EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by Turpin Distribution
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801
© 2014, Kluwer Law International

This journal should be cited as (2014) 22 ERPL 6

The *European review of Private Law* is published six times per year.
Subscription prices for 2015 [Volume 23, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 754/USD 1004/GBP 553
Online subscription prices: EUR 697/USD 930/GBP 512

This journal is also available online at www.kluwerlawonline.com.
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The *European Review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*
Printed on acid-free paper

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

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ISSN 0928-9801

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Typeface ITC Bodoni Twelve
Design Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

European Review of Private Law 6-2014 [901–942] © Kluwer Law International BV. Printed in Great Britain.

Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive*

ANNE-LISE SIBONY**

Abstract: European consumer law rests on a representation of consumer behaviour that is very far from reality as we percieve it but also from the teachings of behavioural sciences. This article explores in what ways behavioural insights could be used to shape the interpretation of European law on unfair practices. It is argued that insights from social psychology on influencing techniques are relevant to the interpretation of the unfair practices directive. These insights cut across national legal traditions and could therefore contribute to a uniform interpretation of EU law in the field of unfair commercial practices. Both conceptual and empirical insights from psychology are valuable from a legal point of view. In order for such insights to be put to actual legal use, it is important to address the question of how they should be used. In this regard, presumptions appear to be a very apt vehicle to incorporate behavioural teachings into the law.

Resumé: Le droit européen de la consommation repose sur une image du consommateur très éloignée de la réalité telle que nous percevons mais aussi des enseignements des sciencse comportementales. Cet article examine de quelles manières utiliser les apports des sciences du comportement peuvent être utiles à l'interprétation de la législation européenne sur les pratiques déloyales. Plus particulièrement, il s'attache à identifier les enseignements de la psychologie sociale relatifs aux techniques d'influence qui présentent un intérêt pour l'interprétation de la directive sur les pratiques commerciales déloyales. Ces apports ne sont pas liés à une tradition juridique nationale en particulier et pourraient donc contribuer à uniformiser l'interprétation du droit européen dans le domaine des pratiques commerciales déloyales. Les enseignements de la psychologie qui présentent une utilité pour le droit sont à la fois conceptuels et empiriques. Afin de se servir de ces apports dans la pratique juridique actuelle, il est nécessaire de se pencher sur les méthodes par lesquelles le droit peut les intégrer. À cet égard, les présomptions semblent être un moyen très approprié pour incorporer dans le droit les enseignements des sciencse comportementales.

Zusammenfassung: Der Beitrag untersucht, auf welche Weise Ergebnisse der Verhaltensforschung für die Ausgestaltung der Interpretation des Europäischen Wettbewerbsrechts genutzt werden könnten. Es wird argumentiert, dass Erkenntnisse

* I thank Maurice Stucke for his comments on a previous draft of this paper, Avishalom Tor, Jeffrey Rachlinski, and Kai Purnhagen for their helpful questions and suggestions during the Lucerne Workshop 'Behavioural Law and Economics: American and European Perspectives' (11–12 Apr. 2014), and Matthias Storme for his remarks. The usual disclaimers apply.

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aus der Sozialpsychologie über Beeinflussungstechniken für die Interpretation der Richtlinie über unlautere Geschäftspraktiken relevant sind. Diese Erkenntnisse wirken über nationale Rechtstraditionen hinweg und könnten daher zu einer einheitlichen Interpretation des EU-Rechts im Bereich der unlauteren Geschäftspraktiken beitragen. Sowohl konzeptionelle als auch empirische Erkenntnisse der Psychologie sind aus rechtlicher Sicht wertvoll. Damit sie in der tatsächlichen juristischen Arbeit angewandt werden, ist es wichtig, die Frage zu stellen, wie sie verwendet werden sollen. In diesem Zusammenhang scheinen Annahmen ein sehr geeignetes Mittel für die Umsetzung von Verhaltenslehren in das Recht zu sein.

1. Consumer Law and Behavioural Science: The European Divide

1.1. Why Is EU Consumer Law Resistant to Behavioural Insights?

At present, the legal system largely operates on implicit rationalist assumptions. Much like traditional economics, which does so explicitly, legal systems often implicitly assumes that people can be governed as though they were rational. European consumer law illustrates this relative blindness of the law to the complexity of actual behaviour of humans in at least two different ways.

First, it contains a very large number of information requirements[1] and more generally rests on what has come to be called an 'informational paradigm'.[2] Information requirements make a lot of sense if consumers are rational and have a lot of available processing capacity. Such requirements make it mandatory for traders to gather all the information deemed relevant, thus decreasing search

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1 The directive on consumer rights consolidates many of these requirements. Directive 2011/83/EU on consumer rights, OJ L 304, 22 Nov. 2011, pp. 64–88, spec. Art. 5 'Information requirements for contracts other than distance or off-premises contracts' contains eight informational requirements, making it mandatory for traders to disclose such information as the main characteristics of the goods or services, the business address of the seller and telephone number (but not email), total price of the goods or services, arrangements for payment, delivery, etc. Art. 6 'Information requirements for distance and off-premises contracts' lists twenty different items of information whose provision is mandatory. The services directive also emphasizes the information dimension. Chapter V of the Directive, entitled 'Quality of Services' contains in Art. 22 a long list of information that providers must make available. Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market, OJ L 376, 27 Dec. 2006, pp. 36–68.

2 N. Reich & H.-W. Micklitz, 'Economic Law, Consumer Interests and EU Integration', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law*, Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 1–65, 21; J. Stuyck, E. Terryn & T. Van Dyck, 'Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Practices in the Internal Market', 43(1). *CMLRev. (Common Market Law Review)* 2006, pp. 107–152, at 108 and references cited; S. Weatherill, *EU Consumer Law and Policy*, Edward Elgar, Cheltenham, Camberley & Northampton 2013, Ch. 4; J.-U. Franck & K. Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and Its Normative Basis', in K. Mathis (ed.), *Economic Analysis of Law in European Legal Scholarship*, Springer, Dordrecht, Heidelberg, London & New York 2014, pp. 329–362, at 334 et seq.

costs for consumers. If consumers had any inclination to read food labels, terms of services, or consumer contracts and tended to rely on the information given in the manner in order to make 'informed choices', then EU law as it stands would be doing a wonderful job at helping them. By and large, European laws in the field of consumer protection are still drafted as though scarcity of information were the issue. The problem is that the scarce resource is not information but attention.[3]

Second, EU consumer law still largely relies on the fiction that consumers are 'reasonably well-informed and reasonably observant and circumspect'.[4] The figure of the average consumer created by the Court is a not so distant cousin of *homo economicus*.[5] Using such a heroic consumer as a standard for the appraisal of unfair practices makes sense if the aim is to unify the internal market. To traders, national provisions protecting consumers often represent obstacles to trade. For example, when Belgian law required margarine to be packaged in cubic form so as to avoid confusing consumers between butter and margarine, margarine producers from other Member States would have had to repackage their product if they wanted to sell in Belgium.[6] Faced with such rules, the Court of Justice is called to decide whether they can be justified. This involves a balancing exercise between free movement and Member States domestic policy goals. The proportionality test provides the legal framework for reasoning this trade-off. It requires the courts to assess whether a national measure is (i) *apt* to achieve its stated goal and (ii) if it is *necessary* to do so. If less restrictive measures can achieve the stated goal, the national measure is incompatible with the internal market. In order to conduct the necessity assessment of domestic consumer protection rules, the Court needed a standard. It chose to answer the question 'when is a measure necessary to protect consumers?' by holding that it is only necessary when a reasonably well-informed and reasonably observant and circumspect consumer needs it. This standard makes it easy to strike down national measures that adopt a protective stance and is therefore particularly suited to the task of removing obstacles to trade. As Micklitz puts it, the 'normatively determined reasonable consumer (…) [is] a vehicle [for] realising the

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3 On the failure of information requirements more generally, see O. Ben-Shahar & C. Schneider, 'The Failure of Mandated Disclosure', 159. *U.Pa.L.Rev.* (*University of Pennsylvania Law Review)*, 2011, pp. 646–749 and, more recently and more radically: O. Ben-Shahar & C. Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure*, Princeton and Oxford, Princeton University Press, 2014.. For a study on smarter disclosure requirements, see O. Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets*, Oxford University Press, Oxford 2012.

4 Established case law since ECJ 16 Jul. 1998, C-210/96 *Gut Springerheide*, para. 31.

5 *Homo economicus* is presumably even more heroic and lives in a world where there is no need for consumer protection.

6 Such a regulation was at hand in ECJ 10 Nov. 1982, 261/81 *Rau*.

internal market'.[7] As a standard for consumer protection, the average consumer standard may score less well, as the real average consumer might more aptly be described as reasonably overwhelmed, distracted, and impatient.[8]

At first sight, the heritage of EU consumer law does not appear particularly welcoming to insights from behavioural sciences. Surely, the drafters or EU laws and judges of the Court of Justice know that consumers more often than not do not read the information they are given (after all, drafters and judges too are consumers), but they had reasons to craft a fiction. In addition to being useful for the all-important task of achieving a single market, it seemed a clever compromise between diverging interests. Firms were not overburdened with compliance costs, and the EU appeared to take consumers interests at heart.

1.2. Reasons to Change

Up until the recent spread of behavioural wisdom,[9] EU consumer law could be viewed as expressing a liberal philosophy, in the (European) sense that individuals, also in their capacity as consumers, were in charge of their own well-being. The role of law was only to ensure fairness and transparency in order

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7 H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law,* Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 101. On internal market considerations in the UCPD more generally, see 77 et seq. in the same chapter.

8 Without using this particular formula, many commentators agree. For a critique of the average consumer from a behavioural angle: R. Incardona & C. Poncibó, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution', 30. *J Consum Policy* (*Journal Consumer Policy*) 2007, pp. 21–38; J. Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practises (sic.) Directive', 34. *J Consum Policy*, 2011, pp. 377–392; A. Scholes, 'Behavioural Economics and the Autonomous Consumer', *Cambridge Yearbook of European Legal Studies*, Vol. 14, 2012, pp. 297–324. From a more legal perspective: V. Mak, 'Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive', *ERPL*, 2011, pp. 25–42. Weatherill, for his part, argues that, while the average consumer standard on its face expresses unrealistic behavioural assumptions, the case law of the Court still leaves room for relevant and substantiated behavioural arguments. S. Weatherill, 'Who Is the Average Consumer?', in S. Weatherill & U. Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/*29, Hart Publishing, Oxford 2007, pp. 115–138, at 133.

9 Many books in recent years have popularized the teachings of behavioural studies. R. Thaler & C. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, Penguin Books, London 2008; D. Ariely, *Predictably Irrational: The Hidden Forces that Shape Our Decisions*, Harper Collins, New York 2008; J. Lehrer, *How We Decide*, Houghton Mifflin Hartcourt, Boston 2010; D. Kahneman, *Thinking, Fast and Slow*, Cambridge University Press, Cambridge 2011; S. Mullainathan & E. Shafir, *Scarcity: Why Having Too Little Means So Much*, Times Book, New York 2013.

to protect individual autonomy.[10] In this perspective, the degree of protection can be apprehended with a cursor analogy. The task of the law is to position the cursor on an axis between under-protection and over-protection. When arguing that over-protection is a dangerous zone, the figure of the 'idiot' serves an important rhetorical function. The role of the legal system, it can be argued, is not to protect idiots, but normal people. If normal people want to behave like idiots, it is not for a nanny state – and far less for a nanny Europe – to look after them, it is their choice and they should live with the consequences.

Behavioural studies show that we are all 'idiots' or, rather, they explain how easily people who are not at all idiotic can be fooled and why. The behavioural perspective on human decision-making dispels – or at least should dispel – any negative judgment or rhetoric on 'irrational' behaviour.[11] Insights from behavioural studies also allow a more reasoned and a more radical critique of the 'average consumer' standard.[12] As it becomes clear that the implicit behavioural assumptions imbedded in consumer law do not survive the confrontation with science, both the effectiveness and the legitimacy of existing instruments are challenged.[13] Indeed, from an effectiveness point of view, it does not make sense for the law to ignore what is known on how people really behave.[14] In turn, laws that are known to be ineffective are not legitimate. Understandably, they tend to be perceived as hypocritical.

1.3. Time to Change

Times seem ripe for a change. Indeed, in recent years, several governments and regulatory agencies have shown a growing interest for the use of behavioural

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10 As Micklitz argues, this philosophy is apparent in the UCPD test for unfair practices ('to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise' (Art. 2 e)): H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in *European Consumer Law,* N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 92.

11 This idea is aptly captured in the title of D. Ariely, *The Upside of Irrationality: The Unexpected Benefits of Defying Logic*, Harper Collins, New York 2010.

12 R. Incardona & C. Poncibó, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', 30. *J Consum Policy* 2007, pp. 21–38 and J. Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practises (sic.) Directive', 34. *J Consum Policy*, 2011, pp. 377–392.

13 On this issue, albeit in a different field of law, see M. Quigley & E. Stokes, 'Nudging and Evidence-Based Policy in Europe: On Normative Legitimacy and Effectiveness', in A. Alemanno & A.-L. Sibony (eds), *Nudging and the Law: A European Perspective*, Hart Publishing, Oxford, forthcoming.

14 A. Tor, 'The Methodology of the Behavioral Analysis of Law', 4. *Haifa L Rev (Haifa Law Review)* 2008, p 237, at 240–241; E. Shafir, 'Introduction', in E. Shafir (ed.), *The Behavioural Foundations of Public Policy*, Princeton University Press, Princeton 2013, at p. 1.

insights in policy making.[15] At European level, this is particularly true in the field of consumer protection. Directorate-General for Health and Consumers (DG SANCO) of the European Commission has commissioned several studies and experiments on discrete questions regarding consumer choice (such as impact of labelling) in various markets (e.g., energy, financial services, healthcare, gambling).[16] The European Occupation and Pensions Authority (EOPA) also shows interest in designing information requirements that are more behaviourally informed, paying close attention to how and when information is presented.[17]

1.4. Change Must Happen at EU Level

So far, the internal market imperative has led the Court to erect a barrier to behavioural insights. No particular hostility of the Court should be read into this state of the law. Indeed, at the time when the Court crafted the character of the average consumer, the behavioural approach to law was not part of the conversation. The Court did not reject behavioural arguments; it was not presented with any. Even in recent years, there is no visible sign in the case law that litigants use behavioural arguments.[18] The closure of the Court's reasoning to behavioural insights can therefore be viewed as more accidental than intentional. In addition, the price to pay for the purely normative approach it embraced when designed the average consumer may not have been immediately apparent, for at least two reasons. First, the Court may have displayed a 'present

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15 For a direct account of the US experience, see C. SUNSTEIN, *Simpler: The Future of Government*, Simon & Schuster, New York 2013. In the United Kingdom, a Behavioural Insights Team, better known as the 'Nudge Unit' has been created within the Cabinet Office. Since February 2014, it has been privatised and advises UK government entities and charities as well as foreign governments: http://www.behaviouralinsights.co.uk/ (last visited on 15 october 2014). The French Government commissioned an expert report on the use of behavioural economics. Several regulatory agencies, in particular in the financial sector, experiment with the use of behavioural tools. More recently OECD has shown interest in the potential of behaviourally informed regulation. P. LUNN, *Regulatory Policy and Behavioural Economics*, OECD Publishing, Paris 2014.

16 E. CIRIOLO, 'Behavioural Economics at the European Commission: Past, Present and Future', *Oxera Agenda*, 2011, pp. 1-5; DG Sanco publicizes its use of behavioural economics on a dedicated webpage: http://ec.europa.eu/consumers/behavioural_economics/ (last visited on 2 Mar. 2014).

17 See, e.g., European Insurance and Occupational Pensions Authority (EIOPA), *Good practices on information provision for DC schemes – Enabling occupational DC scheme members to plan for retirement*, report, EIOPA - BoS 13/010, 24 Jan. 2013, available at: https://eiopa.europa.eu/publications/reports/index.html (last visited on 12 Nov. 2013).

18 For an analysis of one typical judgement of the Court from a behavioural angle, see A.-L. SIBONY, 'Ving Sverge', in E. Terryn, V. Colaert, & G. Straetmans (eds), *Landmark Cases of EU Consumer Law – In Honour of Jules Stuyck*, Intersentia, Antwerpen 2013, pp. 471-492.

bias':[19] the benefits for the single market were immediate, while the cost was deferred and thus underestimated. Second, this effect may have been strengthened by the fact that the cost of imbedding behaviourally erroneous premises in the law was not clearly spelt out. The Court did not have to make an explicit choice between winning a prize now or a larger prize later or buying something now and paying it later with interest on a credit card bill. The true cost of behavioural inaccuracy in the law could not and, in fairness, still cannot be calculated.[20] Indeed, the benefits of a more behaviourally informed consumer law are also very difficult to evaluate, if only because of incorporating behavioural insights into the law involves tradeoffs.[21]

What can be determined with certainty is that, if behavioural insights have a future in consumer law in Europe, it must be at EU level. The national level would be the wrong place to instil behavioural wisdom into the law because the internal market arguments against diversity of consumer protection measures apply exactly in the same way irrespective of whether these measures are behaviourally informed or not. Had the Belgian measure regarding the packaging of margarine been backed up by hard evidence from the physiology of perception, it would not have hindered trade any less. Science might have helped the government prove that its measure was justified, but it is clear that if governments from the various Member State each focus on different aspects of consumer protection, adopt different measures, the fact that such measures may be adopted to counteract a behaviourally plausible risk will not make regulatory

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19 The 'present bias' describe a common tendency to opt for a course of action that will result in immediate gratification even if this will entail a high cost at a later point in time. This tendency is at the root of procrastination. Economists who are interested in measuring the discounting rate people apply to future rewards when they choose a more immediate reward call this bias 'hyperbolic discounting'. See, e.g., D. Laibson, 'Golden Eggs and Hyperbolic Discounting', 112. *Quarterly Journal of Economics* 1997, pp. 443–477. Several studies conducted on students over the past decade show that the proportion of procrastinators is between 40 and 60 per cent. A. Bisin & K. Hyndman, 'Present-Bias, Procrastination and Deadlines in a Field Experiment', *NBER Working Paper* No. 19874, 2014, at 27, and references cited.

20 On the political price for ignoring the reality of consumer/citizen's preferences, see K. Purnhagen, 'Social Market Economy Is Not an Oxymoron: Why EU Internal Market Law Has Always Been Behavioural', in K. Mathis (ed.), *Behavioural Law and Economics: American and European Perspective*, Springer, Dordrecht, Heidelberg, London & New York forthcoming.

21 A. Tor, 'Some Challenges Facing a Behaviorally-Informed Approach to the Directive on Unfair Commercial Practices', in T. Tóth (ed.), *Unfair Commercial Practices: The Long Road to Harmonized Law Enforcement*, Pázmány Press, Budapest 2013, pp. 9–18, at 17–18 (explaining that prohibiting practices that are misleading for some but not all consumer may favour gullible consumers over more rational ones). More generally, on trade offs when incorporating insights from psychology into the law, see Y. Feldman & O. Lobel, 'Behavioural Tradeoffs: Beyond the Land of Nudges Spans the World of Law and Psychology in A. Alemanno & A.-L. Sibony, *Nudge and the Law: What can EU Law Learn from Behavioural Sciences?*, Oxford, Hart Publishing, 2015 forthcoming.

diversity any less costly for traders. In various areas of EU law, the Court has developed effective techniques to avoid engaging with scientific evidence,[22] and in its balancing exercise, it could very well be inclined to accord more weight to free movement than to relevant evidence on how prone to errors consumers are.

If behavioural insights are worked into the law at European level, the tension between diversity and accuracy disappears. Behavioural wisdom is given a better chance to make the law more efficient because the efforts required to elaborate on legally meaningful uses of empirical data have a higher probability of yielding results that will actually serve consumer protection, rather than feeding arguments between Member States and the EU institutions. Choosing the EU level to analyse whether and how behavioural insights could help improve the law also makes sense from a purely legal perspective. In EU consumer law, the current trend is towards maximum harmonization. There is therefore less room than in the past for national regulatory experiments in the field of consumer protection. For all these reasons, behaviourally informed regulatory innovation should happen at EU level. Regulatory innovation can occur by way of new instruments, but also new ways to interpret and enforce existing legislation. In this regard, the Unfair Commercial Practices Directive (UCPD)[23] is an instrument of choice to explore the possibility of making a meaningful use of what psychology teaches us about consumer behaviour. This, however, is no easy task.

1.5. Challenges

Interpreting and applying the UCPD in a behaviourally informed way face two major challenges, which Tor calls 'the material distortion challenge' and the 'average consumer challenge'.[24] The first is a baseline problem, which is inherent to the test contained in the directive. Article 5 prohibits practices that are contrary to professional diligence and 'materially distort the economic behaviour of consumers'. According to Article 2, 'to materially distort the economic behaviour of consumers' means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'. As Tor notes, this is at first glance an extremely broad test. In a free market economy, it would be against the widely shared normative intuition to

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22 A.-L. Sibony, 'La preuve scientifique évitée: Inventaire de quelques techniques judiciaires', in E. Thruilhé-Marengo (ed.), *Preuve scientifique, preuve juridique*, Larcier, Bruxelles, Paris 2012, pp. 161–180, available at: http://hdl.handle.net/2268/142713.

23 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005 L 149/22, 'UCPD'.

24 A. Tor, 'Some Challenges Facing a Behaviorally-Informed Approach to the Directive on Unfair Commercial Practices', in T. Tóth (ed.), *Unfair Commercial Practices: The Long Road to Harmonized Law Enforcement*, Pázmány Press, Budapest 2013, pp. 9–18, at 15 sq.

even consider prohibiting many practices that are known to influence choice, such as cleverly designing the way in which options are displayed in a store or on a menu. It is therefore necessary to find a reasonable interpretation of the 'material distortion' requirement.[25] While this is clearly a challenge, it is by no means specific to a behaviourally informed perspective on the directive. The difficulty of articulating sound normative principles is inherent to the directive itself. The reason why it must be born in mind with particular vigilance when revisiting the directive from a behavioural standpoint is because behavioural studies show that many techniques that no one ever intended to prohibit do in fact impact behaviour and possibly do so in a significant manner. The risk is therefore that a behaviourally informed but normatively naive reading of the directive would result in overbroad interpretation of the prohibition. In this regard, it is useful to read the two-pronged test of Article 5 as containing one criterion that expresses a normative judgment on what practices are acceptable (the 'professional diligence' criterion) and another one that is open to an empirical appraisal of the efficacy of the commercial practice ('material distortion' criterion). In other words, the directive provides a mechanism for refusing on purely normative grounds to extend the prohibition to commercial practices that are considered acceptable, irrespective of how much they may influence consumer's decisions.

The second challenge Tor identifies is posed by the central notion of the 'average consumer'. The average consumer standard is truly in tension with empirical evidence because of its inherent simplificatory function. Behavioural studies show that not all consumers are prone to fall into the same traps, not to the same degree and not in all circumstances. Meanwhile, the law as it stands requires courts to assess whether a given practice distorts the choice pattern of the (unitary) average consumer. In line with the case law of the Court, the directive states that the average consumer test 'is not a statistical test'.[26] Empirical data could in principle shed light on how many consumers display certain behavioural traits, such as sensitivity to framing effects or present bias. The statement that the average consumer is a 'typical' consumer rather than a statistical construct does not make such data completely irrelevant, as they could be taken into account to assess what is typical but does create uncertainty, as the relevance of empirical data on consumer behaviour will be a matter for courts to decide. No guidance is provided on this difficult issue. Courts are simply invited to 'exercise their own faculty of judgment'.[27] In particular, courts may not be fully aware of the tradeoffs that their decisions will entail. As Tor points out, deciding that the average consumer needs protection against certain practices

25 *Ibid.*
26 UCPD, recital 18.
27 *Ibid.*

may result in imposing costs not only on traders but also on those consumers who would not have been mislead by the practice at issue.[28] At this stage, the distributive aspects of consumer protection are in need of more elaboration.

The substantive test contained in the directive presents several levels of normative indeterminacy (what is 'material distortion', what is 'typical'). In other words, it is a hard test to apply. When faced with a hard question, humans tend to substitute an easier one, which they can more readily answer, and (mistakenly) consider they have answered the initial hard question. For example, if asked how dangerous the crossing near her home is, a person might answer on the basis of her recollection of accidents at that location.[29] Attribute substitution is a very common phenomenon. It is thought to explain why beautiful faces are perceived as more familiar than less aesthetically perfect ones (likability is substituted for familiarity).[30] The same mechanism underlies prejudices: if a person has preconceived ideas about intelligence or honesty characterizing different races, she is likely to judge these attributes based on physical appearance.[31] In the context of judging whether a commercial practice is unfair within the meaning of UCPD, one cannot rule out that the conditions for attribute substitution are met: it is hard to assess whether a practice materially distorts the average consumer's behaviour and it is easy to substitute a different question, one more familiar to courts on the basis of their respective legal tradition on unfair competition. If judges were prone to the heuristics just described when applying the general clause of UCPD, it could result in courts answering the purely normative question 'is the practice "contrary to professional diligence" – or "in accordance with good business practices"' – and (implicitly) infer that, if it is, then it must also be likely to distort the economic behaviour of the average consumer. Because material distortion is difficult to assess, courts might appraise acceptability instead. Such a shortcut would collapse the two-pronged test of Article 5 into a single overall assessment of unfairness. It would also constitute yet another way of keeping empirical insights at bay.

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28 A. Tor, 'Some Challenges Facing a Behaviorally-Informed Approach to the Directive on Unfair Commercial Practices', in T. Tóth (ed.), *Unfair Commercial Practices: The Long Road to Harmonized Law Enforcement*, Pázmány Press, Budapest 2013, pp. 9–18, at 18.

29 A. Tor, 'The Methodology of the Behavioral Analysis of Law', 4. *Haifa L Rev*, 2008, p 237, at 245 (citation omitted).

30 B. Monin, 'The Warm Glow Heuristic: When Liking Leads to Familiarity', 85(6). *J Pers Soc Psychol* (*Journal of Personality and Social Psychology)*, December 2003, pp. 1035–1048.

31 D. Kahneman & F. Shane, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment', in T. Gilovich, D. Griffin & D. Kahneman (eds), *Heuristics and Biases: The Psychology of Intuitive Judgment,* Cambridge University Press, Cambridge 2012, pp. 49–81.

1.6. Aims and Scope of This Article

The UCPD is a central piece in EU consumer law. It is therefore a good place to start investigating if and how behavioural insights impact the existing EU legal framework. While other studies have focussed on how to change the legal framework in order to make it more behaviourally informed,[32] this analysis considers how behavioural insights could be incorporated by way of judicial interpretation into the existing legal framework. Open textured rules invite interpretation, and there is evidence from other areas of law, singularly competition law, that judicial interpretation can incorporate ideas from relevant scientific discourses. As I have argued elsewhere, there are only a limited number of legal techniques that can be used to incorporate science into judge-made law.[33] Could these same incorporating mechanisms that are at work with economics in the field of competition law help with making consumer law behaviourally wiser? This is the question I endeavour to answer in this paper.

From the perspective of legal theory, this exploration is linked to the general question of how science is used in the law.[34] If psychology can contribute to consumer law in similar ways as economics contributes to competition law, this would be an indication – certainly short from a general proof, but nevertheless an indication – that there are invariants in the legal techniques through which science is incorporated into the legal discourse. I think there is a good reason to believe that such invariants exist, simply because law is low tech: there are only a limited number of legal techniques that can serve as vehicle for importing science into the law.[35] This in particular is true of judge-made law, which has not so far been the focus of studies on use of behavioural sciences in consumer law (understandably if one considers how much black-letter law there is to study).

From the perspective of European law, a further implication would deserve to be explored. It is linked to the much-discussed question of intensity of

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32 In particular disclosure requirements and rules on consumer contracts. See H. LUTH, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited*, Intersentia, Antwerpen 2010, and references cited at fn. 3.

33 A.-L. SIBONY, 'Limits of Imports from Economics into Competition Law', in I. Lianos & D. Sokol (eds), *The Global Limits of Competition Law*, Stanford University Press, Stanford 2012, pp. 39–53, available at: http://hdl.handle.net/2268/122755.

34 R. FELDMAN, *The Role of Science in Law,* Oxford University Press, Oxford 2009.

35 This idea emerged from my research on how insights from economics are integrated in case law in the field of competition law: A.-L. SIBONY, *Le juge et le raisonnement économique en droit de la concurrence*, LGDJ, Paris 2008. For a concise exposition in plain French, A.-L. SIBONY, 'La porosité du droit: À propos des relations du droit avec d'autres disciplines', *Revue de la Faculté de Droit de l'Université de Liège* 2010, pp. 271–278, available at: http://hdl.handle.net/2268/34788.

harmonization.[36] The directive on unfair practices is a directive of full harmonization.[37] Yet, as is often the case when the language of a directive uses broad concepts such as 'unfair', 'material distortion', or 'undue influence', even meticulous transposition into national legal orders will not prevent such phrases from having different meanings or from prompting a different set of associations in various national legal contexts.[38] Uniform definitions, such as those given in the directive, do not really alleviate this problem, because they are themselves framed in very broad terms.[39] Against this background, might incorporating psychological insight have the added benefit of helping to unify the interpretation of the directive? This would call for careful exploration, which is beyond the scope

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36 See *inter alia*: H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law*, Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123; J. Smits, 'European private Law: A Plea for a Spontaneous Legal Order', in D. Curtin, J. Smits, A. Klip & J. McCahery (eds), *European Integration and Law*, Maastricht University Faculty of Law Working Paper No. 2006-03, 2006, pp. 55–107.

37 The Court made this extremely clear in ECJ 23 Apr. 2009, Joined Cases C-261/07 and C-299/07, *VTB-VAB and others*, para. 52. In this judgment, the Court ruled that Belgian law prohibiting joint selling *per se* was contrary to the directive, whose annex 'exhaustively lists the only commercial practices which are prohibited in all circumstances and accordingly do not have to be assessed on a case-by-case basis' (para. 61). A string of cases applied the same reasoning to hold that various other national *per se* prohibitions of certain commercial practices violated the directive: ECJ 14 Jan. 2010, C-304/08 *Plus Warenhandelsgesellschaft* (prohibition of commercial practices which make the participation of consumers in a lottery conditional on the purchase of goods or the use of services); ECJ 11 Mar. 2010, C-522/08 *Telekommunikacja Polska* (prohibition of joint selling); ECJ 9 Nov. 2010, C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* (prohibition on commercial practices making the offer of bonuses to consumers subject to the purchase of goods or services); ECJ 30 Jun. 2011, C-288/10 *Wamo* and ECJ 15 Dec. 2011, C-126/11 *Inno* (summary publication) (prohibition of announcements of price reductions during the weeks preceding the official sales period); ECJ 7 Mar. 2013, C-343/12 *Euronics Belgium* (summary publication) (prohibition of selling goods at a loss).

38 As pointed out by the Office of Fair Trading during the transposition of the UCPD, the directive introduced several new concepts in UK Law. Office of Fair Trading (OFT), *Consumer Protection from Unfair Trading Regulations 2007 Guidance – Draft Guidance on the UK implementation of the Unfair Commercial Practices Directive*, OFT931con, available at: http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft931con.pdf (last visited 15 october 2014), at 4. The same holds true for most if not all member states. The intended novelty of autonomous EU law concepts carries the message that harmonized rules are different from previous national regimes. H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law*, Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 89, but it cannot de-activate national reasoning patterns.

39 For example, Art. 2 e) provides that '"to materially distort the economic behaviour of consumers" means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'.

of this paper. The issue is complex, as different lines of argument seem to pull in different directions. At a conceptual level, a more precise analytical framework for appraising unfair practices would in itself have a much needed unifying potential, as it would cut across national differences in legal cultures.[40] Yet, it would remain to be seen whether that would lead to uniform application of the directive across Europe. At a normative level, the directive recognizes that cultural norms have a bearing on the appraisal of unfair practices.[41] At an empirical level, there may be a need to distinguish between commercial practices that leverage basic cognitive or emotional mechanisms that are similar for Spanish, Danish, and Polish consumers,[42] the so-called 'marketing universals',[43] and those that reply on more elaborate processes that are influenced by culture.[44] Such an investigation, however, will only become useful if it is first established that EU Consumer law could and should incorporate insights from psychology, which is the task of this paper.

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40 On the risk of divergence between national interpretations, see S. WEATHERILL, *EU Consumer Law and Policy*, Edward Elgar, Cheltenham, Camberley & Northampton 2013, at 239.

41 'The Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, *taking into account social, cultural and linguistic factors*, as interpreted by the Court of Justice' (emphasis added).

42 The phenomena addressed by Kahneman in his Nobel Prize lecture would probably be considered basic mechanisms, as would loss aversion. D. KAHNEMAN, 'Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice', available at: http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/kahneman-lecture.html (last visited 1st Apr. 2014), published as 'A Perspective on Judgment and Choice: Mapping Bounded Rationality', *American Psychologist*, 58:9, 2002, pp. 697–720. One example of the relevance of hard-wired neural circ uits for the effectiveness of commercial practices is 'magic prices' (prices that end in 9). Schin dler and Wiman explain the fact that we tend to underestimate prices ending in 9 by the fact that, when storing numbers in our long-term memory, we pay less attention to digits that are on the right hand side than to those on the left hand side. See also N. Guéguen, *Psychologie du cons ommateur: Pour mieux comprendre comment on vous influence*, Dunod, Paris 2009, at 11–26. For a more general study, see B. KNUTSON, S. RICK, G. WIMMER, D. PRELEC & G. LOEWENSTEIN, 'Neural Predictors of Purchases', 53. *Neuron*, 2007, pp. 147–156.

43 N. DAWAR & P. PARKER, 'Marketing Universals: Consumers' Use of Brand Name, Price, Physical Appearance, and Retailer Reputation as Signals of Product Quality', *The Journal of Marketing*, 1994, pp. 81–95.

44 Most research on cultural differences deals with the individualism-collectivism distinction. For a summary, see D. MAHESWARAN & S. SHAVITT, 'Issues and New Directions in Global Consumer Psychology', 9(2). *JCP* (*Journal of Consumer Psychology)* 2000, pp. 59–66. Cultural differences are shown to exist in relation with commercial behaviour of consumers that could be relevant for the application of the UCPD, e.g., on impulsive buying: J. KACEN & J. LEE, 'The Influence of Culture on Consumer Impulsive Buying Behaviour', 12(2). *JCP* 2002, pp. 163–176. National courts appear to have a different perception of certain practices, in particular 'aggressive practices': H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law*, Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 113.

1.7. Why Psychology?

Before turning to the enquiry, a word of explanation on the interdisciplinary choice made in this article may be necessary. Behavioural economics is much more prominent than psychology in the current discourse on behaviourally informed policy making.[45] The irony of this state of the interdisciplinary conversation must be recalled. For a long time – about fifty years – economists embraced the rationality hypothesis as a matter of professional identity.[46] It is never easy to call one's identity into question and the reluctance of the guardians of the economic temple against empirical assaults on the very foundations of the edifice was understandable. Nonetheless, it is a paradox that the current research efforts towards making policies and laws more behaviourally informed should be labelled as law and behavioural *economics*.[47] As Daniel Kahneman writes 'Labels matter, and the mislabelling of applied behavioural sciences as behavioural economics has consequences'.[48] The consequences Kahneman points to are, first, that 'important contributions of psychology to public policy are not recognized as such' and, second, that this unfairness drives young psychologists away from applied research that could be useful to policy making.[49]

It is fair to confess, however, that the research presented in this paper was not undertaken as an attempt to redress a wrong done to psychologists. My

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45 See e.g. M. Lissowska, 'Overview of Behavioural Economics Elements in the OECD Consumer Policy Toolkit', 34 *J Consum Policy*, 2011, pp. 393–398; P. Lunn, *Regulatory Policy and Behavioural Economics*, OECD Publishing, Paris 2014; A. Oliver, (2013), *Behavioural Public Policy*, Cambridge University Press, Cambridge 2013 (throughout the book). See also conference organized by DG SANCO on 30 Sep. 2013, *Applying Behavioural Insights to Policy-Making: Results, Promises and Limitations*. In the field of consumer law, see O. Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets*, Oxford University Press, Oxford 2012, at 6 et seq.; H. Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited*, Intersentia, Antwerpen 2010, e.g., at 66 and references cited above at fn. 8.

46 A. Oliver, (2013), *Behavioural Public Policy,* Cambridge University Press, Cambridge 2013, at 13.

47 A better name is Law and Behavioural Sciences or 'Behavioural Analysis of Law', see A. TOR, 'The Methodology of the Behavioral Analysis of Law', 4. *Haifa L Rev* 2008, p 237 and his discussion on names for this approach at fn. 13. An important nuance between the two names is that 'Behavioural Analysis of Law' suggests that the law is the object of the behavioural analysis while the more neutral 'Law and Behavioural Sciences' allows for the possibility that the function of behavioural sciences may be to shed light on facts (rather than law), leaving it to legal analysis to decide whether and how this knowledge on facts could and should be incorporated. In my view, the part of the analysis consisting in connecting (any) scientific insights about facts to the law is not specifically behavioural.

48 D. Kahneman, foreword to S. Mullainathan & E. Shafir, *Scarcity: Why Having Too Little Means So Much,* Times Book, New York 2013, IX.

49 *Ibid*.

realization of the relevance of psychology for consumer law was rather fortuitous. It stemmed from the impulse buy of a pop-science book on social psychology, which had been a bestseller in France and which I was lured to buy by its colourful cover and amusing title.[50] To a lawyer trying to make sense of the unfair commercial practices directive, there is a striking proximity between what psychologists call 'manipulation' or 'influence' and what this directive seems to mean when it defines prohibited commercial practices in terms of 'material distortion' of choice patterns or 'undue influence'. Such proximity between words at least justified the hypothesis that psychological insights may be relevant for the interpretation of the legal rule.

Anecdote apart, there is a substantive reason why lawyers may want to borrow specifically from psychology, in particular in the field of consumer law. Most behavioural economics studies do not deal with interpersonal relations,[51] and when it comes to regulating marketing practices, the inter-personal dimension is significant, at least for some practices. The psychological insights reviewed in this article all come from social psychology and relate to interpersonal relations. These insights are typically not incorporated in a behavioural economic approach, and yet they are worth exploring in their own right.

From a methodological standpoint, there is an additional reason to give precedence to psychology over behavioural economics.[52] Consider a legal scholar endowed with some rationality and who embraces a utilitarian perspective: she is willing to get acquainted with other disciplines but wishes to choose the path of her interdisciplinary excursion with care, so as to maximize the expected legal return of her journey. From such a vantage point, behavioural economics and psychology are competing destinations. For the consumer lawyer, they constitute imperfectly substitutable sources of wisdom on consumer behaviour. In this context, psychology appears to have one advantage over behavioural economics: it attempts to describe and explain cognitive and emotional processes that affect our choices, not to *model* behaviour. Because behavioural economics is a branch of economics and because contemporary economists are mostly in the business of modelling, behavioural economists can only relax the heroic hypotheses of neo

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50 R.-V. Joule & J.-L. Beauvois, *Petit traité de manipulation à l'usage des honnêtes gens,* Presses universitaires de Grenoble, Grenoble 2002. The book sold so well that it is reported to have saved Grenoble University Press from bankruptcy. Its title translates as 'Little Treatise of Manipulation for the Use of Honest People'.

51 H.-W. Micklitz, L. Reisch & K. Hagen, 'An Introduction to the Special Issue on "Behavioural Economics, Consumer Policy, and Consumer Law"', 34. *J Consum Policy* 2011, pp. 271–276, at 273.

52 Thanks to Roberto Galbiati (an economist) for drawing my attention to this point by expressing so clearly his doubts about the wisdom of my choice.

classical economics (the well-known rational consumer model) one by one.[53] If they drew simultaneously on all insights of psychology relating to how we actually behave, too many hypotheses needed for equations to 'behave' would have to be relaxed at the same time and modelling would become impossible. Among economists – and some economically minded lawyers – this leads to the perception that behavioural economics is a 'weak' theory, because it cannot produce an overarching framework of analysis comparable to that of general equilibrium. In other words, disciplinary identity affects the way in which economists borrow from the original source of wisdom about behaviour, i.e., psychology.

Lawyers in general and judges in particular are not concerned with modelling; hence, they do not have a good reason to limit themselves to those insights of psychology, which are digestible by economists. This does not mean that the law can incorporate all the fine-grained analyses from psychology and, in particular, the full richness of studies on the context-dependent character of decision making. Law also has a limited capacity to absorb external knowledge, but it has its own limitations, which are not the same as those of economics. Lawyers, therefore, should go shopping for science on their own and see for themselves what psychology has in store that could be of use to them.

1.8. Word Choice

The word 'bias' is initially a statistical and value-neutral term, but, as psychological wisdom filtered through a layer of economics before reaching a wider audience, this word acquired a different connotation and an unpleasant normative undertone. It suggests – wrongly – that the norm from which reality deviates is the *homo economicus*, the fiction neoclassical economists have invented to serve the mathematical needs of a science then in infancy.[54] It would

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53 That behavioural economics is about modelling appears consensual. M. ALTMAN, *Behavioural Economics for Dummies,* John Wiley & Sons, New York 2012. The book opens with this sentence: 'Behavioural economics is all about making our *economic models* (…) more rigorous and realistic, by building them on solid empirical foundations' (emphasis in the original). For an illustration of rewriting a branch of economic theory (industrial organization) relaxing the rationality hypothesis, see R. SPIEGLER, *Bounded Rationality and Industrial Organization,* Oxford University Press, Oxford 2011.

54 As Hausman explains, it is not because economics truly believed that humans were rational in the narrow sense they defined that they chose to base their theory on *homo economicus*. Rather, it is because they wanted their science to be 'separate' and formalized that they needed consumers preference to have certain properties, failing which the utility functions would not be (mathematically) 'well behaved' and it would be impossible to calculate an equilibrium. In particular, that they needed preference to be convex (which translates as diminishing marginal utility or 'the more apples you eat, the less pleasure you derive from an additional apple) and transitive (which translates as 'if you prefer pears to apples and apples to oranges, you prefer pear to oranges'). D. HAUSMAN, *The Inexact and Separate Science of Economics,* Cambridge University Press, Cambridge 1992, Chs 1 and 2.

make more sense to take humans rather than 'econs' as a point of reference and acknowledge it in the words we use.[55] So-called biases are deviations to economists but, to the rest of the world, they constitute deeply rooted psychological realities that are best acknowledged as facts of life rather than judged harshly. It is hard to go against prevailing word use, but perhaps the more value-neutral 'behavioural trait' or simply 'trait' could be given a chance.

1.9. Structure of This Article

Section 2 explains why psychology studies on social influence are relevant to EU consumer law on unfair practices. Section 3 deals with one channel of influence, which is of particular interest for legal purposes and which psychologists call 'commitment'. Section 4 envisages possible objections to importing psychological insights into legal decision-making processes, in particular court adjudication. Section 5 confronts legal typology of unfair practices to categories of psychology and finds that the partial mismatch opens interesting avenues for reasoning by analogy. Section 6 reflects on other possible legal uses of psychological insights in consumer law and finds that critical use and evidentiary use do not seem as valuable as the main interpretative use described in the previous sections. Finally, section 7 contains concluding remarks.

2. Relevance of Social Psychology for EU Law on Unfair Practices

2.1. Marketers Rely on Insights from Psychology and So Should Regulation of Marketing Practices

Influence is the generic term used by psychologists to refer to all techniques that impact on someone's behaviour. The study of influencing techniques and of the different channels through which they work is part of social psychology, of which consumer psychology is a sub-branch. Because most of these mechanisms are unconscious, the subject under influence does not readily detect influencing techniques. This is why psychologists use the phrase 'compliance without pressure'.[56] Subjects under influence do not consciously feel manipulated because the succession of the two (or more) actions obeys a natural internal logic. Manipulation uses natural human tendencies by carefully choosing stimuli, which will, as a rule, induce predictable reactions. The sub-conscious nature of influence is the very reason why these techniques are so useful to marketers.[57] A refined

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55 The phrase was coined by R. THALER & C. SUNSTEIN, *Nudge: Improving Decisions about Health, Wealth, and Happiness,* Penguin Books, London 2008, at 6.

56 See, e.g., J. FREEDMAN & S. FRASER, 'Compliance without Pressure: The Foot-in-the-Door Technique', 4. *J Pers Soc Psychol* 1966, pp. 195-202.

57 A number of studies on influencing techniques in commercial contexts have appeared in marketing journals rather than psychology journals. See, e.g., E. ANDERSON & D. SIMESTER, 'Effects of $9 Price Endings on Retail Sales: Evidence from Field Experiments', 1. *Quantitative*

understanding of emotional and cognitive processes makes it possible for marketers to devise more subtle, clever, and effective ways to influence consumers. If, on the other hand, the law stays blind to the underlying logic of the very practices it seeks to regulate, it puts regulation of commercial practices at a cognitive disadvantage compared to regulatees. In fairness, the law as it stands cannot be described as completely blind to psychological mechanisms, but it is possibly short-sighted, because it relies on folk psychology rather than science.

2.2. Where Psychology Will Not Help: Normative Indeterminacy in the UCPD

There is one aspect in the directive on unfair commercial practices with which psychology is unlikely to help: this is its normative indeterminacy.

The UCPD regulates marketing practices by way of both general and specific prohibitions. Article 5 gives a general definition of unfair practices (discussed below). Then Articles 6–9 give definitions of particular categories of unfair practices: misleading practices (Articles 6 and 7) and aggressive practices (Articles 8 and 9). The annex of the directive gives a list of 31 commercial practices deemed abusive in all circumstances. For these listed practices, there is no need to apply the general or semi-general definitions: they are prohibited *per se*. As explained by Advocate General Wals in his opinion in the *CHS* case, the structure of the directive favours an approach he calls 'top-down', in fact one that starts with the most specific rules (black list) and then progresses as necessary towards the more general rules (provisions on misleading or aggressive practices) or, if they do not apply, to the general clause (Article 5).[58]

Given this general structure of the assessment of commercial practices under the UCPD, it is particularly interesting to confront the notion of influence,

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Marketing and Economics 2003, pp. 93–110. Studies published in psychology journals sometimes have a distinct marketing angle. See, e.g., P. Aggarwal & R. Vaidyanathan, 'Use It or Lose It: Purchase Acceleration Effects of Time-Limited Promotions', 2(4). *Journal of Consumer Behaviour* 2002, pp. 393–403 or studies on effect of touching cited at fn. 70. Several authors quoted throughout this article work in marketing rather than psychology departments.

Sub-conscious nature of influence does not mean of course that in cannot be observed. Indeed, neuromarketing, which has been developing in recent years, takes the study of purchasing decision a step further by literally observing, with the help of brain imaging techniques, how we react to different stimuli. For a good introduction to neuromarketing, see M. Lindstrom, *Buy.ology,* Broadway Books, New York 2008; P. Renvoisé & C. Morin, *Neuromarketing: Understanding the 'buy button' in Your Consumer's Brain,* Thomas Nelson, Nashville 2007.

58 Opinion in ECJ 19 Sep. 2013, C-435/11, *CHS Tour*, para. 29. I am not sure if naming this approach 'top down' is very evocative, but the description of the approach is clearly accurate and consensual. See UK guidance document: Department for Business Enterprise and Regulatory Reform, *Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial*

as defined in psychology, with the general and semi-general legal definitions of unfair practices. The list of commercial practices that are prohibited *per se* can more profitably be read in connection with specific empirical studies (see below).

When reading the general legal definition, it is hard to understand which influencing techniques come within the scope of the general prohibition of unfair practices. Indeed, this definition is quite vague.[59] It reads as follows:[60]

> A commercial practice shall be unfair if:
>
> (a) it is contrary to the requirements of professional diligence, and
> (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.[61]

The second criterion used in this definition (material distortion of consumer behaviour in relation to a product) is clearly reminiscent of the notion of influence used in psychology. It should be stressed, however, that not all influence is prohibited, since influence is only one of two criteria for defining prohibited unfair practices. The other is that the commercial practice must be 'contrary to professional diligence'. The meaning of 'professional diligence' remains unclear and may give rise to slightly divergent interpretation depending on the meaning of the closest notion under national law,[62] but the function assigned to this notion in the definition of unfair commercial practices is that of a limiting factor: only practices that are contrary to the standard of professional diligence are prohibited. If a trader acts 'diligently', what he does to influence

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Practices Directive ('OFT Guidance'), available on the OFT website: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf (last accessed 15 October 2014), at 12.

59 (Perceived) vagueness in the law is a feature that is conducive to imports from science – or extra-legal knowledge generally – into the law. On vagueness as a perceived (as opposed to intrinsic) feature of a text, see J. Black, *Rules and Regulators,* Oxford University Press, Oxford 1997, Ch. 1 (building on H.L.A. Hart). On vagueness as a pre-condition for porousness of the law, see A.-L. Sibony, 'La porosité du droit: À propos des relations du droit avec d'autres disciplines', *Revue de la Faculté de Droit de l'Université de Liège* 2010, pp. 271–278, available at: http://hdl.handle.net/2268/34788.

60 UCPD, Art. 2. para. 2.

61 Emphasis added.

62 H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law*, Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 91.

consumers is not unfair even if it is effective. Definitions and interpretive guidance given both at EU and at national level do not – can cannot – suppress the open-endedness of the concept.[63] 'Professional diligence' is the locus of a – largely indeterminate – normative judgment.

In a way, Article 5 UCPD is a puzzling text: do diligent marketers not use the most apt and subtle techniques to influence consumers? Is it not the very purpose of their job to find ways to make us buy what we neither need nor want? On the other hand, is it not the very purpose of the directive to assert that not everything zealous marketers do is acceptable? Conceptually, 'diligence' is a strange choice for expressing a normative judgment on commercial practices because it seems to refer to a norm for good and bad practices shared by a professional community. If, however, a business community is made up of professional manipulators, it is clear that the EU legislator should not embrace its norms in a consumer protection directive. In fact, the definition of 'professional diligence' in the directive only makes sense in conjunction with European Codes of Conduct defining good practices. This was the original project of the Commission but the codes were never adopted.[64]

One way out of the normative conundrum posed by this incomplete text is to adopt a different reading of Article 5. Instead of reading 'professional diligence' as meaning 'diligence as understood by the professionals', one can hold it to mean 'fairness as commonly understood'. This is in essence how the OFT guidance recommends interpreting the provision: 'poor current practice that is widespread in an industry/sector cannot amount to an acceptable objective standard. That is because this is not what a reasonable person would expect from

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63 Article 2 (h) of UCPD defines 'professional diligence' as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either – (a) honest market practice in the trader's field of activity, or (b) the general principle of good faith in the trader's field of activity'. Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, Commission Staff Working Document, SEC(2009) 1666 ('Commission Guidance', available at: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf. In the UK, the OFT Guidance (Office of Fair Trading (OFT), *Consumer Protection from Unfair Trading Regulations 2007 Guidance – Draft Guidance on the UK implementation of the Unfair Commercial Practices Directive*, OFT931con, available at: http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft931con.pdf) explains that 'the word "special" is not intended to require more than would reasonably be expected of a trader in their field of activity'. The Commission's guidance notice does not attempt to further define or explain the standard of 'professional diligence'.

64 H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law,* Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 91.

a trader who is acting in accordance with honest market practice or good faith'.[65] This certainly adds yet more indeterminacy to the law; it also makes the definition circular, as, under this reading, an unfair practice would essentially be defined as one that is (a) unfair and (b) effective. Circularity is not a very satisfying feature in a legal rule. Yet, at the same time, it accords with normative intuition better and allows courts to exclude from the scope of the prohibition a wide range of techniques often used in the commercial sphere and which are shown to materially influence consumers but could not be said to be unfair in any socially acceptable sense. Such techniques presumably include (at least) smiling,[66] being polite with a consumer,[67] and asking a consumer how she is doing.[68]

For many techniques, however, common sense and ordinary meaning of words are not sufficient guides.[69] Take, for example, the technique that consists in touching (barely) a consumer. Its use is surprisingly effective,[70] but is it 'contrary to professional diligence' to instruct sales personnel to touch

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65 Office of Fair Trading (OFT), *Consumer Protection from Unfair Trading Regulations 2007 Guidance – Draft Guidance on the UK implementation of the Unfair Commercial Practices Directive*, OFT931con, available at: http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft931con.pdf, §10.4. at 47.

66 Effect of smile has long been established. K. Tidd & J. Lockard, 'Monetary Significance of the Affiliative Smile: A Case of Reciprocal Altruism', 11(6). *Bulletin of the Psychonomic Society* 1978, pp. 344–346 (effect of smile of the waitress on tips). Outside of a commercial context, effect of smile on submission has also been documented. See N. Guéguen & J. Fischer-Lokou, 'Hitchhikerss' Smiles and Receipt of Help', 94(3). *Psychological Reports* 2004, pp. 756–760. More recently, the effect of smile in online communication has also been explored (and found positive): N. Guéguen, *Psychologie du consommateur: Pour mieux comprendre comment on vous influence*, Dunod, Paris 2009, at 210–212.

67 On this point, see N. Guéguen, *Psychologie du consommateur: Pour mieux comprendre comment on vous influence*, Dunod, Paris 2009, at 35–39.

68 Just asking 'How are you doing?' has a significant effect on response to a subsequent request. For an account of experiment on this 'trick question', see N. Guéguen, *Psychologie du consommateur: Pour mieux comprendre comment on vous influence*, Dunod, Paris 2009, at 75–78.

69 Referring to ordinary meaning of words is a classical technique of legal interpretation. However, when European law is at stake, the use of this technique is more difficult because of the plurality of languages in which the law (here the UCPD) is translated. Some words or phrases (here 'professional diligence') may carry different connotations in different languages as well as different associations in different legal systems.

70 Several experiments have shown the influence of touch on consumer behaviour. In one experiment, consumers in a supermarket were offered slices of pizza to taste. If they took one, they were given a coupon and shown where the pizza could be found in the supermarket. The consumers who were touched were more likely to take the pizza and to purchase it than those who were only addressed verbally. Smith, Gier and Willis (1982). In another experiment, waiters in a restaurant touched some of the consumers who were dining. Couples where one person was touched gave significantly higher tips than those were neither was touched. The effect of touch varied only very slightly according to sex (both of the diner and of the waiter). J. Hornik, 'Tactile Stimulation and Consumer Response', 19. *Journal of Consumer Research*, 1992, pp. 449–458.

customers? Marketing ethics rather than psychology would probably be the appropriate source to turn to on these and similar issues. Whether it can provide precise guidance however is not clear,[71] nor is it obvious that it would be legitimate for enforcement authorities and courts to turn to marketers themselves as a source of knowledge on how to best regulate their conduct.

Psychology cannot readily help with normative issues, nor should it: outsourcing normative issues to science is not a commendable way for lawyers to use science.[72] This does not mean that behavioural studies could not play any role regarding difficult normative issues in the field of unfair commercial practices. Indeed, empirical studies could help identify what practices are *perceived* as unfair, but it would still be for courts, 'exercising their own faculty of judgment'[73] to determine whether and when they want to rely on the knowledge accumulated on normative judgments. What psychology, however, can help with at present is with the interpretation of the second criterion in the two-pronged test of Article 5 UCPD, which require courts to assess whether a practice 'materially distorts' the behaviour of the average consumer.

2.3. What Psychology Can Help with: 'Material Distortion of Consumer Behaviour' and 'Misleading Practices'

The UCPD is porous to insights from psychology because of three provisions in particular, all of which contain clear references to what psychologists call 'influence'. The first one has already been discussed: the general definition of unfair practices, in Article 5 requires that practices 'materially distorts' the behaviour of the average consumer in relation to a product. The second and third provision whose interpretation could benefit from psychological insights are the prohibition of 'misleading actions' and 'misleading omissions' (respectively Articles 6 and 7 UCPD). It is clear from the wording of the definition of misleading actions that, through the criterion of deception, which is central, the EU legislator was trying to address a form of influence. The definition reads as follows:

> A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, *deceives or is likely to deceive* the average consumer, *even if the information is factually correct*, in relation to one or more of the following

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71 Brenkert, *Marketing Ethics,* Wiley-Blackwell, New York 2008, at 27 et seq.

72 R. Feldman, *The Role of Science in Law,* Oxford University Press, Oxford 2009, at 13–14 and 119.

73 UCPD, recital 18.

elements, and in either case causes or *is likely to cause him to take a transactional decision that he would not have taken otherwise.* [74]

In defining misleading practices, the directive also deals with influence caused by contextual factors, albeit only in two specific cases (confusion and violation of a code of conduct):

> A commercial practice shall also be regarded as misleading if, *in its factual context, taking account of all its features and circumstances*, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, *and* it involves:
>
> (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
>
> (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
>
> (i) the commitment is not aspirational but is firm and is capable of being verified,
> and
>
> (ii) the trader indicates in a commercial practice that he is bound by the code.[75]

Even if contextual factors are explicitly referred to in connection with two rather specific hypothesis, this paragraph is interesting in that it invites courts to consider 'all features and circumstances' of the factual context. This is precisely why this open-textured definition lends itself to taking insights from psychology into account. Though the Commission refers to behavioural economics rather than psychology,[76] this is recognized in its guidance notice, which reads:

> The definition of a misleading action used in the Directive has taken into account the current state of knowledge of how consumers take decisions in the market space. For example, new insights from behavioural economics show that

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74 Article 6, para. 1. Emphasis added. This paragraph is followed by a list of items in relation to which information given to the consumer can be misleading: (a) the existence or nature of the product; (b) the main characteristics of the product […], (c) the extent of the trader's commitments […], (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage; (e) the need for a service, part, replacement or repair; (f) the nature, attributes and rights of the trader […]; (g) the consumer's rights […] or the risks he may face.

75 Article 6, para. 2.

76 See above sec. 2.2.

> not only the content of the information provided, but also the way the information is presented can have a serious impact on how consumers respond to it. […] It is then for the national courts and administrative authorities to assess the misleading character of commercial practices by reference, among other considerations, to the current state of scientific knowledge, including the most recent findings of behavioural economics. [77]

In line with this opening to behavioural insights, the directive contains explicit provisions to cover situations of practices, which are capable of deceiving consumers 'in any way, including overall presentation', even if the information provided is factually correct. The examples given in the notice are default options, provision of unnecessarily complex information,[78] certain price comparisons,[79] 'copycat packaging',[80] and misleading environmental claims.[81]

The directive further defines 'misleading omissions', and in this definition too, the key legal criterion is influence. The drafters of the directive used a somewhat more complex wording, requiring that the omission 'causes the average consumer to take a transactional decision that he would not have taken otherwise'. Yet, there seems to be no difference in meaning with Article 6 or the notion of influence. However, the wording of Article 7, unlike the previously quoted passages of Article 6, contains an implicit reference to the model of a rational consumer. It is apparently assumed that the average consumer can process correctly information that is given to him. The definition of misleading omission reads as follows:

> A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it *omits material information that the average consumer needs*, according to the context, *to take an informed transactional decision* and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.[82]

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77 Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, Commission Staff Working Document, SEC(2009) 1666 ('Commission Guidance', available at: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, at 32 (sec. 4.2.4).

78 *Ibid.*

79 *Ibid.*, at 34 (sec. 4.4.3).

80 *Ibid.*, at 36 (sec. 4.4.4).

81 *Ibid.*, at 36 (sec. 2.5.3).

82 Article 7, para. 1. Emphasis added.

The provisions on misleading practices (Articles 6 and 7) appear as a mix of pre-behavioural focus when it comes to the content of information and openness as regards behavioural insights on the context of information provision.[83] Although the guidance notice does not comment on this point, this provision also seems permeable to insights on circumstances in which missing information is likely to distort consumer behaviour.[84] This is true in particular of Article 7(2), which provides that information given 'in an untimely manner', rather than omitted, can also be misleading.[85] The behavioural wisdom of this addition is beyond doubt as many influencing techniques crucially rely on the sequence in which information is given.[86] Some studies also show that timing, irrespective of sequence, may have an influence.[87]

Articles 8 and 9 of the directive define 'aggressive practices'. Psychology may also be relevant to the application of those provisions, which centrally refer to 'undue influence', but it is apparent that aggressive commercial practices are outside the scope of 'compliance without pressure',[88] because they are precisely about exerting pressure on consumers. This is the reason why they will be left out of the present analysis, which is restricted to soft influence.

It is possible to conclude from the above cursory reading of the main definitions contained in the directive that there is substantive conceptual convergence between what the European legislator is trying to prohibit – practices that 'causes the average consumer to take a transactional decision that he would not have taken otherwise' – and social influence, as studied by psychologists. Influence seems to be just another word for the type of conduct the directive is trying to catch, and this other word carries with it a wealth of accumulated

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83 On the first aspect, see H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law,* Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 102.

84 In this respect, we read the text of the UCPD as being more permeable to insights from psychology than Incardona and Poncibò indicate. R. Incardona & C. Poncibó, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', 30. *Consum Policy* 2007, pp. 21–38, at 33, referring to recital 18 of the directive and asking whether the admission that the average consumer must be appraised taking into account social, cultural and linguistic factors might allow courts to consider the average consumer as an emotional consumer rather than just a 'reasonably well informed and reasonably observant and circumspect' consumer (the classical Court formula since ECJ 16 Jul. 1998, C-210/96 *Gut Springerheide*, para. 31).

85 Article 7, para. 2.

86 These techniques, to which we return below in detail, include: low-ball, lure, 'that's-not-all', foot-in-the-door, foot-in-the-mouth, fear and relief.

87 C. Yoon, M. Lee & S. Danziger, 'The Effects of Optimal Time of Day on Persuasion Processes in Older Adults', 24(5). *Psychology and marketing* 2007, pp. 475–495.

88 This phrase is borrowed from J. Freedman & S. Fraser, 'Compliance without Pressure: The Foot-in-the-Door Technique', 4. *J Pers Soc Psychol* 1966, pp. 195–202.

empirical knowledge about what does influence people, including consumers. Studies on influencing techniques should therefore retain the attention of anyone trying to interpret or apply the directive on unfair practices. Psychological studies on influence, at least those which relate to a commercial context, are therefore relevant to help identify conducts which could fall under the general definition of an unfair practice.

2.4. How Can Psychology Help? An Analytical Guide to Influence

Psychology can help with understanding how influence works. Psychologists have identified several channels of influence. Cialdini classifies them in six categories.[89] First, there is reciprocation. According to a seemingly universal norm, we want to repay others for what they give to us (also if only apparent concessions).[90] Second, there is what psychologist call 'commitment'. This category is of particular interest for legal purposes and will be further developed in section 4. The bottom line of commitment is that we have a nearly obsessive desire to be – and to appear – consistent with what we have already done. This tendency can easily be exploited, because once we have chosen to behave in a certain way, we will experience personal and interpersonal pressures to behave consistently.[91] Third, 'social proof' acts as a means of influence. This principle states that one common intuitive way of determining what is an appropriate course of conduct is to find out what other people do (e.g., laughing at a poor joke in a TV show).[92] Fourth, liking is a powerful influence channel. We simply prefer to accept requests when they come from someone we know and like. This principle may be used by strangers in a variety of ways to get us to comply with their requests (we tend to like physically attractive people, people who appear similar to us).[93] Fifth, authority (or the mere appearance of authority) is also a channel of influence. It seems to be more difficult to refuse to do something when asked by someone displaying a form of authority (whether based on specialized knowledge, title, cloths) than to say no to someone who is not vested with particular authority (e.g., nurse as opposed to doctor, student as opposed to professor).[94] Finally, scarcity seems to be another thing that makes us tick. Offers seem more valuable to us when their availability is – or artificially seems to be –

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89 For a clear account, see R. CIALDINI, *Influence: The Psychology of Persuasion,* Harper Collins, New York 2007, hereafter 'CIALDINI (2007)' or R. CIALDINI, *Influence: Science and Practice,* Pearson Education Canada, Ontario 2009, hereafter 'CIALDINI (2009)', respectively at 18 et seq., 51 et seq., 97 et seq., 141 et seq., 174 et seq., 198 et seq.

90 CIALDINI (2007), pp. 17-21; CIALDINI (2009), pp. 18-50.

91 CIALDINI (2007), p. 57; CIALDINI (2009), pp. 51-96.

92 CIALDINI (2007), p. 116; CIALDINI (2009), pp. 141-173.

93 CIALDINI (2007), p. 167; CIALDINI (2009), pp. 97-140.

94 CIALDINI (2007), pp. 208-220; CIALDINI (2009), pp. 174-197.

limited (e.g., 'limited stock', 'two-day special offer')[95] than when the same offer appears to be lasting.

We will return in section 5 to the usefulness of this typology as a conceptual framework but before doing so, it is useful to illustrate in some detail the value of one particular item in this typology. The notion of commitment is of interest because it underlies several different influencing techniques, which may be used in a commercial context.

3. Commitment: A Notion Worth Borrowing from Psychology

3.1. The Notion

As is clear from the above, 'commitment' is a *faux ami*: the word has a different meaning in psychologese and in legalese. For psychologists, it refers to the link between an individual and his/her acts,[96] not to an agreement or promise to do something in the future. More precisely, commitment is shaped by our internal drive for consistency.[97] If we act in a certain way, we tend to prefer subsequent courses of actions that are consistent with this particular action.[98] This is why commitment is one powerful channel through which influence works: many influencing techniques induce internal commitment by first requiring from the subject an action, which has no other purpose than committing her and will therefore increase the likelihood of subsequently obtaining from her a target behaviour, which is consistent with the initial action.

Psychologists have found that it is amazingly easy to induce commitment. It often takes only one act for a subject to feel committed. This act can be as apparently harmless as answering a short questionnaire, trying or tasting

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95 Cialdini (2007), p. 238; Cialdini (2009), pp. 198-226.

96 This definition was originally proposed by Kiesler in C. Kiesler, *The Psychology of Commitment; Experiments Linking Behaviour to Belief*, Academic Press, Waltham 1971. See R.-V. Joule & J.-L. Beauvois, *Petit traité de manipulation à l'usage des honnêtes gens,* Presses universitaires de Grenoble, Grenoble 2002, at 74; N. Guéguen, *Psychologie de la manipulation et de la soumission*, Dunod, Paris 2004, at 141.

97 While the technical meanings of the term differ in law and in psychology, there may nevertheless be a deep link. As pointed out by Matthias Storme, the fact that contract law gives effect to the appearance of the intention to be bourd (by a contract) is ultimately grounded in the view that people who carry out their promises are primarily motivated by the affirmation of their identity and want to live up to previous representations made of themselves. M. Storme, 'The Binding Character of Contracts – Causa and Consideration', in A.S. Hartkamp, M.W. Hesselink, & E.H. Hondius (eds), *Towards a European Civil Code*, second revised and expanded edition, Kluwer/Ars aequi 1998, 239-254, text at fn. 10 and references in fns 1 and 10.

98 R. Cialdini, *Influence: The Psychology of Persuasion,* Harper Collins, New York 2007, at 67 writes: 'Each of the strategies is intended to get us to take some action or make some statement that will trap us into later compliance through consistency pressure'.

something for free or clicking on a web link.[99] A variety of circumstances have been shown to be conducive to commitment. Cialdini cites four influencing factors, not all of which need to be present for commitment to happen, but each of which facilitates commitment.[100] First, a 'magical act' is helpful for the subject to feel internally committed. An example is where a consumer is asked to fill a form. Second, 'the public eye' seems to be particularly important. We feel more committed by an act and for a longer time if we have performed it in the presence of at least one other person. Third, the cost of the initial act seems positively correlated to the intensity of commitment: the more costly (in time, attention or money) the initial conduct, the more we tend to stick to it (thus making mistakes more costly).[101] Fourth, we feel more committed if we perceive (even mistakenly) our initial behaviour as freely chosen. According to empirical studies, it is disarmingly easy to reinforce this feeling of freedom for the purposes of inducing commitment. It is enough to add 'but of course, you are free to do otherwise' to enhance significantly your chances of obtaining what you want.[102] This

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99 R.-V. Joule & J.-L. Beauvois, *Petit traité de manipulation à l'usage des honnêtes gens,* Presses universitaires de Grenoble, Grenoble 2002; J. Freedman & S. Fraser, 'Compliance without pressure: the foot-in-the-door technique', 4. *J Pers Soc Psychol* 1966, pp. 195–202.

100 R. Cialdini, *Influence: The Psychology of Persuasion,* Harper Collins, New York 2007, at 67–103.

101 A classical experiment in this regard is that of H. Arkes & C. Blumer, 'The psychology of sunk cost', 35. *Organizational Behaviour and Human Decision Processes* 1985, pp. 124–140. In this experiment, students could sign up for two different weekend trips. For the first one, they had to pay USD100, and only USD 50 for the second one, which was more appealing. It turns out that they have to choose between the two as both trips will be organized the same weekend. Having paid the non-refundable sum of $150, students should rationally choose the more appealing weekend. Yet, the majority chooses the more expensive trip. R.-V. Joule & J.-L. Beauvois, *Petit traité de manipulation à l'usage des honnêtes gens,* Presses universitaires de Grenoble, Grenoble 2002, at 41 generalize this result and explain that, in order to effectively trap someone in a spending spiral (what they call 'abstruse trap' ('piège abscons' in the French original), the following conditions have to be met: (i) the subject must have decided to engage in some form of spending in order to reach a certain goal (e.g., wait for the night bus in order to get home); (ii) she must be uncertain as to whether the goal may be reached in this way (there may be no more busses tonight); (iii) the individual must feel that each additional spending (e.g., waiting longer rather than hailing a passing cab) will increase the probability of reaching the goal through the preferred means; and (iv) the subject must not have initially set a limit to her spending (how long she would be ready to wait).

102 N. Guéguen & A. Pascual, 'Evocation of Freedom and Compliance: The "But You Are Free of …" Technique', 5(18). *Current Research in Social Psychology* 2000, pp. 56–59; N. Guéguen & A. Pascual, 'La technique du 'vous êtes libre de …': induction d'un sentiment de liberté et soumission à une requête ou le paradoxe d'une liberté manipulatrice', 15. *Revue Internationale de Psychologie Sociale* 2002, pp. 51–80; N. Guéguen & A. Pascual, 'Improving the Response Rate to a Street Survey: An Evaluation of the "But You Are Free to Accept or to Refuse" Technique', 55. *The Psychological Record* 2005, pp. 297–303.

mechanism seems to be so universal it even works over the internet, without face-to-face interaction.[103]

Besides these four factors highlighted by Cialdini, other authors point to further factors conducive to commitment: the number of occurrences of the preliminary conduct (the more we have acted in a certain way, the more likely we are to want to act in a manner consistent with this series of acts), its irrevocable character, the subjective importance of the behaviour to the subject (we feel less committed if the act is unimportant to us), the feeling of responsibility (we feel more committed if we are personally responsible for setting a standard of conduct).[104]

3.2. Influencing Techniques Based on Commitment

Several influencing techniques rely on commitment. Three of them have been extensively studied. In the jargon of social psychology, they are called 'foot-in-the door', 'low ball', and 'lure'.[105]

Foot-in-the door was initially shown to be effective by Freedman and Fraser in a seminal article of 1966.[106] This technique is sequential: in the first stage (priming), a small request is presented. Only after the request has been accepted and completed, a second, larger request is made. In the initial experiment, American housewives were asked to answer a few questions about which soaps they used. A few days after they had agreed to answer the questionnaire, they were asked to allow a survey team of six men to come to their house and classify all cleaning products for two hours. This large request was accepted significantly, more often if it had been preceded by the small request than if not.[107]

Low ball is another sequential compliance technique. Here, a requester induces a subject to accept a request and only then reveals hidden costs of performing this behaviour. Experiments show that a requester who uses this technique obtains greater final compliance than a requester who informs directly subjects of the full costs of the target behaviour. In the experiment that gave rise to the seminal article on low ball, students were asked to participate in an

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103 C. Jacob, N. Guéguen & A. Pascual, 'Évocation sémantique de la liberté et sollicitation d'une requête sur internet: Analyse d'une nouvelle procédure d'influence du comportement de l'internaute', *Revue des Sciences de Gestion,* 201-202, 2003, pp. 33-41.

104 See, e.g., R.-V. Joule & J.-L. Beauvois, *Petit traité de manipulation à l'usage des honnêtes gens,* Presses universitaires de Grenoble, Grenoble 2002, at 74-78; N. Guéguen, *Psychologie de la manipulation et de la soumission*, Dunod, Paris 2004, at 168.

105 It should be noted here that one (isolated) study shed doubt on whether the efficacy of low ball actually rests on commitment: J. Burger & E. Petty, 'The low-ball compliance technique: task or person commitment?' 40(3). *J Pers Soc Psychol* 1981, pp. 492-500.

106 J. Freedman & S. Fraser, 'Compliance without Pressure: The Foot-in-the-Door Technique', 4. *J Pers Soc Psychol* 1966, pp. 195-202.

107 The study controlled for several factors and there were several variants in the scenarios used.

experiment.[108] Some (control group) were told initially that this experiment would require their presence at the lab at 7 am. Others were told about this inconvenient time only after they had accepted to take part (low ball condition). The result was that members of the second group generally did not take their word back, even though they might not have accepted if they had initially been informed that they would have to get up so early. In a more recent study on the same technique, authors have carried out a field experiment (i.e. they did not stage the experiment in a campus setting, which is practical for academics running the experiments but where there may be biases due to the fact that subjects are all students). People at the entrance of a hospital building were asked if they could mind a dog while the dog owner visited a patient. Only after they had accepted were they told that the visit would take about half an hour.[109] Again, it was shown that using the low ball technique was much more effective than asking people directly if they would mind a dog for half an hour. The low ball technique has also been studied in a commercial context, but somewhat surprisingly, the study did not show it to be effective.[110] This, however, could be due to experimental design, and other experiments are needed before any conclusions can be drawn on the basis of only one study.

A third technique based on commitment is called lure. It consists in, first, leading a person to take the decision to engage in an advantageous behaviour and, then, informing her that circumstances have changed and the planned action can thus no longer take place. At this stage, an alternative, less advantageous course of action is suggested. This technique is similar to the low ball technique in that both involve two decisions, one made before knowing the real cost of the target behaviour and one after being informed of the same. The difference lies in the fact that, in low ball, both decisions concern the same behaviour, which is made more costly, while in the lure technique, the decisions involve two distinct behaviours. Lure has been shown to be effective, initially in a non-commercial context,[111] and then in field experiments in a commercial context.[112]

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108 R. Cialdini, J. Cacioppo, R. Bassett & J. Miller, 'Low-Ball Procedure for Producing Compliance: Commitment then Cost', 36(5). *J Pers Soc Psychol* 1978, pp. 463–476.

109 N. Guéguen, A. Pascual & L. Dagot, Lionel, 'Low-Ball and Compliance to a Request: An Application in a Field Setting', 91. *Psychological Reports* 2002, pp. 81–84. In this study, as in the initial 1978 article, the authors controlled for gender effect and showed that there is none.

110 W. Motes & A. Woodside, 'Influence of Low-Balling on Buyers Compliance', 101. *The Journal of Psychology* 1979, pp. 219–221. Motes and Woodside used a promotional offer on nail polish bottles. Variations of a special offer were presented to female buyers in a department store (reduced price/reduced price for two/three bottles), and clients were then told that the reduced price was higher than initially announced. Clients did not buy significantly more nail polish than in the control condition, i.e., when initially informed about the correct promotional price.

111 R.-V. Joule, F. Gouilloux & F. Weber, 'The Lure: A New Compliance Procedure', 129(6). *Journal of Social Psychology* 1989, pp. 741–749. In this study, students are recruited to

3.3. Legal Relevance: Psychological Concepts as Building Material for Legal Tests

The above examples of manipulation techniques based on commitment show how versatile this influence channel is. This is precisely why the notion of commitment is valuable for the purposes of interpreting and applying the general clause of the unfair practices directive.[113] It has been pointed out that this general clause will rarely be needed because most common practices are dealt with under the list in the annex of the directive.[114] While this may be the case, it remains that rational marketers confronted with a *per se* prohibition of thirty-one commercial practices can reasonably be expected to design new techniques, which will not fall foul of the prohibition but will have a similar effect. Therefore, the broad and open textured definition of unfair practices contained in Article 5 may be viewed as the safety net of consumer protection against manipulative commercial creativity. Because open textured notions are, as such, inherently hard to apply to facts directly, they call for intermediary steps to be defined. Where statutory language is vague, notions borrowed from extra-legal sources of knowledge may be used to frame legal tests or sub-tests.[115] In antitrust law, economics serves as a source of such intermediary notions, which are then woven by courts into legal tests.[116] In the field of consumer law, psychology could, in much the same way as economics

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participate in a rather interesting and well-paid experiment. Once they have accepted, they are asked to come to the laboratory. There, they are informed that the interesting research has been completed, but that they can participate in another experiment, for which they will not be paid. The results show that subjects accept more often to take part in the unpaid experiment when this technique is used than when it is not.

112 N. Guéguen & C. Jacob, 'La chaussure-leurre: Une application de la technique du leurre sur le comportement du consommateur', *12th AFM congress*, Nantes (France), 2006. The authors placed a pair of shoes at a promotional price in a shoe shop window. When a consumer enters the shop and asks for her size, a salesperson explains that this size is no longer available, but presents a similar model, which is sold at the normal tag price. Using this technique, more pairs of shoes are sold than in the absence of lure.

113 European legal commentators commonly refer to the general definition of unfair practices contained in Art. 5 of the UCPD as the 'general clause'.

114 H. Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices', 73. *Modern Law Review* 2010, pp. 89-118, at 97. According to Micklitz, the general clause only applies in 'extreme and obvious cases', H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law,* Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67-123, at 95.

115 We call 'sub-tests' tests designed by courts in order to apply a broad legal test, such as that of Art. 5 of the UCPD. A sub-test in this context could be a criterion or an articulated series of criteria which courts would hold relevant for the purposes of appraising whether a commercial practice is misleading or otherwise unfair.

116 B. Vesterdorf, 'Economics in Courts: Reflections on the Role of Judges in Assessing Economic Theories and Evidence in the Modernised Competition Law Regime', in M. Johansson, N. Wahl & U. Bernitz (eds), *Liber Amicorum in Honour of Sven Norberg: A European for All Seasons*,

in the field of antitrust, be a source of inspiration for courts at the stage of designing legal sub-tests for the purposes of assessing whether a practice 'materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer'.

'Commitment' – as defined by psychologists – is a useful intermediary notion, because it may be helpful to ask 'does this practice induce commitment'? – rather than 'is this practice likely to materially distort the economic behaviour of the average consumer?'. The first question seems somewhat less difficult to answer than the second one if one considers that there is a body of available knowledge on which it is possible to draw in order to identify relevant facts, namely the various factors which have been shown to be conducive to commitment.[117] Drawing on the insights from social psychology, courts could in particular consider whether a practice is sequential. Indeed, this is a common trait to all practices based on commitment, and seemingly a necessary one, as the priming phase is the one inducing commitment in view of the second phase. Courts may further ask if any commitment-inducing factors are present, such as leading the consumer to accept a request in the presence of others, stressing her freedom to say no, or somehow requiring her to incur a sunk cost, which is likely to lead to perseverance. In other words, what courts may borrow from psychology on commitment is an analytical grid.

It follows from the above that there are certainly contact points between the legal definitions of unfair practices under EU law and the notion of commitment used by psychologists to study manipulation. This proximity suggests that imports from psychology may be put to some meaningful legal use. It is however necessary to consider possible objections and to state a more precisely *how* notions such as commitment may be useful in the legal sphere.

4. The Value of Psychological Concepts for the Interpretation of Consumer Law

It could be objected that social psychology as a science is not robust enough to warrant legal use. This however does not seem a valid objection. The fact that research in social psychology may still progress and unveil other factors or add nuances to the relevance of certain factors which have as yet been shown to play a role in inducing commitment is not a reason to turn away from this source of wisdom on consumer behaviour. Four reasons support this claim.

First, imperfect guidance is better than no guidance at all. Second, courts, by their very nature, have to adjudicate cases; they cannot wait for relevant science to be complete and have to take into account best available knowledge.

Bruylant, Bruxelles, Paris 2006, pp. 505–524 and A.-L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence,* LGDJ, Paris 2008, at 446 et seq.

117 See sec. 4.1.

Third, science used in other fields of law where a need for external input is felt is not necessarily more robust than psychology. Indeed, economics, which is rather widely used in interpreting antitrust law, is well known for its fast pace of scientific innovations. It also has little claim to empirical validity.[118] From the point of view of scientific validity, psychology would certainly stand the comparison. Fourth, scientific refinements, which constitute the substance of conversation within a scientific community, may simply not matter from the point of view of law. An example will help illustrate this point. A thorough study was conducted on a technique eloquently called 'and-that's-not-all'.[119] As the name suggests, this technique consists in presenting an initial offer and then, without waiting for the addressee of the offer to accept or reject it, topping it up and offering an additional advantage (extra quantity of the same good or free item) or a reduced price. This technique is shown to be effective in various contexts, i.e., the second offer is significantly more often accepted when this technique is used than when presented directly. However, why this technique is effective was not clear. A series of seven experiments was designed to appraise competing explanations. This type of questioning about causality is certainly very interesting from a scientific point of view, but the results do not matter from a legal point of view. For a court of law, it does not matter *why* a commercial practice distorts behavioural patterns of consumers subjected to it, it suffices that the technique does significantly distort the average consumer's choice patterns.[120]

The same remark applies to other techniques. For example, the so-called 'door-in-the-face' technique, which is the opposite of 'foot-in-the-door' in that it consists in first presenting a large request followed by a small one. When the first request is so costly that subjects are very likely to refuse and do refuse before being presented with a smaller request, this technique has been shown to be effective. Yet, competing explanations have been presented: reciprocity was initially thought to be the underlying mechanism,[121] and this is consistent with

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118 This deliberate choice is part of the disciplinary identity of modern economics. See D. HAUSMAN, *The Inexact and Separate Science of Economics,* Cambridge University Press, Cambridge 1992, Ch. 6 'The Structure and Strategy of Economics'.

119 J. BURGER, 'Increasing Compliance by Improving the Deal: The That's-Not-All Technique', 51(2). *J Pers Soc Psychol* 1986, pp. 277-283.

120 This presupposes that experimental results may translate as a statement about how the 'average consumer' behaves. At first sight, this transfer seems plausible, but this point may need further elaboration.

121 R. CIALDINI, J. VINCENT, S. LEWIS, J. CATALAN, D. WHEELER & B. DARBY, 'Reciprocal Concessions Procedure for Inducing Compliance: The Door-in-the-Face Technique', 31(2). *J Pers Soc Psychol* 1975, pp. 206-215. In this study, the large request consisted asking the subject to volunteer to help delinquent juveniles for two years, the small request was to chaperon a group of under-privileged children for one visit to a zoo.

subsequent studies both in non-commercial[122] and commercial contexts,[123] but scholars have also found that natural inclination to reciprocity does not explain the full effect of the door-in-the face technique and that additional explanations need to be considered.[124] One study finds results inconsistent with the reciprocity hypothesis.[125] Such debates are the essence of science. They do not mean that science is useless neither in general nor for legal use in particular. This is because of the type of uses law can make of scientific insights. Again, for the purposes of appraising allegedly unfair commercial practices in the light of the general clause, judges need to know what influencing technique work, not why they work.

This remark is not in contradiction with the proposition that notions such as commitment, which name a causal mechanism, may be useful for courts. In fact, courts may use empirical and conceptual knowledge distributively. When there are convincing reasons, based on empirical studies, to believe that a given commercial practice does influence consumers, courts will not need to explore why this is the case and will be able to defer to scientific knowledge, provided it is considered robust enough, bearing in mind that the alternative is judges' own account of folk psychology. When this is not the case, effectiveness will not be presumed and will have to be established on the facts of the case. This is where having an analytical grid for factual appraisal will be helpful.

It remains of course to be seen whether European courts, who will have to interpret and apply the broad definition of unfair practices 'making use of their own wisdom',[126] will find insights from psychology worthy of consideration. It may be some time before it is possible to find out, because most cases will

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122 A. Pascual & N. Guéguen, 'Door-in-the-Face Technique and Monetary Solicitation: An Evaluation in a Field Setting', 103. *Perceptual and Motor Skills* 2006, pp. 974-978. This study was staged in bars. A girl asked other consumers if they could pay for the drink her boyfriend had not paid before leaving the bar (explaining she didn't have enough money to pay his drink). After the subject refused, the girl asked for some change to contribute to the unpaid bill. The study showed that this works better than directly asking for change.

123 J. Mowen & R. Cialdini, 'On Implementing the Door-in-the-Face Compliance Technique in a Business Context', 17. *Journal of Marketing Research* 1980, pp. 253-258. In this study, subjects were initially asked to participate in a survey and answer a long questionnaire (for up to two hours). After the subject had declined, the experimenter would make the second request (target behaviour), which consisted in completing a short survey of 15 minutes; C. Ebster & B. Neumayr, 'Applying the Door in the Face Compliance Technique to Retailing', 18(1). *International Review of Retail, Distribution and Consumer Research* 2008, pp. 121-128. This study took place in a mountain hut. When subjects passed by the entrance, they were approached by a female experimenter who invited them to buy some home-made cheese. Subjects were first asked to buy a piece of cheese weighing about two pounds and, after they declined, were proposed a piece of one pound.

124 Such as self-perception or authority of the person making the offer.

125 M. Millar, 'The Effectiveness of the Door-in-the-Face Compliance Strategy on Friends and Stranger', 142(3). *Journal of Social Psychology* 2002, pp. 295-304.

126 UCPD, recital 18.

probably be dealt with under the *per se* prohibitions. Nevertheless, the conceptual delineation of channels of influence and especially the analysis conducted under the heading of commitment seem a valuable input to structure judicial appraisal of complex facts where a practice is purported to be unfair under the general clause. Courts may also use empirical knowledge relating to effectiveness of various techniques, when it is robust enough, to justify a presumption of effectiveness of a given technique, whether or not causality is clear.

As the majority of cases will be dealt with not under the general clause but under the list of *per se* prohibitions contained in the annex or under semi-general clauses (defining misleading and aggressive practices), it is necessary to turn to how psychological and legal typologies of influencing techniques relate to one another.

5. Unfair Practices between Legal and Psychological Categorization: The Contribution of Psychology to Legally Valid Analogies

The directive distinguishes to categories of unfair practices: misleading and aggressive commercial practices. There is no indication that this is a complete typology. Indeed, paragraph 4 in Article 5 states

> *[i]n particular*, commercial practices shall be unfair which:
> (a) are misleading as set out in Articles 6 and 7,
> or
> (b) are aggressive as set out in Articles 8 and 9.[127]

The text thus leaves open the possibility that a practice may be found unfair under the general clause even if it is neither misleading nor aggressive. Other categories of unfair practices could conceivably be recognized, and this is an opening in the law to other categorization emanating from psychology.

The legal classification is nevertheless structuring in the directive. The thirty-one practices listed in annex I of the directive, which are prohibited *per se*, are classified according to these categories. Out of thirty-one, twenty-three are labelled misleading and eight fall under the category of aggressive practices.

Overall, the list of misleading practices displays a good fit with psychological categories. The prohibitions of bait advertising,[128] false allegation that a product will only be available for a short time[129] and false allegation that commercial premises are about to close,[130] are entirely consistent with findings

127 Emphasis added.
128 Point 5 of the annex.
129 Point 7 of the annex.
130 Point 15 of the annex.

on the effect of perceived scarcity.[131] 'Bait and switch',[132] which is also prohibited, appears as a particular case of the broader category of 'lure'. Unannounced language switch (when after-sale service is only available in a language other than the language used to conclude the transaction)[133] is a hidden cost and therefore appears to resort to the category of low ball. The same may be said of the prohibition of false gifts (where the consumer must in fact incur a cost to retrieve the gift).[134] In all of these cases, specific prohibitions contained in the annex appear to relate to particular instances of what is understood (by psychologists) to be a single broader influencing mechanism. In all such cases, there is room for arguments such as 'why forbid lure only in particular instances?'. In other words, there is room for courts to reason by analogy and infer that other avatars of the same mechanism should fall under the general clause.

It should be noted that not all practices that are prohibited *per se* can be linked to influencing technique studied by psychologists. This is in particular true of practices that were previously dealt with under the misleading advertising directive and consist in outright lies.[135] It also applies to other practices mentioned in the annex.[136] This does not detract from our point, which is not to assert that everything in the law of unfair practices is explained or justified by the findings of psychology. Rather, the point is that there are some instances of correspondence between legal and extra-legal category. Indeed, it is because the fit is only partial that it is interesting from the point of view of enriching the law. Using the categories of psychology helps suggest analogies.[137] Of course, it remains for courts to decide whether an analogy is good enough to warrant extension of the prohibition from the black list to a prohibition under the general clause of Article 5 or under the definition of misleading practices under Article 6 or 7. In principle, this extension should not be automatic, as courts would need to check, under Article 5, if the practice is 'contrary to professional diligence'.

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131 See n. 95 above. The practice prohibited under point 18 of the annex could possibly also be linked to artificial creation of an impression of scarcity, but it is less clear.

132 Point 6 of the annex.

133 Prohibited under point 8 in the annex.

134 Point 20 of the annex.

135 Council Directive 84/450/EEC concerning misleading and comparative advertising, OJ L 250, 19Sep. 1984, p 17, amended by Directive 97/55/EC of the European Parliament and of the Council, OJ L 290, 23 Oct. 1997, p 18. These practices are listed under number 1 to 4 in the annex.

136 Practices listed under points 9–14, 16, 17, 19 and 21–23.

137 On the fundamental role of analogies in thought in general, see D. Hofstadter & E. Sander, *Surface and Essences*, Basic Books, New York 2011.

Under Article 6 or 7, however, reasoning by analogy would seem to flow smoothly, as the conditions the court would need to assess in addition to the misleading effect are scope-defining (e.g., the prohibition is restricted to missing or misleading information *on certain aspects* of the transaction) but do not contain another substantive criterion.[138] There is therefore, under these provisions, a large room for reasoning by analogy with prohibited practices from the black list. Psychology provides the categories with regard to which the analogies may be made, and this qualifies as an important contribution to the possible developments of the law.

6. Insights from Psychology and Evidence

The legal uses of psychology discussed so far relate to interpretation of the law. In this type of use, concepts, distinctions, and typologies are what the law borrows from psychology. The law, however, does not only need to be interpreted, it also needs to be applied. Psychology, for its part, offers countless empirical studies. Could it, then, be useful to the enforcement of consumer law not only at the conceptual/interpretive level but also at the factual/evidentiary level? To answer this question, two different types of evidentiary uses need to be distinguished: direct case-specific evidence and presumptions. While the first seems impractical and often unnecessary, the second appears worthy of courts' attention.

6.1. Direct Evidentiary Use of Psychology Studies

There are two reasons why it is not likely that empirical studies from psychology will be used as evidence in a specific case. The first is financial, and the second pertains to the abstract type of appraisal favoured by the courts.

Consumer law cases are often small stake cases. This explains why they are not often litigated before courts. When they are, the party who wants to establish that a commercial practice is unfair, generally a consumer or a consumer association, bears the burden of proof.[139] These litigants will typically not have the necessary resources to hire an expert psychologist. This constraint is

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138 This point was already quite clear from the text of the UCPD but was confirmed by the Court in *CHS Tour*: ECJ 19 Sep. 2013, C-435/11, *CHS Tour*. In this case, Team 4 Travel, a tour operator who organized skiing trips in Austria had entered exclusive contracts with several accommodation providers. In its brochure, it mentioned that these accommodations were 'exclusive' and explained the meaning of the term. In breach of the contracts with Team 4 Travel, some of the accommodation providers rented out rooms to a competing operator (CHS) during the exclusivity periods. This resulted in the brochure containing inaccurate information unbeknownst to Team 4 Travel. Before the Austrian courts, the question arose whether it could rely on its compliance with professional diligence to escape the prohibition of misleading practices under Art. 6 of the UCPD.

139 In consumer law, the burden of proof is sometimes reversed, but it is not the case here. See H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W.

independent from the potential usefulness of expert testimony for the case. In this respect, use of psychology in consumer law litigation is very different from use of economics in antitrust litigation. No large corporation has the means and the incentives to hire experts. The lack of demand probably explains the lack of supply of specialized psychological experts in the field of consumer law. This is reinforced by the lack of demand for case-specific psychological expert evidence emanating from courts.

Courts are unlikely to need case-specific expert evidence for two related reasons. First, the standards they have to apply – be it the average consumer in general, the average consumer of a target group or of a group of vulnerable consumers –[140] all call for a rather abstract appraisal. Second, the legal test is not whether a commercial practice has in fact led a consumer to take a decision he would not otherwise have taken; rather it is whether the practice has the potential to do so. How concretely should this potential be appraised? The guidance which can be derived from the case law of the Court of Justice on this point is not entirely clear. On several occasions, the Court ruled out that a practice could be misleading for the average consumer based not on evidence but on its normative judgment.[141] When the Court does not rule out that a practice could be misleading, it leaves it to the national courts to obtain concrete evidence by way of survey or expert opinion.[142]

It is therefore possible that national courts will want data to help them appraise the effect of a given commercial practice on consumers. In such a case, it

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Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law,* Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 121.

140 Under Art. 5(b), the test is whether a practice 'materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the *average member of the group* when a commercial practice is directed to a *particular group of consumers*'. Under Art. 5(3), 'Commercial practices which are likely to materially distort the economic behaviour only *of a clearly identifiable group of consumers who are particularly vulnerable* to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.'

141 See the discussion in H.-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law,* Intersentia, Cambridge, Antwerpen, Portland 2014, pp. 67–123, at 98–100.

142 See, e.g., ECJ 13 Jan. 2000, C-220/98, *Estée Lauder*, para. 30-31: 'Although, at first sight, the average consumer – reasonably well informed and reasonably observant and circumspect – ought not to expect a cream whose name incorporates the term 'lifting' to produce enduring effects, it nevertheless remains for the national court to determine, in the light of all the relevant factors, whether that is the position in this case. […] it is for the national court – which may consider it necessary to commission an expert opinion or a survey of public opinion in order to clarify whether or not a promotional description or statement is misleading – to determine, in the light of its own national law, the percentage of consumers misled by that description or statement which would appear to it sufficiently significant to justify prohibiting its use'.

would seem both impractical and expensive to launch an empirical study. It seems more reasonable for a court to appoint an expert who can explain what can be inferred from the abundant existing literature that could be relevant to the court's appraisal. This seems a better course of action both practically and from the perspective of a sound use of science in legal proceedings. On any particular question regarding the effect of a practice, a serious psychologist is likely to explain that it depends from a variety of contextual factors. The Court will need a general answer. The finesse gap between the level of granularity common in empirical studies published in peer-reviewed psychology journals and the coarseness of the statement that will be helpful to a court of law will never be bridged by more empirical studies. The only sensible way to deal with it is to acknowledge the existence of this gap, discuss the relevance of scientific insights, and decide what a legally acceptable generalization is. A dialogue between the court and an expert or amicus curiae presenting a meta study based on existing science is much more apt to help the court than a case-specific empirical study even if one could be designed and paid for. In other words, the evidentiary use of psychology (or any other behavioural science) that can meaningfully be contemplated is the admission of presumptions.

6.2. Presumptions

The first and foremost evidentiary use of psychology in unfair practices cases consists of presumptions. As outlined above, empirical evidence from psychology may serve as authority for courts to presume the distorting power of a commercial practice on consumer behaviour. However, for the reasons explained, it is unlikely that empirical studies will be used as evidence adduced by the parties to a trial. Rather, courts could use the gist of such studies independently from whether parties rely on psychology to argue their case to inform their appraisal of what is the predictible effect of a given commercial practice on consumers. Presumptions are rebuttable, so that, if the science evolves in such a way as to show that a science-based presumption has become inacurate, it will be possible to rebut it.

The practical question is of course how courts might learn about insights from psychology that are relevant to the interpretation of UCPD. There are only two avenues for such transfer of knowledge to occur: parties' submissions and judges training. Parties could invoke psychology in their argument, in a general way, which is not the same as commissionning a case-specific study (the hypothesis considered in section 6.1) and is much less costly. It does not seem completely irrealistic to imagine such a development in the future. For example, BEUC, the federation of consumer associations at EU level, is showing a keen

interest in behavioural sciences.[143] Alternatively or – preferably – cumulatively, Courts could be made more aware of the relevance of psychology for consumer law if specific trainings were organised. Such trainings exist in all Member States, sometimes with the involvement of EU institutions, such as Commission's programme for training sessions for judges applying competition law. In the same way as such continuing education progammes include elements of economics, relevant elements of psychology could be included in training modules on consumer law.

If courts were more aware of the relevance of consumer psychology for the interpretation and application of UCPD in particular and, possibly, of consumer law more generally, one question would still remain. While judge-made presumption constitutes a reasonable use of psychology, such use of science is not always transparent. In some European jurisdictions – as well as before the ECJ –[144] there is no procedural obligations for courts to hear an amicus curiae when they plan of relying on scientific input to inform their judgement. This is certainly regrettable as it is to be feared that, without appropriate procedures for bringing science into the courtroom, courts will either ignore science or rely on inadequate accounts of scientific findings. Procedures to check for good science are needed generally and will be needed in consumer law as well if the suggestions made in this article are to be followed.

7. Concluding Remarks

Since the seminal work on decisional biases by Kahneman and Tsversky,[145] behavioural sciences have gained a better understanding of how we really decide. These insights have penetrated economics but seem to be entering the legal sphere at a slower pace. This article shows that the legal rules applicable in the EU to unfair commercial practices lend themselves to interpretation and application in the light of empirical findings about human behaviour in general and consumer behaviour in particular. More specifically, studies in experimental social psychology on influencing techniques are relevant in several different ways to the law. The two most important legal uses of these scientific insights relate to (i) designing legal sub-test in order to apply the very general legal test of 'materially distorting the economic behaviour with regard to the product of the average consumer' and (ii) creating presumptions that certain practices do, as a

143 N. Helberger, Forms matter: Informing consumers effectively (report for BEUC), sept. 2013, http://www.beuc.org/publications/x2013_089_upa_form_matters_september_2013.pdf (last visited 3 Nov. 2014).

144 E. Barbier De La Serre & A.-L. Sibony, 'Expert Evidence before the EC Courts', *Common Market Law Review*, 2008, 45(4), 941-985.

145 D. Kahneman & A. Tversky, 'Prospect Theory: An Analysis of Decision under Risk', 47 Econometrica, 1979, pp. 263-291.

rule, distort consumer behaviour. The two most important items worth importing from psychology into the law are (i) the notion of commitment and related knowledge about what circumstances induce commitment and, more generally, (ii) categories which may support analogies between commercial practices with regard to their effect. These analogies are particularly useful in cases where the commercial practice at stake is not prohibited *per se* but is in some way (which can be described using a category borrowed from psychology) analogous to one, which is clearly prohibited.

European Review of Private Law 6-2014 [1075–1076] © Kluwer Law International BV. Printed in Great Britain.

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