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Abstract

Directive 2005/29/EC on Unfair Commercial Practices was adopted on 11 May 2005 to help consumers benefit from the Internal Market by removing regulatory barriers, deriving from divergent national rules, which discouraged firms from selling and undermined consumers’ trust in buying across the EU. It provides for a high level of consumer protection in all sectors and works as a safety net that fills the gaps, which are not regulated by other EU sector-specific rules. As far as some practices are not regulated by specific Food Law rules, Directive 2005/29/EC ensures also that foodstuffs consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, thus enabling consumers to make informed and meaningful choices.

Key words: Directive 2005/29/EC, Food Law, Consumer protection, unfair commercial practices

I. Introduction

Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market was adopted a decade ago with the purpose of harmonising the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors: “in line with the principle of proportionality, this Directive [2005/29/EC] protects consumers from the consequences of such unfair commercial practices where

they are material but recognises that in some cases the impact on consumers may be negligible.”

The new law harboured many expectations and was welcomed when it came into force. Legal experts wrote numerous articles heaping the most unaccustomed and eloquent praise on the new legislation, or at the very least, highlighting the ‘need’ for it and its likely effectiveness. It is worth recalling that Directive 2005/29/EC was expected to help particularly with strengthening European consumer trust in cross-border transactions.

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2 See the sixth recital of Directive 2005/29/EC, which also states that the Directive neither covers nor affects national laws on unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders: “taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so”.

3 See also VIDRERAS PÉREZ, C., “¿Por qué no se regulan las prácticas comerciales desleales mediante una normativa comunitaria única?”, BoDiAlCo, No. 9, 2014, 3-4.


Although I have discussed the Directive before\(^6\), I believe it is worth revisiting in the light of several new Community documents that have since been published, namely\(^7\):


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\(^7\) I could have also referred to other documents such as the rather interesting European Parliament resolution of 13 January 2009 on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising (2008/2114(INI)) [available at http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=uriserv:OJ.CE.2010.046.01.0026.01.SPA], but felt that it might be counter-productive to overload the reader with information…


\(^10\) Idem.

• the Opinion of the European Economic and Social Committee on Consumer vulnerability in business practices in the single market\(^{11}\) (hereinafter “the EESC’s 2014 Opinion”).

Before analysing the scope of the *proposals and recommendations*\(^{12}\) put forward in the above documents, I will briefly explain the nature of the relationship between the Unfair Commercial Practices Directive, national legislation and other Community provisions, particularly with regard to the food sector\(^{13}\).

### II. Relationship between the Unfair Commercial Practices Directive and EU sectorial legislation

Insofar as the scope of Directive 2005/29/EC is concerned, it defines commercial practices in Art. 2(d) in the following manner:

*Business-to-consumer commercial practices:* “…any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers”.

It is worth stressing that this article deals with *business-to-consumer commercial practices*, not to be confused with *unfair trading practices in the business-to-business food supply chain*, which was the subject of a recent Communication by the Commission [document COM(2014) 472 final of 15.7.2014\(^{14}\)].

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\(^{11}\) Own-initiative opinion of 15.10.2014 (OJ C 12, 15.1.2015, p. 1).


\(^{13}\) An issue that was of course addressed in general terms in the Commission’s 2009 Guidance document (paragraph 1.9) and the 2013 First Report (paragraph 2.5).

The scope of the directive as defined above tells us that it is the general law governing unfair commercial practices in business-to-consumer transactions, and one which covers all commercial practices between businesses and consumers, except where explicitly provided for otherwise.

The literature has highlighted how little conflict there is between *Lex generalis* and *Lex specialis* with regard to the commercial practices regulated by Directive 2005/29/EC - whenever the sector-specific legislation and the directive clash, it is the relevant *Lex specialis* provisions that prevail. Paragraph 2.5 of the Commission’s 2013 First Report indicates that “often, such conflict occurs because the lex specialis contains more detailed pre-contractual information requirements, or stricter rules on the way information is presented to consumers (see Recital 10 of the Directive).” “However”, it then adds, “the existence of specific EU rules in a given sector does not exclude the application of the Directive: in these cases and in relation to all the aspects not covered by the lex specialis, the [Directive 2005/29/EC] complements these sectorial provisions and fills any remaining gaps in the protection of consumers against unfair commercial practices”.

The above criteria applies to the food sector, although this sector is the subject of seemingly comprehensive Community legislation, leaving few areas untouched by specific rules. Thus, for example the principle of providing accurate information about foodstuffs to consumers is based on three different Community rules:


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15 Sic in paragraph 2.5 of the Commission’s 2013 First Report.

16 See paragraph 2.5 of the Commission’s 2013 First Report.


18 Article 3.4 of the Unfair Commercial Practices Directive specifies that “in the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects”.

19 Emphasis added by the author.

20 In addition, indeed excessively detailed according to FERNÁNDEZ MARILGERA, E. *(op. cit.*, p. 15).


- the oft-cited Directive 2005/29/EC; and

- Regulation (EU) No 1169/2011 on the provision of food information to consumers\(^{23}\), which is the \textit{lex specialis} in this case\(^{24}\).

**III. The Commission’s 2009 Guidance**

The reader might at first be surprised to find me referring to this working document produced by the Commission’s services. After all, it is non-binding and so lacks any legal weight, as made clear on the first page:

\begin{center}
\textbf{Disclaimer}

\textit{This document, drawn up by the services of the Directorate-General for Health and Consumers, is not binding on the European Commission as an Institution.}

Please note that this document cannot provide a formal interpretation of community law in relation to specific situation. It does also not provide legal advice on issues of national law.\(^{25}\)
\end{center}


\(^{24}\) See FERNÁNDEZ MARILGERA, E., \textit{op. cit.}, p. 16.

\(^{25}\) In addition, the Introduction to the Commission’s 2009 Guidance document states that “…this document has no formal legal status and in the event of a dispute, the ultimate responsibility for the Directive’s interpretation lies with the Court of Justice of the European Union”.

\[\text{[6]}\]

The Commission’s 2009 Guidance document is an example of the voluntary guidelines that the Commission has felt obliged to publish in recent years due to the increasing complexity of the rules adopted to regulate the food sector\textsuperscript{26}. Its purpose is to “[provide]… guidance on the key concepts and provisions of the Directive [2005/29/EC] perceived to be problematic\textsuperscript{27-28}. It includes practical examples that explain how the Directive works in order to achieve a “…a common understanding and a convergence of practices when implementing and applying the [aforementioned] Directive”\textsuperscript{29}.

The document goes on to make the following points:

\begin{itemize}
  \item \textit{Scope of application:} Article 2(c) of the Unfair Commercial Practices Directive defines product as "any good or service including immovable property, rights and obligations"\textsuperscript{30}, which, as scholars have pointed out\textsuperscript{31}, clearly includes food products.
  \item \textit{Online commercial practices occurring on social media or comparison websites are included within the Directive’s scope of application:}

  - the Commission confirms that “unfair commercial practices may also occur on price comparison websites”\textsuperscript{32} and mentions the \textit{typical case} of one such site belonging to or connected to a trader which uses it to advertise its products: “…"quiestlemoinscher.com" (literally ‘whoisthecheapest.com’), a grocery price comparison service \textit{created by a French major supermarket company}\textsuperscript{33}, was considered by French
\end{itemize}

\textsuperscript{26}See BOURGES, L., \textit{op. cit.}, 4-5.

\textsuperscript{27}Emphasis added by the author.

\textsuperscript{28}See also the Introduction to the Commission’s 2009 Guidance document.

\textsuperscript{29}\textit{Ibidem}.


\textsuperscript{31}See for example NOBELLAR DICENTA, O., “La aplicación de lo dispuesto en la Directiva 2005/29/CE a las prácticas comerciales de las empresas en sus relaciones con los consumidores relativas a la información y la comercialización de productos alimenticios”, \textit{BoDiAlCo}, No. 11, 2014, 25-26.

\textsuperscript{32}See paragraph 1.2 of the Commission’s 2009 Guidance document.

\textsuperscript{33}Emphasis added by the author.
courts to be a trader's website and a tool for comparative advertising\textsuperscript{34-35}, and

- the trader's activity in the case of price comparison websites consists of providing retail prices to consumers, and so “… such service providers should therefore also be considered as traders and they would therefore be bound by the Directive's provisions\textsuperscript{36} (moreover “in such cases the criteria and methodology used by the services providers and any contractual links with certain traders would have to be disclosed to the sites' users\textsuperscript{37-38}).

\textbullet\textit{The Relationship between the Directive 2005/29/EC and national law and other provisions of Community law:}

- Primacy of EU law: according to the case law of the Court of Justice, directives which have been incorrectly transposed or not transposed at all are capable of having direct vertical effect in national law vis-à-vis state entities, if the Directive's provisions are sufficiently clear, precise and unconditional to be properly enforced in national jurisdictions\textsuperscript{39}. “however, directives do not have horizontal direct effect\textsuperscript{40} (for example, consumers cannot use the provisions of the Directive against a company)\textsuperscript{41}.

\textsuperscript{34} Tribunal de commerce de Paris – 29 mars 2007 – Carrefour c/Galaec (la coopérative groupement d'achat des centres Leclerc).

\textsuperscript{35} See also paragraph 1.2 of the Commission's 2009 Guidance document.

\textsuperscript{36} Ibidem.

\textsuperscript{37} Emphasis added by the author.

\textsuperscript{38} See also paragraph 1.2 of the Commission's 2009 Guidance document, which states that “…where individuals provide price comparison information purely on a nonprofessional basis, they are not considered as engaging in commercial practices”.


\textsuperscript{41} See paragraph 1.9 of the Commission's 2009 Guidance document.
- The full harmonisation character of the Directive: according to the Commission, the Unfair Commercial Practices Directive is based on the principle of full harmonisation, which “…means that Member States can no longer implement or apply either less or more restrictive or prescriptive consumer protection measures in the area it harmonises”\(^\text{42}\). As the Preamble to the Directive explains, in order to remove internal market barriers caused by regulatory disparities and to increase legal certainty for both consumers and businesses “…it was necessary to replace existing national systems with a uniform regulatory framework at Community level\(^\text{43}-\text{44}\)\).

- Relationship between the Unfair Commercial Practices Directive and Community sectorial legislation: as mentioned earlier, the Directive is the general law governing unfair commercial practices in business-to-consumer transactions: “it covers all B2C commercial practices, unless the Directive explicitly stipulates otherwise…”\(^\text{45}-\text{46}\).

To round off this discussion of the Commission’s 2009 Guidance document I would just note that the foodstuffs are mentioned in the “Overview of specific EU legislation on environmental claims”\(^\text{47}\). In this section the Commission stresses the importance of the way environmental claims are presented and put in context and the impression the commercial communication produces on consumers in suggesting an environmental benefit which may turn out to be misleading, for example when “…a food product is claimed to be produced in an environmentally friendly manner, based on a label or certification scheme which in fact only ensures that the farmer complies with the environmental baseline under EU law (cross-compliances)”.

It is also worth noting that paragraph 3.3.2 (“Health / Pharmaceutical claims”) contains a number of clarifications regarding “food health claims referring to the prevention, the treatment or the cure of a human disease (e.g. this food can prevent stomach cancer), even if said clarifications become largely irrelevant and out of date upon the entry into force of Regulation No 1169/2011. Finally, the

\(^{42}\) Ibidem.

\(^{43}\) Emphasis added by the author.

\(^{44}\) See also paragraph 1.9 of the Commission’s 2009 Guidance document, as well as Recitals 5, 12 and 13 of Directive 2005/29/EC.

\(^{45}\) See Article 3.8 of Directive 2005/29/EC.

\(^{46}\) Likewise, see paragraph 1.9 of the Commission’s 2009 Guidance document.

\(^{47}\) See paragraph 2.5.2 of the Commission’s 2009 Guidance document.
IV. The Commission’s 2013 Communication

This Communication included the main conclusions that could be drawn based on the initial period of experience in enforcing the Unfair Commercial Practices Directive, as required by its Article 18, setting out what action was needed to maximise the benefits of the Directive for Single Market integration and consumer protection. Its objective was and is to establish “...a high level of consumer protection in all sectors [and] it works as a safety net\(^{49}\) which fills the gaps which are not regulated by other EU sector-specific rules\(^{50}\). The correct application of the national rules which transpose the Directive will usually ensure “… that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, thus enabling consumers to make informed and meaningful choices\(^{51}\).

After the section entitled “Assessing the benefits of the Directive”\(^{52}\) (achieving a high level of consumer protection and a level playing field for traders, building trust in the Single Market, etc.), the Commission listed what it considers to be “Key Priorities for Further Action”\(^{53}\):

- In line with what has been outlined in the “European Consumer Agenda”\(^{54}\) and in the Commission Communication on a better functioning of the Single Market\(^{55}\), ensuring a better implementation and enforcement of existing

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\(^{49}\) Emphasis added by the author.

\(^{50}\) See the Introduction to the 2013 Commission’s Communication.

\(^{51}\) Ibidem.

\(^{52}\) See the second section of the 2013 Commission’s Communication.

\(^{53}\) Ibidem, third section.


\(^{55}\) See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Better Governance For The Single Market” [COM (2012) 259/2, available at
rules is a "quick win" for growth and jobs [here the Directive has a crucial role to play and the Commission has identified retail trade (including e-commerce\textsuperscript{56}), the travel and transport sector, financial services, the digital economy, energy and sustainability as key priority areas for unlocking the Single Market's growth potential].

• To ensure that the Directive on Unfair Commercial Practices maintains a high level of consumer protection and delivers its internal market benefits, intensified national enforcement and reinforced cooperation in cross-border enforcement are still needed (this is especially so in case of unfair practices simultaneously arising in different Member States: in such cases, an efficient coordination between the Commission, national authorities, consumer organisations and businesses is key to tackle practices that have an EU-wide impact\textsuperscript{57}).

• The need to step up enforcement at both cross-border and national levels calls for the Commission to take a more prominent role, joining forces with the Member States and supporting them in the application of the Unfair Commercial Practice Directive across the EU (in this respect, the Commission considered how, in accordance with the Treaties, it can play a more active role in encouraging a coherent application of the Directive in particular with regard to unfair practices having a cross-border dimension such as those taking place in the on-line environment and which raise common questions for enforcers (promoting converging practices in the implementation of the Directive 2005/29/EC is key for securing a level playing field for traders, notably when they act in a cross-border context).

• To ensure the full conformity of national laws with the Unfair Commercial Practice Directive, the Commission, in its role as guardian of the Treaties, decided to continue to closely monitor the correct transposition and application of the Directive in all Member States.

• To ensure that the Directive 2005/29/CE is applied in an appropriate and consistent manner in Member States, the Commission expressed its intention to:

\[\text{http://ec.europa.eu/internal_market/strategy/docs/governance/20120608-communication-2012-259-2_en.pdf}\].

\textsuperscript{56} For NOBELLAR DICENTA, O., the Commission should not have forgotten about the food trade (\textit{op. cit.}, 26-27).

\textsuperscript{57} See paragraph 3.3.3 of the Commission's 2013 First Report, which mentions the decision of the Italian Antitrust Authority (AGCM) PS7256 - Comet-Apple prodotti in garanzia, Provvedimento n. 23193 of 27 December 2011.
- further develop the Commission’s 2009 Guidance document in response to the input received from national enforcers and other stakeholders, the emergence of new practices, including on-line, and the development of EU and national case-law\textsuperscript{58};

- improve, expand and update the Unfair Commercial Practices Directive Database\textsuperscript{59}; and

- improve enforcement and administrative cooperation between Member States (taking into account the feedback received from different States and stakeholders as well as the available data, in order to identify key sectors where detriment and lost opportunities for consumers have been found and where the Single Market's growth potential is the biggest\textsuperscript{60}.

- In order to monitor effectively market developments and raising awareness, the Commission undertook to:

  - closely monitor market developments to ensure that the regulatory framework continues to provide a high level of protection to consumers in their domestic and cross-border purchases; and

  - focus specifically on the suitability of the legal framework to keep up with the rapid development of marketing and sales techniques, products and services in the on-line world.

The Commission concluded that alongside strengthened enforcement, awareness-raising initiatives are important in order to put consumers in a position to properly assert their rights.

V. The Commission’s 2013 First Report

In the same year as its 2013 Communication, the Commission also published its 2013 First Report\textsuperscript{61}. Both documents together made up the aforementioned

\textsuperscript{58} One objective confirmed by the Commission was its intention to continue developing guidance around misleading environmental claims.


\textsuperscript{60} NOBELLAR DICENTA, O. again argues that one of these key sectors should be the food industry (op. cit., p. 27).

\textsuperscript{61} See my article "La Directiva UE sobre las prácticas comerciales desleales: una cosa es predicar y otra dar trigo....", cited in footnote 6.
“European Consumer Agenda”, the main purpose of which was to increase consumer participation and trust and in the market, and thereby fuel confidence and growth.

Brevitatis causae, there are some issues addressed by the Commission in its 2013 Communication which I shall not be discussing here. These include the targeted questionnaires addressed to Member States and a wide range of stakeholders; information about the transposition of the Directive and its application (uniform application, the role and case law of the European Court of Justice, initiatives taken by the Commission, the need to broaden the scope of application of the Directive beyond business-to-consumer transactions, the notion of professional diligence, protection of vulnerable consumers, misleading actions, aggressive practices, the ‘Black List’ of prohibited practices, environmental claims, customer review tools and price comparison websites, Self-regulation, etc.) and the habitual “Overview of the Benefits of the Directive”.

It is however worth highlighting paragraph 3.2.2 on “Sales Promotions”. This is an issue that was hotly debated after the Commission’s proposal for a Regulation on Sales Promotions was withdrawn in 2006 since the Member States had failed to reach an agreement. It has become relevant again in the wake of claims

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62 See paragraph 2.3 on “The Internal Market clause” in the second section of the Commission’s 2013 First Report, which unfortunately cannot be given the space it deserves in this article (see GONZÁLEZ ENROSA, M., “La relación entre la Directiva sobre prácticas comerciales desleales y la legislación sectorial de la UE en general y la alimentaria en particular”, BodiAiCo, No. 11, 2015, 4-5).

63 See the third and fourth sections of the Commission’s 2013 First Report.

64 See NOBELLAR DICENTA, O., op. cit., p. 29.

65 See the fifth section of the Commission’s 2013 First Report.


that initiatives aimed at reducing food losses and waste\textsuperscript{68} have in fact tended to encourage and reproduce the very practices they seek to counter \textsuperscript{69}…

Paragraph 3.2.2 does not of course deal with sales promotions only in relation to food products. Rather it states that Directive 2005/29/EC offers protection against unfair practices across all kinds of sales: “Article 6 (1) (d) prevents traders from misleading consumers on the price or the manner in which the price is calculated, or the existence of a specific price advantage”, and furthermore “prohibitions laid down in Annex I target specific promotional practices such as bait advertising (point 5), special offers (point 7), prize promotions (point 19), prize competitions (point 31), and use of the word ‘free’ (point 20)“.

Finally, the Commission declared that

“As announced in the [Commission’s 2013 Communication], it does not seem appropriate to amend the [Unfair Commercial Practices] Directive at this stage. This outcome reflects the results of the consultation and the preliminary conclusions drawn from the enforcement experience in the Member States, which is significant but still too limited in time for such a comprehensive body of legislation.

The concerns that have been raised by some stakeholders in relation to the application of the [aforementioned Directive] to certain specific unfair commercial practices can be addressed by initiatives to improve enforcement in the Member States. In this connection, as outlined in the ["Commission’s 2013 Communication"], future efforts will need to concentrate on key thematic areas where detriment and lost opportunities for consumers appear to be most frequently recurring and where the Single Market’s growth potential is the biggest\textsuperscript{70}.”

VI. The 2014 European Parliament resolution

In this most interesting document, the European Parliament (EP) confirms that the “… Directive 2005/29/EC on unfair commercial practices is the European Union’s main legislative tool regulating misleading advertising and other unfair practices in business-to-consumer transactions”\textsuperscript{71}. However it also states that


\textsuperscript{69} Although I concur with VIDRERAS PÉREZ, C.’s opinion that “es muy difícil ponerle puertas al campo”, in other words it is hard to ban or regulate very strictly the kind of offers in question, such as those of the “two for the price of one” variety (\textit{op. cit.}, 5-6).

\textsuperscript{70} Emphasis added by the author.

\textsuperscript{71} See Recital “C” of the European Parliament resolution of 2014.
“there have been major differences\textsuperscript{72} in the implementation of Directive 2005/29/EC from one Member State to another\textsuperscript{73}, stressing that “Member States which so wish are free to extend application of the Directive to business-to-business relations, [even though] to date only four Member States have chosen to do so\textsuperscript{74}. Elsewhere it “agrees that further efforts should be made to strengthen the enforcement of the Unfair Commercial Practices Directive in relation to vulnerable consumers”\textsuperscript{75}.

The EP finds it regrettable that

- “some undertakings, particularly the smaller ones, as well as many consumers, are still insufficiently aware of consumers’ rights in Europe”\textsuperscript{76};

- “… despite provisions in Directive 2006/114/EC\textsuperscript{77} to combat misleading practices in business-to-business advertising, some of these practices […], still persist\textsuperscript{78};

- it has not been possible to resolve “…the conflicts of interest involved and the misleading use to which some traders are putting customer review tools and price comparison websites”\textsuperscript{79} (however the EP “welcomes the Commission’s decision to consider how the information provided on such platforms might be made clearer to consumers\textsuperscript{80}); and

\textsuperscript{72} Emphasis added by the author.

\textsuperscript{73} See Recital “E” of the European Parliament resolution of 2014.

\textsuperscript{74} Ibidem, Recital “G”.

\textsuperscript{75} Ibidem, point 14.

\textsuperscript{76} Ibidem, Recital “J” [as I have often stated, ignorance of the law is no excuse ("ignorantia iuris non excusatal"), but it does make applying the law more difficult. Such ignorance is usually caused by the competent authorities’ lack of political will to make the applicable legislative or regulatory measures more visible, and also by redress systems whose complexity discourages citizens from enforcing their rights - with the ensuing collapse of consumer helplines that would no doubt cause, etc. (See for example “La Directiva 1999/44/CE sobre la venta y las garantías de los bienes de consumo y la polémica aplicación de la armonización mínima en el ámbito del Derecho del Consumo”, Revista CESCO, No. 7, 2013, p. 13, available at http://works.bepress.com/luis_gonzalez_vaque/26]).


\textsuperscript{78} See point 2 of the European Parliament resolution of 2014.

\textsuperscript{79} Ibidem, point 15.

\textsuperscript{80} Ibidem.
- “...the use of false environmental claims is an unfair practice which is on the rise”\textsuperscript{81}.

Therefore\textsuperscript{82}:

- it “calls on the Commission to clarify the relationship between Directives 2005/29/EC and 2006/114/EC, in order to guarantee a high level of protection for all economic operators in the Union, particularly consumers and SMEs, from fraudulent and unfair practices, thus boosting confidence within the Single Market”\textsuperscript{83};

- whilst not considering this to be the right time to expand the “Black List” in Annex I, it nevertheless “calls […] on the Commission to draw up a list of practices which national authorities have identified as unfair within the meaning of the general principles of the Directive, in order to assess whether such an expansion would be advisable in the future”\textsuperscript{84};

- in the light of the fact that since 12 June 2013, Member States may no longer maintain the provisions retained until that date as temporary derogations, it calls on them “… to comply with the Directive as swiftly as possible”\textsuperscript{85};

- it “…calls on the Commission to carry out research into how Member States have transposed the Directive, in particular regarding national prohibitions not included in Annex I, and to submit within 2 years to Parliament and to the Council a new comprehensive report on its application, containing, in particular, an analysis on the scope for further harmonisation and simplification of Community law relating to consumer protection and suggestions for any necessary measures to be taken at Community level to ensure that a high level of consumer protection is maintained”\textsuperscript{86};

- it notes that since the time limits to apply the Directive expired in 2007 there have been numerous cases of Member States not correctly

\textsuperscript{81} See point 24 of the European Parliament resolution of 2014.

\textsuperscript{82} I list only the more important EP proposals, or those that could have significant effects on the food sector...

\textsuperscript{83} See point 3 of the European Parliament resolution of 2014.

\textsuperscript{84} Ibidem, point 5.

\textsuperscript{85} Ibidem, point 7.

\textsuperscript{86} Ibidem.
implementing or applying key provisions, in particular the black list of banned, misleading and aggressive commercial practices, calls [...] on the Commission to continue monitoring closely application of the Directive and, if necessary, to bring proceedings against Member States which infringe the Directive or fail to implement it or to apply it correctly, in accordance with the Treaty on the Functioning of the European Union.\textsuperscript{87}

- it “calls on the Commission and the Member States to ensure proper application of the Unfair Commercial Practices Directive especially regarding misleading hidden internet advertising\textsuperscript{88} in the form of comments posted on social networks, forums or blogs, apparently emanating from consumers themselves while they are in reality messages of a commercial or advertising nature directly or indirectly generated or financed by economic operators\textsuperscript{89}; and

- given that it considers that the penalties imposed for failure to comply with the Directive ought never to be lower in value than the profit made through a practice deemed to be unfair or misleading, it “reminds Member States that the Directive [2005/29/EC] states that penalties must be effective, proportionate and dissuasive” [and] asks the Commission to compile and analyse data on penalties applied by Member States as well as on the efficiency of enforcement regimes in particular with regard to the complexity and length of enforcement procedures\textsuperscript{90}.

It is worth fully reproducing here two points from the 2014 European Parliament resolution:

“26. [The EP] points out that many consumers hesitate to ask for redress when it seems to them that the amount concerned is not very high; stresses that consumers need to be made more aware of the support available to them from both consumer associations and the network of European Consumer Centres; underlines the importance of consumer organisations in raising awareness of existing unfair commercial practices as a preventive measure, and on their role in assisting victims of unfair practices, thus enabling consumers to properly assert their rights; calls for coordinated

\textsuperscript{87} See point 9 of the European Parliament resolution of 2014, in which the EP “calls in particular on the Commission to \textit{urgently} resolve any outstanding issues with regard to the consultations launched in 2011, either by terminating the infringement procedures or by referring them to the Court of Justice” (emphasis added by the author).

\textsuperscript{88} According to GONZÁLEZ ENROSA, M. hidden advertising is often used to get around the ban on making claims for the healing effects of health foods or conventional foods (\textit{op. cit.}, p. 7).

\textsuperscript{89} See point 16 of the European Parliament resolution of 2014.

\textsuperscript{90} \textit{Ibidem}, point 19.
actions between consumer organisations at national and European level, as well as with national authorities and the Commission;

27. Stresses the importance for consumers of having effective, swift and inexpensive legal remedies; asks in this regard for Member States to implement fully the Directive on alternative dispute resolution methods and out-of-court settlement of online disputes91, “.

VII. The EESC's 2014 Opinion

1. How is the crisis affecting EU citizens?

In October 2014, the European Economic and Social Committee (EESC) approved an interesting own-initiative opinion on Consumer vulnerability in business practices in the single market, which refers to the gradual erosion of the purchasing power of the middle classes, defining the latter as “the real drivers of consumer society”92, although it subsequently refers to “…all consumers in general”93. For the EESC, the economic crisis and more specifically “…the financial difficulties threatening the very survival of small and medium-sized enterprises”94, given the tight profit margins in the current business climate, have made it necessary to review standard commercial market practices95. It adds that “the knock-on effects of the market distortions caused by unfair practices have led to the emergence of consumers trapped96 by the financial situation they find themselves in unexpectedly, characterised by a loss of freedom of choice and difficulties in asserting their rights in this area”97.

The EESC expresses concern about both wage cuts, that have obliged people to change their consumer habits so that they are able to adjust their household

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91 Emphasis added by the author.

92 See point 1.1 of the EESC’s 2014 Opinion.

93 *Ibidem* [for NAVALÓN VALDECABRILLAS, M. it is neither factually nor politically correct to separate the middle classes from other groups of consumers (see his article “La ‘fragilidad’ del Dictamen del CESE sobre las prácticas comerciales en el Mercado único (2014)”, *BoDiAlCo*, no. 11, 2014, p. 13)].

94 Emphasis added by the author.

95 See also point 1.1 of the EESC’s 2014 Opinion [at the same time NAVALÓN VALDECABRILLAS, M., criticises the way the increase in unfair commercial practices is explained (solely?) by the difficulties faced by small and medium-sized enterprises when in many EU countries it is large financial entities which have been largely to blame for such practices (op. cit., 14-15)].

96 Emphasis added by the author.

97 See point 1.5 of the EESC’s 2014 Opinion.
budget to their new spending capacity, and also the weak financial position of consumers whose finances have suffered as a result of the crisis denies them some of the means they need to access virtual marketing environments: “the digital divide is thus widening the social divide”.

2. Measures that could (or should) be adopted

The EESC believes that measures should be adopted in the areas of prevention, protection, mitigation and recovery, and in particular

• European institutions should adopt measures aimed at:
  - ensuring more effective implementation of the single market rules, especially those concerning product safety and market surveillance, the Directive on unfair commercial practices and the Regulation on cooperation between the Commission and consumer authorities;
  - supporting, supplementing and supervising Member State policies in the area of consumer protection; and
  - monitoring the new barriers that have emerged, hampering the functioning of the internal market, such as consumers falling victim to economic violence when concluding contracts.

• For their part, the Member States should: provide consumer associations with adequate financial support, enabling them to carry out their duty to protect the rights of all consumers; and adopt measures within their social protection systems to prevent the social exclusion of consumers and of all citizens, above the 30% mentioned in the Multidimensional Poverty Index, especially as regards access to and supply of basic essential service.

To alleviate the effects of the crisis, the EESC also makes a series of proposals such as creating a fund with the proceeds from the financial penalties imposed on those who breach consumer rules; creating an observatory to monitor strategic policies adopted in critical sectors, such as services of general

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98 Ibidem, point 2.2.

99 Ibidem, point 2.6.

100 Ibidem, point 1.5

101 Ibidem, point 4.5 [GONZÁLEZ ENROSA, M. argues that this proposal is unnecessary and over-bureaucratic, and that it will provide yet another get-rich-quick opportunity for dishonest politicians (op. cit., p. 8)].

102 See point 4.9 of the EESC’s 2014 Opinion [it is my view that the proliferation of observatories - so beloved of the French authorities in particular - reflects bad governance, as
interest, audio-visual services, fuels, banking, energy oligopolies, housing, etc., which may represent a risk to which weaker consumers are more vulnerable; and drawing up and implementing a ‘citizens’ rescue plan helping to relaunch the household economy by restoring consumer purchasing power\textsuperscript{103}.

3. Business practices likely to undermine the protection of consumers unexpectedly as a result of the economic crisis

Space prevents me from discussing here all of the difficulties mentioned in section 3 of the EESC’s 2014 Opinion, but given our particular interest in analysing the application of Directive 2005/29/EC to food consumption, I do wish to highlight the following ones:

- “not only can essential food needs not be properly met when consumers are in situations of economic vulnerability but they also risk being seriously affected by a range of foodstuffs whose nutritional value is watered down to reflect the lower price”\textsuperscript{104};

- “the same holds true when it comes to assessing conditions for the storage and sale of products which, as perishables, bear a date mark for consumption”\textsuperscript{105};

- “in this regard, we should also consider the deliberate use of terms and descriptions that mislead consumers about a product’s characteristics in commercial promotions and discounts”\textsuperscript{106};

- “the same also applies to misleading advertising, both in terms of marketing campaigns supposedly having an ethical purpose, encouraging people to make purchases on the basis of an emotional draw by suggesting they would be helping others, and in terms of misleading statements about the environment, the accuracy of which is hard to prove”\textsuperscript{107};

\textsuperscript{103} See point 4.15 of the EESC’s 2014 Opinion.

\textsuperscript{104} \textit{Ibidem}, point 3.3.

\textsuperscript{105} \textit{Ibidem}, point 3.4 [it should be noted that in the European Parliament resolution of 19 January 2012 on how to avoid food wastage: strategies for a more efficient food chain in the EU (2011/2175(INI)), the EP asked the Commission to clarify the meaning of the date labels (‘best before’, ‘expiry date’ and ‘use by’) in order to reduce consumers’ uncertainty regarding food edibility and to disseminate accurate information to the public, notably the understanding that the minimum durability ‘best before’ date is related to quality, while the ‘use by’ date is related to safety, in order to help consumers make informed choices” (see point 32 of the resolution)].

\textsuperscript{106} See point 3.6 of the EESC’s 2014 Opinion.

\textsuperscript{107} \textit{Ibidem}. 
- “monitoring should also be carried out on the marketing of generic or ‘own brand’ products, which do not comply with the marketing requirements and standards in force”; and

- “also in the food sector, a particularly worrying aspect is the proliferation of alternative marketing channels which escape administrative supervision, such as ‘food counterfeiting’ using counterfeit basic products, the illegal sale of food and the recirculation of discarded food for human consumption, etc.”

4. The transformation of a single market into a dual-format market?

In short, the EESC urges the competent authorities to do what they can “…to prevent the transformation of a single market into a dual-format market whose less pleasant face would be visible to those who have the least and need the most”, even if that means resorting to a questionable form of positive discrimination by imposing the principle that “business practices should be more scrupulous when targeting the financially weakest consumers”.

VIII. Conclusions

Most scholars consulted agree that Directive 2005/29/EC works as a safety net and, as such, constitutes an effective means of applying the principle of legal certainty to consumer protection. For others, applying the Directive as the Lex specialis could prove a real and effective way of reducing and simplifying transpositions of the Unfair Commercial Practices Directive by Member States.

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108 See point 3.7 of the EESC’s 2014 Opinion [for GONZÁLEZ ENROSA, M. it is surprising that the EESC should adopt such a partisan position on an issue that brings producers into conflict with large supermarkets (op. cit., 7-8)].

109 Emphasis added by the author.

110 According to the EESC, this is a type of fraud which has been investigated by Interpol’s trafficking in illicit goods unit (Operation Opson).

111 See point 3.7 of the EESC’s 2014 Opinion.

112 Ibidem, point 3.19.


114 See for example GONZÁLEZ ENROSA, M., op. cit., 6-7; and NAVALÓN VALDECABRILLAS, M., op. cit., p. 15.

115 Which for MAYORAL, A. should be turned into a Regulation in order to avoid conflicting transpositions of the Unfair Commercial Practices Directive by Member States (op. cit., 27-28).
complex sector-specific Community legislation which is often impossible to apply\textsuperscript{116}, such as that adopted in recent years at the behest of the now defunct DG SANCO\textsuperscript{117}. To complement this latter perspective I list here some (obviously not all) of the alleged or proven unfair commercial practices that have been detected repeatedly in the food sector\textsuperscript{118}:

- the claim that a food product has been approved, endorsed or authorized by a public or private body when this is not the case (or making that claim without complying with the conditions of approval, acceptance or approval)\textsuperscript{119}; aggressive commercial practices (provided for in Section 2 of Directive 2005/29/EC\textsuperscript{120}); falsely indicating that a product can cure illnesses, dysfunction or malformations\textsuperscript{121}; falsely claiming that a food product will only be available for a very limited period of time in order to induce consumers to make an immediate decision\textsuperscript{122}, misleading consumers about the existence or nature of a foodstuff\textsuperscript{123}; infringing national legislation prohibiting joint offers to consumers\textsuperscript{124}; failure to comply with national legislation banning advertising that announces or suggests price reductions\textsuperscript{125}; clearly infringing a "code of conduct" and in

\textsuperscript{116} See for example “La Propuesta de la Comisión relativa a un nuevo Reglamento en materia de etiquetado alimentario: ¿Simplificación o utopía inaplicable?”, ReDeco – Revista electrónica sobre el Derecho del Consumo y la Alimentación, No. 18, 2008, 14-15.

\textsuperscript{117} See MAYORAL, A., op. cit., 26-27.

\textsuperscript{118} This is a provisional list based on the information in documents I studied whilst researching this article, as well as the suggestions of several specialists in food law who I consulted.

\textsuperscript{119} Both practices are included on the ‘Black List’ in Annex I of the Directive (See GONZÁLEZ ENROSA, M., op. cit., 6-7).

\textsuperscript{120} It is worth noting that included among the aggressive practices on the ‘Black List’ in Annex I of the Directive are “conducting personal visits to the consumer’s home ignoring the consumer’s request to leave or not to return …” and “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” [a practice often complained about in relation to snacks and similar products (see MAYORAL, A., op. cit., p. 29)].

\textsuperscript{121} A practice included on the ‘Black List’ in Annex I of the Directive.

\textsuperscript{122} Idem.

\textsuperscript{123} See Article 6.1(a) of Directive 2005/29/EC.

\textsuperscript{124} The case law established by the “VTB-VAB NV” judgment, case C-261/07 and C-299/07 could be applied here. (See GONZÁLEZ ENROSA, M., op. cit., 6-7).

\textsuperscript{125} The case law established by the “INNO NV” judgment, case C-126/11 could be applied here. (See MAYORAL, A., op. cit., 28-29).

\textsuperscript{126} See MAYORAL, A., op. cit., 27-28.
particular “non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound”\textsuperscript{127}; invitations to participate free of charge (or even promising the gift of a specific food product) on an excursion in which consumers will be encouraged to make impulse purchases [often of textiles or accessories with curative effects (!), etc.]\textsuperscript{128}; informing the consumer that he or she has won a prize and then forcing them to incur in an expense in order to receive it (although this is not so common in the food sector\textsuperscript{129}); misleading consumers about the price of a food product\textsuperscript{130}; misleading advertising\textsuperscript{131}; comparative advertising (see the “
Lidl” judgment of 18 November 2010\textsuperscript{132}); publishing editorial content in the media to promote a product when the trader has paid for this promotion, without making the latter clear in the content or through images or sounds which the consumer can clearly identify (infomercials)\textsuperscript{133}; voluntary certification schemes for agricultural products and foodstuffs (see the Commission’s Communication on this issue\textsuperscript{134}); displaying a trust mark, quality mark or equivalent without having obtained the necessary authorization\textsuperscript{135}; displaying a food sample with the intention of promoting a different product (bait and switch)\textsuperscript{136}; unsolicited

\textsuperscript{127} See Article 6.2(b) of Directive 2005/29/EC (also included on the ‘Black List’ in Annex I of the Directive is the practice of “claiming to be a signatory to a code of conduct when the trader is not”).

\textsuperscript{128} See GONZÁLEZ ENROSA, M., \textit{op. cit.}, 7-8.

\textsuperscript{129} According to GONZÁLEZ ENROSA, M., \textit{op. cit.}, 6-7 (the case law established by the “Purely Creative Ltd et al.” judgment, case C-428/11, could be applied here).

\textsuperscript{130} See Article 6.1(d) of Directive 2005/29/EC (also see MAYORAL, A., \textit{op. cit.}, p. 28).

\textsuperscript{131} The case law established by the “
Posteshop SpA” judgment, case C-52/13, could be applied here (see MAYORAL, A., \textit{op. cit.}, pp. 27-28).

\textsuperscript{132} Case C-159/09, ERC p. I-11761 (on this judgment see “The ECJ Issues a Ruling Regarding Comparative Advertising Relating to the Pricing of Food Products Marketed by Competing Retail Chains”, \textit{European Food and Feed Law Review}, No. 2, 2012, 91-95; and DOMÍNGUEZ PÉREZ, E. M., “Problemática de la publicidad comparativa a través del factor ‘precio y de la ‘selección de productos de una gama o serie’ - A propósito de la sentencia TJCE de 18 de noviembre de 2010, asunto C-159/09, Lidl SNC contra Vierzon Distribution SA”, Revista de Derecho de la Competencia y la Distribución, No. 10, 2012, 185-206).

\textsuperscript{133} A practice included on the ‘Black List’ in Annex I of the Directive.


\textsuperscript{135} A practice included on the ‘Black List’ in Annex I of the Directive.

\textsuperscript{136} See GONZÁLEZ ENROSA, M., \textit{op. cit.}, 6-7.
supply\textsuperscript{137}; the forbidden sale of food products at a loss\textsuperscript{138}; and/or establishing, operating or promoting a pyramid promotional scheme, especially in order to sell food supplements\textsuperscript{139}.

I am aware that the above list is not only incomplete, but also includes practices that are heterogeneous and difficult to describe\textsuperscript{140}, but trust that it nevertheless gives an indication of how wide the scope of application of the Unfair Commercial Practices Directive is in the food sector\textsuperscript{141}.

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\textsuperscript{137} Although according to GONZÁLEZ ENROSA, M. (op. cit., 6-7) this is not a very common practice in the food sector either.

\textsuperscript{138} The case law established by the “Euronics Belgium CVBA” judgment, case C-343/12 could be applied here (See MAYORAL, A., op. cit., 27-28).

\textsuperscript{139} A practice included on the ‘Black List’ in Annex I of the Directive, and to which the case law established by the “4finance’ UAB” judgment, case C-515/12 could be applied.

\textsuperscript{140} Given that, as GONZÁLEZ ENROSA, M. argues (in op. cit., 6-7) in some cases such unfair practices are committed passively rather than actively…

\textsuperscript{141} This does not mean that I share the opinion of authors for whom the food laws of recent years which originated with the since dismantled DG SANCO should be repealed, reworked or reduced (mutilated?) (see footnotes 115 and 116). Although in the medium to long term … Chi lo sa?