



The King's Student Law Review

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Source: *The King's Student Law Review*, Vol. 8, No. 1 (2017) pp. 162-176

Published by: [King's College London](#) on behalf of [The King's Student Law Review](#)

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Is Corporate Social Responsibility So Soft?

The Relationship between Corporate Social Responsibility and Unfair Commercial Practice Law

Dario Chiari

Introduction

The adoption by companies of Corporate Social Responsibility (CSR) practices, to a relevant extent, depends on the importance that consumers attach to it.¹ In the past decades, there has been growing attention by consumers on the impact that companies have on the environment in which they operate and the social consequences of their actions.² Consumers have become one of the main drivers of CSR in two ways: by supporting pro-social corporate conduct in their purchases ('positive ethical consumerism') and by punishing firms for their failings, for instance, with boycotts ('negative ethical consumerism').³ Nonetheless, this attitude has not produced a real change in the way consumers behave in the market. Surveys show that while usually 90% of consumers say that they would take into account a company's CSR when purchasing,⁴ this percentage is lower when looking at what customers really do.⁵ The reasons for this gap are various and have been deeply investigated.⁶ One of the reasons why consumers refrain from putting into practice their theoretical intentions is the lack of trust in companies' involvement in CSR practices. Undertakings have understood the potentialities of CSR, and are trying to use it to obtain a competitive advantage in terms of price and reputation. The consequence has been an explosion in the adoption of

¹ J. Klein and N. Dawar. 'Corporate Social Responsibility and Consumers' Attributions and Brand Evaluations in a Product-Harm Crisis' (2004) 21(3) *International Journal of Research in Marketing* 203.

² L. A. Mohr, D. J. Webb, and K. E. Harris. 'Do Consumers Expect Companies to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behaviour' (2001) 35(1) *Journal of Consumer Affairs* 45.

³ N. C. Smith, 'Consumers as Drivers of Corporate Social Responsibility' in A. Crane, D. Matten *et al.* (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 281.

⁴ D. Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2006).

⁵ G. M. Eckhardt, R. Belk and T. M. Devinney, 'Why Don't Consumers Consume Ethically?' (2010) 9(6) *Journal of Consumer Behaviour* 426.

⁶ E. Boulstridge, M. Carrigan. 'Do Consumers Really Care about Corporate Responsibility? Highlighting the Attitude-Behaviour Gap' (2000) 4(4) *Journal of Communication Management* 355; M. J. Carrington, B. A. Neville, G. J. Whitwell. 'Why Ethical Consumers Don't Walk Their Talk: Towards a Framework for Understanding the Gap between the Ethical Purchase Intentions and Actual Buying Behaviour of Ethically Minded Consumers' (2010) 97(1) *Journal of Business Ethics* 139.

reports, declarations and codes.⁷ In this jumble of soft-law instruments, without a reliable and all-encompassing method of analysis, consumers may have the impression that all these efforts only go in the direction of ‘greenwashing’ companies’ reputation and consequently ‘ethical consumerism’ may be discouraged. Therefore, it is exactly because of this connection between companies’ attitude and consumers’ intentions that Unfair Commercial Practice Law (UCPL) can play a role in the field of CSR.⁸

This paper will analyse how and to what extent UCPL can play a role in assessing the truthfulness of the undertakings’ declarations. Section 1 will introduce the topic by explaining how the idea to connect UCPL and CSR statements arose. Section 2 will analyse the relationship between Unfair Commercial Practice Directive (hereinafter ‘UCPD’ or ‘the Directive’)⁹ and CSR trying to show the potentialities and difficulties of using such an instrument. First of all, it will address the question of whether CSR practices can be included in the purpose of the UCPD at all. Answering affirmatively to this question, it will then investigate when CSR codes and declarations can be considered as a commercial practice within the meaning of the UCPD. Subsequently, when it is possible to create this link, the study will move on to enforcement. The main provisions will be analysed in an effort to set out the possible types of enforcement and the powers granted to courts and/or administrative authorities. Eventually, the legal and factual consequences of a judgement or decision in regard of CSR will be examined.

The paper will refer to the concept of Corporate Social Responsibility understood as the voluntary involvement of companies in ‘actions taken at least partially beyond the firm’s direct economic or technical interest’¹⁰ usually in the field of environment, working conditions, and human rights. CSR can take many different forms especially when related to commercial practice. A company can decide to advertise the actions that it has undertaken, or the results that it has achieved. But it can also decide to promote the fact that it is signatory to a renowned code of conduct, or that it has adopted its own code, which regulates its behaviour regarding respect for the environment and/or human rights. For this reason, the expressions ‘CSR statements’, ‘CSR declarations’, and ‘CSR practices’ will be used in an interchangeable way. They all describe the way in which a company publicises its involvement in CSR.

⁷ L. Preuss, ‘Codes of Conduct in Organisational Context: From Cascade to Lattice-Work of Codes’ (2010) 94(4) *Journal of Business Ethics* 471.

⁸ A. Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar Publishing 2015) 129.

⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (hereinafter ‘UCPD’).

¹⁰ K. Davis, ‘Can Business Afford to Ignore Social Responsibilities?’ (1960) 2(Spring) *California Management Review* 70.

Section 1: The origin of an unusual idea

UCPL was linked to CSR statements for the first time in the United States in *Kasky v Nike*.¹¹ The case started in 1998 when Marc Kasky, a California lawyer and consumer activist, sued the sportswear company Nike under the California's Unfair Competition and False Advertising Law. The basis for the lawsuit were the declarations made by Nike after a scandal regarding poor working conditions in its supplier factories. Many media outlets and NGOs had accused the company of exploiting workers in more than 900 factories in 51 countries. Nike responded by launching a campaign that involved press releases, advertisement on the website and on newspapers emphasising the fact that its workers were properly rewarded and well-treated. During the trial, Nike's defence was mainly based on the interpretation of such statements as political speech, and hence protected by the First Amendment. The first two instances of the proceedings were favourable to Nike, but the California Supreme Court disagreed and overruled the lower judgments. It stated that 'Nike was acting as a commercial speaker, [and] because its intended audience was primarily the buyer of its products, and because the statements consisted of factual representation about its own business operation' the statements were commercial speech and consequently subject to false advertising law.¹² In the end, the case was settled out of court before the California Supreme Court had the possibility to assess the accuracy of Nike's statements. However, the case remains as a precedent for statements related to CSR practice to be covered by unfair commercial practice law, at least in the US.¹³

The case caught the attention of the media and activists all over the world, and triggered an academic debate in Europe about the possibility of using UCPL in relation to CSR declarations.¹⁴ Meanwhile, the European Union adopted a directive harmonising the rules on unfair commercial practices. Directive 2005/29/EC sets out the principles and definitions that have to be applied in every Member State (MS). Since the scope of this paper is neither describing how the Directive has been implemented by the MSs nor how successful the process of harmonisation has been, I will assume that the principles and definitions have been correctly implemented; hence, while writing about the Directive, I am also postulating that the law of every single MS that should mirror it to a large extent.

Section 2: Directive 2005/29/EC

¹¹ *Kasky v Nike*, California Supreme Court, 2 May 2002, N S087858.

¹² *Ibid.*, para 259.

¹³ D. C. Vladeck, 'Lessons from A Story Untold: Nike V. Kasky Reconsidered' (2003) 54 *Case Western Reserve Law Review* 1049.

¹⁴ A. Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart Publishing 2015) 186.

The Directive is one of the main instruments used by the EU to achieve the high level of consumer protection required by Article 169 TFEU (ex 153 TEC – the legal basis of the Directive). Its main scope is to protect consumer economic interests from misleading and aggressive marketing by prohibiting the use of unfair commercial practices.¹⁵ Without carrying out a complete analysis of the Directive, this section will analyse the most relevant provisions for the application of UCPL to CSR practices.

2.1 Are CSR practices outside the scope of the Directive?

The first issue that has to be solved for the Directive to be applicable in respect of CSR statements is to understand whether they can be included in its scope or whether instead, they are excluded *a priori* on the basis of recital 7 and Article 1. Recital 7 rules out practices that would qualify as a matter of ‘taste and decency’. The issue of whether CSR statements would qualify as a matter of taste and decency arose because the Commission in its proposal for the Directive stated that ‘matter of taste, decency, and social responsibility will be outside the scope’.¹⁶ Currently, it seems quite unanimously accepted that CSR statements do not fall within the category of taste and decency;¹⁷ firstly because in the definitive version of the Directive the reference to social responsibility has been eliminated. Secondly, because in its Guidance the Commission has clarified that the provision serves to exclude some aspects like prevention of sexual, racial, and religious discrimination, depiction of nudity that are sensible issues for the different cultures of MSs, they have to be allowed to treat these according to their own laws.¹⁸

Article 1 affirms that the Directive applies only to unfair commercial practices that harm ‘consumer economic interest’. Therefore, it is necessary to establish whether CSR statements affect the ‘consumer economic interest’ at all. Recital 7 is relevant since it excludes from the application of the Directive commercial communication carried out for other purposes such as investment, annual reports and corporate literature. The distinction pivots on whether CSR statements are carried out to seek an advantage on the market and improve company’s reputation, in which case they would be included in the scope of the Directive, or whether instead they are performed for other aims. Since companies have

¹⁵ UCPD (n 9) Recital 8 and Art 5.

¹⁶ 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 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) {SEC (2003) 724} /* COM/2003/0356 final - COD 2003/0134 */ para 39.

¹⁷ G. Howells, H. W. Micklitz, T. Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Ltd. 2013) 62; Beckers (n 14) 192.

¹⁸ Commission, ‘Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices’ SEC (2009) 1666, par 13 (hereinafter ‘Commission Guidance’).

understood the potentialities of CSR practices to positively shape their image towards consumers,¹⁹ and consumers have shown a growing interest in the commitments of companies in the field of CSR,²⁰ it would be incorrect and against the scope of the Directive to exclude CSR practices on the basis that they do not harm consumer economic interest. For instance, the German Federal High Court of Justice has stated that ‘breaches of social standards in the manufacturing process could also become relevant in unfair commercial practices law provided that his internal behaviour leads to a direct competitive advantage on the market’.²¹ Moreover, the Commission in its Guidance recognises that environmental claims do affect consumer economic interest.²²

2.2 Which provisions are relevant for CSR?

The Directive prohibits unfair commercial practices in article 5(1) by defining as unfair a commercial practice that is ‘contrary to the requirements of professional diligence’ and that ‘materially distorts or it is likely to distort the economic behaviour of the average consumer’. It then differentiates between misleading commercial practices and aggressive ones.²³ For the purpose of this study, only misleading commercial practices will be analysed.

A commercial practice is considered misleading when it is able or likely to cause an average consumer to take a transactional decision that he would not have otherwise taken and if:

- A. It contains false information;²⁴
- B. It contains factually correct information, but the way this is presented is able or likely to deceive the average consumer;²⁵
- C. The trader does not comply with commitments contained in a code of conduct by which it has undertaken to be bound and if the commitments are not aspirational but firm and capable of being verified; and the trader has indicated in the commercial practice that it is bound by the code.²⁶

2.2.1 Meaning of commercial practices

¹⁹ Y. Lii and M. Lee, 'Doing Right Leads to Doing Well: When The Type of CSR and Reputation Interact to Affect Consumer Evaluations of the Firm' (2012) 105(1) *Journal of Business Ethics* 69.

²⁰ J. J. Singh, O. Iglesias, J. Batista-Foguet, 'Does Having an Ethical Brand Matter? The Influence of Consumer Perceived Ethicality On Trust, Affect and Loyalty', (2012)111(4) *J Bus Ethics* 541.

²¹ Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 120, 320.

²² Commission Guidance 38.

²³ UCPD (n 9) art 5(4).

²⁴ *Ibid* art 6(1).

²⁵ *Ibid*

²⁶ *Ibid* art 6(2)(b).

First of all, it is essential to understand what is meant by commercial practice and how it could include also CSR practices. The Directive itself provide a Guidance on this point stating that it encompasses ‘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;’²⁷ Even though this definition links together commercial practices with the promotion, sale or supply of a product, it has been argued that the term also regards the attempts to build a positive image.²⁸ This interpretation is supported by the scope of the Directive: protect consumers from unfair advertisement and marketing practices of firms. It would be right to affirm that building a positive image and reputation is one of the ways through which a firm promotes its products. Moreover, case laws show quite a wide interpretation of commercial practice. For instance, the District Court of Berlin held that the publication, by a company running a nuclear plant, of statistics comparing the CO2 emissions of a nuclear energy with the one of a wind turbine constituted a commercial practice. The Court went on to hold that the commercial practice was unfair because it tried to exploit the good reputation of wind energy plants to the advantage of nuclear industry.²⁹

2.2.2 Materiality test

When analysing the application of UCPD, it is fundamental to bear in mind that not all misleading commercial practices are prohibited under article 6 UCPD, but only those that cause or are likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. This is sometimes referred to as the ‘materiality condition’, or ‘materiality test’. The materiality test serves to exclude from the application of the UCPD all the information that is not related to the product and that does not influence the average consumer. Since it is particularly complex to understand which factors affects consumers’ behaviour, usually the materiality condition is interpreted in a non-restrictive way and even small details can be determinant in the qualification of a practice as unfair or not.³⁰ The condition is easily fulfilled also for the broad meaning of ‘transaction decision’ that encompasses any decision taken by the consumer, from whether, how and on what terms to purchase, to the decision to exercise a contractual right in relation to the product.³¹ For instance, environmental or social friendly products are usually more expensive exactly because they are supposed to have a higher standard of environmental protection or a higher respect for human rights.

²⁷ *Ibid* art 2(d).

²⁸ Howells *et al.* (n 17) 54.

²⁹ Landgericht Berlin, 7 December 2010, 16 O 560/10

<<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=280&articleID=&countryID=DE>>, accessed 30 April 2016.

³⁰ Howells *et al.* (n 17) 137.

³¹ UCPD (n 9) art 2(k).

Consumers might be keen to pay more when they know that the product has these characteristics. It follows that this information influences consumers' decisions. Without these features consumers may have bought a different product. This has been recognised for environmental claims,³² but it could be transposed to other issues such as working conditions in supply chain or child labour if it was demonstrated that consumers take into account these specific aspects. For example, in Germany a lawsuit was filed by the Hamburg Consumer Protection Agency against the retailer Lidl.³³ The complaint argued that Lidl's advertising campaign, in which the firm claimed to apply fair working conditions, to oppose to child labour and in general to be a member of the Business Social Compliance Initiative (BSCI), constituted an unfair commercial practice. It was indeed discovered, thanks to the work of the European Centre for Constitutional and Human Rights and the Clean Clothes Campaign, that the real working conditions in Lidl's supply chain did not comply with its alleged standards. Eventually the case was settled out of court, but it still remains an interesting example of the application of UCPL to CSR statements, concerning social commitments.

2.3 Untruthful and deceptive information

In the first two hypotheses under article 6, in order to qualify as a misleading commercial practice, the information provided should be either false or deceptive. In the former case the practice is objectively misleading, since the information provided is incorrect. Once the untruthfulness has been established, it is likely that the practice would be considered misleading if the materiality test is satisfied. An easy example correlated with environmental claims is using the term biodegradable or pesticide-free when the product is not.³⁴

In the latter, the commercial practice is not misleading because the information provided is in itself incorrect, but because in the way it is represented deceives or is likely to deceive the average consumer. The Directive lists a series of elements in relation to which the information provided could create a misleading representation. Relevant for this study are the elements of 'nature of the product',³⁵ 'execution', 'composition', 'method of manufacture', and 'commercial origin'.³⁶ For instance, the Guidance states that products that are environmental damaging should not be represented as environmentally friendly³⁷ and that traders must 'present their green claims in a specific,

³² Commission Guidance (n 18) p 37.

³³ Business & Human Rights, Lidl lawsuit, <<http://business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh>>, accessed 1 May 2016.

³⁴ Commission Guidance (n 18) p 43.

³⁵ UCPD (n 9) art 6(1)(a).

³⁶ *Ibid* art 6(1)(b).

³⁷ Commission Guidance (n 18) p 43.

accurate and unambiguous manner’ and ‘have scientific evidence to support them’.³⁸ The Italian Competition Authority found that a commercial communication stating that the production and selling of mineral water bottles have ‘zero impact on the environment’ is misleading, since it may create the wrong impression that the products are not damaging for the environment or less damaging than the competitors’ one. Such conclusion was reached after investigations in which the Authority discovered that the company was not involved in any specific activity to reduce the impact of its products on the environment.³⁹ On the same wavelength, the French Court of Cassation considered misleading labelling pesticides as biodegradable and good for environment.⁴⁰

It is worthy to note that usually undertakings are careful to use sharp statements in their advertisement campaigns. Therefore, generally, it is not easy to establish whether a declaration is false. For this reason, the second provision about deceptiveness is usually deployed. As Anna Beckers correctly argues, ‘while the vague character is a core obstacle when seeking to interpret the codes as a contractual obligation, this is not equally true in the context of unfair commercial practice law.’⁴¹ Vague statements can make the enforcement of CSR impossible under private law, since it is not feasible to find a precise obligation to which the firm is bound. However, in the field of UCPL the analysis focuses on whether the commercial practice might be considered misleading and not on whether the company is actually bound by its statements. In other words, under UCPL the objective is not obliging a firm to carry out what promised in its advertisement, but rather checking that the commercial practices of an undertaking do not mislead consumers. For this reason, the vagueness of a statement is not a significant impediment for the application of article 6(1), but it could also amount to an additional factor to take into account when evaluating whether a practice is misleading. One should bear in mind, however, that what has just been argued is applicable only to article 6(1) regarding false and misleading commercial practices, and not also to article 6(2)(b) which deals with non-compliance with a code of conduct. In that case the vagueness of a commitment and the bond between the code and the company are fundamental factors, as explained below.

2.4 Code of conduct

³⁸ *Ibid* p 41.

³⁹ Autorita’ Garante della Concorrenza e del Mercato (AGCM), 8 February 2012, PS7235 <<http://www.agcm.it/consumatore--delibere/consumatore-provvedimenti/open/C12560D000291394/2B66AD5274E26730C12579B2003AE458.html>>, accessed 30 April 2016.

⁴⁰ Court de Cassation, 6 October 2009, N. 08-87.757 <<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021249274&fastReqId=803265302&fastPos=1>>, accessed 30 April 2016.

⁴¹ Beckers (n 14) 196 (Beckers uses the term codes as a synonym of statement).

According to article 6(2)(b) the fact that a trader does not comply ‘with commitments contained in codes of conduct by which [he] has undertaken to be bound’ is considered a misleading commercial practice if:

- the materiality test is satisfied;
- ‘the commitment is not aspirational but is firm and is capable of being verified’;⁴²
- ‘the trader indicates in a commercial practice that he is bound by the code’.⁴³

Compared to article 6(1) about false and deceptive statements, article 6(2)(b) not only requires the ‘materiality’ test, and incorrectness of the information provided (namely in this case the fact that the trader does not comply with its own commitments) but it also adds two more requirements that have to be satisfied in order for the UCPD to be applicable.

2.4.1 Meaning of codes of conduct

In order to understand this provision, firstly, it is necessary to analyse the meaning of the term ‘codes of conduct’ and establish whether it also encompasses CSR codes. The term refers to many different soft-law instruments used by firms to regulate their own behaviour and hence has to be intended as a synonym of self-regulation. The definition given by the Directive is ‘an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors.’⁴⁴ Since the Directive uses the expression ‘particular commercial practices or business sector’ the definition could appear quite narrow. However, it has been correctly maintained, that the sentence should be interpreted to include general codes covering all industries.⁴⁵ As regards the relationship with CSR, the term ‘codes of conduct’ is to be interpreted as a ‘document which states a number of social and environmental standards and principles that the firm which is a signatory of it is expected to fulfil.’⁴⁶ However, it is neither required that the trader has formally signed up to the code (it is enough if he states he will be bound by it) nor that the trader has participated in the preparation of it.⁴⁷ It is the Commission itself that provides a broad interpretation of ‘codes of conduct’ in its Guidance, giving the clarifying example of a wood trader, bound by a code that promotes the use of only sustainable wood. In the event that it was found that the products advertised contained wood from a deforested

⁴² UCPD (n 9) art 6(2)(b)(i).

⁴³ *Ibid*, art 6(2)(b)(ii).

⁴⁴ *Ibid*, art 2(f)

⁴⁵ Howells *et al.* (n 17) 205.

⁴⁶ Rühmkorf (n 8) 127.

⁴⁷ Howells *et al.* (n 17) 203.

area, the trader would have been in breach of the code under article 6(2)(b), because ‘the average consumer would expect code members to sell products which comply with their code’.⁴⁸

A subsequent important issue that has to be solved is whether the provision covers only codes between many different parties or also a self-regulation code set up by a single firm for its behaviour (own-code). There is no clear Guidance from the Commission on how to interpret this point, nor are there relevant cases. On the one hand, since the provision clearly states that codes should ‘define the behaviour of *traders* (emphasis added)’ the literal interpretation would exclude own-codes.⁴⁹ On the other hand, following a teleological interpretation one would reach the opposite result. Given that the scope of the directive is the protection of consumers from unfair commercial practices, it seems that own-codes could have the same misleading effect of a multilateral one, taking into account the factual context and the relevant circumstances. For this reason, it would be illogic and against the scope of the Directive to exclude own-codes.

2.4.2 The two additional conditions

By setting two strong conditions it is clear that the EU wanted to restrict the application of UCPD to non-compliance with a code of conduct. This seems coherent with the scope of the Directive that is not ensuring the compliance of traders with the codes of conduct that they sign, but rather the protection of consumer from companies’ false claims.

Regarding the first condition (firm and verifiable commitment) a case by case analysis needs to be carried out. In fact, the specific commitment has to be evaluated in its factual context in order to establish whether it is just aspirational or not. However, it is possible to define some statements that clearly do not satisfy the conditions: affirmations such as ‘will use best endeavours’, ‘hope to be able to’, ‘will strive to’ do not satisfy article 6(2)(b)(i).⁵⁰ Therefore, when dealing with the possible application of UCPD to infringement of commitments contained in codes of conduct, particular attention must be given to the words used in the code, as usually they are shaped exactly to be as vague as possible in order to avoid potential enforcement.⁵¹

With regard to the second condition (the inclusion of the tie in a commercial practice), this has to be broadly interpreted to include not only declarations claiming to abide by a code, but also the use of symbols and logos linked to it.⁵² Andreas Rühmkorf accurately

⁴⁸ Commission Guidance (n 18) pp 44, 45.

⁴⁹ Rühmkorf (n 8) 134.

⁵⁰ Howells *et al.* (n 17) 208.

⁵¹ Beckers (n 14) 207.

⁵² Howells *et al.* (n 17) 210.

maintains that having on the same website, information about CSR commitments and shopping facilities, close to each other, would qualify as an indication of the tie in a commercial practice.⁵³

The application of article 6(2)(b) to CSR codes on the one hand seems assisted by the broad interpretation of the term codes of conduct that would allow the inclusion of environmental and social commitments in the application of UCPD. On the other hand, however, the several conditions required by the article make the application of the provision quite complicated. Indeed, often CSR codes contain general statements that would not satisfy the non-aspirational requirement.⁵⁴ Moreover, when the code contains firm declarations, companies are extremely careful not to directly link together the commercial practice and the participation to the code. Eventually, finding information in order to deny companies' claims is a complex and expensive task, usually carried out by NGOs, not without significant difficulties. Nonetheless, a case such as the Lidl one, shows the feasibility of such an option, especially when NGOs and Administrative Authorities work together.

2.5 Enforcement

Dealing with the enforcement of UCPD is particularly complicated, since in this aspect the Directive has left a wide margin of discretion to MSs. Therefore, it is not possible to carry out the analysis under the same assumption of perfect implementation and harmonisation. This section will firstly examine the possibilities of enforcement provided in the Directive referring also to examples of implementation in Germany, Italy and UK. Secondly, it will try to highlight some relevant aspects of enforcement in relation to CSR. The main provisions are contained in articles 11, 12 and 13. The scope of the enforcement is to ensure that adequate and effective means to combat unfair commercial practice are available in every MS. Member States are free to decide to whom grant locus standi (persons, competitors, organisations) that anyway must have a legitimate interest. MSs are also free to decide whether such actors have the right to take directly legal action (private enforcement),⁵⁵ or whether they should always 'bring the matter before an administrative authority, competent either to decide on complaints or to initiate appropriate legal proceedings' (public enforcement).⁵⁶

⁵³ Rühmkorf (n 8) 135.

⁵⁴ E. Pedersen, M. Andersen, 'Safeguarding Corporate Social Responsibility (CSR) In Global Supply Chains: How Codes of Conduct Are Managed in Buyer-Supplier Relationships', (2006) 6(3-4) *Journal of Public Affairs* 228.

⁵⁵ UCPD (n 9) art 11(1)(a).

⁵⁶ *Ibid* art 11(1)(b).

Whatever type of enforcement MSs decide to adopt, they shall confer either upon courts or administrative authorities, powers enabling them:

- ‘To order the cessation of unfair commercial practice’;⁵⁷
- ‘If the practice has not yet been carried out but it is imminent, to order the prohibition of the practice’;⁵⁸
- To apply penalties for infringement of UCPD provisions. These penalties must be effective, proportionate and dissuasive;⁵⁹
- ‘To require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice [...] if such a requirement appears appropriate on the basis of the circumstances of the particular cases’;⁶⁰
- ‘To consider factual claims as inaccurate if the evidence demanded [...] is not furnished or is deemed insufficient [...]’.⁶¹

Moreover, MSs may confer also the power to require the publication of the decision finding the practice as unfair and the publication of a corrective statement.⁶²

Some Member States, for instance Germany, rely mainly on private enforcement, whereas others, such as the UK and Italy, use essentially public enforcement.⁶³ Germany recognised the right of individual enforcement to competitors,⁶⁴ whereas Italy for instance grants only the right to refer to the authority.⁶⁵ Generally, Member States allow collective enforcement by organisations having a legitimate interest. For instance, both in the UK and Germany, associations that are deemed to represent the collective interest of consumers have the right to seek an injunction order against an unfair commercial practice.⁶⁶

Despite the fact that article 10 mentions ‘persons’, differentiating them from companies and competitors, it is undisputed that consumers’ actions are not covered by the Directive. Member States are obviously free to grant special rights to consumers in order to ask for damages and combat unfair commercial practices, but these would be outside the scope of the Directive.

⁵⁷ UCPD (n 9) art 11(2)(a).

⁵⁸ *Ibid* art 11(2)(b).

⁵⁹ *Ibid* art 13.

⁶⁰ *Ibid* art 12.

⁶¹ *Ibid* art 12(b).

⁶² *Ibid* art 11.

⁶³ Howells *et al.*, *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Publishing Ltd. 2014) 236.

⁶⁴ Gesetz Gegen den Unlauteren Wettbewerb (UWG) §9.

⁶⁵ Codice del Consumo art 27 (Decreto Legislativo 6 September 2005 n 206).

⁶⁶ Consumer Protection from Unfair Trading Regulation 2008 s 26; Gesetz Gegen den Unlauteren Wettbewerb (UWG) § 8 III No 3.

In reference to the relationship between CSR and UCPD, it is possible to highlight some relevant aspects. Although the scope of UCPD is to protect consumers from unfair commercial practices, this does not exclude that some of the instruments and enforcement powers provided in the Directive may have also other important consequences in the field of CSR. For instance, the possibility for the court or the authority to require the publication of the decision and/or of a corrective statement can clarify the position of a company in respect of social and environmental themes. Companies care about their image; consequently, such a tool might have an important deterring effect, as it can compromise their reputation. To remedy this situation, companies might actually apply CSR practices, bringing about social or environmental improvements. Another interesting power granted by the Directive to courts or authorities is the possibility to ‘require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice’. This could oblige companies to reveal real information vis-a-vis their respect of social issues or face the consequences of an adverse judgement, in case they decide not to furnish such evidence or their evidence was not sufficient. These are some of the reasons why ultimately companies prefer to settle out of court. Usually settlements are not public and are less likely to catch the public’s attention. For instance, both the *Kasky v Nike* and the *Lidl* case ended with a settlement out of court.

Conclusion

Companies’ commitments to Corporate Social Responsibility practices depend on the weight consumers attach to these issues. Consumers have shown an increasing attention on the social and environmental impact of companies, which theoretically may shift their purchasing decision. However, this attention refrains from translating into an ‘ethical consumerism’. This is also due to the lack of trust in companies’ behaviour that could be stemmed through the application of Unfair Commercial Practice Law to CSR practices. The possibility of applying the European legislation has been analysed and confirmed throughout this study. UCPD is applicable to CSR practices to a large extent. CSR statements qualify as commercial practices, and in more than one occasion environmental claims have been recognised as influencing factors for the average consumer. CSR codes are caught by the definition of codes of conduct, and consequently a breach of the commitment contained in them might qualify as an unfair commercial practice. Notwithstanding these positive aspects, one should not forget the limits of the enforcement of UCPL in respect of CSR practices: firstly, it is difficult to satisfy all the conditions imposed by the Directive; secondly, finding reliable information to rebut what claimed by companies is a costly and time-consuming process; thirdly, the Directive only grants very limited enforcement rights. Last but not least, UCPD focuses on the protection of consumers, and not on the actual respect by companies of the environment and human rights. In this regard, the legal consequences that this connection can bring

about are limited. Probably the most important result that can be achieved by using UCPL in relation to CSR practices is obtaining a judgment that would have the effect of jeopardy the reputation of the company. In this event, it is possible to imagine that in order to win back consumers' trust and a good marketing image, companies would need to commit seriously in CSR, bringing about real improvements.