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1 INTRODUCTION

Directive 2005/29\(^1\) (Unfair Commercial Practices Directive; UCPD hereafter) provides a blanket ban on unfair commercial practices,\(^2\) which harm consumers' economic interests\(^3\) through a layered structure. Practices are unfair if, contrary to professional diligence, they materially distort the economic behaviour of the average consumer\(^4\) and cause him to take a transactional decision\(^5\) he would not have otherwise taken.\(^6\) The text prohibits misleading actions and omissions\(^7\) as well as aggressive practices.\(^8\) It also, via its annex, prohibits outright 31 practices that do not need to be tested for unfairness. The Directive is said to give a


\(^2\) Art 5(2).

\(^3\) Art 1.

\(^4\) Art 5. It is important to note that the texts also recognise vulnerable consumers as a category.

\(^5\) The notion is defined widely. See case C-281/12 Trento Sviluppo Srl, central Adriatica Soc Coop Arl v Autorità Garante della Concorrenza e del Mercato, where the court held that the notion of 'transactional decision' covers 'not only the decision whether or not to purchase a product but also the decision directly related to that decision, in particular, the decision to enter the shop': [2014] 1 WLR 890, [36].

\(^6\) Art 5(2).

\(^7\) Arts 6 and 7 respectively.

\(^8\) Art 8.
'pan-European floor to remedying so-called economic torts', although the text itself does not make any references to being a ‘tort instrument’. Indeed, the word ‘tort’ is not mentioned a single time in the Directive or its Recitals. References to unfair competition are found in Recital 8, which acknowledges that competitors may indirectly benefit while noting the restricted scope of the Directive and the necessity to examine the need for an instrument catering to unfair competition per se. Recital 9 establishes that the Directive is ‘without prejudice to Community or national rules on contract law, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorisation regimes, including those rules which, in conformity with Community law, relate to gambling activities, and to Community competition rules and the national provisions implementing them’. The omission of ‘tort law’ from the list of domains that remain unaffected by the Directive, deliberate or not, is problematic since it may lead to the conclusion that the text does indeed intend to prejudice tort law, or, at the very least, intends to modify its operation to some extent. This may not be such a wild interpretation since Recital 13 indicates that ‘in order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution’. The absence of the notion of ‘tort’ in the Directive is perhaps all the more surprising given the fact that it requires member states to offer ‘tort-like’ remedies, including interim as well as final injunctions for the cessation or prevention of unfair commercial practices. In addition, the scope of the Directive explicitly covers unfair practices ‘before, during and after a commercial transaction’, thus encompassing situations where no contractual link will exist and falling necessarily into the remit of tort law. The absence of any mention of tort, either positively to bring it into scope, or negatively, to exclude it from the domain of application of the Directive undoubtedly brings some ambiguity that the national legal orders had to grapple with. It is therefore not unexpected that ‘the

10 Also see Art 3(2).
11 Also see Art 3(3).
12 Art 11(2).
13 Art 3(1).
technical choices Member States made in order to implement the UCPD vary greatly.\textsuperscript{14} In Austria, the text was implemented as part of the national tort law in the pre-existing rules on unfair competition,\textsuperscript{15} making the link more obvious. Germany adopted a similar approach.\textsuperscript{16} The Netherlands implemented a ‘tort of unfair commercial practices in their civil code supplemented by administrative law fining powers and enforcement orders’.\textsuperscript{17} However, many member states incorporated those rules in their national consumer law code,\textsuperscript{18} without necessarily identifying whether the rules fell within the remit of tort, contract or any other categories of law. Other member states opted for a stand-alone piece of legislation, outside any code.\textsuperscript{19} This includes the UK, which implemented the Directive with the \emph{Consumer Protection from Unfair Trading Regulations 2008}\textsuperscript{20} (UTRs 2008 hereafter). The English implementation is very close to the original text, although some minor modifications relating to the running order and the details of provisions are worth noting.\textsuperscript{21} This text was amended by the \emph{Consumer Protection (Amendment) Regulations 2014}\textsuperscript{22} (UTRs 2014 hereafter) (in force since 1 October 2014) which introduce a right of private action.\textsuperscript{23} It would not


\textsuperscript{15} Van Boom (n 9), 138.


\textsuperscript{17} Willem van Boom, Amandine Garde and Orkun Akseli, \textit{The European Unfair Commercial Practices Directive} (Routledge, Abingdon 2014) 12.

\textsuperscript{18} See for example, Italy, France or Malta: Civic Consulting (n 14).

\textsuperscript{19} For example, UK, Portugal, Poland. For more details on implementation techniques, see Civic Consulting (n 14).

\textsuperscript{20} Statutory Instrument (SI) 2008/1277.

\textsuperscript{21} See for example, Regs 2(4) and (5) which concerns the reference to the ‘average consumer’ contained in Art 5 of the Directive, and not reproduced in Reg 3, which transposes the rest of this Article. Also see Reg 4 which refers to codes of conduct defined in Art 10 of the Directive; Reg 5 (Art 6 of the Directive) which adopts a different running order, although the text is similar; Reg 6 (Art 7) which adds paragraphs to the text of the Directive for clarification and Reg 7 which implements Arts 8 and 9.

\textsuperscript{22} SI 2014/870.

\textsuperscript{23} In the form of a right to unwind the contract, a right to get a discount and a right to claim damages: Reg 27 E–G.
be possible within the remit of this chapter to analyse in detail the impact of the UCPD on tort systems in all European member states, let alone a few. Instead we opt for the study of the system of torts in the UK where the question is particularly important, given the limits of tort as a tool to address economic loss and the fact that ‘lies and pressure selling are common problems for consumers and come at a high cost to the UK economy. In 2009, Consumer Focus estimated that misleading and aggressive practices cost £3.3 billion.’24

In such a light, it is our contention that the introduction of the UTRs in 2008 and their amendment in 2014 is a vast improvement in the protection of consumers, although it is clearly still a work in progress. Indeed, the UTRs 2008 have been widely held as representing a radical departure in consumer protection25 for the UK, which had ‘no existing legal framework, nor experience in the field’.26 Prior to implementation, consumers who were wronged by an unfair commercial practice needed to use an array of legislation, working alongside torts, in order to obtain some relief.27 This system was complicated and not easily accessible to consumers.28 The Directive provides a blanket ban on unfair commercial practice.

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27 The UTRs 2008 amend a considerable amount of texts. The main text to be repealed is the Trade Description Act 1968.

28 Law Commission Consultation Paper No 199, ‘Consumer redress for misleading and aggressive practices’, at para 10.5 at 135, on misrepresentation.
practices, which harm the consumer’s economic interests; in implementing it, the UK therefore ‘moves away from the traditional pattern of punctual criminal law standards and introduces general clauses’.29

We start by reflecting on the inadequacy of traditional torts in remedying economic loss (section 2) before demonstrating that, in the UK, the UCPD supplants the old traditional barriers and there is no longer a need to decide if a claim is in tort or contract, offering consumers a much easier avenue for redress (section 3). Nevertheless it remains doubtful that consumers’ economic losses are going to be adequately compensated, given the limitations of the right of private redress that was introduced in the UK (section 4).

2 THE INADEQUACY OF TRADITIONAL TORTS IN REMEDYING CONSUMER ECONOMIC LOSSES

Tort has, over the past 100 years, undoubtedly come to enhance consumer rights.30 In particular, the case of Donoghue v Stevenson31 significantly improved the position of consumers at a time where consumer protection was not yet a policy focus.32 The House of Lords considered that the manufacturer had been careless in leaving the bottles in a place where they could be accessed by snails and considered that the damage to the consumer was foreseeable. The principle of this case, often cited as the ‘neighbour principle’, simply states that people must take reasonable care not to injure others who could foreseeably be affected by their action or inaction. It thus offered consumers a direct course of action against manufacturers in cases where negligence could be established.33

30 On the importance of tort as a tool for protection for consumers, see Howells and Weatherill (n 26), 35–9.
32 In the UK, the Molony Committee, looking into ways to improve consumer protection, was only set up in 1959 and its findings were first published in 1962. See Report of the Committee on Consumer Protection 1962 Cmd 1781.
33 For more on negligence at common law, see John Adams and Hector Macqueen, Atiyah’s Sale of Goods (12th edn, Pearson, Harlow 2010) 255–64. In other member states, similar duties exist. For instance, France, where everything flows from Art 1382 cc (now 1240 following the recent change to the civil code...
Since Donoghue, the scope of the duty of care has widened providing further assistance to consumers, but in areas removed from unfair commercial practices. Furthermore, despite helping consumers, tort has many limitations. This is primarily because 'torts typically generate legal actions by individuals suffering harm and each tort is marked and limited by its own (frequently rather eccentric) governing criteria, and the law of torts cannot convincingly be presented or conceived as a general framework principle outlawing unfair commercial practices'.

Negligence, in particular, has two main downfalls. First, it requires that fault be demonstrated, a task that can be very challenging for consumers. It is therefore not surprising that in certain areas of consumer protection law, negligence has been replaced by strict liability as a method to protect consumers more efficiently. For example, Part I of the Consumer Protection Act 1987 was introduced to deal specifically with the damage caused to consumers by defective products. According to Howells and Weatherill, this Act introduced a regime, which appears to be a radical departure from standard negligence law and offers much more extensive consumer protection. Notably, the Unfair Commercial Practices Directive also goes down this route. Article 11(2) UCPD requires that member states grant courts or administrative authorities powers enabling them (where necessary) to order cessation or the prohibition of unfair commercial practices 'even without proof of actual loss or damage or of intention or negligence on the part of the trader'. Second, negligence is not built to cater for economic loss, the chief detriment suffered by consumer victims of misleading and aggressive practices. Indeed, while negligence provides compensation for financial losses that stem from physical damage, pure economic loss is not as a general rule recoverable in the tort of negligence. Noting the limited function of negligence in the area of brought about by the Ordonnance No 2016-131 of 10 February 2016, which provisions have come into effect on 1 October 2016). Although specialised torts have emerged, as everything flows from the same Article, it is possible to say that there is a certain unity in this area of French law, which does not exist in the UK, which has parallel systems with different tests.

34 Howells and Weatherill (n 26), 36.
36 Howells and Weatherill (n 26), 37.
economic loss, Howells and Weatherill explain that if advances have to be made, it is for Parliament to take the lead and not the judiciary on this topic.\(^{38}\)

That is not to say that tort in English law does not provide any redress for economic loss. The so-called ‘economic torts’ do just that, but they are again limited in their reach and ability to provide consumers with real assistance. In *Mogul Steamship Co Ltd v McGregor, Gow & Co.*,\(^{39}\) Fry LJ explained that ‘English law recognises the existence of what are now called the “economic torts” (procuring breach of contract, intimidation, unlawful interference with business, unlawful means conspiracy and conspiracy to injure) but these are all torts involving intentional damage to economic interests’.\(^{40}\) It is not always obvious with unfair commercial practices that the traders in question look to intentionally deprive consumers or damage their economic interest. Independent tortious liability for pure economic loss was recognised in *OBG Limited v Allan*,\(^{41}\) but the loss has to be caused through unlawful means and caused intentionally. In *Hedley Byrne & Co v Heller & Partners Ltd*,\(^{42}\) the court found *obiter* that a duty of care can arise with regard to careless statements which, when followed, cause pure economic loss, but this is still conditional on proving a negligent misrepresentation\(^{43}\) and places the bar rather high. Moreover, ‘economic torts’ were also devised and tested in business situations, between competitors and not in situations where consumers are the target. There would therefore be considerable obstacles in relying on ‘economic torts’ as they currently exist to offer consumer victims of unfair commercial practices an avenue for redress.

A further area of tort, which addresses economic loss, is that of passing off. Yet, it too is struggling to offer assistance. Consumers who, unsuspectingly, buy fake products, suffer alongside intellectual property (IP) owners from the ‘passing off’ of goods as genuine and thus share a

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38 Howells and Weatherill (n 36).
39 (1889) 23 QBD 598, 625–6.
43 The representation must be untrue, inaccurate or misleading; the representer must have acted negligently and the representee have relied on the statement. See also *Queen v Cognos Inc* [1993] 1 SCR 87. The use of the tort of deceit is equally fraught with difficulties because it requires a demonstration that a representation is made to another party which is false; the individual making the representation knows it to be false or was reckless; an intention to deceive; loss suffered as a consequence. See *Derry v Peek* (1889) LR 14 App Cas 337.
common interest in seeing such practices stopped.\textsuperscript{44} When goods are counterfeit, the law provides rather clear-cut protection in the form of trademark infringement, although regrettably to the IP owner rather than the consumer.\textsuperscript{45} Another connected area is that of copycats. Copycat products are mimicking products from established brands benefiting from their goodwill. Usually the product is not identical but uses a combination of colours, design and name.\textsuperscript{46} The impact of copycats is to prompt consumers to make a purchase erroneously thinking they have chosen the branded product. Research indicates that around 17 per cent of consumers buy in error.\textsuperscript{47} This is mostly because of the assumptions made by the consumer that the product is made by the same manufacturer if the packaging looks similar and that the quality of the product will also be as good.\textsuperscript{48} Should a consumer be misled by a supermarket own brand for example, because he thought he was purchasing the original branded product, little recourse was available before the entry into force of the UCPD and the introduction of a direct right of action.\textsuperscript{49} The tort of passing off, by and large, could offer some assistance in theory, but many obstacles would have stopped any consumers from using it. Indeed, passing off is primarily, if not exclusively, reserved to the directly injured party, that is, the brand owner whose goods or services are effectively copied. Therefore consumers would normally be barred from acting.\textsuperscript{50} In addition, it appears that judges in the UK tend to look for a high degree

\textsuperscript{44} Christine Riefa, \textit{Consumer Protection and Online Auction Platforms, Towards a Safer Legal Framework} (Ashgate, Farnham 2015) 178.

\textsuperscript{45} Note however, that damage does not always follow for consumers. See ibid, 178 discussing research, which shows that some consumers are actively seeking cheaper status symbols and buying fake goods is becoming engrained as an acceptable behaviour.


\textsuperscript{47} Ibid, 192.

\textsuperscript{48} Ibid, 193. Note that point of sale strategies also increase the likelihood of purchasing error (eg availability, vicinity of branded product, promotions).

\textsuperscript{49} The legal remedies available included public enforcement but Trading Standards (TS) tended to stay away from packaging as it is not a clear-cut issue and TS officers and judges were not well trained in this area. They, therefore, according to Marsland, prioritised obvious trademark infringements. See Marsland (n 46), 196.

\textsuperscript{50} This also poses some restrictions on trademark owners acting because very few do actually register their packaging’s distinguishing features. Marsland
of pack similarity compared to EU counterparts.\textsuperscript{51} Coupled with difficulties in obtaining the evidence of consumers being misled, this makes for a very difficult course of action to successfully put into motion, although not impossible. Indeed, \textit{United Biscuits v ASDA Stores}\textsuperscript{52} saw passing off claims successful in a case where Asda called its own brand Puffin, reminiscent of the Penguin biscuit bars. However, despite this finding, the Puffin bars have remained on the shelves to this day, although admittedly their packaging has changed.\textsuperscript{53} 'The UCPD addresses those issues head on. Recital 21 requires that the persons with a legitimate interest be able to have legal remedies against unfair commercial practices. This, therefore, includes both consumers and competitors.\textsuperscript{54} In the UK, the right of competitors was recognised in Section 81 of the Consumer Rights Act 2015,\textsuperscript{55} which gives effect to Schedule 8 (private actions in competition law). The right of consumers is detailed in the 2014 UTRs. Both the Directive and its UK implementation also offer a clear path to a remedy. The promotion of ‘a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not’ is outlawed.\textsuperscript{56} Besides it is a misleading action to give false or

\textsuperscript{51} According to Marsland, the characteristics of the UK retail market also make protection more difficult. As a result, consumers in other parts of the EU are better protected than UK consumers. See Marsland (n 46) 197.

\textsuperscript{52} [1997] RPC 513.


\textsuperscript{54} In the UK, the tort of unfair competition does not per se exist (see Arnold n 40), although there are tools to that effect. Yet, for consumers, the use of tortious action is too far removed and unlikely to be pursued. As a result, rights of action granted to competitors are likely to yield better results and enable consumers to derive some benefits as discussed further on in this chapter. On another note, see also Phillip Johnson and Johanna Gibson, ‘The “new” tort of passing off’ (2015) 131 LQR 476–94. The authors suggest that the UCPD comes to modify the operation of the general law of passing off in so far as the judges will now need to look at the Directive and apply it. The Directive may not apply to all types of passing off, but for those cases where it does, the operation of the tort of passing off will need to be ‘adapted’.

\textsuperscript{55} 2015, c 15.

\textsuperscript{56} See cl 13, Annex 1 to the Directive. Recital 14 expressly includes similarity in packaging. In the UK, see Annex 1, UTRs 2008.
302  Research handbook on EU tort law

debceptive information about the main characteristics of the product, including its commercial origin and in particular the marketing of a product ‘which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor’.58

3 THE UCPD: AN EASIER AVENUE FOR REDRESS FOR CONSUMERS’ ECONOMIC LOSSES?

In comparison to torts, the UCPD potentially offers a much more efficient vehicle to a remedy for consumers. Indeed, practices are unfair if, contrary to professional diligence, they materially distort the economic behaviour of the average consumer and cause him to take a trans- actional decision he would not otherwise have taken.60 By imposing this general ban on all unfair commercial practices (this includes misleading as well as aggressive practices), the text, for example, avoids the need to distinguish between negligent, fraudulent or wholly innocent misrepresentations. There is also no need for the consumer to establish intention nor is there any need to establish a loss. This is, of course, without even taking into account the banned practices that do not need to be tested for unfairness.61

Following the inadequacy of tort as a tool in helping consumers recover for economic loss in situations where an unfair practice has been used, Howells and Weatherill note the ‘resurgence of the importance of contract law and acceptance of obligations by agreement while noting a decline in the importance of tort law and readiness of judges to impose obligations inspired by a more general sense of social responsibility’.62

Contract law is thus sometimes substituting for tort. In many areas in any event, the distinction between tort and contract law is blurred.63

57 Art 6.1(b); Reg 5(2) (a) and 5(4) (b) UTRs 2008.
58 Art 6.2(a). Reg 5 (3) UTRs 2008.
59 Art 5.
60 Art 5(2).
61 As defined in its Annex.
62 Howells and Weatherill (n 26), 39. It should be pointed out that the Law Commission, in its consultation paper, did make the point several times that vulnerable people needed protection from the so-called cowboy traders. A case study was done for mobility aid (see Law Commission Consultation Paper No 199 n 28, para 10.5, p 135).
63 ‘For example, a claim for damages arising from a defective product may involve a complex web of issues … and give rise to claims under the Sale of Goods Act 1979, the law of misrepresentation and collateral warranty, the tort of
therefore often challenging for consumers – victims of unfair commercial practices – to make adequate choices as to what avenue for redress to pursue, providing that they are all available of course.

As far as the application of the UTRs is concerned, similar overlaps exist. An aggressive practice resulting in a consumer concluding a contract he would not otherwise have entered into can result in duress being invoked, as well as tort, since the Directive governs unfair commercial practices ‘before, during and after a commercial transaction in relation to a product’.\(^\text{64}\) In those instances, therefore, it would be contract law that more often than not provides a remedy for economic loss and not tort, although both could concurrently apply.

It is now, after a period of uncertainty, also clearly established\(^\text{65}\) in English law that ‘there may be concurrent contractual and tortious liability to the same claimant, though he may not, of course, recover the damages twice over’.\(^\text{66}\) As far as unfair commercial practices are concerned, this is not disputed. Regulation 27L(1) of the 2014 UTRs enables consumers to make claims under the right of private redress (which offers remedies in contract law and tort) as well as the rule of law or equity and other enactments regarding a prohibited practice. However, in those cases, Regulation 27L(2) spells out that the consumer can only bring his claims under the UTRs if he has not already recovered.\(^\text{67}\)

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negligence, the Consumer Protection Act 1987 and a chain of contractual indemnities among retailer, middleman and manufacturer’: Edwin Peel and James Goudkamp, Winfield & Jolowicz on Tort (19th edn, Sweet & Maxwell, London 2014) 5, citing, as an example, Lexmead (Basingstoke) v Lewis [1982] AC 225.

\(^\text{64}\) Art 3(1).

\(^\text{65}\) Henderson v Merrett Syndicate Ltd [1994] 3 All ER 506. Although note that some case law excluding concurrent liability can also be found post-Henderson v Merrett. See, for example, Payne v John Setchell Ltd [2002] BLR 489; Robinson v P.E. Jones (Contractors) Ltd [2011] EWCA Civ 9, [2012] QB 44. For more on this issue, see Lord Justice Jackson, ‘Concurrent liability: where have things gone wrong?’ Lecture to the Technology & Construction Bar Association and the Society of Construction Law, 30 October 2014. This is available from the society’s website, https://www.scl.org.uk/resources/talks-papers.

\(^\text{66}\) Peel and Goudkamp (n 63), 5; Lord Justice Jackson (n 65).

\(^\text{67}\) S 27L reads: ‘(1) Nothing in this Part affects the ability of a consumer to make a claim under a rule of law or equity, or under an enactment, in respect of conduct constituting a prohibited practice. (2) But a consumer may not (a) make a claim to be compensated under a rule of law or equity, or under an enactment, in respect of such conduct if the consumer has been compensated under this Part in respect of the conduct, or (b) make a claim to be compensated under this Part
Many of the concepts brought by the Directive and implemented by the Unfair Commercial Practices Regulations 2008 have comparable equivalents in the UK, hereby keeping the blurred distinction between tort and contract alive. Indeed, the prohibition of a misleading action under Regulation 5 bears resemblance to the tort of misrepresentation \(^{68}\) and the prohibited practice of aggressive commercial practice at Regulation 7 is close to the common law concepts of duress, undue influence and coercion, all concepts traditionally within the remit of contract law. This has given rise to academic discussion since the precise ‘demarcation between contract law and the … directive is difficult’. \(^{69}\) Indeed, as the Directive distinguishes between consumer and contract law through Article 3(2), \(^{70}\) national contract laws are protected from the Directive’s full harmonisation. \(^{71}\) Member states are therefore ‘in principle free to give “contract law” significance to some or all of the prohibitions or unfair commercial practices’. \(^{72}\) The problem, of course, stems from the

\(^{68}\) Most types of behaviour amounting to a misleading action are covered by a claim of misrepresentation: Hugh G. Beale, *Chitty on Contracts* (32nd edn, Sweet and Maxwell, London 2015) para 38.171. Yet, as emphasised by the Law Commission, misrepresentation was not developed with customers in mind, changes were therefore necessary to simplify this area which was overly complex and provided uncertain remedies. Law Commission, ‘Consumer redress for misleading and aggressive practices’ LC 2012 No 332, s 14, p x; s 18, p xi and para 3.3 at 23. The fact that misleading omissions are actionable is a novelty compared to the common law approach.


\(^{70}\) The Article stipulates that the Directive is ‘without prejudice to contract law and in particular to the rules on the validity, formation and effect of a contract’. This rather bold move makes perfect sense when viewed in the wider context of the efforts of the European Commission in relation to the harmonisation of contract law. To separate the two was necessary so as not to unduly delay or avoid clashes with the UCPD: Whittaker (n 25), 143–4.

\(^{71}\) The Law Commission clearly states that ‘the private laws of misrepresentation and duress remain unaffected’: LC 2012 No 332 (n 68) para 2.4.12.

\(^{72}\) *Chitty* (n 68), at 38–148. Whittaker argues for the need to interpret ‘contract law’ for the purpose of Art 3(2) in a wide manner ‘so that it includes any laws which govern the rights, duties or liabilities of the parties whatever the formal classification as a matter of national law’. Whittaker believes that to consider that the Directive can have no impact on contract law is regarded as ‘too
lack of clarity over what ‘contract law’ specifically refers to. For instance, the rules on misrepresentation or duress themselves, although usually considered as part of contract law, are nevertheless also commonly placed in the law of tort or deceit. Claims for damages for such practices may therefore be either contractual or tortious. Yet, arguably, the rules on misrepresentation go towards the ‘rules on the formation of a contract’ as per Article 3(2), and consequently should fall outside the scope of the UCPD.

Yet, studying the courts’ decisions in existence in the UK reveals that the debate is potentially just academic. What seems to have happened is that the UCPD supplants traditional barriers. In the post-UCPD era, there is no longer a need to decide if a claim is in tort or contract, it is a

stringent’ since the text gives the judges the option to use the Directive as a source for development of contract law. Whittaker explains that potential influence of the text is possible through the infiltration of ‘porous concepts’: Whittaker (n 25), 147–8. In a similar vein, ‘it may be that the common law of contract will evolve to absorb the conditions for unfair commercial practices within the scope of existing doctrines but it is not guaranteed and is slow’, see Twigg-Flesner and Parry (n 26), 230 and again in Christian Twigg-Flesner, Deborah Parry, Geraint Howells and Annette Nordhausen, An Analysis of the Application and Scope of the UCPD (Department of Trade and Industry, London 2005) 4.51, p 61: ‘the possibility that the courts will over time align the common law principles of duress and undue influence with those in the Directive, whilst it might appear remote, should not be ignored altogether’. It is just over eight years since the Unfair Trading Regulations came into force and just over one year since the introduction of the new private right of redress, but the potential for adjustment of the domestic rules leading to the convergence between the UCPD and domestic concepts does not appear to have materialised. Of note, however, is the clear interaction with other texts, for instance, the interplay with the Unfair Contract Terms Directive highlighted by the case of OFT v Ashbourne Management Services [2011] EWHC 1237 (Ch) where the court held that it was contrary to the UCPD to include an unfair term in a contract and that it was unfair to seek to enforce it. For details of interplay with other directives, and other text, see European Commission, Guidance on the Implementation/Application of Directive 2005/29/EC SWD(2016) 163 (Com 2016/320), 22–30, accessed 30 May 2017 at http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf.


74 Christian Twigg-Flesner et al (n 72), para 4.18 p 55.

75 Note that the impact of the Unfair Trading Regulations is somewhat difficult to fully assess because of the relative paucity of decisions in the field. The reason for the paucity of decisions is not entirely clear but is probably due to the high legal costs. This does not however mean that there is no prosecution;
claim under the UTRs, which thus potentially offers consumers a much easier avenue for redress.

Although the way the judges have at times, in their approach to the implementing text, turned to already existing concepts in the law of misrepresentation and other related domains, they nevertheless appear to use the 2008 UTRs with reasonable ease. It was stated that a verbatim implementation of the UCPD would be preferable to finding domestic terminology as this would increase a purposive interpretation. In the light of the case law, to which we turn, this seems correct.

One of the key differences concerning misleading practices, which used to be governed by the law on misrepresentation, is the causation requirement: the reliance. Indeed, at common law, to be actionable, the representation must induce the misrepresentee to enter into the contract. Under Regulation 5(2)(b), the unfair commercial practice will only be actionable if ‘it causes or is likely to cause the average consumer to take a transactional decision he would not have otherwise taken’. The reliance in the Regulation is therefore framed in terms of a transactional decision, measured by reference to the average consumer, which is central to the Directive framework. The difference between the two was


76 Twigg-Flesner and Parry (n 26), 224.
77 The other difference is over the clear requirement that a misleading omission can be an unfair commercial practice. This effectively imposes a duty of disclosure. As the UK ‘makes no such demands, this is a significant extension’. Christian Twigg-Flesner et al (n 72) para 4.13, p 54. However, how far the duty goes is not entirely clear since it all depends on whether the information missing is regarded as ‘material’ and that is to be decided by reference to context, as decided in Secretary of State for Business, innovation and Skills v PLT Anti-Marketing Ltd [2015] EWCA Civ 76, [2015] Bus LR 959, [45].
78 For the discussion whether the misrepresentation must also be material or whether the materiality is part of the inducement, see McKendrick (n 73), 227.
79 The so-called ‘transactional decision test’ at 4.9 in Twigg-Flesner et al (n 72), 52.
80 The notion of average customer, although not entirely similar to the ‘reasonable person’ in English law, still shows an objective assessment. The fear was expressed that this would not be good for vulnerable consumers and that there should be a different test (Twigg-Flesner et al, n 72, para 4.8, p 52). The 2008 Regulations apply a different test for vulnerable consumers, their specificity is therefore acknowledged.
81 Twigg-Flesner and Parry (n 26), 223.
pointed out by Briggs J in *Office of Fair Trading v Purely Creative Ltd*[^82^],[^83^] a case involving the sending of promotional material by the defendant to consumers giving them the impression that they had won one of a number of specified prizes. In order to ascertain what prize had been won, the consumers had to phone a premium line, but crucial information was omitted.

In this case, Briggs J commented that, at common law, a misrepresentation is actionable ‘only if it constitutes an inducement’ which ‘erects a relatively low hurdle’ since it is sufficient that ‘the claimant was significantly influenced by the misrepresentation rather that the misrepresentation was the sole or even the predominant cause’[^83^]. Briggs J therefore stated that the question was ‘how high is the hurdle constituted by the causation requirement’[^84^] emphasising that the same test had to apply to both misleading actions and misleading omissions[^85^]. Briggs J stated that the assessment of causation under the implementing text demanded ‘an independent interpretation’ and consequently any ‘deep-rooted conceptions must be put to one side’[^86^]. Commenting on the lack of guidance from Europe on this, Briggs J stated that it was up to the national courts to identify the level of the causation test[^87^] but that the interpretation nevertheless had to be purposive since it ‘must be construed as far as possible so as to implement the purposes and provisions of the directive’[^88^]. And yet, he then stated that ‘the phrase “causes or is likely to cause” is equivalent to the English standard of the balance of probabilities’[^89^] and that the test is therefore that ‘but for the relevant misleading action or omission of the trader, the average consumer would have made a different transactional decision from that which he did make’.[^90^] Briggs J added that the misleading act or omission did not need to be the sole cause of the decision and there were limits so as to prevent consumer protection from becoming ‘so paternalistic in its extent as to constitute a barrier to the free movement of goods’[^91^]. He therefore concluded that there would be no infringement ‘if the court concludes

[^82^]: [2011] EWHC 106 (Ch), available on BAILII.
[^83^]: [2011] EWHC 106 (Ch), all [69].
[^84^]: Ibid.
[^85^]: Ibid, [70].
[^86^]: Ibid, [70].
[^87^]: Ibid, [69].
[^88^]: Ibid, [70].
[^89^]: Ibid, [40].
[^90^]: Ibid, [71].
[^91^]: Ibid, [71].
that but for the misleading act or omission, the average consumer would nonetheless have decided as he did'. 92 In this case, the practices were held to be unfair as crucial information about the cost of retrieval of the prize was not disclosed. This seems to be reasonably similar to the position at common law where the representation must play a ‘real and substantial’ role93 but need not be the sole reason for entering into the contract.94 This assessment, as held in Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd, cannot be carried out ‘without the full factual context’.95

The importance of causation/reliance for the application of the Unfair Trading Regulations is clear and the fact that a similar test applies to misleading actions and omissions is welcome for consistency purposes. In R (Surrey Trading Standards) v Scottish Southern Energy,96 the defendant was found guilty of misleading practices on door-to-door sales of electricity. Sales agents were required to follow a script, which was such that it gave the impression that consumers were only applying for a discounted tariff when, in fact, they were signing a contract. The script was known to the defendant, which nevertheless appealed, among other things, on the ground that the judge had not sufficiently emphasised the need for causation and that it should have been presented as a ‘but for’ test. This was rejected since the fact that the judge directed the jury on several occasions to answer whether the misleading practice caused or was likely to cause the average consumer to switch supplier was sufficient.97 To require a ‘but for’ test would be an ‘unnecessary elaboration’.98

In R v UK Parking Control Ltd,99 the appellant company provided parking facilities for businesses. It was convicted of misleading practices consisting of sending documents to customers giving them the impression that such documents came from a public body, indicating that the

92 Ibid, [71].
93 Expression borrowed from McKendrick (n 73), 228. In Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc [2010] EWHC 1392 (Comm), [2010] 1 Lloyds Rep 123, the court held that the claimant must prove that ‘but for such a representation’ he ‘would not have entered into the contract on the terms on which he did, even though there were other matters but for which he would not have done either’ ([170]).
94 Edgington v Fitzmaurice (1885) 29 Ch D 459.
95 See (n 77), [48] per Briggs LJ.
96 [2012] EWCA Crim 539.
97 Ibid, [45].
98 Ibid, [46].
consumer had broken the traffic laws. In this instance, a consumer had been sent three separate letters. The defendant appealed against sentencing on the ground that there appeared to be some discrepancy in the manner in which the transactional decision test was applied to the three letters. The Court of Appeal reiterated the importance of causation to check whether there was indeed an alteration in the economic behaviour.\footnote{Ibid, [7].} The Court of Appeal agreed to the direction that the judge gave to the jury namely that they had to be sure of three things before they could convict and that if they were unsure of the likelihood of the overall presentation of the documents to deceive (1) and unsure as to whether the document was likely to cause the consumer to take a transactional decision (2), then they should acquit. Only if the jury was sure of the first two points could they then go onto point (3) which was whether the defence of due diligence was applicable.\footnote{Ibid, [8].}

Turning to aggressive practices, there is too a parallel between this European-based notion and the common law notions of duress and undue influence.\footnote{Twigg-Flesner and colleagues, in a report for the DTI remarked that the notions were closely aligned. Twigg-Flesner et al (n 72), para 4.31, p 58.} In fact, under Regulation 7, a commercial practice will be aggressive if ‘it significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence’.\footnote{Reg 7(1)(a).} The presence in the text of ‘coercion, undue influence’, terms which are close to the pre-existing common law concepts, together with the low number of cases, means that impact of the text is more difficult to assess. Indeed, in \textit{R v Patrick Connors},\footnote{[2012] EWCA Crim 2106.} the court simply stated that Regulation 7(1) applies where the freedom of choice has been significantly impaired by the use of harassment, coercion or undue influence: ‘a conduct which the common law would recognise as duress or undue influence’.\footnote{Ibid, [14].} Yet, there are, however, certain differences in relation to the transactional decision element.\footnote{Reg 7(1)(b) also requires this to cause or be likely to cause him to take a transactional decision he would not have taken otherwise. On the difference, see Christian Twigg-Flesner et al (n 72), para 4.34, p 58.} On this point, in \textit{R v Patrick Connors}, the court adopted a strict position towards causation by considering that a guilty plea to an aggressive practice is sufficient in...
itself to establish causation. In this case, Mr Weighell, who was 81 years of age, agreed to have his concrete drive replaced with block paving at a cost of £2500. Following further pressured selling, Mr Weighell agreed to have various additional work done to his house, for a total of £16 400. The defendant was found guilty of aggressive commercial practice under Regulation 7, fined £2000 and was sentenced to a compensation order of £16 400 and costs to the victim. Connors appealed against the compensation order, on the ground that he pleaded guilty to a count, which only related to the redecoration of the bungalow, for a sum of £6500. The Court of Appeal rejected his appeal and held that Connors, through his plea of guilty, which related to the entire work done, ‘had accepted that he caused Mr Weighell to enter into a transaction or series of transactions which he would not have done otherwise because his freedom of choice had been significantly impaired’. The court clearly took aggressive commercial practices very seriously and had a harsh stance on them.

This position appears corroborated most recently by the Court of Appeal in *R v Oliver Frederic Waters Westminster Recliners Ltd*, another appeal on sentencing on the ground of due diligence. The court rejected the appeal reiterating, in passing, that as per Regulation 7(1), whether a commercial practice was aggressive was determined by ‘looking at the context and its effect on the average consumer’ and that there is guidance from Regulation 7(2).

What can be observed from the above is that the UCPD, by making it easier to establish an unfair commercial practice, provides lower standards of proof than the pre-existing standards, which therefore appears to protect consumers more efficiently. This is a welcome change in the law and has the potential to enable consumers to go about gaining redress for economic torts in a more satisfactory fashion. Yet, this must be tested in relation to the question of access to justice.

4 THE LIMITED EFFICACY OF REDRESS FOR ECONOMIC LOSSES IN PRACTICE

In spite of the UCPD making it easier for consumers to gain protection, we have doubts as to the real efficacy of the Directive and, in turn, its implementation into national legal orders, the UK being our case in point. Indeed, the Directive gave freedom to member states regarding...
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offering a right of private redress. Therefore, in Germany, for example, consumers cannot access the court directly. Consumer associations, however, can make use of unfair competition law on their behalf. However, could it really be said that consumers’ economic losses are going to be adequately be compensated if a representative needs to be solicited? In the UK, the UTRs 2014 offer a right of private redress.

Before the introduction of such a right, the UTRs 2008 still provided consumers with a rather complicated and still somewhat ineffective patchwork. The text enabled Trading Standards, as well as the then Office of Fair Trading (now the Competition and Markets Authority, CMA), to run test purchases, enter premises, seize goods to establish liability,110 as well as take undertakings (under the Enterprise Act 2002), in order to protect consumers. It was often, and in large part remains so, only if the trader does not respect undertakings that action in front of the court is taken and more severe sanctions sought. However, the approach was rather soft, based on collaboration, meaning that many traders can escape sanctions by agreeing to change their practice for the future. For example, in Office of Fair Trading v Ashbourne Management Services Ltd and others,111 legal action was finally put in motion after a series of discussions leading to no less than 13 amendments to the terms and conditions of Ashbourne and a promise (not kept) to only use the latest agreed version. Under Part 8 of the Enterprise Act 2002, civil actions can be initiated by Trading Standards, the CMA and consumer organisations designated by the Secretary of State112 (the latter can require that a company contravening the Regulations be liquidated, as was the case in PLT Anti Marketing113). Those actions can be used when the collective interests of consumers are at stake, but are rare. Enforcement authorities indeed have limited budgets forcing them to make decisions and prioritise legal action, which explains why many unfair commercial practices are not actively pursued.114

110 See Regs 19 to 22.
111 [2011] EWHC 1237 (Ch).
113 [2015] EWHC 3981 (Ch), Judge Hodge QC. In this case, the company contested the winding up and applied for an order winding up the company on the ground that it was unwilling to pay its debt. Seeing such an order as a ruse to avoid public scrutiny, the Secretary of State contested it. The court held that it had jurisdiction to wind up a company even in the absence of exceptional circumstances.
114 Howells argued that one of the reasons why the system, in spite of its several problems, seemed to work was because "[t]he bulk of the work was
Following the introduction of the Consumer Protection (Amendment) Regulations 2014,\(^\text{115}\) the private right of redress applies to situations where the buyer buys from the trader as well as where he sells to a trader or where the consumer makes a payment to a trader for the supply of a product.\(^\text{116}\) This latter case was introduced to respond to the particular need of consumers whose cars were clamped in the street or on pieces of land where it was not apparent that they were under parking regulations,\(^\text{117}\) but it can apply to all situations where a payment is made. Thus, the right of private redress, although being largely an instrument offering assistance to consumers who have entered into a contract, also permits those outside the bounds of a contract to seek redress. Indeed, if one ignores that a parking fee is due and thus does not have the intention to create legal relations, no contract can be formed.\(^\text{118}\) The payment of money to release the clamped vehicle therefore clearly belongs in the realm of the tortious.

The right is available when the trader engages in a misleading action or an aggressive practice, but is dependent upon that unfair practice having been a significant factor in the consumer’s decision to enter into the contract.\(^\text{119}\) The scope is, therefore, quite narrow\(^\text{120}\) and will not arguably protect the most vulnerable. In addition, under this new action, the undertaken at low cost in the Magistrates’ courts where Trading Standards officers have the right of standing’: Howells (n 25), 184. As highlighted earlier, of the few cases in this field, most cases reaching the Court of Appeal are appeals against sentencing.

\(^{\text{115}}\) SI 2014/870.

\(^{\text{116}}\) Reg 27(A)(2).

\(^{\text{117}}\) BIS Guidance (n 24), 7.

\(^{\text{118}}\) An agreement will only be legally binding if backed up by consideration and an intention to create a legal relationship. In family, domestic or social agreements, the default position is that there is no intention to create legal relations (Balfour v Balfour [1919] 2 KB 571). That presumption can of course be rebutted. For more detail, see McKendrick (n 73), ch 6.

\(^{\text{119}}\) Reg 27A.

\(^{\text{120}}\) The same is done in Belgium where a specific civil remedy was created in Art VI.38 of its Code of Economic Law. This text does not prevent consumers from invoking tort law, but is not available in a situation where the consumer did not conclude an agreement. When an agreement is in place, the new law facilitates the obtaining of damages since consumers only need to prove the extent of the damage suffered. This is because the violation of rules on unfair commercial practices is considered a wrongful act. There may, however, be more difficulty in establishing a causal link: Reinhard Steennot, ‘Belgium: private law remedies for breach of the prohibition of unfair commercial practices’ (2015) 4 EuCML 188–93.
consumer has access to a right to unwind, a right to a discount or a right to claim damages. Although such rights are meant to improve the position of the consumer, it is not clear whether they truly do. This is because the relation between the new rights of redress and existing rights at common law is not entirely straightforward. It is also because the way access to a remedy is framed is limited. Indeed, the right to unwind is limited to 90 days and available to consumers who have entered into a contract. If the period of 90 days may seem generous, it is unlikely to help the most vulnerable who may be victims of aggressive practices. It often takes a long time for relatives of the elderly to find out about repairs carried out or of the exact circumstances in which a contract was signed. Besides, many consumers are also unaware that they have been the victim of an unfair commercial practice and may only find this out after this 90 days deadline. As far as payments outside a contract are concerned, the right to unwind applies in situations where the consumer was not required to make all or part of a payment. In those cases, the consumer is entitled to the money he paid which was not due. The right to a discount that applies to contractual situations follows a tariff graduated from minor to very serious for products up to £5000. The discount is of 25 per cent for minor practices, 50 per cent for significant, 75 per cent for serious practices and, of course, 100 per cent for very serious practices. The seriousness of the practice is assessed by reference to a number of factors. Above the £5000 threshold, it is the difference between the price paid and real market value that will be awarded, but it will fall on the consumer to establish such value presumably by obtaining quotes from competing traders. Consumers also must choose between the right to unwind or the right to a discount, but in the case of consumers where there is no contract, no right to a discount, of course, exists. The sanctions imposed are therefore not really ‘punitive’ and simply designed to put consumers in the state they were in before falling

121. Chitty claims that the relation between the new rights and s 2(1) of the Misrepresentation Act 1967 is difficult to navigate: (n 68), para 38-145. The authors of Atiyah and Adams even state that ‘whether these rights will be exercised in practice remains to be seen’: Christian Twigg-Flesner, Rick Canavan and Hector MacQueen, Atiyah and Adams’ Sale of Goods (13th edn, Pearson, Harlow 2016) 528.

122. Reg 27E.

123. Reg 27H.

124. Reg 27I(5).

125. Reg 27I(7).

126. BIS Guidance (n 24), 14.
victim to the unfair practice. Given consumer apathy, there is little incentive for rogue businesses to stop their practices and it is likely that many consumers will not bring the claims they are entitled to. The right to damages is also limited and therefore falls short of acting as a viable deterrent. It indeed only covers situations where the consumer has suffered actual financial loss due to the unfair commercial practice or has suffered alarm, distress or physical inconvenience or discomfort. The right to damages is limited to losses foreseeable at the time they occurred\(^\text{127}\) and it is for the consumer to provide evidence of actual loss\(^\text{128}\) as well as evidence of any distress. In any event, according to the guidance report from the BIS, ‘the amounts awarded for distress and inconvenience should be restrained and modest, in accordance with the general law in England and Wales and Scotland. Only in exceptional circumstances would these exceed £1,000 and in most cases, a nominal amount below £1,000 would be appropriate’\(^\text{129}\). The trader can also escape paying damages if it can show due diligence was exercised creating one further obstacle to effective redress for consumers\(^\text{130}\).

It remains, at least on paper, that the right of private action can be a very useful tool, able to offer consumers a remedy when public enforcers have not acted and, even if they have, did not pursue civil recovery, but simply focused on ensuring the unfair commercial practice be stopped. Unfortunately, to date, no such actions have been reported. This is a far cry from the projected figures reported by the impact assessment conducted by the Law Commission in 2011, ahead of the reforms. It estimated that 1000 to 5000 additional court cases in England and Wales would derive from the introduction of the new legislation\(^\text{131}\). We doubt this is anywhere near the volume in existence, prior to or after the reforms and the introduction of the right of private redress, although we have been unable to check the exact number of cases launched via moneyclaim online\(^\text{132}\) or in the small claims courts, since this information is not freely available. In any event, we very much doubt this volume is realistic. Our research points to 26 published cases in the period between 2012 and 2017. This is due to two potential explanations beside the

\(^\text{127}\) Reg 27J.
\(^\text{128}\) BIS Guidance n 24, 12.
\(^\text{129}\) BIS Guidance Report n 24, 15.
\(^\text{130}\) Reg 27J (5).
\(^\text{131}\) See the impact assessment included in Part 11 of the Law Commission Report No 332 (n 68).
simple fact that consumers often ignore their rights and do not act. First, consumers are satisfied and make full use of the ability they have under the UTRs 2014 to reject the goods, subject to the contract concluded following the use of an unfair commercial practice. In this case, the trader reimburses affected consumers or in certain circumstances grants a reduction of the original purchase price to the satisfaction of the consumer. Or consumers may feel they have sufficient recourse to payments they have made outside the bounds of a contract under Regulation 27A(2)(c). This may explain why the vast majority of cases never reach court if the consumer has already obtained satisfaction. Alternatively, consumer apathy is rampant in this area also and the rights given, although of great interest in theory, do not provide relief simply because consumers are unlikely to use the time and energy necessary to act it. Another possible element here is that even consumers, who may be informed enough about their rights and willing to exercise them, may be unable to when confronted to a rogue trader’s avoidance tactics. It seems that the role of public bodies such as the Trading Standards and other regulators remains of crucial importance here. In addition, in many instances, the right of competitors to stop misleading practices will also be helpful. That is not to say that a right of private action should not exist and cannot assist consumers. However, it cannot on its own solve the problem of unfair commercial practices effectively and needs to remain a tool in a wider enforcement framework.

5 CONCLUSION

The aim of the UCPD is to harmonise the laws on unfair commercial practices and, with it, bring adequate remedies for consumer victims of

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133 Reg 27E.
134 Regs 27G and 27I.
135 Anecdotally, out of the 26 cases reported on the UTRs 2008, five prosecutions were started by Trading Standards.
136 See the actions as reported by the European Commission in its 2016 report on the UCPD (n 72). The report refers to actions by Which (n 147 p 62 of report), action by the (then) OFT in 2014 (ns 220–22, p 101) and, finally, an action by the CMA (n 294 p 139). Note that in advertising matters, the Advertising Standards Authority adjudicates in a number of cases based on their code of conduct, largely inspired by the UCPD. Figures as to the number of cases can be found in their annual report, eg 2014 report accessed 30 May 2017 at https://www.asa.org.uk/resource/asa-and-cap-annual-report-2014.html.
such practices. The text provided for maximum harmonisation, yet the implementation raised considerable difficulty across Europe over the manner in which to transpose the text. One particular problem was that of enforceability.\textsuperscript{137} It remains so judging by the UK experience. Indeed, while in the UK the implementation appears to be positive, some criticisms can be raised as to the application of the UTRs. Yet the UTRs have come to fill a gap in the ‘tort family’ and have simplified actions to stop unfair commercial practices. In particular, the general approach of the UTRs in combating unfair commercial practices is attractive compared to the ‘punctual approach’ of tort. The UK courts appear to have embraced the general sense of social responsibility of the Directive and have adopted a clear purposive interpretation, emphasising the European nature of the text.\textsuperscript{138} In several decisions, for example, the courts appear to make a moral judgment on the behaviour of the offending trader. For instance, in \textit{R v Lucien Timothy Munn},\textsuperscript{139} a case involving the unfair commercial practice of selling cars omitting the fact that cars had been written off, Hamblen LJ reiterated that, at first instance, the judge had found that the defendant had a ‘cavalier approach to the safety interests of the end-users’ and that it was particularly bad that the cars went to ‘vulnerable people … who were effectively singled out’.\textsuperscript{140} The judges also appear to have taken to heart the need to protect the vulnerable, especially in relation to aggressive practices. It is important to note, however, that, in the UK, very few cases have been heard by the courts and thus only the tip of the iceberg seems to be taken care of. All cases also stem from administrative action and not yet from the right of private redress open to consumers.

However, it bodes well for any private action to see the way judges have received and used the UTRs. It is therefore possible to anticipate

\textsuperscript{137} Three main studies have been carried out, the first one, in 2011 by Civic Consulting (n 14), the second one on vulnerability in key markets across the European Union (EACH/2013/CP/08) available at \url{http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm} and the most recent one in 2016 (Commission guidance on the implementation/application of Directive 2005/29 on unfair commercial practices (n 72)).

\textsuperscript{138} To this maybe we must also add the possible impact that Brexit will have and the difficulties that may ensue from having adopted UCPD concepts that may not, in the long term, survive. For more on the potential impact of Brexit on UK consumer law, see Paula Giliker, ‘The Consumer Rights Act 2015 – a bastion of European consumer rights?’ (2017) 37(1) \textit{Legal Studies} 78–102.

\textsuperscript{139} [2016] EWCA Crim 533.

\textsuperscript{140} Ibid, [9] and [10] respectively.
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that the UTRs can remedy economic torts, should consumers be able to bring their cases to court. This is contentious given the restrictions imposed on the right of private action and the usual obstacles consumers face when trying to access justice.