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# The Implications for Consumer Protection Law in the European Union of Behaviorally Informed Commercial Practices

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# Table of Contents

<b>SUMMARY</b>	<b>4</b>
<b>PREFACE</b>	<b>6</b>
<b>ABBREVIATIONS</b>	<b>7</b>
<b>1 INTRODUCTION</b>	<b>8</b>
1.1 Background Information	8
1.2 Research Questions	10
1.3 Objective & Methodology	11
1.4 Delimitations	13
1.5 Structure	16
1.6 The case for 'making the law more behavioural'	17
1.7 The two parts to <i>nudging</i> : cause and effect	19
<b>2 BEHAVIOURAL INSIGHTS</b>	<b>22</b>
2.1 Introduction	22
2.2 The Representativeness Heuristic	24
2.3 Framing	26
2.4 The sunk-cost fallacy	27
2.5 Nudging and Choice Architecture	28
2.6 Concluding Remarks on Behavioural Insights	30
2.7 The Background to EU Consumer Law	31
2.8 EU over Domestic Reform	34
<b>3 THE <i>THREE TIERS</i> OF THE UCPD</b>	<b>35</b>
3.1 Introduction	35
3.2 'The Blacklist of unfair commercial practices' (OR the <i>third tier</i> )	37
3.3 Article 8 of the UCPD (OR the <i>second tier</i> : aggressive practices)	39
3.4 Articles 6 & 7 of the UCPD (OR the <i>second tier</i> : misleading practices)	40
3.5 Article 5 of the UCPD (OR the <i>first tier</i> : the general clause)	41

<b>3.6 How the Average Consumer Test Works</b>	<b>44</b>
<b>3.7 The interplay between national courts and the ECJ in the application of the average consumer test</b>	<b>46</b>
<b>3.8 Who is the Average Consumer?</b>	<b>47</b>
<b>3.9 The World According to Consumers</b>	<b>50</b>
3.9.1 Introduction	50
3.9.2 Rational or reckless consumers?	51
3.9.3 'Choosing Not to Choose'	55
<b>3.10 Long Term Effects of Nudging</b>	<b>59</b>
<b>4 CONSUMER VULNERABILITY</b>	<b>60</b>
<b>4.1 Introduction</b>	<b>60</b>
<b>4.2 The Vulnerable Consumer Test</b>	<b>62</b>
<b>4.3 Cognitive illusions as a source of vulnerability</b>	<b>62</b>
<b>4.4 Who is the vulnerable consumer?</b>	<b>63</b>
<b>4.5 Other Requirements to qualify as a vulnerable consumer</b>	<b>65</b>
4.5.1 Foreseeability	65
4.5.2 Identifiability as a Group	66
<b>4.6 Vulnerability in the narrow sense</b>	<b>66</b>
<b>4.7 Vulnerability in the wider sense</b>	<b>67</b>
<b>5 THE IHRL IMPLICATIONS OF NUDGING</b>	<b>68</b>
<b>5.1 Introduction</b>	<b>68</b>
<b>5.2 Providing credit to financially vulnerable consumers</b>	<b>69</b>
<b>5.3 Is there a human right to personal autonomy?</b>	<b>70</b>
5.3.1 Introduction	70
5.3.2. Personal Autonomy as part of The Right to Privacy	71
5.3.3 Personal Autonomy as part of Agency	74
5.3.4 Personal Autonomy according to the jurisprudence of the ECtHR	75
<b>6 CONCLUDING REMARKS</b>	<b>80</b>
<b>BIBLIOGRAPHY</b>	<b>87</b>

## Summary

What level of influence should market actors be allowed to exert over consumers' transactional decisions? While persuasive marketing is inherent to free markets and therefore uncontroversial, relatively recent research in the field of behavioural economics about systemic errors in human decision-making has shown just how susceptible consumers are to the will of market actors. Within a rapidly evolving commercial environment, characterised by new technology that resembles science fiction at times, it is time to reconsider whether consumers are adequately protected.

The UCPD, as the primary legal instrument combating manipulative commercial practices within the EU, is analysed in depth in order to ascertain what level of protection consumers enjoy against these behaviourally informed commercial activities. The discussion extends beyond EU law into IHRL as a possible counterweight to excessive influence exerted by market actors over the decision-making processes of consumers. More specifically, the legal status of personal autonomy that includes consumer autonomy is investigated, as it is potentially undermined by commercial practices that are designed to take advantage of systemic errors in human decision-making. Autonomy in this context refers broadly to 'freedom from external control or (excessive) influence'.<sup>1</sup> Intrinsic to any discussion regarding autonomy is the issue of vulnerability, especially cognitive biases and heuristics as a source of vulnerability in the context of this thesis. The weaker the position occupied by a consumer or the more vulnerable they are, the less likely they are to engage autonomously with their environment, commercial or otherwise.

The conclusions reached by the end of this thesis may not satisfy a reader in search of a quick fix. The matter is immensely complex and rendered more so by a number of factors that were unforeseen at the commencement of the research conducted for this thesis. Most surprisingly is the extent to which consumers willingly subject themselves to the control of market actors in an effort to make their lives easier. Moreover, the somewhat abstract nature of manipulation is such that it is exceedingly difficult to regulate. Finally, the focus on behaviourally informed commercial practices in general, as opposed to zooming in on particular instances thereof, is more

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<sup>1</sup> Stevenson & C.A. Lindberg, *New Oxford American Dictionary*, Oxford University Press, (2010)

conducive to identifying problems that require further attention than finding specific solutions to individual cases of problematic commercial practices.

## Preface

I will not use my preface to discuss the topic of my research or my thoughts on it. The reason being that I do not wish to distract from those that I need to thank instead. I have said my peace in the body of the text. I will, however, concede that I have not taken a particular strong stance either in favour of or against *behaviourally informed commercial practices*. The reason is that I am undecided. I find them both exciting and ingenious on the one hand but also realise their power to cause harm on the other. My intention was merely to explore these commercial activities from a legal perspective and to highlight the potential dangers they pose for consumers, rather than passing a definitive moral judgement on what is and what is not acceptable commercial practice. I will leave this to others who find this topic of research as captivating as I do or perhaps I will pursue this objective myself in further research.

I hope the quality of the research is commensurate with the generosity of the Swedish Institute who funded my studies at Lund University. None of the platitudes that usually come to mind when giving thanks seem appropriate to express my gratitude. I do hope that the Swedish Institute is able to provide as many others as possible with the same opportunity as myself.

I have to express thanks to my supervisor, Ulf Maunsbach, who guided me through this process. Most likely without knowing it he motivated and inspired me to work harder than I might have otherwise.

Finally, I have to thank Iegor, Toy, Steve and Tariq for thanking me in their prefaces (at least to my knowledge). But also for the good times we spent together and the friendship that I could not have hoped better for. I look forward to a reunion sometime in the near future.

## **Abbreviations**

AI – Artificial Intelligence

EU – European Union

IHRL – International Human Rights Law

UCPD – Unfair Commercial Practices Directive

ECJ – the European Court of Justice

ECtHR – European Court of Human Rights

ECHR – European Convention on Human Rights

# 1 Introduction

## 1.1 Background Information

Before stating the research questions underpinning this thesis, it is necessary to describe the kind of commercial activities that have precipitated these same questions. Consider the following scenario: A restaurant owner – after hearing about an experiment to improve restroom hygiene – places goal posts in the urinals in the men’s restroom. His objective is to reduce spillage by improving the men’s aim, having learnt that they will aim for the goal posts as opposed to their usual indifference.<sup>2</sup> Note the *influence* that the owner is able to exert over his clients’ behaviour by arranging the restroom in a particular manner. This process has been termed *nudging*<sup>3</sup> as the owner attempts to ‘coax or gently (or not so gently) encourage someone to do something’.<sup>4</sup> A number of terms have been developed to describe *nudging*.<sup>5</sup> A *choice architect* (the owner) manipulates the context in which consumers make choices, that is, the *choice architecture* (the layout of the men’s bathroom) that he has control over, by taking advantage of consumers’ *cognitive biases* and *heuristics* (the desire to hit the target in this instance) in order to *nudge* (steer) consumers into making certain choices, thereby engineering a certain result (less spillage).<sup>6</sup> The terms *choice architect*, *choice architecture*, *biases*, *heuristics* and *nudging* are elaborated upon in chapter 2, but it is important for a proper understanding of the research questions and the introductory section to already have them in mind at this point.

This type of *nudging* does not only occur in the restaurant industry. In fact, it is used extensively in a wide variety of contexts.<sup>7</sup> One of which involves market actors that manipulate the context or environment in which consumers make transactional decisions. Their objective is to *steer* consumers into making certain decisions that are favoured by the market actors. In order to induce the desired outcome, market actors

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<sup>2</sup> R.H. Thaler & C.R. Sunstein, ‘Nudge: Improving Decisions about Health, Wealth and Happiness’, New York: Penguin Books, (2009) pp. 3 – 4; an experiment involving a picture of a fly placed in urinals decreased the amount spilled onto the floor by up to 80%.

<sup>3</sup> See 2.5 below for more on *nudging*.

<sup>4</sup> A. Stevenson & C.A. Lindberg, New Oxford American Dictionary, Oxford University Press, (2010)

<sup>5</sup> See generally R.H. Thaler & C.R. Sunstein (note 1 above); the terminology is developed throughout the book.

<sup>6</sup> Ibid; this is *nudging* in a nutshell.

<sup>7</sup> Ibid; predominantly in public policy as an alternative to command and control regulation.



prey on systemic and predictable errors in human decision-making.<sup>8</sup> However, as aiming for the goal posts as one frequents a urinal is hardly an issue that should concern the law, it is necessary to place the potentially problematic commercial behaviour on a spectrum somewhere between an innocuous supermarket arrangement<sup>9</sup>, for example, and outright fraud. These two can be seen as two extremes on this spectrum. The former constituting a relatively benign commercial activity while the latter is clearly illegal. The focus of this thesis is on practices that are situated somewhere along this continuum in a grey zone where the degree of influence over consumers is overwhelming but the means used are not necessarily, or obviously illegal. An example of a commercial practice of this kind (in very general terms) relates to the *endowment* effect. According to this bias, people overestimate the value of things in their possession. So consumers often overvalue homes they take mortgages out on and unreasonably hold on to, despite having no equity in it, as they perceive it as belonging to them. To what extent should the law allow banks to design their mortgaging practices around this?<sup>10</sup>

Before introducing the research questions, it is imperative to add the caveat that *nudging* is most often used as a technical term to describe an approach to public policy that is known as *libertarian paternalism*.<sup>11</sup> More specifically, it is a technique used to ‘steer’ consumers towards *better* behaviour, or behaviour that is deemed to be good for them. However, the term is used throughout this thesis to describe the action of steering consumer behaviour *without* a paternalistic motive necessarily accompanying it.<sup>12</sup> In fact, as commercial practices undertaken by market actors are the subject of the thesis, the motives are generally of a profit-maximising character. The use of the term in this less restricted manner is hopefully justified by the fact that Richard Thaler, who was instrumental in coining the term, is known to sign books

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<sup>8</sup> See Chapter 2 below.

<sup>9</sup> See R.H. Thaler & C.R. Sunstein (note 1 above) pp. 1 – 2; it has in fact been proven that placing items closer to the checkout points increases their sales.

<sup>10</sup> K. Dudley ‘Behavioural Economics in the mortgage lending and mortgage foreclosure contexts’, 2 JMLS F&A Hous. Comm. 60, (2006) pp. 68 – 70

<sup>11</sup> See R.H. Thaler & C.R. Sunstein (note 1 above) p. 6 where they define a *nudge* as ‘any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit at eye level counts as a nudge. Banning junk food does not.’; the definition of *nudging* within this thesis is looser and merely refers to a degree of manipulation that falls short of illegal fraud or deception.

<sup>12</sup> R.H. Thaler & C.R. Sunstein (see note 1 above) pp. 1 – 5

accompanied by the phrase, ‘nudge for good.’<sup>13</sup> This implies an acknowledgment that nudging can be used for bad, by among others, market actors. The choice to refer primarily to *nudging*, as opposed to *influencing* or *manipulating*, is simply to emphasise that even *subtle* or *gentle* disturbances are often all that is needed to dramatically modify consumer behaviour. The corollary of this is that market actors do not have to construct elaborate ploys to deceive consumers into doing what they want them to do.<sup>14</sup>

## 1.2 Research Questions

In response to the type of marketing activity outlined above, the following questions are posed:

- 1) How receptive is the EU’s regulation of unfair commercial practices to *behavioural insights*<sup>15</sup>?
- 2) What International Human Rights Law obligations does the EU have to protect the *personal autonomy* of (vulnerable) consumers against behaviourally informed commercial practices?

The reference to *behavioural insights* in the first question encompasses the wealth of research in the fields of psychology and economics that empirically describe human decision-making and by extension consumer behaviour.<sup>16</sup> Several synonyms are used by commentators such as *cognitive science*<sup>17</sup>, *neuroscience*<sup>18</sup>, and *behavioural science*<sup>19</sup>. While these terms may vary significantly when used in a technical context, their function in relation to the law is generally to provide an empirical basis from which to describe human behaviour.<sup>20</sup> The use of *behavioural insights* by market

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<sup>13</sup> R.H. Thaler, ‘The Power of Nudges for Good and Bad’, Economic View in *The New York Times*, (Oct. 31 2015)

<sup>14</sup> R.H. Thaler & C.R. Sunstein (see note 1 above) p. 3

<sup>15</sup> *Behavioural Insights* is something of a technical term. Note the explanation in the following paragraph.

<sup>16</sup> D. Kolm, ‘Rational Regulation? Applying a Law and Behavioural Sciences Perspective to EU Environmental Law’, Unpublished PhD Seminar Manuscript dated 2016-04-28, (2016), p. 2; the author has provided permission to refer to his work.

<sup>17</sup> R. Tushnet, ‘Gone in Sixty Milliseconds: Trademark Law and Cognitive Science’, 86 *Tex. L. Rev.* 507 – 568, (2008), p. 506

<sup>18</sup> See J. Trzaskowski, ‘Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive’, *J Consum Policy*, (2011) p. 377

<sup>19</sup> See R. Incardona & C. Poncibò, ‘The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution’, *J Consum policy* 30:21 – 38, (2007) p. 30

<sup>20</sup> See J. Trzaskowski (note 17 above) p. 387

actors to refine their marketing methods is described in the second question as *behaviourally informed commercial practices*, in the sense that behavioural insights can be used to influence or inform commercial practices, making them more effective.<sup>21</sup>

The second question requires further explanation, as the reference to *vulnerable* consumers might be misleading. *Vulnerability* is used in the context of this thesis as a term that describes *any* position of weakness that a consumer occupies that ultimately affects the terms on which she is able to engage in commercial transactions.<sup>22</sup> It therefore includes *all* consumers' cognitive biases and heuristics that lead to predictable errors in their decision-making, thereby making them vulnerable in the market place.<sup>23</sup> This naturally involves the relationship between market actors and consumers. However, it extends beyond this. It encompasses *any* weakness a consumer might have that ultimately diminishes their *personal autonomy*. Autonomy in this context refers to 'the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces'.<sup>24</sup> This reveals one of the objectives of this thesis, which is to emphasise the effects of consumer *vulnerability* on consumer *autonomy* and the implications thereof for the realisation of certain human rights.<sup>25</sup> As such, *vulnerability* is used in a wider sense than the *vulnerable consumer* as per the UCPD as will be expanded on below.<sup>26</sup>

### 1.3 Objective & Methodology

One of the primary objectives of this thesis is to determine to what extent consumers need protection against behaviourally savvy market actors. An accompanying question is whether EU Consumer Protection Law as it is, is capable of providing this level of protection. In order to assess this a legal dogmatic method is utilised to

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<sup>21</sup> See 2.3 below

<sup>22</sup> See M. Friant-Perrot, 'The Vulnerable Consumer in the UCPD and Other Provisions of EU Law', in van Boom et al (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems*, Routledge, (2014) p. 90

<sup>23</sup> D. Ariely, 'Are we in control of our decisions?', TED Talk, (2008)

<sup>24</sup> J. Christman, 'Autonomy in Moral and Political Philosophy', in E.N. Zalta (ed.) *The Stanford Encyclopaedia of Philosophy*, (2015) URL = [Plato.stanford.edu/entries/autonomy-moral/#ConAut](https://plato.stanford.edu/entries/autonomy-moral/#ConAut)

<sup>25</sup> C.R. Sunstein, 'Choosing Not to Choose', Preliminary draft 2/10/14, p. 26

<sup>26</sup> See Chapter 4 below

analyse the UCPD, as it is the legislative act within the EU that is most closely associated with the regulation of the kind of behaviour that constitutes *nudging* by market actors. Only the provisions that potentially impact the use of *behavioural insights* by market actors to manipulate consumers are analysed.

Enriching the law with *behavioural insights* can be described as an interdisciplinary undertaking due to the reliance on knowledge deriving from other non-legal disciplines, namely psychology and economics. The use of behavioural insights in this thesis is limited to some of the most prominent and widely acknowledged biases and heuristics that are regarded as uncontroversial by psychologists. This is, after all, not the place to test ideas residing within the avant-garde of psychological research, courtrooms even less so. This reduces the risk that later research will compromise the validity of the *behavioural insights* on which this thesis relies.<sup>27</sup> It is not insignificant that the psychologist Daniel Kahneman, on whose body of work regarding *behavioural insights* this thesis so heavily relies, won the Nobel Memorial Prize in Economic Sciences for ‘having integrated insights from psychological research into economic science, especially concerning human judgement and decision-making under uncertainty’.<sup>28</sup> Moreover, as it is impossible to describe *all* the biases and heuristics that may affect consumer behaviour due to the sheer number of them, it is unnecessary in this context to consider those that are less well received amongst experts in psychology.<sup>29</sup>

Ethical concerns based on the potential of *nudging* to undermine the *autonomy, liberty* and *dignity* of consumers in the existing literature are rarely framed in hard-core legal terms.<sup>30</sup> This reduces their persuasive value in a legal context. They do, however, closely resemble human rights based arguments pertaining to *freedom of choice*. As a result, I deemed it a useful exercise to consult IHRL in search of normative guidance regarding the limits to which market actors can legally influence consumer behaviour. As there is a fairly robust jurisprudence concerning the protection of *personal autonomy* within the jurisprudence of the ECtHR, it serves as the primary source to illustrate the human rights implications of *nudging* within this thesis.<sup>31</sup> However,

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<sup>27</sup> D. Kolm, (note 15 above) p. 21

<sup>28</sup> See [www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/) for a list of ‘all prizes in economic sciences’.

<sup>29</sup> D. Kolm (note 15 above) p. 21

<sup>30</sup> See C. McCrudden, ‘Nudging and Human Dignity’, VerfBlog, (2015) for a similar critique.

<sup>31</sup> See 5.3.4 below.

other discourses within IHRL are also analysed to provide greater insight into the function of *autonomy* in relation to human rights and the realisation thereof. In this regard a more theoretical approach is followed pertaining to the right to privacy and its conceptual underpinnings, as well as human agency that is argued by some to constitute the basis of IHRL, both of which are at risk if *nudging* is allowed to proceed unchecked and unchallenged.<sup>32</sup>

On account of the interdisciplinary nature of this thesis, in addition to the relative novelty of the questions guiding the research, a wide range of materials are used from a number of different disciplines. From the point of view of behavioural economics and psychology the works of Daniel Kahneman are used, which include journal articles as well as his best selling book *Thinking, Fast and Slow*. The fathers of *nudging*, namely, Cass Sunstein and Richard Thaler also feature very prominently. The mainstreaming of behavioural economics has led to an explosion of other works ranging from textbooks and journal articles to blogs and web articles, which I have consulted during the course of my research. From a legal perspective, the UCPD as the most relevant instrument from an EU perspective is closely analysed. A number of journal articles and textbooks on this directive are also relied upon, in addition to a select few European Commission documents that provide some detail on the functioning of the directive.<sup>33</sup> Finally, from an IHRL point of view, the ECHR as the primary source of law of the ECtHR is analysed in order to determine what protection is offered to the *personal autonomy* of persons (as consumers), which entails a kind of translation of the relevant judgements into a commercial context. The more theoretical discussion pertaining to the role of *autonomy* within the IHRL framework is again derived from works such as textbooks and journal articles within legal philosophy.

#### **1.4 Delimitations**

The complex relationship between Fundamental Rights and Human Rights is beyond the scope of this thesis. This includes the legal arrangements surrounding the different

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<sup>32</sup> See 5.3.2 – 5.3.3 below.

<sup>33</sup> Such as the Guidance on the implementation/ application of directive 2005/29/EC on unfair commercial practices, commission staff working document, SEC(2009) 1666 (3 December)

legal institutions of the EU as well as the Council of Europe as well as the relevant legal instruments, namely, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. It is assumed, therefore, for the purpose of this thesis that the content of the relevant human rights that are referred to are sufficiently similar that the human rights law implications of nudging will not materially differ depending on which instrument is at issue. It is also relevant in this regard that all EU member states are also members of the Council of Europe and therefore bound by both instruments referred to in this paragraph. It is also the case that the Charter of Fundamental Rights of the European Union was to some extent derived from the European Convention on Human Rights as a result of which the ECJ commonly refers to the jurisprudence of the ECtHR.<sup>34</sup>

The competition law implications of *nudging* by market actors fall outside the scope of this thesis. But it is important to emphasise that certain commercial practices that *nudge* will most definitely have competition law implications and further studies in this direction would certainly be worthwhile.

The majority of the literature on law and *behavioural insights* focuses on its use as a regulatory tool.<sup>35</sup> That is, where regulators nudge or guide consumers as well as market actors into behaving in a certain manner. For example, environmental protection legislation can be designed to influence or nudge consumers to recycle their waste or to use less plastic.<sup>36</sup> This thesis is limited, however, to the legal implications of the use by market actors of behavioural insights to exploit consumers. Moreover specifically, only business-to-consumer commercial practices. The fairly robust critique of nudging as a regulatory tool is, therefore, only relevant to this thesis in so far as it overlaps with nudging methods used by market actors. The reasoning for this resides in the vastly different functions and responsibilities carried by market actors, as opposed to state regulators.<sup>37</sup> This is not to say that the extent to which EU law itself nudges or is in some other way designed in accordance with behavioural insights is not an important factor to consider. The explicit use by EU regulators or policy-makers of behavioural insights would suggest that the efficacy of these

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<sup>34</sup> See the Charter of Fundamental Rights of the European Union, Preamble, (2000/C364/01)

<sup>35</sup> *Nudging* as a regulatory tool is what Thaler and Sunstein had in mind when they coined the term.

<sup>36</sup> D. Kolm (note 15 above) p. 2

<sup>37</sup> See generally M.D. White, 'All Nudges Are Not Created Equal', in *The Manipulation of Choice: Ethics and Libertarian Paternalism*, Palgrave Macmillan, (2013), C.R. Sunstein 'Nudging and Choice Architecture: Ethical Considerations', *Yale Journal on Regulation*, (2015)

methods is indeed recognised within EU law. Where as things currently stand, the role of behavioural insights within EU law is somewhat ambiguous. As a result, it is unclear to what extent behavioural insights can be invoked in consumer law litigation, despite its widespread acceptance within the worlds of psychology and economics. A very useful exercise could therefore be to analyse the *suitability* assessments of legislation that is challenged before the ECJ, as it applies the proportionality principle.<sup>38</sup> The extent to which the ECJ recognises measures that are explicitly based on behavioural insights as suitable for realising ‘the desired objective’<sup>39</sup>, would suggest that the ECJ takes behavioural insights seriously. While this has no bearing on the normative question regarding how far market actors can go in influencing consumers by using these insights, the Court would have to concede that consumers’ choices are vulnerable to similar strategies employed by market actors.

It is beyond the scope of this thesis to engage in a detailed analysis of how particular commercial practices target consumer biases and heuristics, although some examples are referred to throughout. This analysis would be better performed by experts in psychology.<sup>40</sup> This has significant implications for the thesis as it means that manipulative commercial practices are taken as a whole, rather than zooming in on particular practices. Such an abstract critique of *nudging* has been criticised due to the fact that different nudging techniques can differ greatly in their effect as well as the means employed to nudge.<sup>41</sup>

The merits of *paternalism* are beyond the scope of this thesis. Paternalism in this context refers to the use of behavioural insights by regulators to formulate corrective measures, such as default rules, to compensate for the systemic errors in human decision-making. These types of regulatory acts are aimed at restoring consumers’ *freedom of choice* by nullifying any cognitive errors that they are prone to if left to their own devices.<sup>42</sup> The UCPD arguably falls into this category. Whether or not this constitutes ‘an insult to individual dignity, and a form of infantilisation, to (interfere

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<sup>38</sup> See Kolm (note above 15) in relation to which this was discussed in a very enlightening PhD proposal seminar presented by Daniel Kolm

<sup>39</sup> The Focus, ‘The Principle of Proportionality and the concept of margin of appreciation in human rights law’, Basic Law Bulletin Issue 15 – December, (2013) p. 2  
[www.doj.gov.hk/eng/public/basiclaw/basic15\\_2.pdf](http://www.doj.gov.hk/eng/public/basiclaw/basic15_2.pdf)

<sup>40</sup> This point was made in the PhD seminar referred to in note 37.

<sup>41</sup> See C.R. Sunstein, ‘Nudges, Agency, Navigability and Abstraction: A Reply to Critics’, *Review of Philosophy and Psychology*, Special Issue on Nudges, (2015) p. 1

<sup>42</sup> See C.R. Sunstein, (note 24 above) pp. 3 & 25

with) people's ability to go their own way' from a regulatory point of view is an issue that is *not* further engaged with.<sup>43</sup> This includes the charge that paternalistic regulation obstructs the education of consumers as the state takes over a greater watchdog function, lulling consumers into a false sense of safety and enabling reckless behaviour on their part.<sup>44</sup> It should be noted, however, that this is the primary difference between the *nudges* of market actors and public institutions: market actors are likely to exploit the errors resulting from behavioural biases for profit while the government is (or at least should be) interested in correcting these errors in order to restore a kind of decision-making equilibrium in which the error (or the effect thereof) is neutralised.<sup>45</sup> Moreover, as the EU is rather tolerant of 'paternalistic interventions', the urgency with which to justify the use of behavioural insights in order to protect consumers is reduced.<sup>46</sup>

The debate surrounding consumer rights as human rights is not analysed in any detail.<sup>47</sup> There is, however, an incontrovertible connection in the sense that consumer rights contribute to the realisation of human rights. For example, labelling requirements regarding safety features of a product may be essential to consumer health thereby engaging the right to health. Human rights can likewise contribute to stronger consumer rights as the human right to health may oblige states to ensure that such strict labelling is required by law to protect consumer health.<sup>48</sup>

## 1.5 Structure

This thesis is divided into 6 parts, namely, an introduction, four chapters and concluding remarks. The contents of the four chapters is as follows:

Chapter 2 consists of the psychological research that is referred to within this thesis as *behavioural insights*. A brief look is also taken at the foundations of EU Consumer

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<sup>43</sup> C.R. Sunstein, (note 24 above) p. 13; Sunstein does not hold this view but is merely analysing the issue from different angles; See also S. Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law, Common Market Law Review, 269 – 293, (2002) p. 269

<sup>44</sup> See I Benöhr, 'Consumer Protection and Financial Contracts', in EU Consumer Law and Human Rights, Oxford Scholarship Online, (2013) p. 121

<sup>45</sup> C.R. Sunstein, (note 24 above) pp. 19 – 20

<sup>46</sup> See AL Sibony & H. Geneviève, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?', in A. Alemanno & A. Sibony (eds), *Nudge and the Law*, Hart Publishing, Oxford, (2015) p. 211

<sup>47</sup> For more on this see generally I Benöhr, 'The Evolution of Consumer Protection and Human Rights', in EU Consumer Law and Human Rights, Oxford Scholarship Online, (2013)

<sup>48</sup> *Ibid* p. 49



Protection Law in order to determine how receptive it is likely to be to *behavioural insights*.

Chapter 3 sets out the *three tiers* of the UCPD and issues surrounding the *average consumer test*. This includes how the *average consumer* test works and who the *average consumer* is. The chapter concludes with a look at the contemporary environment in which consumptions occurs as well as how consumers actually engage with market actors. One of the striking features identified is the extent to which consumers actually appreciate being *nudged*.

Chapter 4 is devoted to consumer *vulnerability*. In terms of the UCPD, it describes a position of weakness that a consumer occupies that affects the terms on which they are able to engage in commercial transactions.<sup>49</sup> This part includes a look at the UCPD's *vulnerable consumer test* as well as which consumers qualify as such. But vulnerability is also assessed from a more general perspective in relation to its effect on *consumer autonomy* extending beyond a commercial context.<sup>50</sup> This assessment reveals an inverse causal relationship between *consumer vulnerability* and *consumer autonomy*.

Chapter 5 assesses the role of *consumer autonomy* as well as its status in law as a counterweight to *behaviourally informed commercial practices*. The legal framework within which this occurs is IHRL. Various permutations of *personal autonomy* are looked at, including its function within human agency and the right to privacy. The chapter concludes with an analysis of the jurisprudence of the ECtHR pertaining to *consumer autonomy* in order to provide a practical dimension that is grounded in hard law to the discussion.

## **1.6 The case for 'making the law more behavioural'**

In light of the novelty of behavioural perspectives on EU law, more can be said to justify the use of *behavioural insights* in this legal setting.<sup>51</sup> Consumer protection law is intrinsically connected to human behaviour. It is built around, among other things, how human beings are believed to behave in certain situations. Our understanding of human behaviour is, therefore, vitally important to the assumptions underlying

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<sup>49</sup> See M. Friant-Perrot (note 21 above) p. 90

<sup>50</sup> Ibid pp. 94 – 98

<sup>51</sup> See note 37

consumer protection law.<sup>52</sup> As mentioned above, *Behavioural insights* encompass the wealth of research in the fields of psychology and economics that empirically describe human decision-making and by extension consumer behaviour.<sup>53</sup> This suggests a natural fit between consumer law and behavioural insights in order to ensure that the law takes cognisance of the realities of consumer behaviour to gauge the level of protection required.<sup>54</sup> Behavioural insights are most often used to highlight discrepancies between actual human behaviour in the real world and other models of human behaviour that have helped shape the law. A shared critique by several commentators is that the notion of consumers as rational ‘*utility maximisers*’ has been imbedded in the law, when in fact they are prone to err in predictable ways.<sup>55</sup> Part of this thesis is therefore devoted to exposing potential misapprehensions about actual consumer behaviour that underscore EU consumer law.<sup>56</sup> The hope is then that with these misapprehensions debunked that they can be corrected.

One of the objectives of encouraging the introduction of behavioural insights into consumer law discourse is, therefore, simply to align the theoretical assumptions underlying consumer law as closely as possible with the reality it is supposed to depict.<sup>57</sup> In other words, to ‘make law more behavioural’ or ‘as behavioural as it needs to be’.<sup>58</sup> Where the content of a legal norm is based on a theoretical model of human behaviour, what reasons could there be to ignore scientific evidence providing a more in depth understanding of such behaviour?<sup>59</sup> A lack of consistency between the *average consumer* portrayed by the EU consumer law framework and the real deal can have significant implications.<sup>60</sup> Most notably, unless the *average consumer* fiction is also made to suffer from the same cognitive biases and heuristics as real

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<sup>52</sup> See A.-L. Sibony, ‘Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive’, in K. Mathis, Chp 5 in *European Perspectives on Behavioural Law and Economics*, Springer, (2014) p. 74

<sup>53</sup> See D. Kolm (note 15 above) p. 2

<sup>54</sup> See AL Sibony & H. Geneviève, (note 45 above) p. 210

<sup>55</sup> S. Steed, ‘Behavioural Economics – Dispelling the Myths’, *Economics in Policy Making* 11, the new economics foundation, (2013) p. 1

<sup>56</sup> D. Kolm (note 15 above) p. 3

<sup>57</sup> See A.-L. Sibony (note 51 above) p. 77

<sup>58</sup> Kolm (note 15 above) p. 21

<sup>59</sup> *Ibid* p. 4

<sup>60</sup> See A.-L. Sibony (note 51 above) p. 74

human beings, it can be very difficult for regulators to justify measures protecting consumers against unfair nudges.<sup>61</sup>

The introduction of perspectives derived from psychology and behavioural economics will not shake the foundations of consumer law. These fields merely *describe* natural phenomena that are the subject of legal regulation. As such, the knowledge that the science contributes is merely a tool that can be utilised in the application of the law.<sup>62</sup> However, as the judicial interpretation and application of the UCPD requires normative judgements of commercial practices to determine the (un)fairness thereof, the science *per se* provides no assistance in drawing a red line that separates commercial practices that fairly influence consumers from those that unlawfully manipulate consumer decision-making.<sup>63</sup>

### **1.7 The two parts to *nudging*: cause and effect**

The analysis of *nudging* in this thesis is novel for a number of reasons. As explained above, the focus on market actors doing the *nudging* (as opposed to regulators) significantly changes the context. Moreover, while reference is often made in the literature to certain ethical concerns surrounding *nudging*, commentators have thus far focussed their energies on somewhat vague, general philosophical arguments.<sup>64</sup> IHRL, on the other hand, has been neglected as a normative source that may assist in drawing a red line that separates commercial practices that fairly influence consumers from those that unlawfully manipulate consumer decision-making.<sup>65</sup> As a result of this novelty, it may be useful to describe in further detail precisely how *nudging* is analysed in the following chapters, particularly in relation to the IHRL dimension of the arguments presented.

The term *nudging* is often used to encompass both the act of *nudging* as the *cause* and the *effect(s)* of the resulting consumer behaviour. However, in the context of this thesis, it is useful to conceptualise *nudging* in two parts. The first is the *influence* or

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<sup>61</sup> Recall the discussion surrounding the *suitability* of a regulatory measure under the delimitations at 1.4 as well as footnote 38.

<sup>62</sup> See J. Trzaskowski (note 17 above) p. 387

<sup>63</sup> Ibid p. 387 & 391; A.-L. Sibony (note 51 above) p. 84

<sup>64</sup> At least this is my impression. See also footnote 29.

<sup>65</sup> See J. Trzaskowski (note 17 above) p. 387 & 391

*manipulation per se* that is exerted, (which can be described as the *cause*). The second is the consequences of such manipulation, which is tantamount to the consequences of the induced transactional decision, (which can be described as the *effect*)<sup>66</sup>.

Both the *cause* and the *effects* of *nudging* are potentially relevant from an IHRL perspective. In relation to the *cause* – that is, the manipulative act and the resultant manipulation in the mind of the consumer – the question is whether any human rights are impaired when a consumer is manipulated into performing an act that he would *not* have performed otherwise, regardless of the nature or eventual consequences of the *induced* act?<sup>67</sup> Or, does the danger in manipulation rest solely on the potentially adverse consequences thereof? This consequentialist approach refers to the *effects*, where the consumer's welfare diminishes as a result of the transactional decision that was unfairly induced.<sup>68</sup>

From a practical point of view, it may be that the *effect* can act as a proxy indicator for the *cause*, as consumers are unlikely to pursue any kind of legal action regardless of the extent of manipulation they were subjected to, unless they sustain some kind of damage. In other words, systemic adverse consequences such as diminishing consumer welfare may point to a degree of manipulation that is problematic from an IHRL point of view. Depending on the situation, this welfare loss (very broadly referred to) may obstruct the realisation of a number of human rights. For example, where a pattern of systemic nudging over a period of time might, in extreme cases, adversely affect the 'right of everyone to an adequate standard of living ... including adequate food, clothing and housing, and to the continuous improvement of living conditions'.<sup>69</sup> One can also conceive of a situation where a company like Starbucks, in addition to utilising manipulative methods, increases the size of its beverages and adds sugar to the extent that a consumer's health may deteriorate appreciably if

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<sup>66</sup> See J. Stuyck, 'The Court of justice and the unfair commercial practices directive', CMLR, (2015) p. 724

<sup>67</sup> The word *induced* is used in the sense that the market actor *induces* the consumer to perform a certain act. There is a hot debate concerning the ethics of nudging in the regulatory sense. One of the main concerns is 'the assault on consent, will and dignity'; see M.D. White, 'Behavioural Law and Economics: The Assault on Consent, Will and Dignity', in G. Gaus (et al eds.), *New Essays on Philosophy, Politics and Economics: Integration and Common Research Projects*, (2010). However, this debate has not seemed to extend to market actors use of *nudging* methods.

<sup>68</sup> See C.R. Sunstein (note 24 above) p. 4 where he refers to *welfare losses*.

<sup>69</sup> An example of this may be the 2008 financial crisis and the global recession it led to. Article 11 (1) of the ICESCR; see also I Benöhr (note 43 above) pp. 49 – 50

consumed in significant quantities over a period of time.<sup>70</sup> Considering that the WHO has referred to a ‘global obesity epidemic’ it can be argued that the right to health is engaged and that states have an obligation to curtail this kind of activity.<sup>71</sup> The extent to which IHRL is applicable depends on the facts but these examples are sufficient to illustrate how a sustained *nudging* campaign can potentially implicate IHRL further down the line. Note, however, that the focus in these instances is the *effect* of the nudge rather than the act of nudging in itself. Moreover, as these adverse consequences can be achieved through means other than *nudging*, the main focus of this thesis is primarily on the act of manipulation as a *cause* rather than the *effects* thereof.

This brings into play the *notions* of *personal autonomy, agency and freedom of choice*, in order to examine the extent to which the act of usurping a consumer’s decision-making process has to be regulated by states, in order to comply with their IHRL obligations. These notions clearly resist any outside influence on consumers’ capacity to choose for themselves.<sup>72</sup> The difficulty, however, is that without a precise delineation of the legal obligations that the EU has in this regard, it is very difficult to measure the consistency of EU law with human and fundamental rights in so far as *personal autonomy* is concerned.<sup>73</sup> The last chapter of this thesis is therefore devoted to analysing the legal status of *personal autonomy, agency and freedom of choice* within the IHRL framework.

Very briefly, this approach mirrors that of the UCPD, which is more concerned with the *cause* than the *effects* of nudging. That is, the act of nudging and the resultant manipulation in the mind of the consumer falls within the scope of the UCPD, while the other effects that are removed in time and space from *the transaction* are irrelevant as far as a determination of (un)fairness of a commercial practice is

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<sup>70</sup> Research has been conducted indicating that certain beverages contain up to ‘25 teaspoons of sugar per cup’. See M. Brignall, ‘The Cafes Serving Drinks with 25 Teaspoons of Sugar per Cup’, *The Guardian*, (2016 [www.guardian.com/business/2016/feb/17/cafes-selling-drinks-25-teaspoons-sugar-starbucks/costa-coffee](http://www.guardian.com/business/2016/feb/17/cafes-selling-drinks-25-teaspoons-sugar-starbucks/costa-coffee))

<sup>71</sup> World Health Organisation, ‘Controlling the global obesity epidemic’, Nutrition at [www.who.int/nutrition/topics/obesity/en/](http://www.who.int/nutrition/topics/obesity/en/)

<sup>72</sup> J. Dryden, ‘Autonomy’, Internet Encyclopaedia of Philosophy, ISSN 2161-0002 [available at [www.iep.utm.edu/autonomy/](http://www.iep.utm.edu/autonomy/)]

<sup>73</sup> See E. Carolan & A. Spina, ‘Behavioral Sciences and EU Data Protection Law: Challenges and Opportunities’, in A. Alemanno & A. Sibony (eds), *Nudge and the Law*, Hart Publishing, Oxford, (2015) p. 164

concerned.<sup>74</sup> There is no mention of damage or loss to a consumer anywhere within the UCPD. The UCPD can therefore be said to be aimed at the ‘protection of individual decision-making’ and ultimately of consumer *autonomy*.<sup>75</sup> The extent to which this aim is realised, however, is debateable. The UCPD is analysed in detail below.

## 2 Behavioural Insights

### 2.1 Introduction

In order to ensure a thorough understanding of *behaviourally informed commercial practices*, it is necessary to elaborate on the content of what has been termed *behavioural insights*. ‘Behavioural insights’ is a term that encompasses findings from the fields of psychology and economics that empirically describe actual human behaviour in the real world.<sup>76</sup> Behavioural insights are especially relevant to this thesis as they shed light on a number of cognitive biases and heuristics that lead to ‘systematic errors’ in consumer decision-making.<sup>77</sup>

Due to the finitude of resources available to humans who are subject to ‘information overload’<sup>78</sup> when making decisions in complex environments and unfamiliar situations, we rely on ‘general problem solving strategies’<sup>79</sup> or rules of thumb known as heuristics.<sup>80</sup> Heuristics can also be described as ‘simple procedure(s) that help find adequate, though often imperfect, answers to difficult questions’.<sup>81</sup> Their usefulness resides in the fact that they ‘are highly economical and usually effective, but (the downside is that) they lead to systemic and predictable errors’.<sup>82</sup> As careful deliberation is effortful and not always practical, it is hardly surprising that we are so reliant on heuristics. A common strategy employed by humans is to replace difficult

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<sup>74</sup> See 3.1 below for a critique of this ‘transaction test’ as too narrow.

<sup>75</sup> See E. Carolan & A. Spina (note 72 above) p. 163

<sup>76</sup> D. Kolm (see note 15 above) p. 17

<sup>77</sup> A. Tversky & D. Kahneman, ‘Judgement Under Uncertainty: Heuristics and Biases’, *Science*, New Series, Vol. 185, No. 4157, pp. 1124 – 1131, (1974) p. 1124

<sup>78</sup> This term was coined by *Alvin Toffler*

<sup>79</sup> N. Holt et al, ‘Psychology: The Science of Mind and Behaviour’, McGraw-Hill Education (2015) p. 392

<sup>80</sup> R.H. Thaler & C.R. Sunstein, (see note 1 above) p. 22

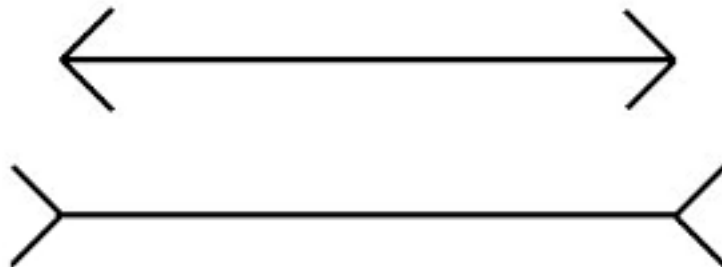
<sup>81</sup> D. Kahneman, ‘Thinking, Fast and Slow’, Penguin Books, (2011), p. 98

<sup>82</sup> A. Tversky & D. Kahneman (note 76 above) p. 1131

‘target questions’ with easier ‘heuristic questions’. For example, replacing the question, ‘how popular will the president be in six months?’, with, ‘how popular is the president right now?’.<sup>83</sup>

Heuristics are responsible for cognitive biases.<sup>84</sup> A cognitive bias can be defined as a ‘systematic pattern of deviation from a norm (such as logic<sup>85</sup>) or rationality in judgement’.<sup>86</sup> Biases are ‘systematic and frequent’ as opposed to ‘occasional and accidental’.<sup>87</sup> Therein lies the utility for those seeking to exploit consumer biases. Consumers’ irrational judgements are *predictable* to the extent affected by known cognitive biases.<sup>88</sup>

Psychologists distinguish between ‘two modes of thinking’.<sup>89</sup> System 1 ‘operates automatically and quickly, with little or no effort and no sense of voluntary control.’<sup>90</sup> System 1 is responsible for our ‘gut reactions’ and intuitive responses.<sup>91</sup> The Müller-Lyer illusion is a textbook illustration of system 1 in action:<sup>92</sup>



Notice the ‘visual illusion’ that the length of the bottom line exceeds the length of the top line, when in actual fact both lines are equally long, despite what our eyes tell us.<sup>93</sup> It is, of course, possible to engage System 2 – the second ‘mode of thinking’ – by consciously measuring the lines.<sup>94</sup> System 2 consists of slow, ‘deliberate, effortful

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<sup>83</sup> D. Kahneman (note 80 above) p. 98

<sup>84</sup> A. Tversky & D. Kahneman (note 76 above) p. 1131

<sup>85</sup> J.-P. Caverni et al (eds), *Cognitive Biases*, North-Holland, (1990) p. 8

<sup>86</sup> ‘Cognitive Bias Explained’, [available at] [everything.explained.today/Cognitive\\_bias/](http://everything.explained.today/Cognitive_bias/)

<sup>87</sup> J.-P. Caverni et al (note 84 above) pp. 7 – 8

<sup>88</sup> D Kolm (note 15 above) p. 4

<sup>89</sup> D. Kahneman (note 80 above) p. 20

<sup>90</sup> Ibid

<sup>91</sup> R.H. Thaler & C.R. Sunstein, (see note 1 above) p. 21

<sup>92</sup> D. Kahneman (note 80 above) p. 27

<sup>93</sup> Ibid p. 26 – 27

<sup>94</sup> Ibid

and orderly' thinking.<sup>95</sup> Very significantly in the context of this thesis, System 2 is responsible for 'the subjective experience of agency (and) choice'.<sup>96</sup> System 2 can therefore trump System 1, such as where the lines are physically measured, by using 'debiasing strategies'.<sup>97</sup> Curiously, however, even the knowledge that the lines are of equal length does not dispel the visual illusion induced by System 1.<sup>98</sup> It is merely that System 2 – the voice in your head – is now attentive to the fact that the lines are identical in spite of the persisting visual illusion. System 2 trusts the measuring exercise it undertook.<sup>99</sup> In response to this it has been remarked that 'our intuition (System 1) is really fooling us in a repeatable, predictable, consistent way and there is almost nothing we can do aside from taking a ruler and ... measuring it'.<sup>100</sup>

'Cognitive illusions' or 'illusions of thought', resulting from biases and heuristics, can be as powerful as visual illusions.<sup>101</sup> Moreover, due to the automatic nature of System 1, 'errors of intuitive thought' are not easily rectified.<sup>102</sup> It is only if System 2 is roused into action that the error might be noticed as a result of 'the enhanced monitoring and effortful activity of System 2'.<sup>103</sup>

The following section outlines some of the most prominent and widely acknowledged biases and heuristics that may affect consumer behaviour.<sup>104</sup> As already alluded to, this is in no way a comprehensive description of all the relevant biases and heuristics. The objective in this section is simply to describe how human decision-making can be compromised by cognitive biases and heuristics.

## 2.2 The Representativeness Heuristic

Arguably the most famous rendition of the representative heuristic is The Linda Problem.<sup>105</sup> The subjects of the experiment are given the following information:

Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student she was deeply concerned with issues of

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<sup>95</sup> Ibid p. 20

<sup>96</sup> Ibid p. 21

<sup>97</sup> D. Kolm (note 15 above) p. 20; debiasing strategies are sometimes used by regulators to elicit better decisions from consumers which is another form of *nudging*.

<sup>98</sup> D. Ariely, 'Are we in control of our decisions?', TED Talk, (2008); Ibid p. 27

<sup>99</sup> D. Kahneman (note 80 above) p. 27

<sup>100</sup> D. Ariely, (note 97 above)

<sup>101</sup> D. Kahneman (note 80 above) p. 27

<sup>102</sup> Ibid. 28

<sup>103</sup> Ibid

<sup>104</sup> D. Kolm (Note 15 above) p. 21

<sup>105</sup> D. Kahneman (note 80 above) p. 156



discrimination and social justice, and also participated in anti-nuclear demonstrations.

They are then asked to ‘rank the following statements in order of their probability:<sup>106</sup>

- Linda is a teacher in elementary school
- Linda works in a bookstore and takes yoga classes
- Linda is active in the feminist movement
- Linda is a psychiatric social worker
- Linda is a member of the League of Women voters
- Linda is a bank teller
- Linda is an insurance salesperson
- Linda is a bank teller and is active in the feminist movement

Now focus on the two underlined options. Linda’s characteristics very obviously hint at a feminist disposition and therefore the latter option appears more likely than the former. The image of a quintessential bank teller does not evoke associations with political or social activism.<sup>107</sup> When this experiment was first conducted, the majority of participants, upwards of 80% in fact, agreed and ranked the second underlined option more probable than the first.<sup>108</sup> However, this is an obvious error as the first group of bank tellers contains the second group of feminist bank tellers. In other words, all feminist bank tellers are also just bank tellers. ‘The logic of probability’ tells us that with every additional detail the likelihood of an uncertain outcome occurring decreases.<sup>109</sup> When the experiment was redesigned, by removing the other distracting options, and thereby only requiring participants to choose whether Linda was more likely to be a bank teller or a feminist bank teller, the percentage of participants who answered correctly increased but not as significantly as one might expect.<sup>110</sup> With only two options, a direct comparison is induced and System 2 can override the intuitive (System 1) response.<sup>111</sup> In a similar fashion to the Muller-Lyer illusion, however, the error is no less appealing despite System 2’s intervention.<sup>112</sup>

The representative heuristic works as follows: in assessing the likelihood that a person or a thing (A) falls within a larger category (B), the answer is incorrectly provided based on how representative A is of B, or the measure of similarity between A and a

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<sup>106</sup> E. Yudkowsky, ‘Conjunction Controversy (or, How They Nail It Down)’, LessWrong, (2007). The anachronistic nature of these options is a result of the times in which the experiment was conducted, namely the 1980s. D. Kahneman, (note 80 above) p. 157

<sup>107</sup> D. Kahneman (note 80 above) p. 157

<sup>108</sup> Ibid pp. 157 - 158; Kahneman explains how the experiment was repeated several times with similar results

<sup>109</sup> Ibid

<sup>110</sup> Ibid p. 158; D. Kolm (note 15 above) p. 23

<sup>111</sup> Ibid p. 159

<sup>112</sup> Ibid p. 159

typical sample of B, as opposed to the actual statistical probabilities pertaining to the question.<sup>113</sup> The description of Linda is so consistent with a stereotypical feminist and so dissonant with the stereotypical bank teller that System 1 fools us into an erroneous intuitive response.<sup>114</sup>

It is not hard to imagine how market actors can make use of stereotypes and additional distracting options, under the guise of complying with disclosure requirements, to prevent a consumer's dormant System 2 from interfering with the incorrect intuitive response of System 1. The insurance industry, for example, is based on statistical probabilities that are virtually impossible for a layperson to comprehend at the best of times, let alone when one labours under a cognitive bias.<sup>115</sup>

### 2.3 Framing

It is apparent that the power that market actors have in *framing* the questions they ask consumers is substantial. In another experiment participants had to choose between an all expenses paid trip to Paris (X) or an all expenses paid trip to Rome (Y). Needless to say, the participants had a hard time choosing. But when an irrelevant third option was introduced, namely, a trip to Rome covering all expenses except coffee (that is, Y without coffee), the original option Y became more appealing even in relation to X.<sup>116</sup> The Economist magazine ran an advertisement implementing this strategy a number of years ago that was framed in the following way<sup>117</sup>:

Welcome to the Economist Subscription Centre.

Pick the type of subscription you want to buy or renew.

- **Economist.com subscription** – USD 59.00  
One-year subscription to Economist.com  
Includes online access to all articles from The Economist since 1997.
- **Print subscription** – USD 125.00  
One-year subscription to the print edition of The Economist
- **Print & web subscription** – USD 125.00  
One-year subscription to the print edition of The Economist and  
online access to all articles from The Economist since 1997

An experiment was conducted on the basis of this advertisement with perhaps not-so-surprising results considering what we know about cognitive biases. When presented

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<sup>113</sup> A. Tversky & D. Kahneman (note 76 above) p. 1124

<sup>114</sup> D. Kolm (Note 15 above) p. 23

<sup>115</sup> Aptly named the *Conjunction fallacy*; D. Kahneman (note 80 above) p. 159

<sup>116</sup> D. Ariely (note 97 above)

<sup>117</sup> Ibid

in the manner directly above, 16% of participants chose option 1 while 84% chose option 3. Option 2 is clearly an inferior option as it costs the same as option 3 but does not include online access to the magazine. However, when the experiment was run without the irrelevant second option, 68% of participants preferred option 1, while only 32% preferred option 3. The reason for this discrepancy is that the second irrelevant option makes the third option look more attractive. Option 3 is the same price as option 2 but the purchaser gets more value in return. Due to the fact that not all our preferences are as clear to us as how many sugars we take with our coffee, we are highly ‘susceptible to ... influences from the external forces’.<sup>118</sup>

## 2.4 The sunk-cost fallacy

The best way to conceptualise the sunk-cost fallacy is to recall a scene in Shakespeare’s *Macbeth* where Macbeth has some doubts about whether to continue with his evil plans. The scene involves a vision that he has of himself wading through a pool of blood. He is so covered in blood that he decides that going back to the side from where he came from (a metaphor for giving up), would be as tedious as pushing on to the other side (or seeing out his plans to their end). His mistake is that instead of taking a composed, cool-headed decision based on his current situation, he allows his emotions and sentiments about past and therefore irrelevant events to dictate his future course of action. More relevant to consumers, is an example of two sets of stocks (X and Y) owned by John. At the moment John requires some money and needs to choose which set of stocks to sell, X is trading at SEK 10000 higher than what he purchased them for. While Y is trading at SEK 10000 lower than what he purchased them for. It is highly likely that John will sell X shares as according to empirical research, owners of stocks exhibit a ‘massive preference for selling winners rather than losers’.<sup>119</sup> Instead of maintaining objectivity and rationality by simply selling the set of stocks that hold the least promise of favourable returns in the future regardless of the purchase price, consumers sell winners.<sup>120</sup> Selling the losers is unpleasant and so consumers hold on to bad stocks in the hope that they will eventually become winners.<sup>121</sup> Sunk-costs should be disregarded and yet they are

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<sup>118</sup> Ibid

<sup>119</sup> D. Kahneman (note 80 above) p. 344; the underlying bias is the *disposition effect*. For more detail see p. 344

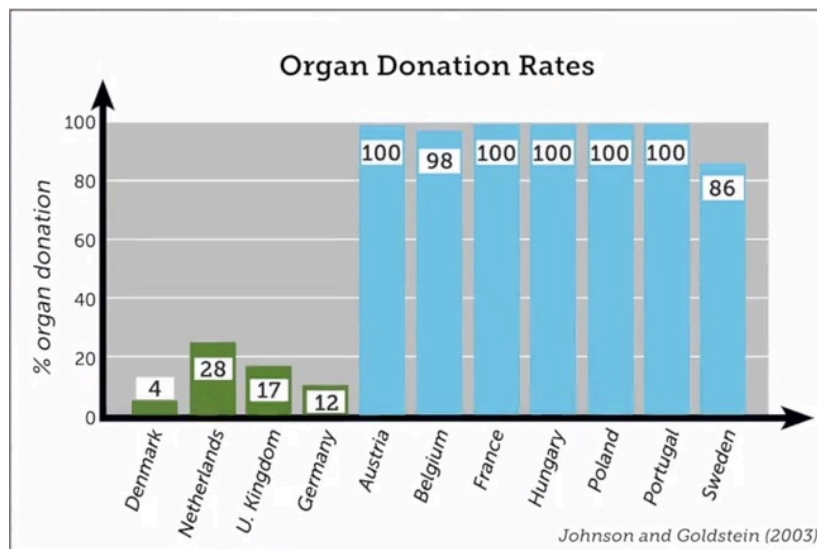
<sup>120</sup> Ibid p. 344

<sup>121</sup> Ibid pp. 344 – 346

instrumental in many decisions consumers make.<sup>122</sup> This has been described as ‘the escalation of commitment to failing endeavours.’<sup>123</sup> Market actors can, therefore, use the sunk-cost fallacy to tempt consumers into throwing even more money at bad investments from which they have already sustained losses.

## 2.5 Nudging and Choice Architecture

Nudging is a term that has been coined for a regulatory approach that utilises behavioural insights in order to *steer* consumer behaviour.<sup>124</sup> It has been described as a form of libertarian paternalism in the sense that a regulator nudges (or steers) the consumer into making *better* choices but the consumer retains freedom of choice.<sup>125</sup> One of the best examples of nudging pertains to organ donation. Note the following graph indicating the percentage of organ donors in the various countries:<sup>126</sup>



Taking the graph at face value it is curious that the Austrians are so willing to donate while the Germans are so reluctant. The same could be said of the Swedes in relation to Danes and the Belgians in relation to the Dutch. These countries are historically deemed to share similar cultures and one would expect similar views on organ

<sup>122</sup> Ibid p. 346

<sup>123</sup> Ibid p. 345

<sup>124</sup> See generally R.H. Thaler & C.R. Sunstein (note 1 above); D. Kolm (note 15 above) p. 28

<sup>125</sup> R.H. Thaler & C.R. Sunstein (note 1 above) p. 5

<sup>126</sup> E.J. Johnson & D. Goldstein ‘Do Defaults Save Lives?’, Science, Vol. 302, (2003) p. 1338; D. Ariely (note 97 above)

donation.<sup>127</sup> Closer investigation, however, revealed that the default position in relation to organ donation on the forms to register for a driver's license differed. In the blue countries, drivers donated by default unless they opted out. In the green countries, drivers did not donate by default but could opt in.<sup>128</sup> The efficacy of default rules is as a result of, among other things, the status quo bias or inertia. That is, a preference for things as they are as well as for choosing not to choose. It is simply easier for consumers to do nothing.<sup>129</sup> The implication is that potential donors do not choose whether they want to donate their organs or not, although it is within their power to do so. It is rather the *choice architects* who set up the relevant forms that decide on their behalf.<sup>130</sup>

Nudging is premised on the idea that all decisions are made within a particular context, or *choice architecture*.<sup>131</sup> The choice architecture is designed by a *choice architect*, who 'has the responsibility for organising the context in which people make decisions'.<sup>132</sup> Choice architecture can never be completely neutral and so choice architects will influence choices even in spite of their best efforts not to.<sup>133</sup> There is no way to get around arranging items in a supermarket, whichever way that is, and this will influence sales whether the owners of the supermarket intended this consequence or not.<sup>134</sup> The arrangement of the items is the choice architecture providing the context for any choice taken in that supermarket.<sup>135</sup> It is more common, however, for market actors to take full advantage of this by proactively designing the choice architecture they have control over in a manner that maximises their profits.<sup>136</sup> The power to influence choice through 'clever' choice architecture (or nudging) is evident from the vast disparity in organ donation rates referred to above. One could go as far as to say that choices are being made for consumers.<sup>137</sup> This is concerning from a consumer law perspective as there is no reason to believe that nudging (or perhaps manipulation) is any less effective in a commercial context.

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<sup>127</sup> D. Ariely (note 97 above)

<sup>128</sup> Ibid

<sup>129</sup> R.H. Thaler & C.R. Sunstein (note 1 above) p. 83 – 84

<sup>130</sup> D. Ariely (note 97 above)

<sup>131</sup> See R.H. Thaler & C.R. Sunstein (note 1 above) pp. 1 – 4; D. Kolm (note 15 above) p. 28

<sup>132</sup> R.H. Thaler & C.R. Sunstein (note 1 above) p. 3; D. Kolm (note 15 above) p. 29

<sup>133</sup> Ibid

<sup>134</sup> See the cafeteria example in R.H. Thaler & C.R. Sunstein (note 1 above) p. 1 – 4; D. Kolm (note 15 above) p. 29

<sup>135</sup> R.H. Thaler & C.R. Sunstein, (see note 1 above) pp. 1 – 2; D. Kolm (note 15 above) p. 29

<sup>136</sup> See R.H. Thaler & C.R. Sunstein (note 1 above) p. 2 option 5

<sup>137</sup> D. Ariely (note 97 above)

Whether it is a market actor or a regulator setting the default rule, it is the result of human decision-making. Very interestingly therefore, choice architects as humans are subject to the same cognitive biases and heuristics as consumers in many cases.<sup>138</sup>

## 2.6 Concluding Remarks on Behavioural Insights

The question can therefore legitimately be asked whether ‘we are (really) in control of our decisions’<sup>139</sup>? If not, then who is? Market actors and regulators for the most part. The point of departure for these *choice architects* as they go about their business of designing the environments in which choices are made, differs vastly. Market actors pursue profit motives while regulators ideally act to promote the best interests of consumers. While it is especially contentious to what extent regulators should interfere with or on behalf of consumers, whether by *command and control regulation* or a gentler form of *nudging*,<sup>140</sup> market actors are sometimes given a free pass because *apparently* ‘we (as consumers) know (that) businesses do not share our interests and instead pursue their own ends using whatever tools possible (and allowed), but we’re prepared for it’<sup>141</sup> ... even if we’re not aware of what exactly they do<sup>142</sup>. Virtually anyone will admit that they are perfectly aware that market actors go to great lengths to influence their decision-making. But does this awareness translate into a defence against these practices.<sup>143</sup> The answer is most likely that in some cases yes but in other cases no. Recall that *cognitive illusions* persist even after System 2 recognises them as errors.<sup>144</sup> Not to mention that it is unrealistic to expect consumers to be on their guard at all times.<sup>145</sup> Even if they were, it would most probably lead to unhealthy amounts of anxiety and stress. What a draining exercise it would be to check and double-check every intuitive thought that crossed your mind?<sup>146</sup> Remember, ‘our intuition (System 1) fools us in a repeatable, predictable, consistent

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<sup>138</sup> See generally W.K. Viscusi & T. Gayer, ‘Behavioural Public Choice: The Behavioural Paradox of Government Policy’, *Harvard Journal of Law and Public Policy*, (2015)

<sup>139</sup> D. Ariely (note 97 above)

<sup>140</sup> See G. Dworkin, ‘Paternalism’, in E.N. Zalta (ed.) *Stanford Encyclopedia of Philosophy* (2014)

<sup>141</sup> M.D. White (note 36) p. 110

<sup>142</sup> *Ibid.* 109

<sup>143</sup> See J. Trzaskowski (note 17 above) pp. 384 – 385

<sup>144</sup> D. Kahneman, (note 80 above) p. 27; D. Ariely (note 97)

<sup>145</sup> *Ibid.* p. 28

<sup>146</sup> D. Kahneman (note 80 above) p. 28; Kahneman does refer to a compromise where we ‘learn to recognise situations in which mistakes are likely and try harder to avoid significant mistakes when the stakes are high.’

ways'.<sup>147</sup> It is, therefore, not much use to consumers to know that market actors are generally interested in influencing their decision-making. Nevertheless, there appears to be no shortage of faith in *the market* to take care of the problem by, among other things, punishing delinquent market actors as consumers move their business elsewhere.<sup>148</sup>

The psychological findings presented in this chapter, therefore, challenge the notion that consumers are adequately forewarned against market actors, by suggesting that consumers are somewhat helpless against their cognitive biases and heuristics in certain conditions (of uncertainty).<sup>149</sup>

It must be emphasised that as yet no arguments based on *behavioural insights* have been brought before the ECJ in the context of consumer protection litigation. The exploitation of consumers' biases and heuristics has therefore never been considered. As a result, it has never had behaviourally informed argumentation brought before it or noticeably factored these *insights* into its jurisprudence.<sup>150</sup> An inevitable consequence of this is that this thesis is characterised by a significant degree of speculation regarding the potential role of behavioural insights in EU law and is of a forward-looking nature.

## 2.7 The Background to EU Consumer Law

Any discussion about making EU consumer protection law more behaviourally oriented must be placed within its proper context, as the idiosyncrasies of the EU legal framework have major implications for this process.<sup>151</sup> This warrants a brief look at the background to EU consumer law. One of the objectives in this regard is to explain *why* there is a disconnect between actual human behaviour and the notional

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<sup>147</sup> D. Ariely (note 97 above)

<sup>148</sup> See C.R. Sunstein (note 24 above) p. 9; See also M.D. White, 'Behavioural Law and Economics: The Assault on Consent, Will and Dignity', in G. Gaus (et al eds.), *New Essays on Philosophy, Politics and Economics: Integration and Common Research Projects*, (2010) p. 19

<sup>149</sup> Judgments 'under conditions of uncertainty' are more prone to result in heuristics and biases-based errors. See generally A. Tversky & D. Kahneman (note 76 above)

<sup>150</sup> See J. Trzaskowski (note 17 above) p. 391; See A.-L. Sibony (note 51 above) p. 75

<sup>151</sup> *Ibid* pp. 75 – 76

*average consumer* as per EU consumer law, as well as why this disconnect is problematic.<sup>152</sup>

Contemporary EU consumer law is a product of a system that values and promotes ‘the realisation of an internal market’.<sup>153</sup> In fact, the EU’s competency to regulate consumer law matters is contingent upon ‘a demonstration that it actually contributes to eliminating obstacles to the free movement of goods’.<sup>154</sup> This is possible by ‘boosting consumer confidence’<sup>155</sup> through increased protection measures.<sup>156</sup> As such, the regulatory measures pursued by the EU have thus far and will continue to be profoundly impacted by this free movement objective. The ‘information paradigm’ – that is currently the favoured regulatory approach – is so attractive to the EU legislator because it leaves the internal market intact.<sup>157</sup> The *information paradigm* describes a system that is fully confident in the ability of *rational* consumers to ‘make intelligent choices’ that are in their best interests if they possess the necessary information to do so.<sup>158</sup> EU consumer law therefore equates an informed consumer with a protected consumer, with the added bonus that providing information, such as affixing a label to a product, does not present any significant obstacles to the movement of goods within the EU.<sup>159</sup> This has implications for the extent and manner in which behavioural insights will influence consumer protection, as restrictions on trade are contrary to the objectives of the EU.<sup>160</sup>

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<sup>152</sup> See 3.6 to 3.8 for detail regarding the *average consumer*.

<sup>153</sup> See A.-L. Sibony & H. Geneviève, (note 45 above) p. 211; See S. Weatherill, ‘Who is the average consumer?’, In S. Weatherill & U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29*, 115 – 138, Oxford: Hart Publishing (2007) p. 117 – 120 regarding other important factors that helped shape EU consumer law.

<sup>154</sup> As per articles 114 and 115 of the TFEU; See S. Weatherill, (note 152 above) p. 119

<sup>155</sup> Consumers, Consumer Rights and Law, Unfair commercial practices directive, [ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm)

<sup>156</sup> J. Stuyck et al, ‘Confidence through fairness? The New Directive On Unfair Business-to-Consumer Commercial Practices in the Internal Market’, *CMLR*, (2006) p. 107 – 108 & 114; Weatherill (note 152 above) p. 119

<sup>157</sup> See *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*, opinion of Advocate General Fennelly delivered on 16 September 1999, C-220/98, ECR, 2000 para 25; See J. Trzaskowski, (note 17 above) p. 378 & 386; See A.-L. Sibony, (note 51 above) p. 72; See A.-L. Sibony & H. Geneviève (note 45 above) pp. 211 & 214 – 216; See also R. Incardona & C. Poncibò, (note 18 above) p. 29 – 30 regarding the information paradigm.

<sup>158</sup> See Stuyck et al (note 155 above) p. 108; A.-L. Sibony (note 51 above) pp. 71 – 72; See also R. Incardona & C. Poncibò, (note 18 above) pp. 30 – 31 where A.G. Fennelly is quoted; see also A.-L. Sibony & H. Geneviève (note 45 above) p. 215

<sup>159</sup> G. Howells & S. Weatherill, ‘Consumer Protection Law’, Aldershot: Ashgate Publishing Group (2005) p. 63 – 64

<sup>160</sup> See A.-L. Sibony & H. Geneviève (note 45 above) p. 212



There is, however, mounting empirical evidence – described above as *behavioural insights* – that undermines the premise of so-called *rationality* underpinning the *average consumer*. The *average consumer* is EU consumer law’s *fictional* benchmark against which to measure the fairness of commercial practices. This has the potential to compromise the entire legal framework that is largely based on the mandatory disclosure of certain information. If the manner in which the *average consumer* fiction is deemed to process and act upon these disclosures differs from how actual consumers in the real world deal with them, it follows that consumer protection measures will be suboptimal.<sup>161</sup> Moreover, there is a danger that market actors, who are acutely aware of how real consumers process information, might take advantage of this.<sup>162</sup> Attention must, therefore, be drawn to the fact that disclosure does not necessarily produce marketplace transparency.<sup>163</sup>

The influence of economic theory is partly responsible for this *over-use*, according to a number of commentators, of disclosure requirements. Prior to the rise of behavioural economics, the conventional wisdom that *asymmetries of information* produced *market failures*, led regulators to believe that they could protect consumers simply by ensuring that their informational disadvantage was nullified. Requiring market actors to disclose certain information would therefore restore the equilibrium.<sup>164</sup> However, we now know that consumers’ biases and heuristics make consumer protection significantly more complex than merely informing consumers. While it is common for the law to lag behind the latest developments in the field it regulates, if this rift becomes too great then the legitimacy of that law is diluted.<sup>165</sup> Fortunately, there is evidence to suggest that there is an increased awareness of and willingness to draw on behavioural insights by certain actors within the EU such as the European Commission.<sup>166</sup> It has taken some concrete steps to utilise behavioural

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<sup>161</sup> Ibid p. 214; See I Benöhr (note 43 above) p. 122

<sup>162</sup> See A.-L. Sibony & H. Geneviève (note 45 above) p. 215

<sup>163</sup> S Weatherill (note 152 above) p. 121

<sup>164</sup> Ibid; See also A.-L. Sibony & H. Geneviève, (note 45 above) p. 217; see also A.-L. Sibony (note 51 above) p. 72

<sup>165</sup> See A.-L. Sibony & H. Geneviève, (note 45 above) pp. 217 – 218; See also See A.-L. Sibony (note 56 above) p. 74

<sup>166</sup> See A.-L. Sibony & H. Geneviève, (note 45 above) p. 213 & 218; see footnote 15 where reference is made to the ‘Legacy Document Consumer Policy 2000 - 2014’ authored by Commissioner Neven Mimica; See also A.-L. Sibony (note 51 above) p. 74 where it is stated that the Directorate-General for Health and Consumers and the European Occupation and Pensions authority have undertaken a number of studies on consumer decision-making.

insights to improve its policy formulation in a wide range of policy areas.<sup>167</sup> It is difficult to determine, however, to what extent this translates into policy and law.<sup>168</sup>

The rationale for ‘making (the) law more behavioural’<sup>169</sup> is based on, among other things, the problems that may arise as a result of this disparity between how consumers are thought to behave and how they really behave. Very simply, if the assumption that consumers are able to process all the disclosed information and behave accordingly is incorrect, then disclosure does *not* ensure protection.<sup>170</sup> Moreover, it is clearly undesirable to legislate around false assumptions of human behaviour, as this will directly impact the determination of the level of protection that is reasonably required.<sup>171</sup> Furthermore, unless the *average consumer* fiction is also made to suffer from the same cognitive biases and heuristics as real human beings, it can be very difficult for regulators to justify measures protecting consumers against unfair nudges.

## 2.8 EU over Domestic Reform

A legitimate question is which actors or entities are in a better position to utilise behavioural insights to improve consumer protection. There are convincing reasons, in this regard, why behavioural insights should influence reform, if any, at EU level as opposed to proactive member states pursuing their own agendas domestically. The primary obstacle in the way of member states doing so is the all-important realisation of the internal market. Any consumer protection measures, regardless of the influence of behavioural insights in their formulation, are at risk of being found in violation of EU law if they restrict trade within the internal market.<sup>172</sup> Measures based on the science of decision-making are not by this fact alone less likely to restrict trade than those that are not.<sup>173</sup> There is thus always the possibility that the ECJ will promote the ideal of free movement at the cost of consumer protection, regardless of the type of

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<sup>167</sup> J.S. Lourenço et al ‘Behavioural Insights Applied to Policy: European Report 2016’, (European Commission, 2016); These include: competition, consumer protection, employment, energy, environment, health, finance, taxation, and transport.

<sup>168</sup> D. Kolm (note 15 above) p. 5

<sup>169</sup> D. Kolm (note 15 above) p. 21; see 1.6 above

<sup>170</sup> See A.-L. Sibony & H. Geneviève, (note 45 above) p. 214; See I Benöhr, (note 43 above) p. 122; G. Howells & S. Weatherill (note 158) p. 63 – 64

<sup>171</sup> See A.-L. Sibony & H. Geneviève, (note 45 above) p. 210

<sup>172</sup> See A.-L. Sibony (note 51 above) p. 75

<sup>173</sup> Ibid

consumer weakness the regulatory measure was intended to guard against.<sup>174</sup> Cognitive biases and heuristics do not rank higher than any other aspect of consumer protection such as consumer health for example. Moreover, if member states unilaterally pursue diverse consumer protection objectives to align their national laws with the latest developments in behavioural science, it will significantly increase costs for market actors who then have to navigate a fragmented legal framework.<sup>175</sup>

### 3 The *three tiers* of the UCPD

#### 3.1 Introduction

In this chapter, the articles of the UCPD will be set out that are most relevant for the protection of *personal autonomy*, namely, Articles 5 to 9 (including Annex I). However, this chapter only deals with the *average consumer*, while the following chapter deals with the *vulnerable* consumer. It is important to bear this distinction in mind as the UCPD explicitly differentiates between these two categories of consumers, with very significant consequences.<sup>176</sup> As part of the EU consumer law framework, the UCPD is intended ‘to boost consumer confidence and make it easier for businesses to carry out cross border trading’.<sup>177</sup> More specifically, however, the underlying rationale for the UCPD is to limit the extent to which market actors can influence consumers’ choices, thereby undermining their *personal autonomy*.<sup>178</sup> Its relevance to *nudging* is therefore self-evident.

The evaluation of the (un)fairness of a *contested commercial practice*, in accordance with the UCPD, occurs by way of a ‘three tier system’.<sup>179</sup> The tiers will be mentioned in reverse order as they are applied in this way according to the UCPD’s ‘top-down approach’.<sup>180</sup> The *third tier*<sup>181</sup> consists of the blacklist which details all the *per se*

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<sup>174</sup> Ibid

<sup>175</sup> Ibid p. 76

<sup>176</sup> See Article 5 (3) and Recital 18 of the ECPD

<sup>177</sup> Consumers, Consumer Rights and Law, Unfair Commercial Practices Directive, [ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm)

<sup>178</sup> Ibid

<sup>179</sup> J. Stuyck (note 65) pp. 725 – 726

<sup>180</sup> CHS Tour Services GmbH v Team4 Travel GmbH, Opinion of Advocate General Wahl delivered on 13 June 2013, C-435/11, NYR, 2013 para. 29

<sup>181</sup> See Annex I of the UCPD

prohibitions.<sup>182</sup> The *second tier*<sup>183</sup> consists of misleading commercial practices and aggressive commercial practices. As the definitions of misleading and aggressive commercial practices are not as specific as those mentioned on the blacklist and require courts to examine the *effect of contested commercial practices* on consumers' transactional decisions, they are considered to be of a more general character.<sup>184</sup> The *first tier*<sup>185</sup>, however, is known as the general clause as its formulation is wider still than misleading and aggressive commercial practices. Advocate General Wals has opined that 'an assessment ... begins with the blacklist, followed by the provisions on misleading or aggressive practices, and ending with the general clause'.<sup>186</sup> Once a *contested commercial practice* is found to constitute an unfair commercial practice, it becomes redundant to move through the remaining tiers, 'as the contested practice would in any event have to be regarded as unfair'.<sup>187</sup> The *three tiers* are described in detail below.

Before delving into the details of the *three tiers*, however, it must be emphasised that no practice can be considered unfair unless it causes 'the consumer to take a *transactional decision* that he would not have taken otherwise'.<sup>188</sup> Although this need not be proven in the case of practices located within the blacklist, it is nevertheless implied.<sup>189</sup> A transactional decision is defined as:

Any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;<sup>190</sup>

In light of the fact that *nudges* may have consequences that are far removed in time and space from the *transactional decision* itself, one could criticise the UCPD as focussing too narrowly on the *transactional decision* at the cost of the bigger picture.<sup>191</sup> However, it can also be argued that as the *transactional decision* is the

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<sup>182</sup> See J. Trzaskowski (note 17 above) p. 380

<sup>183</sup> Articles 6 – 9 of the UCPD

<sup>184</sup> J. Stuyck (note 65 above) p. 725

<sup>185</sup> Article 5 of the UCPD

<sup>186</sup> CHS Tour Services GmbH v Team4 Travel GmbH, Opinion of Advocate General Wahl delivered on 13 June 2013, C-435/11, NYR, 2013, para. 29

<sup>187</sup> Ibid

<sup>188</sup> This is known informally as *the transaction test*. See UCPD Articles: 6(1), 7(1), 8, 5(2) read in conjunction with 2(e);

<sup>189</sup> This conclusion is made on the basis that the blacklist contains specific species of misleading commercial practices and aggressive commercial practices.

<sup>190</sup> Article 2 (k) of the UCPD

<sup>191</sup> My supervisor, Ulf Maunsbach, suggested this point to me. *Personal autonomy* extends beyond the particular transactional decision to the consequences thereof on consumers' overall 'capacity for self-

genesis of any potential further adverse impacts, if the integrity of the decision-making process underlying the transactional decision is protected, then any further negative consequences can be mitigated.<sup>192</sup>

The discussion above concerning the *average consumer* as the benchmark against which to evaluate the (un)fairness of a *contested commercial practice* is developed further in this chapter. As Articles 5 to 9 of the UCPD are underpinned by this benchmark, any analysis of these articles necessitates a detailed look into the functioning of the *average consumer* test. This includes how the average consumer test works and who the average consumer is. The chapter concludes with a look at the contemporary environment in which consumptions occurs, how consumers conduct themselves within this environment, as well as a short note on some unforeseen long terms effects of *nudging*.

### 3.2 ‘The Blacklist of unfair commercial practices’<sup>193</sup> (OR the *third tier*)

As mentioned above, the Blacklist is the point of departure for a determination of the (un)fairness of a *contested commercial practice*. Article 5 (5) of the UCPD references ‘Annex I (that) contains the list of those commercial practices which shall in all circumstances be regarded as unfair’. If a court determines that a given commercial practice constitutes one of the ‘*per se* prohibitions’, it must declare and prohibit it as such. Its effect on a particular consumer’s *transactional decision* is irrelevant, as the EU legislator has already determined that such commercial practices are unfair.<sup>194</sup> Therefore, the blacklist can be said to function as a list of *ex ante* prohibitions that are irrefutably presumed to be unfair in all cases, regardless of evidence to the contrary.<sup>195</sup> Annex I is a comprehensive enumeration from which national legislatures and judiciaries cannot deviate, bearing in mind the maximum harmonisation that

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determination’; See J. Dryden, ‘Autonomy’, Internet Encyclopaedia of Philosophy, ISSN 2161-0002 [available at] [www.iep.utm.edu/autonomy/](http://www.iep.utm.edu/autonomy/)

<sup>192</sup> Bearing in mind that the definition of a transactional decision explicitly refers to both actions and omissions, that is, decisions ‘to act (and) to refrain from acting’; see Art 2(k) of the UCPD.

<sup>193</sup> M. Namyslowska, ‘The Blacklist of Unfair Commercial Practices: The Black Sheep, Red Herring or White Elephant of the Unfair Commercial Practices Directive?’ in van Boom et al (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems*, Routledge, (2014) p. 65

<sup>194</sup> See J. Trzaskowski (note 17 above) p. 380; see M. Namyslowska (note 192 above) p. 67

<sup>195</sup> See M. Namyslowska (note 192 above) p. 67

characterises the UCPD.<sup>196</sup> Consequently, additions or modifications to the list can only be made at EU level by an amendment of the UCPD.<sup>197</sup> The effect of this is that novel forms of manifestly unfair commercial practices that concretise over time and become widely used will not easily crystallise into *per se* prohibitions. These will continue to be dealt with under the more general clauses under Articles 5 to 9 that entail an investigation into the *effect* of a commercial practice on a *transactional decision* of the *average consumer*.<sup>198</sup> This feature of the UCPD should not deter behavioural insights from playing a greater role in consumer law. But it does mean that courts retain greater discretion to examine the *effects* of commercial practices on consumer decision-making, as greater reliance is placed on the general clauses referred to in Articles 5 to 9. The nature of a fixed list, while probably useful and a means of promoting consistency, is such that it is not the most appropriate vehicle to keep up with commercial practices that are constantly evolving in highly competitive markets, where market actors spend billions to stay ahead of the game.<sup>199</sup> It is also conceivable that a crafty market actor could merely modify a practice to remove it from the purview of the list of *per se* prohibitions while maintaining its original manipulative character.

It is encouraging that the UCPD's blacklist contains a number of prohibited practices that target consumers' cognitive biases. That is, where the legislators clearly had some notion of *behavioural insights* in mind. For example, the *per se* proscription of 'falsely stating that a product will only be available for a very limited time' and 'claiming that the trader is about to cease trading or move premises when he is not' protect consumers against the effects of the *scarcity* heuristic.<sup>200</sup> This heuristic is a rule-of-thumb that uses the apparent scarcity of a product as a proxy for a determination of its value. The scarcer the product, including the ease with which it can be poached by a rival consumer, the greater the value placed upon it.<sup>201</sup> The

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<sup>196</sup> Ibid p. 65 & 67

<sup>197</sup> Ibid p. 67 & 82

<sup>198</sup> Ibid pp. 68 – 69

<sup>199</sup> See C.R. Sunstein (note 40 above) p. 1 where he emphasises how varied different nudges can be.

Note also that a general critique of the blacklist in terms of the execution thereof on a national level is beyond the scope of this thesis. See M. Namyslowska (note 192 above) pp. 68; 70 – 71; 78; 83 – 84 for a critique of the blacklist. The Blacklist is only relevant in the context of this thesis in so far as its use as a potential entry point for or obstacle to behavioral insights is concerned.

<sup>200</sup> Nos. 7 and 15 respectively of Annex I to the UCPD; See Sibony (note 51 above) p. 98

<sup>201</sup> For more on the *scarcity heuristic* see [www.behaviouraleconomics.com/mini-encyclopedia-of-be/scarcity-heuristic/](http://www.behaviouraleconomics.com/mini-encyclopedia-of-be/scarcity-heuristic/). It must also be conceded that Wikipedia was consulted but with the necessary caution.

legislators surely had this effect in mind when they included these prohibitions onto the blacklist.

If the *contested commercial practice* is not prohibited by the blacklist, the evaluation moves to the *second tier*, namely, misleading and aggressive commercial practices.

### 3.3 Article 8 of the UCPD (OR the *second tier*: aggressive practices)

Article 8 of the UCPD defines *aggressive* and therefore prohibited<sup>202</sup> commercial practices as follows:

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by ... *undue influence*, it significantly impairs or is likely to significantly impair the average consumer's *freedom of choice* or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.<sup>203</sup>

The protection of consumers' *freedom of choice* is encouraging as it ostensibly gives effect to the right to (or notion of) *personal autonomy* that will be elaborated upon further below. Article 2 (j) provides that:

‘Undue influence’ means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision

It is conceivable that commercial practices that involve manipulation or *nudging* may fit within the scope of *undue influence*, as defined above, and thereby within the scope of *aggressive commercial practices*. Market actors do, generally, enjoy a position of power in relation to the average consumer and they do exert pressure on potential buyers.<sup>204</sup> It is probable that some practices that utilise *behavioural insights* will qualify as *aggressive commercial practices* while others will not, as ‘all nudges (or manipulations) are not created equal’.<sup>205</sup> The extent of manipulation and the exertion of pressure can vary greatly between different commercial practices.<sup>206</sup> Whether the threshold has been reached at which a ‘consumer’s ability to make an informed decision’ is sufficiently limited and their *freedom of choice* is impaired to

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<sup>202</sup> Read in conjunction with 5 (1) and Art 5 (4) b of the UCPD.

<sup>203</sup> NB: Harassment and coercion have been left out of the definition, as they are less relevant in the context of *nudging*.

<sup>204</sup> See J. Trzaskowski (note 17 above) p. 384

<sup>205</sup> M.D. White (note 36 above) p. 103

<sup>206</sup> C.R. Sunstein (note 40 above) p. 1

the extent that a *transactional decision* is induced ‘that would not have (been) taken otherwise’, will need to be determined on a case-by-case basis.<sup>207</sup>

The practical application of these two articles taken together appears to involve a number of steps that may turn out to be more complicated than expected. There are five requirements that need to be satisfied: (1) the market actor must exploit a position of power, (2) the market actor must apply pressure on the consumer, (3) the ability of the consumer to make an *informed decision* must be limited as a result, (4) there must be a likelihood that the *freedom of choice* of the *average consumer* is significantly impaired, (5) The ultimate result being that a *transactional decision* is induced that would not have been taken if not for the above. This structure contains a number of causal links and thresholds that are not entirely clear. Moreover, what is the relationship between the third and fourth requirements as set out within this paragraph? Can the ability of a consumer to make an *informed decision* be limited without their *freedom of choice* being impaired? Or does the establishment of the one imply the existence of the other?

### **3.4 Articles 6 & 7 of the UCPD (OR the *second tier*: misleading practices)**

Article 6 (1) of the UCPD defines misleading actions that are prohibited as follows<sup>208</sup>:

A commercial practice shall be regarded as misleading if it ... in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if it is factually correct ... and ... causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.<sup>209</sup>

The reference to overall presentation and the fact that a factually *incorrect* misrepresentation is *not* a requirement to *mislead* a consumer, suggests an attempt to regulate market actors’ influence over the *choice architecture* that consumers have to navigate.<sup>210</sup> In relation to this Article the European Commission has very encouragingly stated that<sup>211</sup>:

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 not only the content of the information provided, but also the way the

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<sup>207</sup> Art 8 & 2 (j) of the UCPD; See also J. Trzaskowski (note 17 above) p. 387

<sup>208</sup> These misleading actions are prohibited by Art 5 (1) read in conjunction with Article 5 (4) (a) of the UCPD.

<sup>209</sup> The sections left out are not deemed relevant for the present discussion of *nudging*.

<sup>210</sup> See A.-L. Sibony (note 51 above) pp. 88 – 89

<sup>211</sup> *Ibid* p. 88



information is presented can have a serious impact on how consumers respond to it. The Directive has therefore 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. 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.<sup>212</sup>

Equally encouraging is the fact that default rules<sup>213</sup> – that can appear so benign at face value – are explicitly mentioned as capable of constituting misleading actions due to, among other things, consumer *inertia*.<sup>214</sup> While behavioural economics is only mentioned in the Commission document in relation to misleading actions, the recognition of its place among the factors that courts ought to consider when adjudicating in the field of consumer law is a positive development.<sup>215</sup>

Article 7 that defines misleading omissions is sensitive to, among other things, the use of timing and sequencing by market actors in their engagement with consumers, such as a website with several steps on the way to purchasing a product. The *availability* heuristic may be especially relevant in this regard as the salience of certain information can be manipulated by the timing of its release.<sup>216</sup> This provides more evidence that the UCPD is not devoid of *behavioural insights*.<sup>217</sup>

If the *contested commercial practice* does not qualify as a misleading or aggressive commercial practice, the evaluation moves to the *first tier*, namely, the general clause.

### 3.5 Article 5 of the UCPD (OR the *first tier*: the general clause)

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<sup>212</sup> See the Commission Staff Working Document (note 32 above) p. 32 but do note that it ‘has no formal legal status’ and so its influence is limited; See J. Trzaskowski (note 17 above) p. 379; See A.-L. Sibony (note 51 above) p. 88

<sup>213</sup> Such as those pertaining to organ donation at 2.5 above.

<sup>214</sup> Consumer *inertia* has been defined as ‘a general tendency to stick with (one’s) current situation’ in R.H. Thaler & C.R. Sunstein (note 1 above) p. 34. See also the Commission Staff Working Document (note 32 above) p. 32; See also A.-L. Sibony (note 51 above) p. 89

<sup>215</sup> Commission staff working document (note 32 above) p. 32

<sup>216</sup> The *availability heuristic* is a rule of thumb whereby we judge the likelihood or rate of occurrence of a certain event, based on the ease with which we can recall such an event occurring. For example, the probability of a plane crashing is generally overestimated due to the effortlessness with which we can recall previous plane crashes; D. Kolm (note 15 above) p. 25

<sup>217</sup> See A.-L. Sibony (note 51 above) p. 89; Art 7(2) of the UCPD

Article 5 of the UCPD has been described as ‘designed to safeguard the consumer’s decision making freedom.’<sup>218</sup> According to Article 5 (2) of the UCPD, a commercial practice is unfair and therefore prohibited according to article 5 (1), if it is ‘contrary to the requirements of *professional diligence*’, and simultaneously ‘materially distorts or is likely to materially distort the economic behaviour’ of the relevant consumers.<sup>219</sup> This translates into a cumulative examination of the commercial practice *as such* as well as the *effect(s)* thereof.<sup>220</sup> This formulation is interesting as it implies that merely ‘using a commercial practice to appreciably (even overwhelmingly) impair the consumer’s ability to make an *informed decision*’ is insufficient to constitute an unfair commercial practice *on its own*.<sup>221</sup> So even the most manipulative of commercial practices will not be unfair *unless* it also falls foul of the requirements of *professional diligence*.<sup>222</sup>

So what is professional diligence? The European Commission has stated that:

Professional diligence ... is analogous to notions of good business conduct found in most legal systems of the Member States. It is the measure of care and skill exercised by a good businessman, in accordance with generally recognised standards of business practice in his particular sector of activity.<sup>223</sup>

The qualities or characteristics of ‘a good businessman’ are anyone’s guess. Perhaps a good businessman is one who will do anything to make as much money as possible for the shareholders whose interests he has a fiduciary duty to uphold? This formulation appears to accept – as does the definition in the UCPD with its reference to “the trader’s field of activity” – that *professional diligence* is largely determined by and within an industry itself. There is a risk in this that certain commercial conduct, such as consumer manipulation, may become normalised and institutionalised over time within a particular business sector. This could lead to a process of desensitisation

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<sup>218</sup> Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v ‘Österreich’ – Zeitungsverlag GmbH, Opinion of the Advocate General Trstenjak delivered on 24 March 2010, C-540/08, 2010 at 31; and by extension Articles 6 – 9 of the UCPD

<sup>219</sup> Art 5(2) of the UCPD

<sup>220</sup> See A.-L. Sibony (note 51 above) p. 77

<sup>221</sup> Art 2(e) of the UCPD; See A.-L. Sibony (note 51 above) p. 85; See J. Trzaskowski (note 17 above) p. 381; Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450EEC, 97/7/EC and 98/27/EC (The Unfair Commercial Practices Directive), COM (2003) 356, 2003/0134/COD, paragraph 53

<sup>222</sup> Defined in the in Art 2 (h) of the UCPD as follows: ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/ or the general principle of good faith in the trader’s field of activity’. See J. Trzaskowski (note 17 above) p. 380

<sup>223</sup> Proposal for a Directive ... concerning unfair business-to-consumer commercial practices in the Internal Market (see note 220 above) paragraph 53; See also J. Trzaskowski (note 17 above) p. 380

affecting both consumers and market actors within an industry who simply accept the *status quo*.<sup>224</sup> Who then determines what is reasonably expected of traders? This has been identified as a risk in a guiding document from the UK, which provides that dubious practices that occur systemically within an industry must be considered contrary to the principle of good faith and ultimately cannot be considered ‘commensurate with honest market practice’.<sup>225</sup> As such, an industry’s favourable outlook on a particular commercial practice does not guarantee that it ‘amounts to an acceptable objective standard’.<sup>226</sup> It is also possible even probable that there is disagreement over what constitutes *professional diligence* within an industry.<sup>227</sup> Nevertheless, this is an expected qualification as one could reasonably confuse Article 5 (2) (b) of the UCPD with the definition of success of a marketing campaign in a market-driven economy.<sup>228</sup> It is also one of the obstacles in the way of taking behavioural science seriously. Mainstream society generally accepts that if a product is marketed to a consumer in a fashion that induces him to purchase the product, it is a commercial success, provided the commercial practice stops short of outright deception.<sup>229</sup>

The scope of the material distortion of economic behaviour contemplated by Art 5 (2) (b) appears wide enough in theory to encompass the exploitation of cognitive biases and heuristics.<sup>230</sup> As illustrated in chapter two, such exploitation can indeed ‘appreciably impair the consumer’s ability to make an informed decision, thereby’ inducing ‘a transactional decision that he would not have taken otherwise’. If this is the case, there will have been a material distortion of economic behaviour as per

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<sup>224</sup> See A.-L. Sibony (note 51 above) pp. 85 - 86; The Commission Staff Working Document (note 32 above) provides no additional guidance on this matter; See 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’ (2007) where reference is made to what ‘would reasonably be expected of a trader in their field of activity’.

<sup>225</sup> Ibid; Art 2 (h) of the UCPD

<sup>226</sup> Ibid; Office of Fair Trading (OFT), 2007, Consumer protection from unfair trading regulations 2007 guidance – Draft guidance on the UK implementation of the Unfair Commercial Practices Directive; 10.4 p. 47

<sup>227</sup> S. Weatherill (note 152 above) p. 115; Ibid pp. 86 – 87

<sup>228</sup> See A. Tor, ‘Some challenges facing a behaviourally-informed approach to the directive on unfair commercial practices’ (2013) p. 15; See J. Trzaskowski (note 17 above) p. 380

<sup>229</sup> See A.-L. Sibony (note 51 above) p. 86

<sup>230</sup> Bearing in mind that the science of decision-making will advance and influencing methods will most likely become more sophisticated as time goes by.

Article 2 (e). Once more it is likely that some *nudges* will materially distort economic behaviour and fall within the scope of Art 5 (2) (b), while others will not.<sup>231</sup>

The flexibility and vagueness that characterises the test enunciated in Article 5 (2) leaves plenty of room for the consideration of behavioural science but it does not explicitly mandate its consideration either.<sup>232</sup> There can be no doubt that the door to a more robust role for behavioural science has been at least half opened. Articles 5 to 9, in addition to the Blacklist<sup>233</sup>, are unequivocally aimed at preventing market actors from exerting excessive influence over consumers' *freedom of choice*. The result is a number of entry points for *behavioural insights* to positively influence the application of the law.<sup>234</sup>

### 3.6 How the Average Consumer Test Works

According to Articles 5 to 9 of the UCPD, a practice is *ultimately* unfair if it causes the *average consumer* 'to take a transactional decision that he would not have taken otherwise'. The constitution of the *average consumer* can therefore be said to be fundamentally important to the UCPD, as it is the standard used to determine whether a commercial practice is unfair or not.<sup>235</sup> Consequently, it also functions as the standard that determines from what practices real consumers in the real world will eventually receive protection.

If a member state implements a particular national policy objective in the area of consumer protection that obstructs the free movement of goods within the internal market, it will have to be 'in line with the *principle of proportionality*'.<sup>236</sup> Part of which revolves around the *necessity* of the measure to protect consumers.<sup>237</sup> Basically, if the average consumer *needs* protection from harm, then such protection will be deemed *necessary* and therefore *proportionate*, provided the other

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<sup>231</sup> See A.-L. Sibony (note 51 above) p. 85

<sup>232</sup> Ibid p. 78

<sup>233</sup> See the paragraph below.

<sup>234</sup> See A.-L. Sibony (note 51 above) p. 87

<sup>235</sup> J. Trzaskowski (note 17 above) p. 383 – 383

<sup>236</sup> On maximum harmonisation see J. Trzaskowski (note 17 above) p. 379; See the Commission Staff Working Document (note 32 above) p. 25

<sup>237</sup> The other requirement is suitability and whether *less restrictive measures* are possible. See A.-L. Sibony (note 51 above) p. 73

requirements are also met.<sup>238</sup> Whether consumers require protection is determined by their ability to look after themselves, which is in turn influenced by the characteristics consumers are deemed to have. The average consumer standard fulfils this function. So, if a protective measure is aimed at protecting *real* gullible consumers who might be deceived by a commercial practice that the *average consumer* would understand for what it is, then that measure prohibiting that practice will be deemed *unnecessary* and *disproportionate*. Unless such gullible consumers qualify as *vulnerable consumers*, in which case the standard is modified to reflect the relevant vulnerability.<sup>239</sup> As already mentioned, vulnerability is dealt with in chapter 4.

Note, however, that Recital 18 of the UCPD explicitly provides that ‘the average consumer test is not a statistical test’.<sup>240</sup> Consequently, member states cannot necessarily save a contested measure by merely adducing expert scientific evidence indicating that a high percentage of consumers are being induced to act contrary to their best interests by a given commercial practice. As a result, it has been argued that the UCPD is ‘quite sceptical of empirical evidence’,<sup>241</sup> instead leaving it to ‘national courts and authorities ... to exercise their own faculty of judgment’.<sup>242</sup> Nevertheless, there is no reason why a judge cannot or should not take such evidence into account as she ‘exercise(s) (her) own faculty of judgement’ in ‘determin(ing) the typical reaction of the *average consumer* in a given case.’<sup>243</sup> This formulation is neutral in relation to behavioural science as the extent to which the one applying the test wishes to make use thereof is within their discretion.<sup>244</sup> The primary point of contention regarding the *average consumer* test is whether the fiction has been correctly calibrated to reflect the current state of behavioural science.<sup>245</sup> This criticism is best described by emphasising that unless the *average consumer* is made to labour under cognitive biases and heuristics, then any measure protecting real consumers from the

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<sup>238</sup> See A.-L. Sibony (note 51 above) pp. 72 – 73

<sup>239</sup> See S. Weatherill (note 152 above) p. 116

<sup>240</sup> See A.-L. Sibony (note 51 above) p. 77

<sup>241</sup> Ibid p. 100; See W.-H. Micklitz, ‘Unfair Commercial Practices and Misleading Advertising’, in N. Reich et al (eds), *European Consumer Law*, (2014) p. 100; Recital 18 of the UCPD makes it clear that no statistical test is to be conducted and that national courts are to exercise their own faculties of judgement.

<sup>242</sup> Recital 18 of the UCPD

<sup>243</sup> Ibid

<sup>244</sup> See A.-L. Sibony (note 51 above) p. 77

<sup>245</sup> See R. Incardona & C. Poncibò (note 18 above) p. 22 & 36; See J. Trzaskowski (note 17 above) p. 386

exploitation of their cognitive biases and heuristics will likely fail the *proportionality* test if tested by a court.

In reality, different consumers react very differently to the same commercial practice. As a result, the *average consumer* standard casts a protective net over only a select group of consumers that share certain characteristics with the average consumer.<sup>246</sup> The consumers that do not behave in a similar fashion to the *average consumer* may or may not receive protection as *vulnerable consumers*. But it is not guaranteed that consumers are one or the other and they may as a consequence find themselves without any protection at all.

### **3.7 The interplay between national courts and the ECJ in the application of the average consumer test**

The ECJ is known to make *normative* judgements using the ‘notional, typical consumer’ as a benchmark in order to analyse, among other things, ‘the general propensity of advertising measure(s) to produce misleading effects’, while national courts are left to utilise empirically sourced data as evidence specifically related to the challenged commercial practice.<sup>247</sup> More specifically, the ECJ will make a normative judgement as to whether there is a possibility that a commercial practice is misleading. If it decides that there is no such possibility then the domestic protection measure will be deemed unnecessary or unjustified and the enquiry ends.<sup>248</sup> It must be noted with very little detail provided regarding the reasoning employed by the court. If, however, it finds that it is potentially misleading, or at least does not exclude such a possibility, then it remits the decision to the national court to have the final say over whether the practice is indeed misleading.<sup>249</sup> While the relevant cases do not concern

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<sup>246</sup> See S. Weatherill (note 152 above) p. 115 – 116

<sup>247</sup> Recital 18 of the UCPD; Ibid p. 101; H.-W. Micklitz (note 240 above) p. 98 & 100; See also Case C-220/98, Estée Lauder [2000] ECR I-117 pp. 30 – 31 referred to in A.-L. Sibony (note 51 above) p. 101

<sup>248</sup> As was found by the ECJ in the following cases: Case C-470/93, [1995] ECR I-01923 at para 24, Case C-315/92 [1994] ECR I-00317 at para 23, Case C-238/89 [1990] ECR I-04827 at para 16 - 19, Case C-456/93 [1995] ECR I-01737 at para 28. These cases were arranged in this manner in J. Trzaskowski (note 17 above) p. 383 in footnote 28. The motivation being to support the statement that ‘Whenever the evidence and information before the European Court of Justice has seemed sufficient and the solution clear, it has settled the issue itself rather than leaving the final decision for the national court’.

<sup>249</sup> This approach was followed in: Case C-220/98, Estée Lauder [2000] ECR I-117 at pp. 30 – 31, Case C-303/97 [1999] ECR I-00513 at para 38, Case C-210/96 [1998] ECR I-04657 at para 36, Case C-

the UCPD as such, they do provide some insight into how the ECJ goes about determining whether a ‘trademark, promotional description, or statement’<sup>250</sup> is misleading to consumers. The *Lifting* case provides an illustration of this. The ECJ was *not* prepared to exclude the possibility that the *average consumer* could be misled despite an explicit finding that ‘at first sight, the average consumer – reasonably well informed and reasonably observant and circumspect – ought not to (be misled)’.<sup>251</sup> Instead it provided that:

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<sup>252</sup>

This leaves significant room for a national court to consult experts in the science of decision-making to shed light on the effects of a commercial practice.<sup>253</sup> This has significant implications for the type of role that evidence will play in proceedings where a commercial practice is alleged to be unfair, depending on the level at which the case is heard. Nevertheless, both these forms of reasoning can be enriched by *behavioural insights*. At EU level, the ECJ can benefit from an increased understanding of consumer decision-making in general terms while courts at national level can benefit from a scientific account of the effect a particular commercial practice has in a given case.<sup>254</sup>

### 3.8 Who is the Average Consumer?

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313/94 [1996] ECR I-06039 at para 27, C-373/90 [1992] ECR I-00131 at para 15, Case C-203/90 [1992] ECR I-01003 at para 20; See H.-W. Micklitz (note 240 above) p. 100 – 101; See A.-L. Sibony (note 51 above) p. 101; see J. Trzaskowski (note 17 above) p. 383 – 384

<sup>250</sup> see J. Trzaskowski (note 17 above) p. 383 – 384

<sup>251</sup> See Case C-220/98, *Estée Lauder* [2000] ECR I-117 at 30 where it was held that ‘although at first sight, the average consumer ... ought not to expect a cream whose name incorporates the term “lifting” to produce enduring effects’.

<sup>252</sup> See Case C-220/98, *Estée Lauder* [2000] ECR I-117 pp. 30 – 31; See A.-L. Sibony (note 51 above) p. 101 footnote 140; See recital 18 of the UCPD; See J. Trzaskowski (note 17 above) p. 384

<sup>253</sup> See J. Trzaskowski (note 17 above) p. 384

<sup>254</sup> *Ibid* p. 100 – 102; See J. Trzaskowski (note 17 above) p. 387

The defining features of the elusive *average consumer* have been discussed extensively. The objective behind this exercise is to establish the ‘vision of the consumer’ that is held by the ECJ and EU consumer law in order to, among other things, apply the above mentioned *average consumer test*.<sup>255</sup> Based on this vision one can then also speculate about the level of influence ascribed to behavioural sciences. The ECJ has assigned a number of characteristics to the ‘average consumer’ in its development of EU consumer protection jurisprudence.<sup>256</sup> Most notably, that the *average consumer* is ‘reasonably well-informed and reasonably observant and circumspect’.<sup>257</sup> However, it should not come as a surprise that in reality, ‘reasonably well-informed and reasonably observant and circumspect’ consumers also suffer from cognitive biases and heuristics. But is this reflected in the law?

If the ECJ were to rule, hypothetically, that the *average consumer* is subject to *status quo* bias, for example, it would obviously signal a strong intention on the part of the court to incorporate *behavioural insights* into its reasoning.<sup>258</sup> However, it is not quite as simple as this as the ECJ does not engage in this type of reasoning. Its concise judgements are relatively sparse in so far as providing a comprehensive account of its reasoning is concerned and therefore the standard appears to function more as a rule-of-thumb, as opposed to the court giving genuine substance to the notion of the *average consumer*. This allows the court ample room to manoeuvre depending on the case at hand. But the *average consumer* test is rendered less predictable as a result.<sup>259</sup> This increases the difficulty of speculating how receptive the ECJ will be to hard scientific evidence about consumer decision-making processes before litigants actually pursue this course of action.<sup>260</sup> Therefore, an empirical basis for the *average consumer’s* supposed tendencies is to be encouraged, as it may in turn foster greater predictability.

The general perception from the literature is that consumers are more or less rational<sup>261</sup> and ‘able to take care of (themselves) ... in the market by digesting and

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<sup>255</sup> See S. Weatherill (note 152 above) p. 120

<sup>256</sup> See R. Incardona & C. Poncibò (note 18 above) p. 22 & 29

<sup>257</sup> See Case C-210/96 Gut Springenheide [1998] ECR I-04657; See Recital 18 of the UCPD; See R. Incardona & C. Poncibò (note 18 above) p. 29 for more on the ECJ’s treatment of the *average consumer*.

<sup>258</sup> This was discussed in the PhD seminar referred to in note 37.

<sup>259</sup> Ibid

<sup>260</sup> See J. Trzaskowski (note 17 above) p. 391; See A.-L. Sibony (note 51 above) p. 75

<sup>261</sup> See S. Weatherill (note 152 above) p.123



acting upon information that is mandatorily supplied and, if necessary, withdrawing from a deal on reflection after “cooling off”.<sup>262</sup> However, all the characteristics that have been emphasised by the ECJ throughout its case law do not form a single, fully coherent neatly packaged *average consumer*.<sup>263</sup> The ECJ has, occasionally, been more sympathetic to the ‘consumer-as-victim’ and conjured up a less conscientious and more easy-going *average consumer*, whose attention span is subject to distraction.<sup>264</sup> Some weaknesses are explicitly recognised by legislative acts, such as in the case of *off-premises contracts* covered in the Consumer Rights Directive.<sup>265</sup> In these circumstances it is recognised that ‘(any) consumer may be under potential psychological pressure or may be confronted with an element of surprise’<sup>266</sup>. Although these remarks succeed in describing certain general tendencies of the average consumer, it is questionable how useful these generalised descriptions are from a practical point of view, considering how context specific the actual cases are. What exactly can be extrapolated from the fact that ‘reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase’<sup>267</sup>, for example, that is of general application to other cases that can be distinguished on the facts? Another commentator has merged a number of judgments of the ECJ to describe the *average consumer* as:

‘... Deemed to have enough slack in his mental bandwidth to be ‘reasonably well-informed and reasonably observant and circumspect’. This wise shopper is not seriously affected by the no-reading tendency; he will go online to check what is behind the small prints in an alluring advertisement and read food labels. He does not trust appearances and is not easily fooled by colours or size of promotional markings on a package.’<sup>268</sup>

While another commentator has offered that the average consumer is ‘... sensible, attentive and cautious, as well as able to analyse, critically and discerningly, the messages behind advertising and commercial practices in general.’<sup>269</sup> In this way a kind of psychological profile of the archetype *average consumer*, as per the judgements of the ECJ, has been developed. As already alluded to though, the

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<sup>262</sup> Ibid p. 121

<sup>263</sup> Ibid p. 117

<sup>264</sup> Ibid p. 115; such as was case in C-220/98, Estée Lauder [2000] ECR I-117

<sup>265</sup> Recital 21 of The Consumer Rights Directive 2011/83/EU

<sup>266</sup> Ibid; S. Weatherill (note 152 above) p. 121 – 122

<sup>267</sup> C-470/93, [1995] ECR I-01923 at 24

<sup>268</sup> See A.-L. Sibony & H. Geneviève, (note 45 above) pp. 214 – 215

<sup>269</sup> See R. Incardona & C. Poncibò (note 18 above) p. 30

usefulness of such profiling is open for debate. It may well be useful to think about the *average consumer* in these terms, but there may equally be other analytical tools that can contribute to a better understanding of the ECJ's reasoning as well as possibly to assist in determining which practices are unfair and which are not. For example, one could compare commercial practices with each other in order to determine to what extent they rely on a particular underlying bias or heuristic for their efficacy, despite appearing at face value as unrelated and therefore distinguishable on the facts. If commercial practices can be categorised or systematised in terms of their reliance on cognitive illusions, it can encourage recourse to *behavioural insights* and possibly shed some light on the ECJ's reasoning between the lines. Incidentally, judges are not impervious to the effects of biases either.<sup>270</sup> Nevertheless, as market actors often rely on similar strategies which become systemic within an industry, it may be possible to identify patterns in the practices they utilise that point to unfair commercial practices.

A possible illustration of this may be in relation to the UCPD's blacklist that contains a number of prohibited practices that target consumers' cognitive biases. For example, the *per se* proscription of 'falsely stating that a product will only be available for a very limited time' and 'claiming that the trader is about to cease trading or move premises when he is not' protect consumers against the effects of the *scarcity* heuristic.<sup>271</sup> That is, where the apparent scarcity of a product is used as a proxy for a determination of its value. The scarcer the product, including the ease with which it can be poached by a rival consumer, the greater the value placed upon it.<sup>272</sup> Other commercial practices that are based on the *scarcity* heuristic but that are distinct in the execution thereof and therefore outside the scope of the blacklist may be identified as unfair in this manner.

### **3.9 The World According to Consumers<sup>273</sup>**

#### **3.9.1 Introduction**

Under the following two sub-headings<sup>274</sup>, the contemporary market space is briefly

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<sup>270</sup> See A.-L. Sibony (note 51 above) p. 78

<sup>271</sup> See note 199 above.

<sup>272</sup> See note 200 above.

<sup>273</sup> A play on the title of the John Irving novel, *The World According to Garp*.

<sup>274</sup> That is, 3.9.2 and 3.9.3.

considered. Most importantly in this regard is the extent to which consumers are so out of their element that they are often perfectly willing to subject themselves to the control of market actors. The result of this is a high degree of dependency of consumers on market actors, which has profound implications for what it means to be an *autonomous* consumer. *Autonomy* in this context can be equated with the level of control that consumers have over the substance of a transaction. By placing the *area* that the UCPD seeks to regulate in a practical context, it becomes clear just how difficult it is to ensure genuine consumer *autonomy*.

Seeing as contracts are one of the principal vehicles facilitating commercial intercourse, in addition to the fact that the conclusion of a contract can be a choice-intensive activity (that is, several decisions lead up to the conclusion of a contract), this process is briefly explored. The intention is to scrutinise consumer behaviour in a practical context in order to determine the level of *autonomy* they enjoy in real terms. Finally, it is emphasised that *autonomy* does not exist in a vacuum. Increasing the level of control that consumers enjoy over transactional activities affects the transactional equilibrium that may ultimately have unintended consequences for them.

### **3.9.2 Rational or reckless consumers?**

*Behavioural insights* are not restricted to the *nudging* paradigm. *Nudging* is merely a tool that is informed by *behavioural insights*.<sup>275</sup> Therefore, in order to understand how receptive EU law is to *behavioural insights*, it is useful to explore the wider context or environment in which commercial transactions occur, rather than focusing exclusively on how market actors *nudge* or manipulate consumers.

It is not only the finitude of time and resources available to real consumers that put the habits or tendencies of the diligent *average consumer* beyond the reach of the quintessential working class hero.<sup>276</sup> Nor is it exclusively the result of cognitive biases and heuristics that operate automatically. Even after conscious (system 2) deliberation, a consumer might take what appears to be a reckless decision but that is in actuality

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<sup>275</sup> J.S. Lourenço et al (note 166 above) p. 10; recall that *behavioural insights* consist of the body of knowledge that has been accumulated from various scientific disciplines devoted to the study of human behaviour and associated decision-making processes.

<sup>276</sup> See R. Incardona & C. Poncibò (note 18 above) p. 35

entirely rational under the circumstances.<sup>277</sup> For example, it is widely understood – although somewhat disregarded by the law of contract – that consumers do not read standard form contracts.<sup>278</sup> The intuitive response of most readers to this is most likely that this is a bad or reckless decision on the part of consumers (at least before remembering when last they punished themselves by trying to read a contract). Nevertheless, the formation of a contract is founded upon an implied consensus in relation to a number of terms that despite being accessible for perusal frequently remain unread. According to one commentator, this is justified by the notion that ‘choosing not to read is a more meaningful surrender to the unread terms when there is an option to read than when the option does not exist’.<sup>279</sup> The *meaningfulness* is derived from the supposed respect accorded to the *autonomy* of the consumer who – now equipped with the necessary information – is left to make up her own mind.<sup>280</sup> That is, the consumer makes a conscious decision to refrain from exploiting the ‘opportunity to read’.<sup>281</sup> Or perhaps the decision is better characterised as an omission in that the consumer – who is aware of the risk, at least at an abstract level – cannot be bothered to read the contract.<sup>282</sup> It is interesting to note that the provision of information in this context is perceived as an autonomy-preserving mechanism, considering that market actors are perfectly aware of consumers’ disregard for contractual terms. There is no reason why market actors would not exploit this weakness, thereby undermining consumer *autonomy* in other ways.<sup>283</sup> Moreover, how is a consumer’s *equally autonomous* decision to enter into a contract, fully aware that the precise terms constituting the boilerplate will only become *accessible* to her post sale, any different?<sup>284</sup>

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<sup>277</sup> See O. Ben-Shahar, ‘The Myth of the Opportunity to Read in Contract Law’, ERCL, 1/2009 pp. 15 – 19

<sup>278</sup> Ibid p. 2

<sup>279</sup> Ibid p. 4

<sup>280</sup> See *ibid* p. 4 & 12 for a discussion on *meaningfulness* in this context.

<sup>281</sup> Ibid p. 5

<sup>282</sup> Ibid p. 15 where this is described as ‘a preference not to care’. It will be shown below at 3.9.3 that consumers are often indifferent or even appreciative of market actors’ nudges, such as when a particular option (including a contractual arrangement) is recommended.

<sup>283</sup> See O. Ben-Shahar (note 276 above) p. 15

<sup>284</sup> Ibid pp. 9 & 11 – 12; consumer autonomy can only be promoted by the availability of information if their decision-making process labored under a lack thereof in the first place. But if we accept, as the research indicates, that consumers generally do not read contracts regardless of the amount of time given for said contracts perusal, then regulatory measures designed to increase the accessibility of information are irrelevant in so far as consumer autonomy is concerned. See O. Ben-Shahar (note 276 above) p. 15.

One might be inclined to feel that consumers should be left to the wolves if they are so flagrantly blasé about the contracts they enter into. Perhaps they should. But upon closer inspection it becomes clear that the fictional contract-reading consumer, ironically, might just be the foolish one.<sup>285</sup> There are a number of reasons why choosing not to read a contract might be considered the wiser course of action. For one, real consumers are simply unable to grasp the ramifications of the terms they read.<sup>286</sup> They lack the legal knowledge and skill to evaluate choice of law clauses, for example, not to mention their inability to appreciate the probabilities surrounding the contingencies referred to in a contract.<sup>287</sup> Furthermore, even if they are unhappy with a particular clause they are hardly in a position to renegotiate.<sup>288</sup> Therefore, the opportunity cost of wasting precious time on an essentially pointless, painstaking examination of a contract can be considered to be too great.<sup>289</sup> This applies not only to contracts, but also to any transaction characterised by, among other things, complexity, novelty or simply a lack of interest.<sup>290</sup> Take the fact that there is convincing evidence that the success of professional financial advisors in picking stocks that yield returns is based on chance and not skill. Even more alarming is the claim that ‘the illusion of skill is not only an individual aberration; it is deeply ingrained in the culture of the industry’, which incidentally renders transactions relating to stock markets exceptionally conducive to consumer manipulation.<sup>291</sup> If most professionals have no clue, what are the chances for laypersons? Recognising this, consumers may find that the cost associated with making a particular decision under these conditions is not worth the trouble, possibly justifying their willingness to delegate the decision to another decision-maker, who in the case of a default rule is the initial *choice architect*, namely the market actor.<sup>292</sup>

Another factor that operates counter-intuitively is that so-called ‘bad’ terms (ie terms

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<sup>285</sup> Ibid p. 15

<sup>286</sup> See I Benöhr (note 43 above) p. 118; Ibid

<sup>287</sup> See E. Carolan & A. Spina, (note 72 above) p. 172; See O. Ben-Shahar (note 276 above) p. 16

<sup>288</sup> Joined cases C-240/89 to C-244/98 Océano [2000] ECR I-04941 at 25 where the ECJ holds that ‘the consumer is in a weak position vis-à-vis the seller or supplier as regards ...his bargaining power. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.’; See S. Weatherill (note 152 above) p. 122; See O. Ben-Shahar (note 276 above) p. 2; It is also worth noting in this regard that suppliers in a particular industry will usually offer similar terms and so it is not even open to a consumer to shop around for a better contract.

<sup>289</sup> See O. Ben-Shahar (note 276 above) p. 15 & 17; See J. Trzaskowski (note 17 above) p. 386

<sup>290</sup> See C.R. Sunstein (note 24 above) p. 14 for more reasons to choose not to choose.

<sup>291</sup> D. Kahneman (note 80 above) p. 216

<sup>292</sup> C.R. Sunstein, (note 24 above) p. 27

that are deemed to be unfavourable to consumers) in a contract usually result in lower prices for consumers.<sup>293</sup> In this regard it has been stated that ‘when individuals participate in transactions and enter into contracts, their desire is not necessarily to get the best legal terms. They want only the terms that are worth the price’.<sup>294</sup> Therefore, if market actors *nudge* consumers through the use of recommendations or default options for example, in order to save time or lower prices, then the manipulative methods employed might in fact be justified from a utilitarian perspective at least.<sup>295</sup> It is important, therefore, to keep this consumer eco-system in mind – where even a small change might have unintended adverse consequences for consumers down the line – especially considering the breakneck speed at which consumption occurs today. Similar concerns arise over additional costs that have to be carried by consumers when additional consumer protection measures are introduced. To add insult to injury, consumers who do not even need more protection in the first place are equally responsible for carrying these costs.<sup>296</sup>

Consider the following example from the health insurance industry<sup>297</sup>: Health insurers commonly employ wellness programs to encourage healthier lifestyles for their clients. The objective of a wellness programme is to reduce the number of claims by insured persons, as a result of the incentivised healthier lifestyle, in an effort to maximise the insurer’s profit. The incentives often take the form of discounts at a particular shop or the cinema for example. (So far so good). However, it is equally common for insurers to place slight obstacles in their clients’ way in order to reduce, with remarkable effectiveness, the number of clients that will actually utilise these discounts. So the insurer gets the best of both worlds: healthier clients without having to make good on the discounts that were offered. The mere requirement to register for discounts online has been known to deter a significant amount of consumers. The methods used draw extensively on *behavioural insights*. In fact, the entire insurance regime is built around *behavioural insights*, as the whole system of ‘cross-subsidisation’ would collapse if all the consumers obtained the maximum benefits

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<sup>293</sup> See O. Ben-Shahar (note 276 above) p. 15

<sup>294</sup> Ibid

<sup>295</sup> See C.R. Sunstein (note 24 above) p. 18 where he refers to *efficiency* as a justification for a particular choice architecture.

<sup>296</sup> A. Tor (note 227 above) p. 18

<sup>297</sup> Recalled from a conversation with an actuary currently working at an insurance company in the US, although the information is widely known. See O. Ben-Shahar (note 276 above) p. 20

possible from the wellness program.<sup>298</sup> Or the insurance premiums would have to increase to keep the system financially viable for the insurer. Considering that the rewards promised by these wellness programs are largely responsible for inducing consumers to opt for a particular insurer, it could be argued that these strategies to intentionally obstruct consumers from redeeming certain benefits are not as benign as they would have you believe. On the other hand, registering online is hardly a mountain to climb. So, provided the effect of the market actor's nudge is not genuinely harmful, there does not appear to be a pressing need for regulators to come to the aid of consumers against these manipulative activities. Losing out on a 20% discount on your next ticket to the cinema is harmless enough. Especially since the viability of the system depends on it. But the arguments for regulatory intervention become significantly stronger when consumer manipulation is accompanied by a genuine risk to consumers' fundamental rights.

### 3.9.3 'Choosing Not to Choose'<sup>299</sup>

Any discussion regarding consumer manipulation has to include the extent to which consumers *choose not to choose*, as this may reflect a willingness to be subjected to the influence of market actors. Is it not easiest when everything is taken care of by someone else?<sup>300</sup> The implications of this proposition for consumers' *personal autonomy* is analysed in the following section.

A dichotomy is often presented between *active* and *informed* choice by consumers on the one hand and their automatic responses to default rules on the other.<sup>301</sup> The latter can be located on a continuum between the slightest *nudge* and more extensive manipulation. Compelling an *active* choice from a consumer is therefore instinctively considered to promote *freedom of choice* while *nudging* the consumer into following a default option is less favourably received.<sup>302</sup> However, it is very common for consumers to *actively choose not to choose*, that is, they want to be defaulted into a particular choice. In its most extreme form, consumers pay large sums of money to

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<sup>298</sup> Ibid p. 16

<sup>299</sup> Sunstein uses this term throughout his article referred to in note 24 above. I have done the same.

<sup>300</sup> See the quote by Esther Duflo referred to below at 5.2.

<sup>301</sup> See C.R. Sunstein (note 24 above) p. 2

<sup>302</sup> Ibid

delegate their choices to others.<sup>303</sup> It must be emphasised, though, that choosing not to choose does not refer to an apathetic state in which a consumer fails to do anything about a pending choice but rather to the situation where a consumer either (legitimately) expects the choice to be made by another, or delegates the choice to another.<sup>304</sup>

*Freedom of choice* in the form of *active choosing* is generally seen as the safest option against the errors of well-meaning regulators as well as against the manipulative commercial practices of market actors.<sup>305</sup> This has, presumably, contributed to the EU's reliance on disclosure requirements, which generally encourages *active choosing*. Unfortunately, as already mentioned human decision-making does not allow for such a simple solution in all cases, as default rules can lead to significantly better end results for consumers than *active choosing*.<sup>306</sup> Therefore consumer welfare and *autonomy* do not always pull in the same direction. It is even possible that imposing an *active* choice on consumers can have a negative impact on their welfare where they lack the competence to decide in their own interests, in addition to disregarding their *autonomy*, by forcing them to choose where they would rather not.<sup>307</sup>

Nevertheless, it regularly happens that regulators and market actors force consumers to actively choose, in situations where they would rather not.<sup>308</sup> These are situations where consumers are perfectly willing to be defaulted into certain transactions but are denied this 'luxury' as their usually *implicit* 'choice not to choose' is rejected.<sup>309</sup> Obliging a consumer to make an active decision against their wishes or to their

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<sup>303</sup> For example, it is very common for consumers to seek the services of financial planners to manage their retirement investments. See C.R. Sunstein (note 24 above) pp. 3 – 4, 12 & 14 for a comprehensive list of reasons as to why consumers often avoid taking decisions themselves.

<sup>304</sup> Ibid p. 3; See also FN 7

<sup>305</sup> Ibid p. 27

<sup>306</sup> The outcomes are highly dependant on a number of variables such as the choice architect's agenda and competence as well as the consumer's attentiveness and capabilities, among other things.

<sup>307</sup> See C.R. Sunstein (note 24 above) p. 33

<sup>308</sup> Ibid. 3 – 4

<sup>309</sup> See the Esther Duflo quote below at 5.2; see C.R. Sunstein (note 24 above) pp. 4 – 5 where he refers to this as '*choice-requiring paternalism*'. It should also be noted that there are several possible permutations regarding active choices and default rules. One possibility is that a default option applies that a consumer can override with an active choice. Another is that a consumer must actively choose between a default rule and her personal preferences. Each possibility has its own implications for consumer autonomy. One must also distinguish between first-order and second-order decision-making. The former relates to the details of transactional choices themselves while the latter relates to choices about choices. In this regard see C.R. Sunstein & E. Ullmann-Margalit, 'Second-Order Decisions', (1998) p. 3



annoyance is not necessarily bad *per se*, but there should ideally be a valid justification for the paternalistic nature of such a choice requirement.<sup>310</sup> Moreover, there is no obvious reason why freedom of choice should not encompass the freedom to choose not to choose.<sup>311</sup> This leads to the somewhat ironic conclusion that it may be in the interest of consumer autonomy for market actors to decide for (or nudge) consumers, but only in so far as consumers desire this.<sup>312</sup> The difficulty, however, is that different consumers do not exhibit a uniform desire to choose or not to choose outside of very general tendencies.<sup>313</sup> So ideally, the level of consumer involvement in shaping their own destiny, including ‘choosers (who) choose not to choose’, should be left up to them.<sup>314</sup> *Personal autonomy* does not presuppose active decision-making in all situations but rather control over ‘whether and when to choose’.<sup>315</sup> Mandatory disclosure by market actors may be a good form of regulation in this regard to ensure that consumers are able to make second-order decisions about how actively to participate in the *choices* affecting their lives.<sup>316</sup>

Imagine a hypothetical scenario in which the technology that market actors use to forecast consumer preferences becomes so sophisticated that they can predict what consumers want to purchase with a success rate of virtually 100%.<sup>317</sup> There are several examples of this kind of technology currently in use such as Spotify’s Discover Weekly although with a significantly lower success rate at present. Nevertheless, for the purposes of the hypothetical example, entertain the idea that the consumer preference-predicting technology has been perfected. A certain bookstore, using this technology, automatically sends books to consumers, who can then either pay for the books they are happy with and willing to read, or return the titles they are unhappy with.<sup>318</sup> Note that even though consumers are entirely free to opt out of this arrangement at any time, the *choice architecture* is not as neutral as it may appear due to the forces of ‘inertia and the power of suggestion’.<sup>319</sup> As a result, some consumers

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<sup>310</sup> See C.R. Sunstein (note 24 above) pp. 3 – 4; 6; 16

<sup>311</sup> Ibid. 5

<sup>312</sup> Ibid p. 7 & 15

<sup>313</sup> Ibid. 6

<sup>314</sup> Ibid. 6 & 12

<sup>315</sup> Ibid. 15

<sup>316</sup> Ibid. 16

<sup>317</sup> Ibid p. 31

<sup>318</sup> See G Bensinger ‘Amazon wants to ship your package before you buy it’, *The Wall Street Journal*, (2014); The article refers to ‘anticipatory shopping’ that may rely on, among other things, ‘how long an internet user’s cursor hovers over an item’. See C.R. Sunstein (note 24 above) p. 10 & 31

<sup>319</sup> See note 213 for more on *consumer inertia*.

will not exercise their power to customise their choices away from the default option were the technology to malfunction, despite it being contrary to their best interests.<sup>320</sup> The consumers are essentially ‘defaulted into’ buying the books. Bearing in mind that the predictions are invariably correct (or almost), the costs of these decisions and potential mistakes are practically nothing.<sup>321</sup> So, it would be completely rational for consumers to defer their judgement to the bookstore in this instance, as they are virtually guaranteed to be satisfied with their purchases without having to expend any effort whatsoever. That is, being *defaulted into* these transactions leads to an entirely pleasing outcome for the consumer.<sup>322</sup> The level of influence exerted over the consumer may differ depending on the structure of the transaction but on some level decisions are being made for the consumer who has apparently chosen not to choose.<sup>323</sup> Perhaps, it could be argued that decisions are merely being made on behalf of the consumer, but that the consumer still determines the content of the decision, if only passively as the algorithm ‘reads’ the consumer. The efficacy of technology of this kind will determine to what extent this statement holds water but once more we find ourselves leaning towards the world of science fiction. This situation is analogous to the film, *Minority Report*, in which suspects are arrested, judged, and sentenced prior to committing crimes based on extremely sophisticated technology that is able to predict human action before it actually takes place. It is not surprising, however, that there is a natural resistance to empowering AI in such a way that it has any controlling influence over human behaviour and that keeping humans ‘in-the-loop’ and firmly in control is highly valued.<sup>324</sup>

Is the hypothetical bookstore described above not an example of a market actor ‘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’? After all, the consumer may well have chosen differently were he to frequent a bookstore in person. If so, it may describe a situation where an unfair commercial practice leaves a consumer completely satisfied.<sup>325</sup> Do

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<sup>320</sup> See C.R. Sunstein (note 24 above) p. 25

<sup>321</sup> *Ibid* p. 31

<sup>322</sup> *Ibid*

<sup>323</sup> *Ibid* p. 28 & 32

<sup>324</sup> See C.R. Sunstein (note 24 above) p. 31 for the results of an experiment illustrating this point; the idea of a ‘human-in-the-loop’ is taken from the literature on Lethal Autonomous Robotics (LARs) more relevant to the field International Humanitarian Law.

<sup>325</sup> Art 2 (e) in conjunction with Art 5 (2) (b) of the UCPD.

consumers need protection in these circumstances? The UCPD contains no requirement of harm or that consumers must act to their detriment in order for a commercial practice to be unfair. The only consequence the UCPD is concerned with is the ‘engineered’ change in the consumer’s mind as opposed to an adverse impact on the consumer’s welfare. Recall the distinction made in the introduction between the *causes* and *effects* of nudging, that is, the influence as such and the consequences thereof, with the latter acting as a *proxy indicator* for the former. This presupposes a causative relationship between consumer manipulation and the consequent welfare loss for consumers. But if consumers do not experience any detriment, then there is no causal chain to speak of and the manipulation can be said to be of a benign nature. It can therefore be argued that consumer manipulation is only relevant to the extent that it causes further adverse effects to consumers. So provided consumers are satisfied, who cares if they were manipulated or not?<sup>326</sup> According to this approach, *personal autonomy* is only necessary to the extent that market actors’ interests and consumers’ interests diverge, resulting in market actors manipulating or defaulting consumers into bad situations, leaving them unsatisfied at best, or prejudiced in a more serious way, at worst. The extent to which market forces will allow this type of conduct is unclear. One possibility is that ‘market pressures’ will keep market actors in line.<sup>327</sup> Another is that consumer manipulation will be rampant. The third and more likely possibility is somewhere in between these two poles.

### 3.10 Long Term Effects of Nudging

There is evidence that certain *nudges* may inhibit beneficial changes in the physiology and ultimately the functioning of the human brain.<sup>328</sup> One of the prototype *nudges* regularly used to illustrate the virtues of *nudging* is the GPS, which has in fact been shown to have this effect. It merely suggests to (or very gently *nudges*) a driver in a certain direction but the driver at all times retains a veto right. She can even mute it or switch it off if she were so inclined. It is hard to imagine a more innocuous method of *nudging*. Yet research has revealed that London cab drivers, identified as a group that

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<sup>326</sup> It is also possible that market actors will satisfy consumers even though they took advantage of the consumer in some way.

<sup>327</sup> See C.R. Sunstein (note 24 above) p. 24

<sup>328</sup> See E.A. Maguire, ‘Navigation-related structural change in the hippocampi of taxi drivers’, 97, PROC. NAT’L ACAD. SCI. 4398 (2000) p. 21

relies heavily on their natural navigational abilities, undergo structural changes of the brain as they develop these abilities in the course of their work.<sup>329</sup> The experiment's control group of ordinary drivers, who depend on GPS, do not undergo this learning process. It could, therefore, be argued that this benign *nudge* has prevented the latter group of drivers' navigational abilities from developing to its full potential, although there are obvious benefits to this trade-off. Moreover, there is no reason why this 'anti-developmental consequence' of *nudging* whereby human capacities stagnate or degenerate would not happen in relation to other capacities unrelated to navigation.<sup>330</sup> Is it not possible that this process can occur in a transactional environment, the result of which is 'to appreciably impair the consumer's ability to make an informed decision' and thereby constitute an unfair commercial practice?<sup>331</sup> What greater impairment can there be than structural changes (or the prevention thereof) to the human brain? If Amazon's anticipatory shopping or the like comes to fruition, which is a fairly moderate development in comparison to other possibilities found in the realm of science fiction, these ideas might not appear as far-fetched as they do now.<sup>332</sup>

## 4 Consumer vulnerability

### 4.1 Introduction

Up to this point, *vulnerable* consumers have only featured peripherally in the discussion surrounding the *average consumer*. Before moving onto the analysis of the legal protection of *vulnerable* consumers according to the UCPD, it is appropriate at this stage to introduce more detail on the relationship between *autonomy* and *vulnerability*. These two concepts are negatively correlated as more of the one means less of the other. One could even go as far as characterising it as an inverse *causal* relationship although proving this is outside the scope of this thesis. Basically,

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<sup>329</sup> Ibid p. 21

<sup>330</sup> See C.R. Sunstein (note 24 above) p. 21

<sup>331</sup> Art 2 (e) of the UCPD; 'ability' as it is used here includes potential ability or the capacity to develop one's abilities.

<sup>332</sup> The world created by Aldous Huxley in *Brave New World* is often referred to as an alternative reality that we may be heading towards. See C.R. Beitz, 'Human Dignity in the Theory of Human Rights': Nothing but a Phrase', *Philosophy and Public Affairs*, 2013) p. 280; also C.R. Sunstein (note 24 above) p. 22

*vulnerable* consumers enjoy less *autonomy* than other consumers.<sup>333</sup> The reason being, on a rudimentary level, that the more empowered you are, the more you can do what you want to. Conversely, the weaker you are, the less you are able to impose yourself on the world.<sup>334</sup> Furthermore, as a consumer's level of *vulnerability* increases their level of *autonomy* diminishes.<sup>335</sup> It is vitally important, however, to note that the *vulnerable* consumer referred to in the UCPD is a technical concept that must be distinguished from consumer *vulnerability* in general. The *narrow* description offered above of *vulnerability* as a position of weakness that a consumer occupies that affects the terms on which she is able to engage in commercial transactions is more consistent with the notion of the *vulnerable* consumer found in the UCPD.<sup>336</sup> While the broader description of *vulnerability* as *any* weakness a consumer might have that ultimately diminishes their *personal autonomy*, which extends beyond transactional *autonomy*, is more consistent with consumer *vulnerability* in general.<sup>337</sup>

There is a similar distinction that can be made between *autonomy*, in a more general sense, that refers to 'the ability to conduct one's life in a manner of one's own choosing' free from 'manipulative or distorting external forces'.<sup>338</sup> Which can be contrasted with a more immediate (or narrower) dimension to *autonomy* that relates to control over a *particular* transactional decision.<sup>339</sup> In the same way as *autonomy* is conceptualised narrowly in the UCPD as pertaining only to *transactional decisions*<sup>340</sup>, the *vulnerable* consumer standard is also conceptualised narrowly in the sense that it is only applicable in relation to commercial practices.<sup>341</sup> The interplay between these concepts is complex. The question deserving of an answer is whether *vulnerable* consumers are adequately protected and by extension what the implications are of their current level of protection, as it relates to their ability to conduct their lives *autonomously*.

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<sup>333</sup> Esther Duflo in S. Parker, 'Esther Duflo Explains Why She Believes Randomized Controlled Trials Are So Vital', The Centre for Effective Philanthropy (2011) available at [www.effectivephilanthropy.org/esther-dunflo-explains-why-she-believes-randomized-controlled-trials-are-so-vital/](http://www.effectivephilanthropy.org/esther-dunflo-explains-why-she-believes-randomized-controlled-trials-are-so-vital/)

<sup>334</sup> Ibid

<sup>335</sup> Ibid; these ideas are explored below under 5.2; See also I Benöhr (note 43 above) p. 113

<sup>336</sup> See M. Friant-Perrot (note 21 above) p. 90

<sup>337</sup> See M. Friant-Perrot (note 21 above) p. 94 – 98

<sup>338</sup> See ECtHR Judgement of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02 at para 62; J. Christman, 'Autonomy in Moral and Political Philosophy', in E.N. Zalta (ed.) *The Stanford Encyclopaedia of Philosophy*, (2015) URL = [Plato.stanford.edu/entries/autonomy-moral/#ConAut](http://Plato.stanford.edu/entries/autonomy-moral/#ConAut)

<sup>339</sup> Recall the critique above at 3.1 of the narrowness of the transaction test.

<sup>340</sup> Ibid

<sup>341</sup> See Art 5 (3) & Recital 18 of the UCPD

As stated, the following section concerns the protection of *vulnerable consumers*.<sup>342</sup> This includes a look at the functioning of the *vulnerable consumer test* as well as which consumers qualify as *vulnerable consumers* in accordance with the requirements of the UCPD. The different manifestations of *vulnerability* affecting consumers are also examined including the notion of cognitive biases and heuristics as a source of *vulnerability*.

## 4.2 The Vulnerable Consumer Test

One of the factors mitigating the *strictness* characterising the *average consumer test* is the fact that provision is made for consumers who for a number of reasons may not be as ‘reasonably well informed and reasonably observant and circumspect’ as the *average consumer*.<sup>343</sup> The UCPD provides additional protection for these *vulnerable consumers*.

Art 5 (3) of the UCPD is pertinent in this regard and reads as follows:

‘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...’

## 4.3 Cognitive illusions as a source of vulnerability

The potential of a cognitive bias or heuristic to render a consumer *abnormally* susceptible to a commercial practice makes *behavioural insights* imminently relevant to any discussion on consumer *vulnerability*. Biases and heuristics that enable *nudging* are present in several different forms to various degrees in different consumers. Therefore, a distinction must be made between those that affect the *average consumer* (that is, virtually all consumers) and those that only affect a particular group (that is, a vulnerable group). If the percentage of consumers that are susceptible to a particular *nudge* is sufficiently high, then we can no longer speak of a vulnerable group. The implication of this is that any possible revision of the benchmark test used to determine the unfairness of a commercial practice would

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<sup>342</sup> To be contrasted with *average consumers*.

<sup>343</sup> See Trzaskowski (note 17 above) p. 365

pertain to the general *average consumer* standard. Alternatively, if the target group is sufficiently small that we can speak of a ‘clearly identifiable group of (vulnerable) consumers’ as opposed to consumers in general, it may justify the assessment of the offending commercial practice ‘from the perspective of the average member of *that* (vulnerable) group’.

#### 4.4 Who is the vulnerable consumer?

The *vulnerable consumer* is a fairly novel concept in EU Consumer law.<sup>344</sup> While its place within the legal framework is now fixed, its substantive content has not fully crystallised.<sup>345</sup> As already mentioned, it is a vehicle used by the EU legislator to allow for the protection of certain consumers, whose conduct is at variance with that of the notional *average consumer*.<sup>346</sup> As stated, the point of departure for EU Consumer law is that a functional and free single market enables the *average consumer* to optimally fulfil her own interests.<sup>347</sup> Conversely, where a group of consumers is unable to participate on these terms, the group is considered *vulnerable* and in need of additional protection. This is not the same thing as the difference between the *real* average consumer and the *fictional* average consumer described above. Instead, *vulnerability* refers to a type of consumer with an identifiable feature that renders them more *vulnerable* than another consumer, who does not suffer from the same impediment. This is reflected by the reference in the UCPD to the ‘age, mental or physical infirmity or credulity’ of a consumer in the determination of *vulnerability*.<sup>348</sup>

The application of these criteria can be problematic due to the ambiguity that characterises a feature such as *credulity*. As all consumers are credulous to some degree, it is unclear at what point a consumer is so credulous as to be considered *vulnerable*. Credulity is simply not empirically quantifiable.<sup>349</sup> Moreover, some commentators have raised concerns that explicitly identifying old age as a source of *vulnerability* might entrench this perception and increase the risk that elderly persons might suffer further encroachments on their personal liberties ‘for their own good’.<sup>350</sup>

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<sup>344</sup> See M. Friant-Perrot (note 21 above) p. 89

<sup>345</sup> Ibid p. 94

<sup>346</sup> Ibid p. 93

<sup>347</sup> Provided that certain other conditions are met such as the availability of information; See M. Friant-Perrot (note 21 above) p. 90; See R. Incardona & C. Poncibò (note 18 above) p. 30

<sup>348</sup> See M. Friant-Perrot (note 21 above) p. 90

<sup>349</sup> See R. Incardona & C. Poncibò (note 18 above) p. 28

<sup>350</sup> Ibid p. 29

This critique is merely a variation on the arguments against paternalistic regulation.<sup>351</sup> Nonetheless, over-protection (as opposed to under-protection) of elderly consumers is probably the lesser of two evils. Especially since the *vulnerable consumer* standard is only used to test the fairness of commercial practices. It does not impede any consumer's activities as they consume in real time.

From the two references to *vulnerability* in the UCPD it would appear that the text does not perceive the kind of archetype human being as *vulnerable*, despite the prevalence of cognitive biases and heuristics that render this real *average consumer* susceptible to *nudges* by profit-hungry market actors. Moreover, consumers who are not as 'reasonably well informed and reasonably observant and circumspect' as the *average consumer* are not necessarily *vulnerable consumers*.<sup>352</sup> The effect of this is that there are not only two groups of consumers, namely, average consumers and vulnerable consumers. There is a third group of consumers whose behaviour deviates from the *average consumer* norm but whose form of vulnerability is not recognised by the law. As such, they do not qualify as *vulnerable consumers*. Instead, the criteria listed in Article 5 (3) as potential *causes* of *vulnerability* are all based on physiological or psychological deficiencies of the human person.<sup>353</sup> No mention is made, however, of any limitations of the causes of a deficiency.<sup>354</sup> This is significant as a person can be excessively credulous for a number of reasons including factors that are extrinsic to the human person.<sup>355</sup> For example, it may be easier to *nudge* an indigent and uneducated person than a professor in behavioural economics or psychology.<sup>356</sup> While it is not entirely clear to what extent other considerations such as consumers' socio-economic circumstances will factor into a determination of *vulnerability*, a number of developments have occurred that point to a recognition of the relevance of these factors.<sup>357</sup> Ideally, the influence of such factors *should* be taken

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<sup>351</sup> Ibid

<sup>352</sup> See R. Incardona & C. Poncibò (note 18 above) p. 28

<sup>353</sup> It is interesting to note that Recital 19 of the UCPD refers to 'certain characteristics such as ...' which is indicative of an open list in contradistinction to Art 5 (3) which is constructed as a closed list with a set criteria.

<sup>354</sup> See M. Friant-Perrot (note 21 above) p. 92

<sup>355</sup> Ibid; See the Commission Staff Working Document (note 32 above) p. 30 for a non-binding interpretation to the effect that: 'credulity as a criteria of vulnerability 'protect(s) members of a group who are for *any* reason open to be influenced by certain claims. An example might be members of a group who, because of particular circumstances, might believe certain claims more readily than others.'

<sup>356</sup> This is not to say that education will necessarily nullify a cognitive bias. Certain nudges might actually depend on a high level of education for their efficacy.

<sup>357</sup> See M. Friant-Perrot (note 21 above) p. 93



into account to the extent that it manifests into a ‘loss or lack of autonomy in consumption choices’<sup>358</sup> or to the degree that the commercial practice in combination with these factors ‘appreciably impair(s) 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’.<sup>359</sup> There is no obvious reason why consumers of this kind should not qualify as a ‘clearly identifiable group ... who are particularly vulnerable’ so long as their economic behaviour is (or is likely to be) materially distorted.<sup>360</sup> This approach is consistent with the idea that ‘*vulnerability aggregates multiple situations* in which a person’s autonomy should be restored in the name of the principle of dignity’ [emphasis added].<sup>361</sup>

## 4.5 Other Requirements to qualify as a vulnerable consumer

### 4.5.1 Foreseeability

The *foreseeability* requirement attached to Article 5 (3) of the UCPD is such that a departure from the *average consumer* standard against which to test the (un)fairness of a commercial practice is only justified to the extent that ‘the trader could *reasonably* be expected to foresee’<sup>362</sup> the relevant material distortion of economic behaviour.<sup>363</sup> The kind of *foreseeability* that is contemplated by Art 5 (3) is qualified by the standard of *professional diligence* as per Art 5 (2).<sup>364</sup> The objective of *reasonable* foreseeability is to remove anomalous, arbitrary or random occurrences from the purview of unfair commercial practices such as an absurd or irrational belief held by ‘a few consumers that (for example) ... (all) Spaghetti Bolognese (is) actually made in Bologna’.<sup>365</sup> This objective is fair enough. However, in the vast majority of cases market actors are perfectly aware of the effects that their commercial practices have on various consumers. In fact, companies expend considerable resources to

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<sup>358</sup> See M. Friant-Perrot (note 21 above) p. 92 where the author mentions that ‘persons in a pathological situation or out of the ordinary, who are not able to properly exercise their rights and freedoms, are thus vulnerable ones.’

<sup>359</sup> Art 2 (e) of the UCPD

<sup>360</sup> Art 5 (3) of the UCPD

<sup>361</sup> See M. Friant-Perrot (note 21 above) pp. 89 – 90

<sup>362</sup> Art 5 (3) of the UCPD

<sup>363</sup> See M. Friant-Perrot (note 21 above) p. 92

<sup>364</sup> According to Art 2 (h) of the UCPD: ‘professional diligence means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/ or the general principle of good faith in the trader’s field of activity.’

<sup>365</sup> See M. Friant-Perrot (note 21 above) p. 92

determine which commercial practices will bring about their intended result. So the fact that consumers can be *foreseeably* and predictably irrational is not captured by the superlative Spaghetti Bolognese example, the exploitation of which may constitute unfair commercial practices.<sup>366</sup>

#### 4.5.2 Identifiability as a Group

The reference in Article 5(3) of the UCPD to ‘*only* of a clearly identifiable group’ [emphasis added] that appears to contemplate only *one* particular group that is or is likely to be affected by a commercial practice can be misleading. In reality, the exploitation of a cognitive bias is likely to affect a wide array of consumers and the efficacy of the *nudge* will vary greatly between them as a result of consumer heterogeneity.<sup>367</sup> This will impact the constituency of the *vulnerable* group. Instead of having a number of similarly situated persons it is more probable that a heterogeneous group will form that shares a similar *vulnerability* for the commercial practice but to different degrees. They may also appear not to have much else in common at face value. Establishing the existence of a ‘clearly identifiable group of consumers’ might therefore prove difficult in the context of *nudging*. It could also be a result of clumsy drafting as opposed to a legislative intention to require a neatly defined group of homogenous consumers that are disproportionately affected by a commercial practice while all other consumers are more or less impervious to it.

#### 4.6 Vulnerability in the narrow sense

It has been pointed out that the UCPD’s *vulnerable consumer* should be distinguished from the broader notion of consumer *vulnerability*. However, this is *not* to say that there is no connection between the two. On the contrary, there is a definite connection between consumer *vulnerability* and commercial practices that prey upon such *vulnerability*. In the context of the UCPD, a consumer cannot be generally *vulnerable*. A consumer can only be *vulnerable* in relation to a specific commercial practice.<sup>368</sup>

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<sup>366</sup> See the Commission Staff Working Document (note 32 above) p. 31; D. Ariely (note 97 above)

<sup>367</sup> S. Weatherill (note 152 above) p. 115; the complete phrase reads as follows: ‘Commercial practices which are likely to materially distort the economic behavior only of a clearly identifiable group of consumers...’

<sup>368</sup> See Art 5 (3) & Recital 18 of the UCPD

Although *disability* and *vulnerability* are two distinct concepts in law, various parallels may be drawn such as the idea that both are *relational* terms used to describe a relationship between a consumer (or a subject) and their environment as opposed to focussing on the individual characteristics of a group of consumers in isolation.<sup>369</sup> This would provide support for the notion that *vulnerability* should be determined in terms of the relationship between the commercial practice and the relevant characteristics of consumers, as opposed to focussing only on the characteristics of the consumers in and of themselves. Recital 18 of the UCPD reflects this approach as it suggests that *vulnerability* refers only to a specific characteristic (or characteristics) displayed by an *identifiable group of consumers* that render them uniquely susceptible to a particular commercial practice.<sup>370</sup> This is important as the idea of *vulnerability* evokes images of a helpless victim who is easily manipulated due to an acute defect of some kind, when in fact a fully functional person might as easily succumb to a crafty *nudge*. As already mentioned, no human being is immune from cognitive biases and heuristics.

#### **4.7 Vulnerability in the wider sense**

The concept of *vulnerability* appears in several other contexts throughout the EU legal landscape.<sup>371</sup> Outside of the UCPD context, *vulnerability* no longer refers exclusively to a weakness in the face of a particular commercial practice. This is where one sees the broader notion of consumer *vulnerability* played out. Wider concerns are addressed such as ensuring the rights of generally *vulnerable* groups to food, housing and health in order to bring about, among other things, ‘the restoration of consumers’ *autonomy*, by giving effect to certain fundamental rights’.<sup>372</sup> Where consumers are *vulnerable* in this broader sense there is the increased danger that a *nudge* will both exploit their *vulnerability* and exacerbate their situation, paving the way for more *nudging* of this kind. There is evidence of a correlation between the *vulnerability* of consumers in the broad sense (that is, consumers who are unhealthy or destitute for

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<sup>369</sup> See M. Friant-Perrot (note 21 above) p. 90; this was emphasised by Anna Bruce during a series of lectures at Lund University regarding the UN Convention on the Rights of Persons with Disabilities.

<sup>370</sup> See M. Friant-Perrot (note 21 above) p. 91

<sup>371</sup> See M. Friant-Perrot (note 21 above) pp. 94 – 98 for examples.

<sup>372</sup> Autonomy in this context is used in a wider sense than merely in relation to decision-making.

example) and an increased *vulnerability* to their cognitive biases.<sup>373</sup> This illustrates how seemingly innocuous *nudging* can obstruct the realisation of fundamental rights. It is therefore not only the act of *nudging* that is problematic but also the effects thereof. This evidences a merging of the two stages of nudging that have been referred to throughout this thesis, namely, the *nudge* itself and the effect(s) thereof.

## 5 The IHRL implications of *nudging*

### 5.1 Introduction

Several concerns regarding the IHRL implications of *nudging* have been introduced above. In keeping with the emphasis on the manipulative element of *nudging* rather than the final result thereof, a number of human rights arguments are considered in this chapter to determine whether there is a human right to *personal autonomy*. Drawing on legal philosophy, *personal autonomy* is conceptualised as part of the right to privacy as well as *human agency*. Following which the case law of the ECtHR is analysed in relation to the content it has instilled into the notion of (or right to) *personal autonomy*. The purpose of this is to construct a discussion that draws on both theoretical assertions as well as more practical findings by the ECtHR. A robust, well-defined right to *personal autonomy* would arguably encourage stronger regulation of manipulative marketing practices. At the very least it would provide some more guidance on the issue.

The influence of consumer *vulnerability* is as pertinent to this discussion on account of its potential to undermine human *agency*, *freedom of choice* and *personal autonomy*. In order to expand on this connection, the provision of credit to financially *vulnerable* consumers is examined shortly. An important distinction is made between an *autonomous* decision-making process, that is, *freedom of choice* on the one hand and the ability to behave *autonomously* in the sense that it is possible to physically carry out that decision on the other. Both aspects fall within the scope of *personal autonomy* as either one is rendered meaningless to the extent that the other is undermined. The human rights law implications attach more obviously to the ability to carry out a decision, or usually to the *inability* to carry out a decision. In a wider

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<sup>373</sup> See M. Friant-Perrot (note 21 above) p. 98

context this translates to ‘the ability to conduct one’s life in a manner of one’s own choosing’.<sup>374</sup> Although it is argued throughout this thesis that the decision-making process itself is equally important due to the inextricable connection between the two. It is merely that the effects are more visible as they manifest in the real world as opposed to within the minds of consumers.

## 5.2 Providing credit to financially vulnerable consumers

It is widely understood that excluding consumers from access to credit perpetuates financial and social exclusion.<sup>375</sup> This in turn impedes a more comprehensive realisation of other human rights and ultimately diminishes *consumer autonomy*.<sup>376</sup> On the other hand, over-indebtedness can lead to similar results, as has been emphasised by the Council of Europe in a recommendation titled ‘Legal Solutions to Debt Problems’, in which it states that ‘owing to its complex nature, over-indebtedness may lead to social, health and legal problems for individuals and families and may put children’s basic needs at risk.’<sup>377</sup> It also recognises that ‘paying great attention to human rights and dignity’ is an essential condition to any legal solution to debt problems.<sup>378</sup> Note the explicit recognition that adverse financial impacts can compromise human dignity.<sup>379</sup> Furthermore, *consumer autonomy* is virtually extinguished when an over-indebted consumer’s capacity to spend money is reduced or even suspended.<sup>380</sup> Consumers who find themselves in either of these two situations described above are severely burdened and their ability for *autonomous* commercial engagement and ultimately an *autonomous* life is likewise diminished. There are other less obvious consequences, however, that may be overlooked. A keen observation has been made that:

From our position of being reasonably well off and comfortable ... we tend to be patronising about the poor in a very specific sense, which is that we tend to think, “Why don’t they take more responsibility for their lives?” And what we are forgetting is that the richer you are the less responsibility you need to take for

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<sup>374</sup> See ECtHR Judgement of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02 at para 62.

<sup>375</sup> I. Benöhr (note 43 above) p. 110 & 125

<sup>376</sup> *Ibid* p. 113

<sup>377</sup> The Council of Europe, Explanatory Memorandum to Recommendation on Legal Solutions to Debt Problems; adopted by the Committee of Ministers of the Council of Europe on 20 June 2007 pp. 9 – 10

<sup>378</sup> *Ibid* pp. 9 – 10

<sup>379</sup> It is for this reason that it is a common feature of insolvency law that certain necessities cannot be attached in the normal course of events such as beds and clothing.

<sup>380</sup> I Benöhr (note 43 above) p. 113

your own life because everything is taken care for you. And the poorer you are the more you have to be responsible for everything about your life . . . My lesson is to stop berating people for not being responsible and start to think of ways instead of providing the poor with the luxury that we all have, which is that a lot of decisions are taken for us. If we do nothing, we are on the right track. For most of the poor, if they do nothing, they are on the wrong track.<sup>381</sup>

It is ironic that financial *vulnerability* can lead to more choices – or require more mundane decision-making – about daily necessities that are usually taken for granted. Choices concerning how to acquire food and clean water should not take up a significant amount of time or effort.<sup>382</sup> This may not be an entirely appropriate analogy in an EU context. But it illustrates the value to consumers of external forces that take responsibility for some choices in consumers' lives as it allows them to allocate their finite resources to aspects of their lives that they are genuinely interested in, thereby advancing their *autonomy*.<sup>383</sup> In this manner freedom *from* choice can actually promote consumer *autonomy*. It is the *vulnerable consumers* who do not have the luxury to *choose not to choose*.

Regardless, the capacity for *autonomous* commercial engagement and the concomitant *autonomy* that this facilitates in a consumer's life more generally is irrelevant, if their decision-making process is hijacked by a market actor.

### 5.3 Is there a human right to personal autonomy?

#### 5.3.1 Introduction

The notion of individual or *personal autonomy* manifests itself in many guises in different contexts. This includes IHRL as well as other bodies of national and international law.<sup>384</sup> However, there is no explicit reference to 'autonomy' *per se* in

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<sup>381</sup> This quote is attributed to Esther Duflo in S. Parker, 'Esther Duflo Explains Why She Believes Randomized Controlled Trials Are So Vital', The Centre for Effective Philanthropy (2011) available at [www.effectivephilanthropy.org/esther-dunflo-explains-why-she-believes-randomized-controlled-trials-are-so-vital/](http://www.effectivephilanthropy.org/esther-dunflo-explains-why-she-believes-randomized-controlled-trials-are-so-vital/); CR Sunstein (note 24 above) p. 26

<sup>382</sup> C.R. Sunstein (note 24 above) p. 26

<sup>383</sup> Ibid; Sunstein mentions some examples of what is taken care of for consumers that might be taken for granted.

<sup>384</sup> See generally N.R. Koffeman, '(The Right to) Personal Autonomy in the Case Law of the European Court of Human Rights (note opgesteld ten behoeve van de staatscommissie Grondwet)', External

the core human rights law treaties. Therefore, if one is to rely on *personal autonomy* as a counter-weight to the manipulation of consumers, it is necessary to establish its status in law. This is possible through the various interpretations that have been attributed to, among other things, the rights to privacy and human dignity from which the notion of *autonomy* is derived.<sup>385</sup> Short of a self-standing right to *personal autonomy*, the argument could also be made that *personal autonomy* permeates IHRL as an underlying notion or a general principle of law that is visible through an aggregation of several rights.<sup>386</sup> Other terms are also used to describe, very broadly, ‘the capacity of individuals to determine their own lives’ such as self-determination and self-direction.<sup>387</sup>

### 5.3.2. Personal Autonomy as part of The Right to Privacy

One of the underlying justifications for the right to privacy is its function as a precondition for individual *autonomy*.<sup>388</sup> So the latter depends on the former. This function is premised on the idea that privacy is an essential component of an environment in which consumers are able to conduct themselves *autonomously*. Outside of a consumption context this phenomenon has been notoriously described in terms of a Panopticon.<sup>389</sup> A Panopticon is a type of prison that is designed in a particular shape that ‘allows all (the) inmates of an institution to be observed by a single watchmen without the inmates being able to tell whether or not they are being

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Research Report, (2010); autonomy features in debates regarding abortion, euthanasia, sexual life and many more.

<sup>385</sup> *Consumer autonomy* is referred to fairly commonly in the literature without a sound theoretical underpinning of the concept, as a kind of after thought or side issue; see E. Carolan & A. Spina (note 72 above) p. 163 where the author refers to a quote in R. Post, ‘Three Concepts of Privacy’, Georgia Law Journal, 2087 (2001) on the nebulous nature of the right to privacy that reads as follows: ‘Privacy is a value so complex, so entangled in competing and contrary dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.’ The right to dignity is no less vague. While this presents a challenge for anyone attempting to establish the existence of a concrete right to personal autonomy, it is also an opportunity as the limits of the relevant rights are open for debate.

<sup>386</sup> N.R. Koffeman (note 383 above) p. 6

<sup>387</sup> See C.R. Beitz (see note 331) p. 286; See also E. Carolan & A. Spina (note 72 above) p. 162

<sup>388</sup> Ibid. pp. 163 – 164

<sup>389</sup> Ibid p. 164; The Panopticon is the brainchild of the philosopher and social theorist, Jeremy Bentham.

watched.’<sup>390</sup> While the guard on duty is unable to observe all the inmates simultaneously, the inmates – who are aware of the prison’s structure – must assume that they are under constant surveillance, as they have no way of determining which inmate is the subject of the guard’s gaze. The effect of which is that significant influence is exerted over the behaviour of all the inmates, thereby diminishing their potential for genuinely *autonomous* decision-making.<sup>391</sup> The restriction on the prisoners’ rights to privacy and by extension on their *autonomy* may or may not be justified, but the infringement on both is incontrovertible. Perhaps this is a very convoluted way of saying simply that people behave differently and therefore cannot genuinely be themselves when they are being watched. Therefore, privacy is essential to *autonomy*. In the context of consumption there is an even greater risk to *autonomy*, as the exposure in itself of consumers to the prying eyes of market actors enables personalised behavioural targeting based on the data collected in the process of commercial intercourse.<sup>392</sup>

There is a growing awareness of this as evidenced by the concern that has been expressed over the control that external, commercially driven forces have over the personalised content that is delivered to individual Internet users.<sup>393</sup> Is it not disconcerting that ‘different users are shown different Google results, news stories, ads, Amazon recommendations and even prices’, based on indicators such as the presumed affluence of a user that has been gleaned from data concerning the neighbourhood in which they reside.<sup>394</sup> Or that Pandora Internet Radio, a music streaming service in the US, may air the advertisements of Democrat candidates to users who listen to hip-hop music, for example, and air the advertisements of Republican candidates to those who listen to country music.<sup>395</sup> Not to mention the increased use of artificial intelligence and sophisticated algorithms, that transcends any human capability to analyse data and use it to influence consumer behaviour.<sup>396</sup>

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<sup>390</sup> This is quoted from Wikipedia at [en.wikipedia.org/wiki/Panopticon](http://en.wikipedia.org/wiki/Panopticon), again with the necessary precautions regarding its veracity.

<sup>391</sup> Ibid. See also E. Carolan & A. Spina (note 72 above) p. 164

<sup>392</sup> ‘Exposure’ here refers to the ease with which information about consumers can be obtained. Note also that while big data is obtained *legally* in many instances it can still be used to usurp the *choice architecture* of a consumer to a degree that may compromise their ability to think for themselves.

<sup>393</sup> See generally E. Pariser, *The Filter Bubble: What the Internet is Hiding from You*, New York: Penguin Press, (2011)

<sup>394</sup> Ibid; See E. Carolan & A. Spina (note 72 above) p. 165

<sup>395</sup> This is an example pertaining to the US but it is relevant nonetheless; N. Singer, ‘Listen to Pandora, and It Listens Back’, *The New York Times*, (2014); C.R. Sunstein (note 24 above) p. 12

<sup>396</sup> See E. Carolan & A. Spina (note 72 above) p. 165 & 168



The ECJ has emphasised that “mass data collection (using means currently at the disposal of market actors) ‘may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life ... places of residence, daily or other movements, the activities carried out ... and the social environments frequented by them.’”<sup>397</sup> This allows even greater precision when refining *choice architecture*, as market actors do not rely only on cognitive biases that humans are prone to generally but also on the particularities of individual consumers.<sup>398</sup>

The *marketplace* has long since expanded beyond physical markets and shopping malls. It has migrated into cyberspace and ultimately into consumers’ personal space such as their ‘always-on, always-receiving, always-transmitting’ phones, laptops, and tablets.<sup>399</sup> Essentially, market actors are bringing the market to you, wherever you are. However, some have argued that notwithstanding the fact that a consumer googled and then purchased a product in the privacy of their home, ‘the Internet projects that activity out into the world of commerce’ in which privacy concerns are less valid.<sup>400</sup> Regardless, the means available to market actors to manipulate the environment in which consumption takes place are becoming increasingly sophisticated and will continue to do so with the rapid development of new technologies.<sup>401</sup> As a result, the control that market actors exercise over the *choice architecture* that consumers have to navigate, and often cannot realistically get away from, is growing exponentially.<sup>402</sup> The culmination of which is a convergence or a ‘catching-up’ of the ability to manipulate consumers with the age-old intention of doing so, which does not bode well for consumer *autonomy*.

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<sup>397</sup> Joined Cases C-293/12 and 594/12 Digital Rights Ireland [2015] QB 127 para 27; See E. Carolan & A. Spina (note 72 above) p. 167

<sup>398</sup> See E. Carolan & A. Spina (note 72 above) p. 167

<sup>399</sup> See TR Julin, ‘Sorrell v IMS Health – May Doom Federal Do Not Track Acts’ (2011) 10 Privacy and Security Law Reporter p. 2; See E. Carolan & A. Spina (note 72 above) p. 161

<sup>400</sup> See TR Julin, (note 398 above) p. 7

<sup>401</sup> This includes the use of algorithms and artificial intelligence to process the ‘digital tsunami’ as a result of which ‘our everyday behaviour is recorded in a digital form that makes it potentially susceptible to external scrutiny and supervision’; See E. Carolan & A. Spina (note 72 above) p.161 & 168

<sup>402</sup> See TR Julin, (note 398 above) p. 7 where he states that ‘consumers have the option of shutting themselves off from this contact’. But, is going ‘off the grid’ really a realistic option?

Autonomy has been described as the ‘right to be let alone’.<sup>403</sup> In a commercial context this might translate into a right to conduct one’s affairs in peace, by limiting *unwarranted* tampering with the relevant *choice architecture*. Of course some degree of *choice architecture* is inevitable and businesses are perfectly entitled to design and construct their own websites, for example.<sup>404</sup> But not at the expense of consumers’ free will.<sup>405</sup> According to this approach, the prevention of certain intrusions into the consumer’s life, secures the necessary privacy to ensure that ‘an individual ... is capable of making her own choices ... (according to) her own will’.<sup>406</sup> There can be no genuinely *autonomous* action on the part of a consumer where a market actor has usurped their will.<sup>407</sup>

### 5.3.3 Personal Autonomy as part of Agency

Another argument for the preservation of *personal autonomy* is based on the notion of human *agency*. One of the primary criticisms of *nudging* is that defaulting consumers into certain transactions, even if this results in a welfare gain on their part, nevertheless undermines their *agency*.<sup>408</sup> This philosophical claim is based on the idea that

To be an agent, in the fullest sense of which we are capable, one must (among other things) choose one’s own course through life – that is, not be dominated or controlled by someone or something else (call it ‘autonomy’).<sup>409</sup>

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<sup>403</sup> S. Warren & L. Brandeis, ‘The Right to Privacy’, Harvard Law Review, Vol. 4 Issue 5, (1890) p. 193; See also E. Carolan & A. Spina (note 72 above) p. 164 – 167 for a critique of this negative conceptualisation of autonomy or simply negative autonomy. The author describes a more robust right to ‘positive autonomy’ that requires positive action through law to facilitate an individual’s autonomous participation *within* society. As this process deals more with the establishment of an environment that is conducive to social interaction, its scope is much broader than consumption and therefore outside the scope of this thesis. It must be noted, however, that this more robust version of autonomy provides stronger support for the assertions made in the body of the text.

<sup>404</sup> R.H. Thaler & C.R. Sunstein (note 1 above) p. 3

<sup>405</sup> See E. Carolan & A. Spina (note 72 above) p. 169]. ‘Free will’ is merely used as a benchmark to indicate an acceptable level of consumer autonomy.

<sup>406</sup> E. Carolan & A. Spina (note 72 above) p. 164

<sup>407</sup> Ibid p. 165; This sentiment is echoed by Art 5 (2) (b) of the UCPD that renders any commercial practice unfair that, provided all the other conditions are met, ‘materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer’.

<sup>408</sup> C.R. Sunstein (note 24 above) p. 22

<sup>409</sup> See J Griffin; ‘First Steps in an Account of Human Rights’, in *On Human Rights* (2008) p. 33 which is quoted in S.M. Liao, ‘Agency and Human Rights’, Journal of Applied Philosophy (2009) p. 1; the quote continues to mention other essential elements of human agency, of which autonomy is merely one.

This element of *agency* is understood as *autonomy*. The position of the broader notion of *agency* in relation to the philosophy of human rights has been described as follows<sup>410</sup>:

What seems to me the best account of human rights is this. It is centred on the notion of agency. We human beings have the capacity to form pictures of what a good life would be and try to realise these pictures. We value our status as agents especially highly, often more highly even than our happiness. Human rights can then be seen as protections of our agency.<sup>411</sup>

This quote encapsulates the idea that agency can be equated to the freedom to pursue ‘a worthwhile life’ as well as to decide what constitutes ‘a worthwhile life’ which is most important, rather than the actual attainment of ‘a good or happy or perfected or flourishing life’.<sup>412</sup> A more clichéd explanation is that it is the pursuit of happiness that is facilitated by *human agency* rather than happiness itself.

According to this theory, ‘the notion of agency alone is sufficient for determining the content of human rights’.<sup>413</sup> The general idea being that the various rights protected by IHRL, in particular the rights to life and freedom of expression among others<sup>414</sup>, are essential to and therefore emanate from *human agency*. One cannot speak of an agent if the candidate for agency is no longer alive or unable to express herself, for example.<sup>415</sup> While there is some disagreement as to whether *agency* on its own is capable of underpinning the entire theoretical framework of human rights, the value in ensuring *human agency* is incontrovertible.<sup>416</sup> A world in which people have no agency may well resemble Huxley’s *Brave New World*.<sup>417</sup>

### 5.3.4 Personal Autonomy according to the jurisprudence of the ECtHR

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<sup>410</sup> S.M. Liao (note 408 above) p. 1

<sup>411</sup> J. Griffin, ‘Discrepancies between the best philosophical account of human rights and the international law of human rights’, (2001) p. 4 referred to by S.M. Liao (note 408 above) p. 1

<sup>412</sup> S.M. Liao (note 408 above) p. 1; J Griffin (note 410 above) p. 4

<sup>413</sup> See S.M. Liao (note 408 above) p. 5; Note this is Liao interpreting the work of Griffin and not Liao’s own opinions.

<sup>414</sup> Liao agrees with Griffin that these two rights may well be derived from ‘the notion of agency’.

<sup>415</sup> See S.M. Liao (note 408 above) p. 2

<sup>416</sup> *Ibid* pp. 2 – 3

<sup>417</sup> See C.R. Beitz (note 331 above) p. 280 and C.R. Sunstein (note 24 above) p.22 who both reference Huxley’s *Brave New World*.

The ECtHR has referred to *personal autonomy* in a number of different contexts and in relation to a number of different rights.<sup>418</sup> While the term *personal autonomy* does not explicitly feature in the core human rights instruments it is deemed to derive from, among other things, the rights to human dignity and privacy.<sup>419</sup> In a dissenting judgment in a case concerning ‘the legal recognition of a transsexual’s post-operative gender’ it was held that:<sup>420</sup>

‘The right to (personal) self-determination ... is at the basis of several of the rights laid down (in the Convention), especially ... the right to respect for private life under Article 8. Moreover, it is a vital element of the “inherent dignity” which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.’<sup>421</sup>

From this quote one gets a sense of the vagueness that shrouds the notion of *personal autonomy*.<sup>422</sup> Firstly, it is not entirely clear whether *self-determination* and *personal autonomy* are used interchangeably or whether they cover different aspects of an individual’s *personal freedom*.<sup>423</sup> The ECtHR has referred to both concepts in close proximity to each other without explaining the relationship between the two. Nevertheless, the Court equates *personal autonomy* with ‘the ability to conduct one’s life in a manner of one’s own choosing’, which appears to correspond to the dictionary definition of *self-determination*, namely, ‘the process by which a person controls their own life’.<sup>424</sup> Secondly, and arguably the primary point of contention relating to this description of *self-determination* is the offhand reference to a *right* that can be somewhat misleading. The classification of an entitlement as a *right* has significant implications for the role it can play in the operation of the law and therefore it is problematic to refer to a right when the existence of such right is not a settled matter.<sup>425</sup> It is doubtful whether a claim before the ECtHR could be successfully based purely on an infringement of the right to *personal autonomy* (or

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<sup>418</sup> See N.R. Koffeman, (see note 383 above) p. 62

<sup>419</sup> ECtHR Judgement of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 a.o., dissenting opinion of Judge Van Dijk, para. 5.

<sup>420</sup> ECtHR Judgement of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 para 45

<sup>421</sup> ECtHR Judgement of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 a.o., dissenting opinion of Judge Van Dijk, para. 5.; note that this quote, along with a number of others in this part of the thesis were collected and analysed in a similar manner by N.R. Koffeman (see note 383 above) in her work on *personal autonomy*. Her work has no relation to unfair commercial practices or consumer protection though.

<sup>422</sup> See N.R. Koffeman (note 383 above) p. 8

<sup>423</sup> *Ibid* p. 16; Koffeman argues they are different.

<sup>424</sup> ECtHR judgement of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 62; A. Stevenson & C.A. Lindberg, *New Oxford American Dictionary*, Oxford University Press, (2010)

<sup>425</sup> See N.R. Koffeman (note 383 above) p. 8 – 10

*self-determination*), where it is not positioned as an element of another Convention right.<sup>426</sup> Although, the ECtHR has on a number of occasions referred to ‘the *right* to personal autonomy’ as encompassed by the right to private life, including in a grand chamber decision.<sup>427</sup> However, on other occasions the ECtHR has referred to *personal autonomy* as a *notion* rather than a *right*.<sup>428</sup> In a majority decision pertaining to assisted suicide the ECtHR has decided that:

‘Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the *notion* of personal autonomy is an important principle underlying the interpretation of its guarantees.’<sup>429</sup>

This suggests that the ECtHR considers *personal autonomy* to be a general principle of law, bearing in mind that a *notion* carries less gravitas than a *right* per se.<sup>430</sup> It must be pointed out that in later case law the ECtHR categorically stated that *personal autonomy* underpins not only the interpretation of the right to private life but also the interpretation of the Convention as a whole, in order to emphasise the *freedom of choice* that derives from the freedom of assembly and association.<sup>431</sup> In fact, *freedom of choice* can be seen as a recurring theme throughout the ECHR.

In a case concerning marital rape, the ECtHR has held in a majority ruling that ‘the very essence of ... the fundamental objectives of the Convention ... is respect for human dignity and human freedom’.<sup>432</sup> The notion of *human freedom* logically encompasses *personal autonomy* to some extent. Countless descriptions of what it means to be an autonomous and free individual have been given such as the following from a dissenting judgment of Judge Martens where he opined that ‘human dignity and human freedom imply that a man should be free to shape himself and his fate in

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<sup>426</sup> Ibid p. 8

<sup>427</sup> ECtHR judgement of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 71; ECtHR judgement of 20 March 2007, *Tysiack v. Poland*, appl. no. 5410/03, para 107; ECtHR judgement of 1 May 2009, *Kalacheva v. Russia*, appl. no. 3451/05, para. 27; N.R. Koffeman (note 383 above) p. 8 & 10

<sup>428</sup> See N.R. Koffeman (note 383 above) p. 9

<sup>429</sup> ECtHR judgement of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 6.; Ibid p. 6

<sup>430</sup> See N.R. Koffeman (note 383 above) p. 5 & 9

<sup>431</sup> ECtHR [GC] judgement of 11 January 2006, *Sørensen and Rasmussen v. Denmark*, appl. nos. 52562/99 and 52620/99 para 54; ECtHR judgement of 27 April 2010, *Vördur Olafsson v. Iceland*, appl. no. 20161/06, para 46; Ibid pp. 6 – 7

<sup>432</sup> ECtHR judgement of 27 September 1995, *C.R. v. the United Kingdom*, appl. no. 20190/92, para 42; See N.R. Koffeman (note 383 above) p. 5

the way that he deems best fits his personality’.<sup>433</sup> This culminates in a complex web of terms relating to, or used interchangeably with personal autonomy, defined in some cases and left unresolved in others, that are often very context specific.<sup>434</sup> As a result it is difficult to draw general conclusions that are applicable in other situations with certainty. Furthermore, the operationalising of these abstract notions into concrete boundaries, that set the limits of market behaviour, is an exceedingly complicated task.<sup>435</sup>

It is necessary to concede that *personal autonomy* has as yet not featured in any disputes concerning consumer protection. It has also not been used to protect the decision-making process as such but rather to enable ‘individuals to choose how to live their own lives’ (or the ability to act out a decision).<sup>436</sup> However, it can be argued that where the decision-making process is unduly manipulated, the ability to ‘choose how to live’ is also diminished. This approach is consistent with the description of *personal autonomy*, in the context of disability, provided by the CoE’s Commissioner for Human Rights that ‘personal autonomy is ... about having control of your life and the possibility to make decisions and have them respected by others.’<sup>437</sup> Furthermore, it has only featured in cases regarding some of the most sensitive and high-stakes decisions that human beings are capable of making. These include decisions pertaining to the manner in which a person chooses to die, sexual behaviour, becoming a parent and gender identity to name a few.<sup>438</sup> However, it is difficult to assign a qualitative value or weight to a decision in relation to another.<sup>439</sup> The decision over which chocolate bar to buy is clearly less important than the decision to

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<sup>433</sup> ECtHR judgement of 27 September 1990, *Cossey v. the United Kingdom*, appl. no. 10843/84, dissenting opinion of Judge Martens para 2.7; This case also dealt with the ‘legal recognition of gender reassignment’ (See para 5.5 of the judgment); N.R. Koffeman (note 383 above) p. 5

<sup>434</sup> See J. Marshall, *Personal Freedom Through Human Rights Law? Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Boston: Martinus Nijhoff Publishers (2009) p. 89, 96 and 97; N.R. Koffeman (note 383 above) pp. 41 – 42

<sup>435</sup> See N.R. Koffeman (note 383 above) pp. 7 – 8 where reference is made to the *intangible* nature of personal autonomy.

<sup>436</sup> *Ibid* p. 56

<sup>437</sup> Commissioner for human rights, human rights and disability: equal rights for all, Strasbourg, 20 October 2008, CommDH/IssuePaper(2008)2, original version para 5.2; N.R. Koffeman (note 383 above) p. 60

<sup>438</sup> See Koffeman (note 383 above) p. 17, 26, 33, 42; see the cases of *Pretty* (note 423 above); *Evans* (note 426 above); *Cossey* (note 432 above) and ECtHR judgement of 19 February 1997, *Laskey, Jaggard & Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93.

<sup>439</sup> Take note, however, that the ECtHR does situate different types of choices differently within the concept of private life, as some are considered more intimately connected to an individual’s private life than others. See A. Pedain, ‘The Human Rights Dimension of the Diane Pretty Case’, in: *The Cambridge Law Journal*, 62(1), (2003) p. 193; See N. R. Koffeman (note 383 above) p. 19.

discontinue treatment for a life threatening illness.<sup>440</sup> But some commercial transactions can have disastrous consequences spanning a lifetime and affecting whole families. Furthermore, a series of transactions taken in the aggregate can profoundly influence consumers' lives even if each transaction, taken in isolation, has a negligible impact on consumer welfare. It is submitted, therefore, that the right to (or notion of) *personal autonomy* has a role to play in the context of consumer law in so far as the decision-making capacities of consumers are at stake in light of the serious consequences that may follow.

This is not necessarily to say that a claim on the basis of a state's inadequate protection of consumers' rights to *personal autonomy* can be successfully argued before the ECtHR or the ECJ today. But the justiciability or otherwise of a right to *personal autonomy* does not decide the matter. These marketing activities are in a stage of infancy – at least as far as the science of decision-making is concerned – which can be expected to become increasingly ubiquitous and more sophisticated. It is essential therefore that these developments are closely followed and that regulators take a proactive approach. Furthermore, the instinctive or visceral feelings that one might have upon hearing of these manipulative tactics employed by market actors is insufficient reason (on its own) to warrant a clamp down on such activities. It is therefore necessary to engage with these arguments early on in order to ensure that any course of action that is or is not taken is well-reasoned, well-researched and in line with the empirical scientific facts that have emerged from the study of decision-making.<sup>441</sup>

An essential question is whether commercial activity that a consumer engages in falls within the scope of *personal autonomy*.<sup>442</sup> Or rather, is a consumer's *personal autonomy* at stake during the course of commercial dealings? A related (or perhaps the first) question that needs to be answered is whether commercial actions and decisions can fall within a consumer's private life.<sup>443</sup> The ECtHR has repeatedly held

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<sup>440</sup> See N.R. Koffeman (note 383 above) p. 15

<sup>441</sup> See T.R. Julin, (note 398 above) p. 2

<sup>442</sup> There are examples of activities that fall outside the scope of personal autonomy. For instance, the ECtHR has ruled that 'hunting (is) too far removed from the personal autonomy of the applicants' and there could thus be no interference with the right to private life. Part of its reasoning was that 'hunting is, by its very nature, a public activity'. See ECtHR decision of 24 November 2009, *Friend and Countryside Alliance and others v. the United Kingdom*, appl. nos. 16072/06 and 27809/08 para 43; See N.R. Koffeman (note 383 above) p. 12

<sup>443</sup> See T.R. Julin, (note 398 above) p. 7

that ‘the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and *psychological integrity* of a person’.<sup>444</sup> It is possible therefore that significant manipulation of a consumer, as a result of a certain *choice architecture* that is imposed on such consumer in a manner that cannot easily be avoided, may fall within the scope of private life. This possibility is supported by a further ruling that: ‘Under article 8 of the Convention in particular, where the notion of *personal autonomy* is an important principle underlying the interpretation of its guarantees, protection is given to the *personal sphere* of each individual...’<sup>445</sup> Bearing in mind that the focus remains on the consumer’s decision-making process to which there is undoubtedly an element of privacy. Commercial negotiation would be completely redundant if the contracting parties were privy to each other’s thoughts. A far-fetched but useful illustration may be the blockbuster Sci-Fi film, *Inception*. The plot turns on a form of commercial espionage where an idea is artificially planted into someone’s head while making them believe it was their idea in the first place. The objective behind this being to close a deal that the target of such espionage may not be willing to accept otherwise. However public the eventual transaction may be, there can be no doubt that such artificial meddling with an individual’s decision-making process constitutes a breach of their privacy and their *personal autonomy*. In the film, the protagonists virtually enter the mind of their victim, which obviously belongs to the realm of fantasy (at least for now). But the principle remains.

## 6 Concluding Remarks

That market actors will go to great lengths to maximise profits is a *truism* that needs no mention. It has been persuasively argued, in this regard, that market actors routinely take advantage of consumers precisely ‘because of the operation of the *invisible hand*, not in spite of it’.<sup>446</sup> In other words, not only are *free markets* not a guarantee against this type of behaviour but instead, encourage it. Added to this are a

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<sup>444</sup> See ECtHR judgement of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02 at para 61 where reference is made to ECtHR judgement of 26 March 1985, *X and Y v. the Netherlands*, appl. no. 8978/80 para 22

<sup>445</sup> See N.R. Koffeman (note 383 above) p. 45; See ECtHR [GC] judgement of 11 July 2002, *I. v. the United Kingdom*, appl. no. 25680/94 para 70 which concerned the ‘legal recognition of (the applicant’s) post-operative sex’.

<sup>446</sup> C.R. Sunstein, ‘Why Free Markets Make Fools of Us’, *The New York Review of Books*, October 22 2015. Sunstein reviews ‘Phishing for Phools’, a book by George Akerlof and Robert Shiller.



number of other factors, in recent times, which greatly improve the means of market actors to achieve their objectives. Technological advances and an evolving marketplace have had a profound impact. But most importantly in the context of this thesis, progress in the scientific study of decision-making and the resulting *behavioural insights*, have provided market actors with yet another advantage over consumers. Many would say an unfair advantage. In response to these *behaviourally informed commercial practices*, the question has been posed: How receptive is the EU's regulation of unfair commercial practices to *behavioural insights*? As the legislative act within the EU Consumer Protection framework that is most apt to counteract these marketing activities, the UCPD was analysed in order to determine the level of protection that consumers enjoy against behaviourally savvy market actors.

The analysis showed that *behavioural insights* are indeed making their way into EU Consumer Protection Law. The extent or pace at which this is happening, however, is open for debate. The aim of the UCPD is to protect the integrity of consumers' decision-making processes and their *freedom of choice*, by limiting the degree of influence that market actors can exert over them. It evidences a clear legislative intention to promote the *personal autonomy* of consumers. By restricting the type of *choice architecture* that market actors can set for consumers, there is a kind of cap on how much control market actors can have over consumers' decision-making ability. Moreover, the blacklist explicitly prohibits a number of behaviourally informed commercial practices (or practices that constitute *nudges*). This presupposes some form of understanding or underlying assumption of human behaviour. The question triggered by this is how does the ECJ's understanding of human behaviour differ from psychologists' understanding of human behaviour. As *behavioural insights* is an empirical account of actual human behaviour in the real world, one would hope that the ECJ's understanding of consumer behaviour corresponds as closely as possible to the scientific account thereof.<sup>447</sup> In practical terms, while psychologists are unanimous that *framing* effects influence consumer decisions for example, does the ECJ recognise this? Until a case is heard regarding the (un)fairness of a commercial practice that resembles a *nudge*, commentators will have to fish for clues in the

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<sup>447</sup> D. Kolm (see note 15 above) p. 17

reasoning of the court. Moreover, as the number of biases and heuristics are so numerous, the judicial recognition of one does not imply the recognition of another.

Even if the ECJ fails to appreciate how effective a particular *nudge* can be or alternatively finds that a particular *nudge* is a fair commercial practice, the legal machinery is there to prohibit commercial practices that excessively influence consumer behaviour. It is merely for litigants to convince the relevant court that the *contested commercial practice* exerts the requisite level of influence.<sup>448</sup> There is a danger, however, that for so long as market actors can *nudge* indiscriminately by targeting a bias that the ECJ fails to recognise, consumers that do suffer from the bias will likely suffer adverse impacts. Nevertheless, the problems pertaining to the composition of the *average consumer* are not insurmountable. The benchmark is not set in stone and it is conceivable that cognitive biases and heuristic may in time come to form of a part of the *average consumer's* personality.

It is encouraging that the UCPD protects *vulnerable* consumers. The hope is that even if the ECJ finds that the *average consumer* is not affected by a particular cognitive bias that a *vulnerable consumer* is. However, it is not clear to what extent cognitive biases and heuristics can serve as the source of a *vulnerable consumer's vulnerability*. The UCPD's narrow conceptualisation of *vulnerability* as a weakness affecting commercial engagement only, mirrors its narrow focus on *transactional decisions*. That is, the UCPD's focus on maintaining the integrity of *transactional decisions*, possibly neglects other decisions removed from the scope of the UCPD but that are nevertheless influenced by commercial practices. This reveals one of the weaknesses of the UCPD in that it fails to take the bigger picture into account. *Vulnerability* and *autonomy* are both limited to the *transactional decision*, thereby leaving out the far-reaching implications of these notions beyond the commercial setting on the realisation of a number of other human rights. A fair rebuttal to this point is that the UCPD is designed to protect consumers within a commercial context only. It is not a human rights instrument. One could therefore fairly question whether it is for the EU legislator to promote the realisation of human rights through a consumer protection instrument. This is not to undersell the obligations that the EU has in this regard. It is merely a question whether it is the appropriate vehicle to achieve it.

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<sup>448</sup> See J. Trzaskowski (note 17 above) p. 391; See A.-L. Sibony (note 51 above) p. 75

The most vexing question is *the tipping point* at which a market actor crosses the red line separating *nudges* that fairly influence consumers from those that unlawfully manipulate consumer decision-making.<sup>449</sup> This *tipping point* operates on two levels. The one concerns the level of influence exerted over the consumer, that is, at what stage has a consumer's will been supplanted by the will of another? The second concerns the normative dimension according to which a court must decide what level of influence is unfair. This is where the science and the law converge. Practically, this relates to the spectrum referred to in the introduction ranging from thoughtless supermarket product arrangements on the one end to elaborate plots to deceive consumers on the other. Where on this spectrum does a *nudge* become an unfair commercial practice? The relative thresholds are described in the UCPD but only in very general terms. For example, what *degree* of impairment is required to "appreciably impair (the) consumer's ability to make an informed decision"?<sup>450</sup> As a result, it is only when the analysis moves from a study of *nudging* in general to particular *nudges* that these *tipping points* can be established.

The introduction to the thesis includes a dichotomy between the action of *nudging* as a *cause* and the ultimate result of the *nudge* as an *effect*. In the Starbucks example referred to above, the manipulation in the mind of the consumer that induces him to buy an extra large beverage containing 25 teaspoons of sugar is part of the *cause*, while drinking it and possibly becoming obese over time is the *effect*. The focus throughout has been on *nudging* as a *cause* rather than the subsequent *effects* thereof. The relative novelty of *nudging* as a *means* to influence consumer behaviour seemed a more meaningful subject of research considering that the same *effects* can be achieved using other means. That is, the *means* are novel but the *effects* are not. While traders have been blatantly scheming consumers into bad deals since the beginning of time, the *novelty* of *nudging* is in its subtlety, which has the potential to produce insidious effects that may be overlooked or underestimated at first glance. It takes only the slightest modification to *choice architecture* to achieve very significant results.<sup>451</sup> From an enforcement perspective, concentrating on the *means* of *nudging*, that is, the assault on the will of a consumer that undermines their *personal autonomy*, is very useful in relation to the UCPD as its objective is to preserve the integrity of

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<sup>449</sup> See J. Trzaskowski (note 17 above) p. 387 & 391

<sup>450</sup> Article 2 (e) of the UCPD

<sup>451</sup> R.H. Thaler & C.R. Sunstein (note 1 above) pp. 3 – 4

*transactional decisions*. However, from a human rights perspective it is a less promising strategy as discovered in response to the second research question. Namely: What International Human Rights Law obligations does the EU have to protect the *personal autonomy* of (vulnerable) consumers against *behaviourally informed commercial practices*? This question is contextualised by a brief discussion regarding the relationship between *autonomy* and *vulnerability*. The inverse causal relationship that exists between these two concepts is emphasised as well as the profound implications that this has for the protection of *personal autonomy*.

When a pattern of systemised *nudging* leads to large-scale adverse impacts on consumers' human rights, the road to enforcement is fairly clear in the sense that the particular right that has been infringed can be utilised as a cause of action. Consumer organisations can sue regulatory authorities, for example, for failing to adequately protect the right to health of consumers against market actors who have contributed to the obesity epidemic referred to above. Again, this might be a somewhat superlative example but the point is clear enough. The substantive content of the right to health is well established within IHRL jurisprudence and proving negative impacts on health is feasible. However, where the cause of action is based on an infringement of the *personal autonomy* of consumers, enforcement becomes significantly more difficult. More has to be done to establish the existence of an obligation by states to protect *consumer autonomy*. Moreover, manipulation occurs within the mind of the consumer and so without an external manifestation thereof it may not be feasible to prove that it has even occurred. As a result, in so far as IHRL is concerned, it is a tactically wiser decision to focus on the *effects* of the *nudge* rather than the act of *nudging* itself. However, problematic enforcement does not mean that human rights law is not engaged. The substance of a right is no less valid due to difficulties relating to its enforcement or justiciability.

Three arguments were advanced to establish a human rights obligation on member states of the EU to protect the *personal autonomy* of consumers. Two of these are of a more theoretical nature and can be said to derive from legal philosophy, while the third pertains to the jurisprudence of the ECtHR for a more practical perspective grounded in *hard law*. The first argument hinges on the right to privacy as a precondition for *personal autonomy*. Where market actors take over consumers' *personal space*, usually by means of technology, their power as *choice architects*

grows immensely. Moreover, as consumers cannot realistically escape from their own *personal space*, they are left at the mercy of these market actors. The second argument is based on the idea that the various rights protected by IHRL are essential to and therefore emanate from *human agency*. Agency in this context refers to the freedom to pursue ‘a worthwhile life’ as well as to decide what constitutes ‘a worthwhile life’, free from the interference of external forces.<sup>452</sup> The point of this argument is to emphasise the value in ensuring *human agency*. Finally, the ECtHR conceptualises *personal autonomy* as part of the right to private life whereby ‘protection is given to the *personal sphere* of each individual’<sup>453</sup>, which includes the *psychological integrity* of consumers. Aggressive *nudging* may well compromise the *psychological integrity* of consumers.<sup>454</sup> The ECtHR also hints at a self-standing right to *personal autonomy*. It is conceded above that *personal autonomy* has never been used in a commercial context by the court and it is therefore unclear to what extent these findings can be transplanted to a different context. The definition of *personal autonomy* as ‘the ability to conduct one’s life in a manner of one’s own choosing’<sup>455</sup> has a global character as opposed to being descriptive of a single *transactional decision*. Nevertheless, considering the potentially life-altering consequences that commercial transactions may have, there is no cogent reason why the *personal autonomy* of consumers should not be protected in these circumstances. While establishing a human rights obligation to protect the *personal autonomy, human agency and freedom of choice* of consumers is an important step, more is required to use these notions to set precise limits for acceptable market behaviour. This will also require the analysis of specific nudges as opposed to nudging in general.

The greatest obstacle in the way of tighter control over market actors’ use of *nudging* is that consumers so often want to be *nudged*. Life is simply easier that way. Choices can be a burden and there are other things that consumers would rather spend their time on.<sup>456</sup> It has been said that the ‘simple making available of a choice is not enough to ensure that the individual actually understands, is aware of or has engaged with the

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<sup>452</sup> See S.M. Liao (note 408 above) p. 1; J Griffin (note 410 above) p. 4

<sup>453</sup> See N.R. Koffeman (note 383 above) p. 45; see ECtHR [GC] judgement of 11 July 2002, I. v. the United Kingdom, appl. no. 25680/94 para 70 which concerned the ‘legal recognition of (the applicant’s) post-operative sex’.

<sup>454</sup> See ECtHR judgement of 29 April 2002, Pretty v. United Kingdom, appl. no. 2346/02 at para 61 where reference is made to ECtHR judgement of 26 March 1985, X and Y v. the Netherlands, appl. no. 8978/80 para 22

<sup>455</sup> See ECtHR Judgement of 29 April 2002, Pretty v. United Kingdom, appl. no. 2346/02 at para 62.

<sup>456</sup> See C.R. Sunstein (note 24 above) p. 26

issues involved—all of which would be necessary for the choice to be genuinely autonomous'.<sup>457</sup> But is this always practical? Once more it seems that the *effect* of a *nudge* trumps its *cause* from a human rights point of view. That is, without an accompanying welfare loss of some kind, any human rights claim based on an infringement of *personal autonomy* is unlikely to succeed.

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<sup>457</sup> See E. Carolan & A. Spina (note 72 above) p. 170

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