individual remedy.<sup>29</sup> A new Article 11a UCPD<sup>30</sup> provides that Member States must ensure that these consumers are entitled to invoke both contractual and tortious claims reducing or removing the consequences of the unfair commercial practice. These claims must include the possibility for the consumer to unilaterally terminate the contract concluded on the basis of the unfair commercial practice and the right to compensation. The Article, however, does not provide any information as to the exercise of these remedies. For instance, does the notion of unilateral termination refer to termination for non-performance, or is it intended as a synonym for a neutral way of ending the contract? Does this remedy have retroactive effect? Is fault required? Does *any* unfair commercial practice justify termination?<sup>31</sup> Is the right to damages applicable only if a contract has been concluded, or also if the consumer did not conclude a contract but nevertheless has suffered a loss as a result of the unfair commercial practice?<sup>32</sup> Are Member States free to apply national contract law or tort law requirements and limitations for the application of these remedies?<sup>33</sup> And finally, must the consumer prove a causal link between the unfair commercial practice and the conclusion of the contract or the damage suffered?<sup>34</sup> As Twigg-Flesner concludes, the proposal currently does little more than to establish a basic principle, but leaving all the details to the Member States.<sup>35</sup> That should be stated explicitly as it will lead to differing conditions from one Member State to the next. Moreover, the Modernization Directive explicitly requires Member States to offer *at least* the two remedies mentioned, leaving them the possibility to provide also other remedies. On these points, the Modernization Directive thus aims at minimum full harmonization, whereas the UCPD generally aims at full harmonization.

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28 A New Deal, p 13.

29 A New Deal, p 4.

30 Inserted by Art. 1, para. 4, Modernization Directive.

31 See also critically C. TWIGG-FLESNER, 'Bad Hand? The "New Deal" for EU Consumers', *GPR (Zeitschrift für Gemeinschaftsprivatrecht)* 2018/4, pp 168-169.

32 TWIGG-FLESNER 2018, p 169.

33 TWIGG-FLESNER 2018, p 169, for instance, points to time-limits, criteria for foreseeability of damage and compensation for non-economic loss.

34 See also TWIGG-FLESNER 2018, p 169.

35 TWIGG-FLESNER 2018, p 169.

7. Secondly, it is proposed to offer consumers who conclude contracts at an online market place more information as to the identity of their contractual counterpart and as to their rights and obligations. Consumers making use of such platforms often believe they conclude a contract with the platform whereas in reality they may conclude a contract with a third party.<sup>36</sup> Moreover, the third party may be a trader but may also be a private party; in the latter case, European consumer law will not apply to the contract concluded. In order to better inform consumers of their rights and obligations, a new Article 6a CRD<sup>37</sup> requires the platform to indicate on the basis of which criteria the order is determined by which the goods and services are listed, whether the third party is a trader, whether European consumer law is applicable to the contract and, if the other party to the contract is a trader, which trader is required to comply with the obligations towards consumers arising from European consumer law. The platform is, however, not required to check whether the third party indeed is a trader or another consumer.<sup>38</sup>

8. The Commission further announced that the scope of the CRD will be extended to cover the provision of ‘free’ services to consumers, such as cloud storage, social media and email accounts, where consumers provide their personal information to the trader. The changes introduced by the Modernization Directive ensure that consumers of such ‘free’ services will be entitled to the same pre-contractual information and to a right of withdrawal.<sup>39</sup>

9. On some points, the Modernization Directive aims at simplifying the position of traders. Traders no longer need to provide the model form for the withdrawal from the contract if the contract is concluded through a means of distance communication that offers limited space (e.g. SMS) or time (TV advertising) for displaying information.<sup>40</sup>

Secondly, the right of withdrawal for distance and off-premises contracts is excluded in cases where consumers have used the goods instead of merely trying them out ‘in the same way they could have done in a brick-and-mortar shop’.<sup>41</sup> This proposal is in line with the recommendations made within the framework of the fitness check.<sup>42</sup> Article 14, paragraph 2, CRD currently provides that a consumer who has used the goods may still withdraw from the distance or off-premises

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36 A New Deal, p 5.

37 Inserted by Art. 2 under 10 Modernization Directive.

38 Cf. recital (20) in the preamble to the Modernization Directive; see also TWIGG-FLESNER 2018, p 172, who argues that the proposal does not go far enough in this respect.

39 A New Deal, p 5; see Art. 2 under 7, 11 and 12 b Modernization Directive amending Art. 2, 7, para. 3, and 8, para. 8, CRD.

40 See Art. 2 under 12 a Modernization Directive amending Art. 8, para. 4, CRD.

41 See the Explanatory Memorandum to the Modernization Directive, p 3, and Art. 2, under 9, s. 3, Modernization Directive adding Art. 16 under n CRD.

42 RPA 2017, p 187.

contract but is liable for the depreciation of the goods resulting from the continued use of the goods. This provision is problematic in practice as there are no criteria to determine when the testing phase is over and therefore to determine as of which moment the consumer would be liable for subsequent depreciation of the goods. Moreover, criteria to calculate the amount of the depreciation are missing as well.<sup>43</sup> The proposed exclusion of the right of withdrawal also allows for the deletion of this problematic provision.<sup>44</sup>

Thirdly, it is proposed that the trader is only then required to return the sales price when it has received the goods back.<sup>45</sup> This amendment is intended to prevent traders from already having to pay back the sales price before having had the chance to inspect the returned goods (and to determine whether these have been used, in which case the right of withdrawal had been lost to the consumer and no obligation to pay back the price had come into existence in the first place).<sup>46</sup>

10. The question is whether these amended rules indeed lead to a better enforcement and modernization of EU consumer law regarding the right of withdrawal. In my view this is not the case. The real problem is how to determine whether or not the goods have merely been tested or have in fact been used by the consumer. For instance, can the consumer be considered to be testing or using a computer if, in order to see whether it meets her expectations, she starts it and is prompted to install it before she can try it out? By the time she can, several files will have been automatically installed and a 'personal profile' will have been created on the computer. The comparison with what the consumer would do with the computer in a brick-and-mortar store does not help us here, as then the computer will already have been unpacked and installed. The proposed amendments to the CRD do nothing to solve this matter. Instead, the last two amendments together - loss of the right of withdrawal when the goods have been used and allowing the trader to withhold the reimbursement of the sales price until the goods have been returned to it - effectively diminish the chances of consumers successfully withdrawing from the contract even in cases where they have in fact not used the goods. The problem is that when a trader after inspection argues that the goods have been used, the consumer no longer in a position is to prove otherwise as the trader already has acquired possession of the goods. An unwilling trader would thus be able to deprive a consumer from her right of withdrawal even though she would be entitled to withdraw from the contract. There are clear incentives for traders to invoke such a defence even if, from a legal point of view, this would not be justified. In the interviews undertaken for the Study on the application of the CRD, one of the traders stated that the mere fact that a box was opened, already led to a

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43 RPA 2017, p 115.

44 See A New Deal, pp 5-6, and Art. 2 under 8, s 1, Modernization Directive.

45 See Art. 2 under 7 a Modernization Directive amending Art. 13, para. 3, CRD.

46 See recital 36 in the preamble of the Modernization Directive.



disproportionate decrease in value.<sup>47</sup> Another trader noted the problem of determining the depreciation of expensive electronic or technological products that initially are sold against a high introductory price and later at a lower price.<sup>48</sup> It does not seem unlikely that such traders, even in good faith, sooner rather than later believe that the goods have been used instead of merely tested.

#### 4. Improving Compensation

11. The first measure implementing the Commission's intention to enhance consumer redress is the introduction of a procedure for representative actions, which may be used for mass claims.<sup>49</sup> As mentioned, the relevant proposal for a directive is not discussed here.

12. The second measure, already discussed, is the introduction of individual remedies for consumers that have fallen victim to an unfair commercial practice.<sup>50</sup>

13. Thirdly, the European Commission intends to make the existing instruments in the field of alternative dispute resolution, such as the ADR Directive<sup>51</sup> and the ODR Regulation<sup>52</sup> more effective by making it easier for consumers to take advantage of these instruments.<sup>53</sup> In this context, in 2017 the European Commission published a separate report on the functioning of the ODR platform (hereinafter: ODR Report).<sup>54</sup> The Commission then announced it aims at improving the number of traders participating in the ODR platform.<sup>55</sup> Firstly, a communication campaign among traders would be launched.<sup>56</sup> Secondly, together with national public authorities it would strengthen the compliance of the obligation for online traders to provide a link to the ODR platform on their website.<sup>57</sup> The problems with the ADR Directive and the ODR Regulation, however, reach further: whereas on average over 2,000 complaints per month were submitted to the ODR platform in the

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47 RPA 2017, p 115.

48 RPA 2017, pp 115-116.

49 A New Deal, p 6.

50 See above, section 3.

51 Directive 2013/11/EU, *OJ* 2013, L 165/63.

52 Regulation (EU) No 524/2013, *OJ* 2013, L 165/1.

53 A New Deal, pp 6-7.

54 Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, report of 13 December 2017, COM (2017) 744 final.

55 ODR Report, p 8.

56 A New Deal, p 7, fn. 31.

57 ODR Report, p 8. According to the report, in 2017 only 30% of the 20,000 web shops investigated complied with this obligation, see ODR Report, p 4.

first year of its existence,<sup>58</sup> 85% of these complaints were automatically closed within 30 calendar days after submission as the parties had not agreed on a competent ADR body to deal with the complaint. According to the European Commission, in 40% of these cases the trader had contacted the consumer directly in order to solve the problem without any further progression of the complaint on the platform.<sup>59</sup> Even if, as the Commission claims, one would argue that in these cases the ODR platform has helped consumers and traders to solve their disputes as consumers' recourse to the ODR platform has had an effect on traders to settle the dispute informally, one must conclude that of the roughly 24,000 complaints in the first year of the platform, 50% were simply dismissed as the consumer and the trader could not agree on a competent ADR body, and 3% of the complaints were flat-out refused by the trader.<sup>60</sup> Moreover, about half of the 2% of the original complaints that were submitted to a specific ADR body, were refused by the chosen ADR bodies on procedural grounds, resulting in a final outcome of the ADR procedure of only 1% of the original 24,000 complaints.<sup>61</sup> That result is negligible. I am afraid that the measures announced by the European Commission will not yield much better results as they do not address these more serious problems.

## 5. Improving Enforcement

14. The third series of measures aim at improving the enforcement of EU consumer law and strengthening the cooperation of public authorities. In 2004, the Consumer Protection Regulation (hereinafter: CPC Regulation) laid down the legal framework for cross-border cooperation of consumer authorities; this regulation will be replaced in 2020 by a new regulation.<sup>62</sup> The new CPC Regulation provides the basis for a uniform enforcement of EU consumer law by national public authorities.<sup>63</sup> In addition, the European Commission now proposes to introduce more effective and more uniform fines for widespread breaches of consumer law<sup>64</sup>: it is proposed to increase the maximum fines for such infringements to (at least) 4% of the annual turnover of the trader. According to the Commission, fines of that magnitude will work as a deterrent and will thus contribute to the prevention of such infringements.<sup>65</sup>

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58 ODR Report, p 4.

59 ODR Report, p 6.

60 ODR Report, p 6.

61 ODR Report, p 7.

62 Regulation (EC) 2006/2004, *OJ* 2004, L 364/1, to be replaced by Regulation (EU) 2017/2394, *OJ* 2017, L 345/1.

63 A New Deal, p 7.

64 That is, infringements of EU consumer law that affect consumers in at least 3 Member States, see Art. 3 under 3 CPC Regulation 2017.

65 A New Deal, p 8.

15. To this end, the Modernization Directive contains (identical) provisions amending the UCPD, the CRD, the UCTD and the PID<sup>66</sup> requiring the Member States to provide for effective, proportionate and dissuasive penalties for traders not respecting the provisions of the relevant directives.<sup>67</sup> The provisions give detailed information as to the circumstances to be taken into account.<sup>68</sup> When redistributing the income from these fines the interests of consumers will have to be taken into account.<sup>69</sup> This requirement will, in particular, be met if the amount of the fines recovered is used for the benefit of the information of consumers or the enforcement of consumer law by the public authority receiving that amount.

## 6. Other proposed Changes

16. Some minor adjustments are made to the directives concerned.<sup>70</sup> For example, the UCPD will expressly provide that the Member States may establish rules with respect to aggressive or misleading commercial practices leading to the conclusion of an off-premises contract in so far as these national rules are justified on grounds of public policy or the protection of private life.<sup>71</sup> This provision will enable Member States to swiftly take action against unfair commercial practices that are not black-listed, but which do require immediate action. This amendment – which to some extent undermines the full harmonization nature of the UCPD<sup>72</sup> – is defended in the explanatory memorandum to the Modernization Directive in no less than three different ways: it would be in line with the principle of subsidiarity,<sup>73</sup> it would be consistent with the respect for the consumer's private life in accordance with Article 7 of the EU Charter of Fundamental Rights, and it would be necessary in order to clarify the relationship between the UCPD and national legislation.<sup>74</sup> These arguments seem rather weak. Firstly, the argument of subsidiarity may be invoked against almost all (provisions of) directives, especially if these are based on full harmonization. A justification why the argument of subsidiarity would be more relevant specifically for these situations is missing. Secondly, if the argument of protecting

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66 See respectively Art. 1 under 5 Modernization Directive for the amendment of Art. 13 UCPD, Art. 2 under 24 Modernization Directive for the amendment of Art. 24 CRD, Art. 3 Modernization Directive for the insertion of Art. 8b UCTD, and Art. 4 Modernization Directive for the amendment of Art. 8 PID.

67 See the first paragraph of each of these modified or inserted articles. On the basis of the sixth paragraph thereof, the measures taken by Member States are to be notified to the European Commission.

68 See the second paragraph of each of these modified or inserted articles.

69 See the fifth paragraph of each of the modified or inserted articles.

70 These are not all discussed here.

71 See Art. 1 under 1 a Modernization Directive amending Art. 3, para. 5, UCPD.

72 See also TWIGG-FLESNER 2018, p 173.

73 See the explanatory memorandum to the Modernization Directive, pp 10 and 17.

74 See the explanatory memorandum to the Modernization Directive, p 16.

the consumer's private life on the basis of Article 7 of the EU Charter would hold true, the whole phenomenon of doorstep selling could be called into question. Moreover, the argument bears little relevance to off-premises contracts that are not concluded at the consumer's doorstep, but during an excursion organized by the trader away from business premises; the amendment would, however, also apply to such off-premises contracts. Finally, the argument that the relationship between the Directive and national legislation is in need of clarification on this point is a white lie: the full harmonization nature of the UCPD makes it perfectly clear that the Directive currently does not allow national legislation preventing or restricting particular commercial practices that have not been blacklisted by the Directive itself.<sup>75</sup> In reality, this proposal contains a political choice to limit the extent of full harmonization in an area where national legislation cannot have significant effects on the internal market<sup>76</sup> – the number of cases where a trader concludes cross-border contracts at the consumer's doorstep obviously is very limited.

17. The UCPD's blacklist is amended on one point only: the prohibition of the misleading commercial practice of hidden advertising in editorial content in the media<sup>77</sup> is complemented by a ban on hidden advertising in the provision of information in the form of search results for an online consumer's search query.<sup>78</sup> The underlying idea is that many consumers are guided by the order indicated by the search engine as they assume that the order is determined by the relevance of the product in relation to the query, unless it is made sufficiently clear to the consumer that the list is affected by 'paid placements' (where a product receives a higher place in the ranking due to payments made to the search engine-trader) or by 'paid inclusions' (where the search engine-trader is paid for the inclusion in the list of results even though the search criteria are not met, for example, when similar products or accessories for the searched product are listed).<sup>79</sup>

18. The Modernization Directive will also replace rules that have become obsolete as a result of technological developments – such as the obligation to have a fax number or e-mail address available for communication with consumers – by a more contemporary (and technology-neutral) provision allowing a trader to instead choose to communicate via a web form or chat sessions. The trader must, however, enable the consumer to retain the content of the

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75 The European Commission is also aware of this, as appears from the underpinning directly following the argument made.

76 See also the explanatory memorandum to the Modernization Directive, p 17; in this sense also TWIGG-FLESNER 2018, p174.

77 Annex I to the UCPD, under 11.

78 See Art. 1 under 6 Modernization Directive.

79 See the explanatory memorandum to the Modernization Directive, pp 3 and 18; see also TWIGG-FLESNER 2018, p 170.

communication on a durable medium, similar to email.<sup>80</sup> This implies that the trader must offer the consumer the possibility to save or print a transcript of, for instance, a chat session on her computer – as many traders already do.

19. Primarily of political relevance is the proposal to supplement the UCPD with the provision that it is a misleading commercial practice for a trader to package and market products in different Member States in the same way, even though the composition or characteristics of these products differ significantly.<sup>81</sup> The proposed amendment relates to the criticism of ‘dual quality’ regularly voiced in Eastern European countries: products in these countries arguably are of poorer quality than the same product in Western European countries even though they have been packaged and marketed in the same way. The proposed amendment of the UCPD would allow public authorities to act against such practices on the basis of an express provision in the Directive.<sup>82</sup> Whether or not the average consumer would be misled by the packaging and marketing of the goods, however, must be established on a case-by-case basis, as the commercial practice is not blacklisted.<sup>83</sup>

## 7. Fitness Check: Recommendations Followed?

20. The ambitious title of the Communication notwithstanding, the proposals of the Modernization Directive are not very exciting. The farthest-reaching proposal, introduced by a separate proposal that is not discussed in this article, concerns the introduction of representative actions for mass claims. A second main proposal concerns the proposed introduction of individual remedies for consumers who have fallen victim to unfair commercial practices. The Modernization Directive furthermore proposes to extend the scope of the CRD to ‘free’ services, where consumers provide their personal data to the service provider. In addition, it is proposed to include information obligations for online platforms on the contractual relationship between the provider of goods or services and consumers who order these goods or services through a platform. A limitation of the right of withdrawal for distance and off-premises contracts is announced where the consumer has used instead of merely tested the goods – without however the Directive providing a criterion how to distinguish between the two. Finally, worth mentioning is the proposed increase of the maximum fines for infringements of EU consumer law.

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80 See Art. 2 under 9 Modernization Directive amending Art. 6, para. 1 under c, CRD; cf. also the explanatory memorandum to the Modernization Directive, pp 12, 16 and 19, and recital 38 in the preamble of the Modernization Directive.

81 A New Deal, pp 4 and 11–12 and Art. 1 under 2 Modernization Directive for the insertion of Art. 6, para. 2 under c, UCPD.

82 Explanatory memorandum to the Modernization Directive, p 17, and recitals (41–43) in the preamble of the Modernization Directive.

83 See the explanatory memorandum to the Modernization Directive, pp 15 and 18.

21. The question I will address in the coming sections of this article is whether these and the other proposals announced by the European Commission in the New Deal and the Modernization Directive do justice to the outcomes of the 2017 fitness check. Is the consumer *acquis* up-to-date and fit for the 2020s if these proposals, together with the revised CSD and the pending Digital Content Directive, are adopted? In the following sections I will discuss the most important similarities and differences.

### 7.1. *Information Obligations*

22. A first recommendation that follows from the fitness check is to streamline the precontractual and contractual information obligations following from the various European consumer law directives.<sup>84</sup> In particular it was recommended to incorporate the provisions of the PID into a revised UCPD (or in an even more general instrument).<sup>85</sup> In order to avoid *information overload* – as a result of which consumers could refrain from taking any information – use should be made of the results of *behavioural studies* in order to determine what information should be provided in which stage of the contracting procedure and in how far the information as to the main characteristics of the goods or services offered may be standardized.<sup>86</sup> Finally, if a standard format would be used to present information to consumers, this could contribute to better decision making. In particular when purchasing digital content, a uniform way of labelling information regarding functionality and interoperability (‘only for X-box’, ‘requires Windows 10’) would be useful.<sup>87</sup>

23. Only the recommendation to determine at what contracting stage information is to be provided<sup>88</sup> is to some extent reflected in the Modernization Directive: the obligation to already inform the consumer of the complaints handling procedure at the advertising stage will be deleted from the UCPD.<sup>89</sup> Apart from this minor point, the European Commission only indicates to support a self-regulatory, non-binding initiative of European business to develop key principles for better presentation of information (including standard contract terms).<sup>90</sup>

24. The limited response to the call for streamlining of information obligations is remarkable. In so far as this would be ‘too complicated’ (as was suggested in the corridors), this would in fact support the criticism voiced by traders that European consumer law on this point is overstretching both the needs of consumers and the

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84 Civic Consulting 2017, pp 268 and 296; in this sense also RPA 2017, p 187.

85 Civic Consulting 2017, p 268.

86 Civic Consulting 2017, pp 262 and 268.

87 GfK 2017, p 101.

88 See Civic Consulting 2017, p 457.

89 Cf. Art. 7, paragraph 4, UCPD and the proposed amendment of this provision in Art. 1 under 3 Modernization Directive; cf. also recitals (29-30) in the preamble of the Modernization Directive.

90 A New Deal, p 13.

capabilities of traders – if it has become too complicated for the European Commission to unify the information duties, then how can it be expected from traders to know exactly which information is to be presented in which form at which moment? It is suggested that the European Commission should take a step back and consider, once again, what information consumers actually *need*, and at which time and in which form the information should be presented for consumers to be able to take an informed decision.

## 7.2. *The Consumer Contract Notion*

25. European consumer law assumes that a trader offers goods and services to a consumer, and the consumer pays a price for those goods and services in money. The fitness check has led to the recommendation to extend the scope of the CRD to cover ‘free’ services, such as online services where the trader obtains the consumer’s personal data.<sup>91</sup> This recommendation has been followed, as was also mentioned already in section 3. The recommendation to also explicitly extend the scope of the UCTD to such contracts has, however, not been followed, even though there is no consensus on the applicability of this Directive to ‘free’ online services.<sup>92</sup>

26. Whether European consumer law also applies to *consumer-to-business* (C2B) contracts, i.e. contracts under which a consumer sells goods to a trader, is much less clear.<sup>93</sup> In many ways, the position of consumers in C2B contracts is similar to that of consumers in business-to-consumer (B2C) contracts.<sup>94</sup> Such contracts are certainly concluded less frequently than B2C contracts, but undeniably some traders make their business of purchasing second hand goods from consumers (and reselling them to other consumers or to other traders). This is evidenced by the existence of websites concerned with traders buying consumers’ cars,<sup>95</sup> jewellery, watches and precious metals,<sup>96</sup> and antiques.<sup>97</sup> Such traders may, of course,

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91 RPA 2017, p 188.

92 See Civic Consulting 2017, pp 230, 242-243. In my view, given the fact that the UCTD does not require any payment as counter-performance for the provision of services, the directive is applicable to such ‘free’ services, see M.B.M. LOOS & J.A. LUZAK, ‘Wanted: A bigger stick. On unfair terms in consumer contracts with online service providers’, *JoCP (Journal of Consumer Policy)* 2016/1, p 67; M.B.M. Loos, ‘Standard terms for the use of the Apple App Store and the Google Play Store’, *EuCML* 2016/1, p 11.

93 Civic Consulting 2017, pp 198 and 265, states that the consumer protection directives do not apply to C2B contracts.

94 Civic Consulting 2017, pp 210 and 266.

95 See for instance [www.webuyanycar.com](http://www.webuyanycar.com) (UK), [www.wirkaufen-ihrauto.de](http://www.wirkaufen-ihrauto.de) (Germany), [ikwilvanmijn-autoaf.nl](http://ikwilvanmijn-autoaf.nl) (The Netherlands) and [www.vendremavoiturepro.be](http://www.vendremavoiturepro.be) (Belgium).

96 See for instance [www.juwelenplein.nl](http://www.juwelenplein.nl) (The Netherlands), [www.hattonjewels.com/sell\\_your\\_jewellery.html](http://www.hattonjewels.com/sell_your_jewellery.html) (UK) and [www.cresus.fr/vendre-son-bijou.html](http://www.cresus.fr/vendre-son-bijou.html) (France).

97 See for instance [www.proantic.com/vendre-vos-antiquites.php](http://www.proantic.com/vendre-vos-antiquites.php) (France), [www.antiquitiesonline.co.uk](http://www.antiquitiesonline.co.uk) (UK) and [www.antik-stermann.de/ankauf-antiquitäten](http://www.antik-stermann.de/ankauf-antiquitäten) (Germany).

make use of unfair terms in their contracts, of unfair commercial practices, and consumers offering their goods to such traders have little or no information about their rights and obligations. During the fitness check there was no consensus among stakeholders whether an explicit extension of the scope of EU consumer law to encompass also such contracts is needed,<sup>98</sup> but a recommendation to extend the scope of (at least) the UCPD and the UCTD to C2B-contracts was nevertheless made.<sup>99</sup> This would also take away the need for (national) legislation in specific areas - as has already been established in some Member States.<sup>100</sup> The recommendation is, however, not taken over by the European Commission. This is all the more regrettable since consumers selling these valuable items often are in a problematic situation - either they sell their inheritance, often in a period of grief, or they are in a dire financial position. Traders will be aware of this and may be tempted to take advantage thereof. A social European Union wishing to protect weaker parties could certainly offer relief here without unnecessarily hindering the internal market or touching upon national sensitivities. Moreover, changing the scope of these directives in this sense is technically and legally relatively unproblematic.

27. So far, the role of intermediaries in the conclusion of contracts between consumers and traders is hardly taken into account. This situation is no longer tenable with the emergence of online platforms. In the report on the functioning of the CRD it is therefore recommended to better equip this directive for contracts concluded through online platforms.<sup>101</sup> In section 3 of this article it has already been highlighted that the Modernization Directive indeed amends the CRD at this point by introducing additional information obligations for online marketplaces. Unfortunately, substantive provisions regulating the relationship between platform and consumer in case where the seller or service provider is indeed a third party have neither been recommended during the fitness check nor proposed by the European Commission.

### **7.3. Enforcement**

28. In section 5 of this article the proposed introduction of high(er) fines for widespread breaches of EU consumer law was mentioned. That proposal is in line with the recommendations of the fitness check. It was noted that public authorities should have sufficient means and instruments in order to ensure the enforcement of the CRD; in this respect the maximum fine that could be imposed on a trader for

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98 See Civic Consulting 2017, pp 198-199, and 228 on the extension of the scope of the UCPD and pp 210, 233, and 273 on the extension of the scope of the UCTD.

99 Civic Consulting 2017, p 265.

100 Civic Consulting 2017, pp 210, 233, and 273.

101 RPA 2017, p 188.



breaches of consumer law should be set at such a high level that the fine could function as a deterrent against such infringements,<sup>102</sup> whereas in most Member States, the maximum fine currently is relatively low unless it can be demonstrated that the infringement has led to a distortion of the market.<sup>103</sup> Several stakeholders, including public authorities, argued that the current fines that may be imposed are set at such low maximum that they are insufficiently deterrent.<sup>104</sup> However, the fitness check has also showed that there is no empirical evidence that the level of fines (or the differences between the Member States regarding the maximum fines) actually has implications for the compliance of traders with the directives.<sup>105</sup> A failure to comply with these directives rather seems to be the result of the traders' ignorance of these rules.<sup>106</sup> In this respect, it is not surprising that it is recommended to improve both consumers'<sup>107</sup> and (retail-) traders' knowledge of European consumer law.<sup>108</sup> In section 2 of this article the measures the European Commission intends to take in this regard have already been discussed.

29. In my opinion, it is regrettable that the recommendation to take measures to abolish the 'loser pays' principle for consumer organizations and public authorities,<sup>109</sup> has not been followed - neither in the Modernization Directive nor in the proposal for representative actions. Civic Consulting noted in this respect that the abolishment of that principle would take away a major obstacle to a cross-border collective claim or to cross-border public enforcement. The abolishment of the principle would also fit in with the idea that public authorities and consumer organizations exercising their rights under the InjD are acting in the public interest.<sup>110</sup> Not following this recommendation means that both the collective action-procedure and public enforcement remain relatively blunt instruments in a cross-border context. Similarly, the recommendation that consumer organizations should explicitly be empowered to seek an injunction against standard contract terms which do not meet the transparency requirement rule but which may nevertheless substantively acceptable,<sup>111</sup> unfortunately also has not been taken over.

30. Another way to stimulate the use of collective action procedures is to award direct legal consequences to the outcome of a collective action-procedure in individual procedures. The Court of Justice has clarified that a term found to be unfair in a collective action procedure, is deemed to be unfair in each subsequent

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102 RPA 2017, p 188.

103 RPA 2017, p 44.

104 RPA 2017, p 44.

105 RPA 2017, pp 44-45.

106 RPA 2017, pp 44-45.

107 GfK 2017, p 98; RPA 2017, p 188.

108 GfK 2017, p 100; RPA 2017, p 188.

109 Civic Consulting 2017, p 285.

110 Civic Consulting 2017, p 285.

111 Civic Consulting 2017, pp 276-277.

individual procedure involving the same trader and the same set of standard contract terms, regardless of whether the contract was concluded before or after the decision in the collective action procedure.<sup>112</sup> The obligation of courts to test terms of their own motion<sup>113</sup> brings with it that the court will also have to declare such terms unfair in case the consumer has not brought the matter up himself. In Civic Consulting's Main report it is recommended to provide that the prescription of individual claims should be suspended or interrupted by a collective action procedure that is relevant to that claim.<sup>114</sup> Moreover, other traders than the defendant trader should under certain conditions even be bound by the decision in the collective action procedure.<sup>115</sup> Neither of these recommendations has found their way into the Modernization Directive (or the proposal for representative actions).

#### 7.4. *Unfair Terms*

31. Under the UCTD, the consumer must be made aware of the standard contract terms before the conclusion of the contract in order for her to be able to understand the economic consequences of these terms and to subsequently make an informed decision as to whether or not to contract with the trader.<sup>116</sup> Civic Consulting recommended to codify this case-law,<sup>117</sup> but this recommendation has not been followed. Neither have the recommendations to codify the case law on core terms, on the assessment of the unfairness of a term, and the fact that the mere violation of the transparency requirement may already lead to the assessment that a term is unfair.<sup>118</sup>

32. Another recommendation entailed that traders should be required to present the main provisions in the standard contract terms separately and in a clear manner.<sup>119</sup> Such a 'summary' of the standard contract terms is better read than the usual long set of terms.<sup>120</sup> Furthermore, consumers who read such a 'summary' are better able to distinguish between fair and unfair terms in the standard contract

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112 ECJ 26 April 2012, *Invitel*, C-472/10, ECLI: EU:C:2012:242, points 38 and 43.

113 See, inter alia, ECJ 4 June 2009, *Pannon*, C-243/08, ECLI:EU:C:2009:350, point 28.

114 Civic Consulting 2017, p 288.

115 Civic Consulting 2017, p 288.

116 ECJ 30 April 2014, *Kásler*, case C-26/13, ECLI:EU:C:2014:2812, points 69-72; ECJ 26 February 2015, *Matei*, C-143/13, ECLI:EU:C:2015:127, points 73-74; ECJ 23 April 2015, *Van Hove*, C-96/14, ECLI:EU:C:2015:262, point 33; ECJ 20 September 2017, *Andriciuc*, C-186/16, ECLI:EU:C:2017:703, point 44.

117 Civic Consulting 2017, p 276.

118 Civic Consulting 2017, pp 274-278.

119 Civic Consulting 2017, pp 283-284.

120 GfK 2017, p 53.

terms than consumers who read the longer set of terms.<sup>121</sup> The use of a shorter set of standard contract terms presented in a standardized way thus leads to a better understanding of the content of the terms of the contract, presumably because otherwise more hidden terms in this way sufficiently stand out.<sup>122</sup> Following this recommendation would therefore also do justice to the case-law of the Court of Justice as to the possibility for consumers to understand the economic consequences of a term before they are bound by them. The recommendation by Civic Consulting is supported by earlier empirical research conducted - on behalf of the European Commission - by an interdisciplinary team in which I participated.<sup>123</sup> Unfortunately, the European Commission nevertheless decided not to follow it.

33. The same unfortunate decision was made as regards the recommendation<sup>124</sup> to extend the scope of the UCTD to individually negotiated terms. Such extension would solve the practical problem whether a specific term which has been the subject of individual discussion but has not or only on a minor point been amended as a result of the discussion, should fall under the unfairness test or should be excluded therefrom. The extension was thought to be relevant in view of the possibility of sham negotiations.<sup>125</sup> In addition, it should be noted that since the adoption of the UCTD technological development has made it much easier to produce contractual terms that look as if they have been individually negotiated but in fact have been pre-prepared and inserted at the appropriate place in a contract document, without anybody being able to tell the difference between the individual and the pre-drafted terms coming out of the printer. In this respect, the exclusion of individually negotiated terms is an anachronism that should have been deleted in a Modernization Directive. However, since it is the trader that must prove that a term was individually negotiated,<sup>126</sup> the practical importance of the Commission's decision not to take over this recommendation should not be overstated - the same reasons that make it difficult for the consumer to point out that a term is actually pre-drafted make it difficult for the trader to prove otherwise.

34. Of more practical importance is the recommendation to replace the indicative list of possibly unfair terms with a blacklist and/or a grey list of terms that are deemed or presumed to be unfair and to allow the Member States to add terms to the list for contracts governed by their national law. It was suggested that when determining which terms could be placed on such list, inspiration could be drawn from the existing indicative and national lists, taking into account the following factors:

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121 GfK 2017, p 54.

122 GfK 2017, p 99.

123 M. Elshout, M. Elsen, J. Leenheer, M. LOOS & J. Luzak, Study on consumers' attitudes towards terms and conditions (T&Cs), Final report 2016, p 97, [ec.europa.eu/info/sites/info/files/terms\\_and\\_conditions\\_final\\_report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/terms_and_conditions_final_report_en.pdf) (accessed 19 September 2018).

124 Civic Consulting 2017, pp 273-274.

125 Civic Consulting 2017, pp 85-87.

126 See Art. 3, para. 3, UCTD.

- (1) The term is highly unbalanced (the clause offers no advantage to consumers);
- (2) The trader's interest to make use of the term is clearly and significantly outweighed by the consumer's interest not to be confronted with the term (reflecting the prohibition of abuse of rights);
- (3) Placing the term on the list leads to a considerable simplification of the assessment of the unfairness of the term (implying that the blacklist or grey list should not contain open standards itself).<sup>127</sup>

The introduction of such a list would make it significantly easier for consumers and consumer organizations to combat unfair terms and it would significantly simplify the court's task in the assessment of potentially unfair terms or the task of public authorities to enforce the UCTD. In case of a blacklist, the court would not have to consider the specific circumstances of the case but merely needs to ascertain whether or not the term is blacklisted. In case of a grey list, the trader would have to prove that considering the circumstances of the case the term in fact is fair. A failure to provide such proof would also free the court from having to test the term; only where the trader argues that the term is in fact fair the court would have to consider the argument put forward. Moreover, the existence of such a list would contribute to legal certainty as both consumers and traders would know that the terms listed will or are likely to be considered unfair. The list would therefore likely also have a deterrent effect on traders - in particular since the Modernization Directive introduces the possibility for public authorities to impose a serious penalty on the trader for incorporating an unfair term in a consumer contract. The introduction of a blacklist and/or a grey list would therefore lead to better enforcement of the UCTD without adding unreasonable costs to traders. In this respect, it is deplorable that this recommendation also has not been followed.

35. The same is true for not following the recommendation to clarify the relationship between the UCTD and sector-specific legislation,<sup>128</sup> in a similar manner as the UCPD and the CRD have clarified their relationship to such legislation.<sup>129</sup> The introduction of such provision would signal to the (often specific) public authorities that are competent to enforce sector-specific legislation that the UCTD applies as well<sup>130</sup> and thus contribute to better compliance with the provisions of the UCTD without adding to traders' costs.

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127 Civic Consulting 2017, pp 279-281, with examples taken from the indicative list that illustrate how these factors would work out in fixing a black (or grey) list.

128 Civic Consulting 2017, pp 186.

129 See Art. 3, paras 2 and 3, UCPD and Art. 3, para. 2, CRD.

130 Civic Consulting 2017, pp 181 and 183.

## 7.5. *Unfair Commercial Practices*

36. In section 6 of this article I have already mentioned that the Modernization Directive will lead to only minor amendments to the UCPD. The results from the fitness check suggested that a much further-reaching revision of the Directive was needed. Firstly, it was recommended to substantially revise the blacklist in the Annex to the Directive: on the one hand, it was proposed to add new commercial practices to the existing list of prohibited commercial practices,<sup>131</sup> while on the other hand it was recommended to delete from the list commercial practices that still require a concrete assessment of the unfairness of the practice as an open standard was used to describe the commercial practice.<sup>132</sup> For example, according to point (22) of the Annex, a commercial practice is deemed to be misleading if a trader falsely claims or gives *the impression* that the trader is not acting for the benefit of its trade or business; similarly, according to point (24) of the Annex, a commercial practice is deemed to be aggressive if the trader gives the consumer *the impression* that she may not leave the property before a contract has been concluded. Whether such impression has arisen, at least in part requires a casuistic assessment, even if it the matter is assessed from the position of the average consumer. In addition, it was recommended to introduce a simple mechanism for changes to the blacklist, for example on the basis of delegation to the European Commission.<sup>133</sup> These recommendations have been ignored apart from the black-listing of hidden advertising in the provision of information in the form of search results.<sup>134</sup>

37. Secondly, in order to improve the protection of weaker consumers it is recommended to supplement the standard of the ‘average consumer’ with the standard of a ‘targeted average consumer’. This additional criterion should be applied if it may be expected that a certain commercial practice is likely to affect a specific group of consumers, without the need to prove that the practice was also specifically focused on that group.<sup>135</sup> In addition, it was recommended to extend the list of factors that may lead to vulnerability of a consumer with external conditions such as unemployment, over indebtedness as well certain market conditions (for instance, the existence of a monopoly on the part of the trader), and to clarify that vulnerability may also be temporary.<sup>136</sup> These recommendations have not been followed either.

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131 Civic Consulting 2017, pp 268-269 and 292.

132 Civic Consulting 2017, p 252.

133 Civic Consulting 2017, pp 269 and 293.

134 See above, section 6.

135 Civic Consulting 2017, p 294.

136 Civic Consulting 2017, p 294.

38. The UCPD currently contains no provision under which the Member States are required to offer an individual remedy to consumers who have been victims of an unfair commercial practice. This means that in the Member States where no individual remedy is granted to consumers,<sup>137</sup> consumers who have fallen victim to such practices must rely on general doctrines as damages for breach of contract or tort, or avoidance of the contract because of mistake or abuse of circumstances.<sup>138</sup> An experiment with mystery shopping showed that traders that make use of misleading commercial practices often do not recognize that their practices are unfair and (therefore) are not likely to acknowledge a consumer's complaint about the unfairness of, for example, advertising.<sup>139</sup> For this reason it was recommended to require Member States to provide individual remedies,<sup>140</sup> but not to determine *what* remedies the consumer must be entitled to: it was felt that on this point full harmonization would be seen as having too much impact on national contract law, and could lead to inconsistencies in national legal systems or to a floodgate of possibly unjustified claims against traders. Prescribing specific remedies therefore seemed to be politically too sensitive.<sup>141</sup> This recommendation has been followed, as was discussed above in section 3 of this article: Member States will have to offer consumers at least the possibility of termination of the contract and the right to claim damages, but the conditions for these remedies are left to the Member States and other remedies may also be offered.

## 8. Conclusion

39. When the Modernization Directive is evaluated against the recommendations resulting from the fitness check, it is striking how few recommendations have been taken over. Of course, there may be good arguments for this – for instance, different priorities may follow from other sources used by the European Commission in the preparation of the Modernization Directive, such as public consultations and impact assessments – but it is nevertheless remarkable, especially if one considers *which* recommendations have not been followed. Looking from some distance, especially recommendations to codify the case law of the Court of Justice<sup>142</sup> and recommendations that would extend or strengthen consumer protection often have not been followed. The latter series of recommendations include the introduction of a blacklist or grey list of unfair terms, the revision of the blacklist of unfair commercial practices, the

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137 Such remedy is currently missing in most Member States, see Civic Consulting 2017, pp 211 and 266.

138 See also TWIGG-FLESNER 2018, p 168.

139 GfK 2017, p 86.

140 Civic Consulting 2017, pp 270-271; GfK 2017, p 102.

141 Civic Consulting 2017, pp 270-271.

142 When it comes to a mere codification of existing case law, the impact assessment should show no negative effects of legislation as codification as such does not lead to additional rules that must be complied with by traders.

introduction of the obligation for traders to provide a summary of the main standard contract terms to consumers, and the introduction of a standard format for the information to be provided to consumers. The failure to extend the scope of European consumer law directives to C2B contracts is regrettable as well. Disappointing for all stakeholders is the absence of measures streamlining the information that is to be provided on the basis of the different consumer directives: harmonization thereof would make it easier for traders to comply with their obligations and reduce the risk of an information overload for consumers.

40. With regard to the right of withdrawal for goods purchased at a distance or off-premises, it is proposed to decrease the level of consumer protection in order to meet traders' concern as to consumers abusing their rights by using instead of merely testing the goods. This proposal may solve practical problems for some traders, but in turn invites traders to abuse the exception to the right of withdrawal thus created.

41. The biggest oversight, in my view, is the absence of substantive rules for the relationship between consumer and platform: the idea that merely introducing information obligations for online platforms would suffice, neglects the fact that online intermediaries are important economic operators themselves. In practice, these platforms often deny having any contractual obligations towards the consumer and/or exclude any liability for failure to non-performance. Although various provisions of the CRD will apply to the services offered by these platforms, the applicability of the UCTD and the UCPD remains an open question since these platforms typically do not require payment in money by the consumer and the scope of these directives have not explicitly been extended to 'free' services.

42. In many ways, the Modernization Directive therefore seems to be a missed opportunity. That does not mean that the Directive is meaningless or redundant: the proposals on the improvement of enforcement may not go far enough, but they are generally a step in the right direction, and the introduction of individual remedies for consumers that have fallen victim to an unfair commercial practice may even be considered an important step forward for consumers in Member States that so far have not introduced such remedy. The extension of the scope of the CRD to 'free' services is in line with the proposal for a Digital Content Directive and as such to be welcomed. But all in all, the end result is disappointing. Neither the Modernization Directive itself nor the Communication deserves the association with a 'New Deal' - it is rather a pig in a poke.