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4

Regulatory Siblings: The Unfair Commercial Practices Directive Roots of the AI Act

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I. Introduction

During the past two years, the European Commission has been issuing one regulatory proposal after another in the field of technology regulation. One of the proposed instruments is the Artificial Intelligence Act (AI Act),[1] which is expected to shape the future of technology innovation on the internal market, while proposing stringent normative boundaries for the development of artificial intelligence (AI) in the European Union space.

A quick read of the lengthy AI Act proposal reveals a highly complex and cumbersome piece of regulation, which might further complicate harms arising out of the deployment of AI products, rather than clarify the regulatory boundaries of its use. Particularly for the consumer protection reader, Article 5 is reminiscent of an earlier, principle-based regulatory instrument, namely the Unfair Commercial Practices Directive (UCPD).[2] In a very similar fashion, Article 5 of the AI Act sets forth a prohibition of certain artificial intelligence practices, just as Article 5 of the UCPD establishes a prohibition of unfair commercial practices and certain categories thereof. Yet the UCPD, for all its benefits, has also led to pitfalls, particularly in the harmonisation of its interpretation and enforcement.

As it currently stands, the UCPD's broad range also includes commercial practices arising out of the use of technology. In 2018, after the revelations of undisclosed data sharing with third parties by Facebook, the Italian Competition Authority fined Facebook on the ground of the company having used misleading

[1] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 final. This contribution will focus on the text of the proposal.

[2] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L-149/22 (UCPD).

and aggressive practices.[3] The initial investigation[4] leading to this fine subsequently resulted in a second investigation which attracted, in 2021, another fine for Facebook's lack of compliance with the earlier warnings.[5] While this move was not followed by the rest of the authorities in Member States with powers to enforce the UCPD, it proved that not just data protection, but also the manipulation of consumer behaviour in commercial transactions, can be sanctionable activities on the digital internal market. This is all the more important since the General Data Protection Regulation (GDPR)[6] has played a central role in remedying harms arising in the data economy.[7] So much so, that the attention paid to data protection enforcement as a *sui generis* Internet legal framework undermined enforcement in other regulation sectors, such as the UCPD.[8]

Given the UCPD's structure, combining a list of prohibited practices, special tests for misleading and aggressive practices, as well as a general unfairness test, it could be argued that it already possesses all the necessary future-proof features for a regulatory instrument that has the flexibility to be applied to a very wide range of technological practices, while also not specifically defining them. Yet the proposal of a separate regulation aimed at governing technologies defined as 'artificial intelligence' will give rise to certain tensions with existing regimes. This chapter will explore the tensions arising out of the similarities and potential overlaps of the manipulation tests in the AI Act and the UCPD. This comparison is followed by the introduction of the concept of 'regulatory siblings' in the European Union landscape: similar or identical legal rules used across different legal instruments, which may sound the same but have very different interpretations and thereby create risks for legal consistency.

To better understand regulatory siblings in the context of principled-based regulation, this chapter proposes a comparative analysis of Article 5 of the UCPD and Article 5 of the AI Act proposal, aimed at fleshing out the similarities between the AI Act and the UCPD relating to terminology and concepts. In doing so, the chapter first describes both texts and further extracts their common characteristics. It additionally offers insights for the interpretation of these characteristics

[3] 'AGCM – Autorita' Garante Della Concorrenza e Del Mercato', en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes.

[4] 'AGCM – Autorita' Garante Della Concorrenza e Del Mercato', en.agcm.it/en/media/detail?id=a275df5f-079b-4772-9870-3148c9ca558c.

[5] 'Facebook's Dodgy Defaults Face More Scrutiny in Europe' (*TechCrunch*, 2020) techcrunch.com/2020/01/24/facebooks-dodgy-defaults-face-more-scrutiny-in-europe/.

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L-119/1 (GDPR).

[7] 'Meta Hit with ~$275M GDPR Penalty for Facebook Data-Scraping Breach' (*TechCrunch*, 2022) techcrunch.com/2022/11/28/facebook-gdpr-penalty/.

[8] F Zuiderveen Borgesius, N Helberger and A Reyna, 'The perfect match?a closer look at the relationship between eu consumer law and data protection law' (2017) 54 (5) *Common Market Law Review* 1427–65.

on the basis of UCPD case law from the Court of Justice of the European Union (CJEU). Lastly, the chapter critically addresses some problematic concepts embedded in the Article 5 AI Act proposal in the light of the legal uncertainty raised by the prior application of the general test in Article 5 UCPD.

II. The UCPD as a Technology Regulation Instrument

A. A Crash Introduction to the UCPD

In order to understand the similarities and differences between Articles 5 of the UCPD and the AI Act proposal, it is first necessary to understand their contexts. The UCPD was adopted in 2005, with the goal of improving consumer confidence and cross-border trade. In doing so, the European regulator looked at commercial practices occurring before, during and after a business-to-consumer transaction.[9] The UCPD reflects the field of unfair competition, also known as unfair trade law, which has a dual purpose: on the one hand, to protect consumers from manipulative practices which would negatively impact their decision-making processes; on the other hand, as a result, to protect competitors from dishonest businesses practices that can harm the market at the same time.[10] Its rules include requirements for businesses to provide clear and accurate information to consumers, to be transparent about the nature of their products and services, and to refrain from using aggressive or misleading tactics in their advertising.

The UCPD Preamble further clarifies its scope. According to Recital 7, the UCPD 'addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products', and excludes other forms of commercial communication, such as that targeting investors. Furthermore, Recital 15 clarifies that it includes commercial communication, advertising and marketing targeting consumers. Moreover, Article 2(d) defines business-to-consumer commercial practices as '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'. This also includes services, in addition to products.[11] While this definition

[9] Article 3(1) UCPD.

[10] H Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer Law International, 2004); M Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing, 2016); N van Eijk, C J Hoofnagle and E Kannekens, 'Unfair Commercial Practices' (2017) 3 *European Data Protection Law Review* 325; OK Osuji, 'Business-to-Consumer Harassment, Unfair Commercial Practices Directive and the UK – A Distorted Picture of Uniform Harmonization?' (2011) 34 *Journal of Consumer Policy* 437.

[11] European Commission, Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320) [2021] OJ C-526/1. See also Case C-388/13, *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft*. ECLI:EU:C:2015:225, [2015] 3 CMLR 25, para 35; C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* ECLI:EU:C:2010:12, [2010] ECR I-217, para 39.

is very broad when it comes to the commercial implications of the relationship between businesses and consumers, it does not reflect the full spectrum of practices in which businesses may engage, such as practices which involve businesses and citizens (instead of consumers), with the prime example being that of political advertising.[12] This restriction can be understood to have been implemented in an attempt to not overlap with other policy sectors, in this case more geared towards fundamental rights. However, in more recent times the interplay between the market of political advertising and commercial practices has raised new questions relating to the potential inspiration, if not harmonisation, which different policy fields could benefit from when dealing with considerable similarities.[13]

Still, even with these sectoral limitations, it is noteworthy that when it comes to the practices of technology companies, they will often make statements about the accuracy, parameters or terms for the use of their technologies. To the extent these technologies are consumer-facing, the UCPD applies. This was the case in the aftermath of the Cambridge Analytica scandal, where Facebook was found to have deceived its users in relation to its data sharing practices. While telling consumers a more concise and less concerning version of what it was doing with their data, Facebook was funnelling data at an industrial level through its Graph Application Programming Interface to a wide volume of third parties, without having obtained specific consent for this distribution.[14] Data sharing practices such as in the Cambridge Analytica public scandal showed the legal and regulatory community the potential of the UCPD to address harms arising out of data collection and profiling through machine learning.

In 2019, the UCPD was updated through the Modernisation Directive,[15] which added a number of novel provisions,[16] and overall made the UCPD more fit to deal with business practices in the digital economy.[17] The UCPD is one of the Directives in the consumer acquis currently undergoing a fairness check led by the European Commission, to explore additional ways in which it can be consolidated even further to meet the needs of a fast-moving digital market.[18]

[12] For instance, political advertising practices, albeit facilitated by business activity, are generally not covered by the UCPD. See G De Gregorio and C Goanta, 'The Influencer Republic: Monetizing Political Speech on Social Media' (2022) 23 *German Law Journal* 204; N Helberger, T Dobber and C de Vreese, 'Towards Unfair Political Practices Law: Learning Lessons from the Regulation of Unfair Commercial Practices for Online Political Advertising' (2021) 12 *JIPITEC*.

[13] Helberger, Dobber and de Vreese (n 12).

[14] C Goanta and S Mulders, '"Move Fast and Break Things": Unfair Commercial Practices and Consent on Social Media' (2019) 8(4) *Journal of European Consumer and Market Law* 136–46.

[15] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328 (Modernisation Directive).

[16] Including the formalisation of case law on the scope of the UCPD with respect to both services and products, see Article 3 Modernisation Directive.

[17] B Duivenvoorde, 'The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act' (2022) 11(2) *Journal of European Consumer and Market Law* 43–52.

[18] European Commission, 'Digital Fairness Check', ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en..

B. Article 5 UCPD

The tiered structure of the UCPD reflects three parts which guide how the Directive is supposed to be applied. First, the UCPD straight out bans practices listed in its Annex 1. For instance, dishonestly claiming to be a signatory of a code of conduct is a practice which is in all circumstances considered to be a misleading commercial practice.[19] Similarly, falsely limiting the availability of products and services is also considered unfair, and in particular a misleading commercial practice.[20] Examples of aggressive practices are also covered by the Annex. For instance, ads including direct exhortations targeting children, to buy products or to persuade parents to buy products, is considered to be not merely a misleading practice, as much as an actually aggressive practice.[21] Second, the UCPD operates with specific tests in Articles 6–9. These are tests for misleading actions, misleading omissions and aggressive practices. The tests introduce specific contextual details that may be taken into account to determine the unlawful nature of commercial practices. Last, if practices are difficult to define under the Annex or the special tests, the UCPD also provides for a general test in Article 5.

According to Article 5(1), unfair practices are prohibited. To test the unfairness of a commercial practice, subparagraph 2 introduced two conditions:

(i) That a commercial practice is contrary to the requirements of professional diligence; and
(ii) That it 'it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.'

The two conditions are cumulative. On the one hand, the test reflects professional diligence, defined in Article 2(h) as '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'. In other words, this echoes the expectation that businesses should not engage with consumers to the detriment of their interests, namely in an attempt to negatively manipulate them, but rather initiate transactions in good faith.[22] On the other hand, the test makes reference to specific concepts such as 'material distortion', 'economic behaviour' and 'average consumer' as an implied standard for the average targeted consumer. The average consumer qualification has been a subject of intense debate in European private law literature,[23] particularly

[19] Point 1 of Annex I UCPD.
[20] Point 7 of Annex I UCPD.
[21] Point 28 of Annex I UCPD.
[22] Good faith is however not defined in the Directive.
[23] R Incardona and C Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 *Journal of Consumer Policy* 21; B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer, 2015).

due to the fact that the UCPD does not see it as a statistical or economic concept. The average consumer is rather a doctrinal benchmark reflecting a reasonably well-informed and reasonably observant and circumspect consumer, when taking into account social, cultural and linguistic factors.[24] In other words, '[t]he average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case'.[25]

In addition, Article 5(3) also makes reference to a special average consumer, namely the vulnerable consumer, as part 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'.

III. The AI Act: Another Layer of Regulation

The proposal on the AI Act, dating from 2021, aims to 'improve the functioning of the internal market by laying down a uniform legal framework in particular for the development, marketing and use of artificial intelligence in conformity with Union values'.[26] In doing so, the European Union hopes to set a global example in the governance of new technologies, as it is said to have achieved in the context of the GDPR.[27] The AI Act is part of the European AI Strategy, which pursues two goals. First, the Strategy aims to create an innovative Digital Single Market, in an attempt to be competitive on the international technology playing field. Second, it aims to promote European Union values, such as those reflected by the European Charter of Fundamental Rights, at the heart of new technologies, all while supporting legal certainty.[28]

It is outside the scope of this chapter to give a comprehensive overview of the AI Act. This chapter will focus on Article 5, and in particular on the prohibitions enshrined therein. Article 5 enumerates and prohibits a list of so-called 'artificial intelligence practices', namely:

(i) The commercialisation and use of AI systems that 'deploy[..] subliminal techniques beyond a person's consciousness in order to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm';

[24] Recital 18 of UCPD Preamble.
[25] ibid.
[26] Recital 1 of AI Act preamble.
[27] N Helberger and N Diakopoulos, 'The European AI Act and How It Matters for Research into AI in Media and Journalism' (2022) 0 *Digital Journalism* 1.
[28] ibid.

(ii) The commercialisation and use of AI systems aimed at exploiting vulnerable persons 'due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm';

(iii) The commercialisation and use of AI systems by or on behalf of public authorities aimed at evaluating or classifying 'the trustworthiness of natural persons over a certain period of time based on their social behaviour or known or predicted personal or personality characteristics', with rankings ('social scores') leading to any of the following two options (or both):

   a. Discriminatory treatment for natural persons or groups in situations unrelated to the contexts in which the original data generation or collection took place;
   b. Discriminatory treatment of natural persons or groups which is considered unjustified or disproportionate;

(iv) Real-time remote biometric identification for purposes of law enforcement, unless this is strictly necessary for one of the following goals:

   a. Targeting the search for specific potential crime victims;
   b. Preventing terrorist acts or other public safety dangers;
   c. Finding criminals.

Sub-paragraphs 2, 3 and 4 continue to address more details relating to biometric identification.

The four practices identified in Article 5 fall into two main categories. A first category of commercial practices (*private practices*) entails 'the placing on the market, putting into service or use of an AI system' and includes Articles 5(1)(a) and (b). This category seems to govern business practices on consumer markets, even though the terminology of 'person' is used instead of 'consumer'. The second category of practices (*public practices*) reflects the same terminology, namely 'the placing on the market, putting into service or use of an AI system', but this time it also involves a public administration component. Article 5(1)(c) refers to 'public authorities' or practices 'on behalf of public authorities', and Article 5(1)(d) refers to 'publicly accessible spaces' and 'law enforcement'. For the purposes of a comparison with a consumer law instrument such as the UCPD, this chapter will only address the first category, namely private practices.

IV. Comparing the Two Articles 5

A. Mapping Similarities

So far, Sections II and III were focused on providing the basic characteristics of two articles from two separate legal instruments which bear considerable

similarities – and even the same numbering. Earlier literature on the AI Act has already noted the similarities between the two Articles 5 discussed in this chapter. According to Veale and Zuiderveen Borgesius, the AI Act adds little to existing EU law, because, among others, the two prohibited practices regulating manipulation (referred to as private practices above), and which the authors call 'manipulative systems', resemble the UCPD.[29] In what follows, this resemblance will be explored in more depth, to reflect upon whether such resemblance is desirable to start with. While the AI Act is still merely a proposal, the UCPD has been applied to a considerable number of industries and commercial practices. The purpose of the comparison is to determine what interpretational pitfalls have been identified in the text of Article 5 UCPD, and consider whether these pitfalls may be risks for the consistent interpretation of Article 5 AI Act.

On the basis of the analyses in Sections II and III, it can be noted that the overlap between the two articles only takes into account the first category of practices under the AI Act (private practices), as the UCPD does not address practices undertaken by public authorities.[30] Using a rather classical comparative approach in analysing the text of the two articles, Table 1 below makes an overview of the terminological similarities identified therein.

Table 1 includes highlighted terms which are common (whether in that order or another) across the two different articles. The table reveals two types of similarities:

(i) The setting of a clear prohibition of unfair commercial practices and of particular artificial intelligence practices; and
(ii) The common terminology in Articles 5(2) and (3) UCPD and 5(1)(a) and (b) AI Act.

Looking more closely at these similarities, we can notice a few specific concepts across the two instruments, namely: the material distortion of behaviour (which is economic behaviour in the UCPD and general behaviour in the AI Act); and a clearly identifiable group (UCPD) or specific group (AI Act) of vulnerable consumers (UCPD) or individuals (AI Act) on the basis of mental or physical infirmity and age (UCPD) or age and physical or mental disability (UCPD).

[29] M Veale and F Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act – Analysing the Good, the Bad, and the Unclear Elements of the Proposed Approach' (2021) 22 *Computer Law Review International* 97.

[30] This perspective can be in itself a source of criticism, since academic literature across multiple disciplines has identified that the identity of consumers and that of citizens often overlap. See for instance J Davies, *The European Consumer Citizen in Law and Policy* (Palgrave Macmillan, 2011); A Mol, 'Good Taste: The Embodied Normativity of the Consumer-Citizen' (2009) 2 *Journal of Cultural Economy* 269; E Porter, *The Consumer Citizen* (Oxford University Press, 2021); CH de Vreese, 'Digital Renaissance: Young Consumer and Citizen?' (2007) 611(1) *The Annals of the American Academy of Political and Social Science* 207–16.

Table 1 Selected provisions from Article 5 UCPD and Article 5 AI Act

UCPD		AI Act	
Article 5(1)	'[u]nfair commercial practices shall be prohibited.'	Article 5(1)	'[t]he following artificial intelligence practices shall be prohibited'
Article 5(2)(b)	'[…] it **materially distorts or is likely to** materially distort the economic **behaviour** with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.'	Article 5(1)(a)	'the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person's consciousness in order to **materially distort** a person's **behaviour** in a manner that causes **or is likely to** cause that person or another person physical or psychological harm'
Article 5(4)	'[i]n particular, commercial practices shall be unfair which: (a) are misleading as set out in Articles 6 and 7, or (b) are aggressive as set out in Articles 8 and 9.'		
Article 5(3)	'commercial practices which **are likely to materially distort** the economic **behaviour** only of a **clearly identifiable group** of consumers who are particularly **vulnerable** to the practice or the underlying product because of their **mental or physical infirmity**, **age** or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.'	Article 5(1)(b)	'the placing on the market, putting into service or use of an AI system that exploits any of the **vulnerabilities** of a **specific group** of persons due to their **age**, **physical or mental disability**, in order to **materially distort** the **behaviour** of a person pertaining to that group in a manner that causes or **is likely to** cause that person or another person physical or psychological harm'

So how should we interpret the similarities between these articles, and what do they mean?

B. A General versus a Specific Prohibition

Article 5(1) UCPD sets out a general prohibition to use unfair commercial practices, and it outlines a general test to determine what may amount to an unfair commercial practice. Furthermore, according to Article 5(4), certain types of practices (misleading and aggressive) are mentioned as a particular category of prohibited practices. Similarly, Article 5(1) AI Act lists a number of particular artificial intelligence practices which are prohibited.[31] This reveals the similarity in approach between the two legal instruments, namely to create categories of prohibited practices, loosely defined, and with their own self-standing tests. The difference is that while in the AI Act these tests are contained within one article, in the UCPD, the practices are further elaborated upon in subsequent articles.

As can be observed, a general prohibition is missing from the AI Act, as artificial intelligence practices are not by themselves a harmful category; it is only manipulative practices that are considered to be problematic. By contrast, even though the UCPD also does not prohibit all commercial practices, it does single out and define an entire category of unwanted practices under the umbrella of unfairness, loosely characterised by the existence of deceit that may result in consumer manipulation.

C. Manipulation and Causality

The first cluster of terminological similarities revolve around Articles 5(2) UCPD and 5(1)(a) AI Act, where the concepts of material distortion and behaviour can be discussed. Although it must be noted that the similar concepts are built slightly differently in the causal mechanisms referred to across the two articles, they actually seem to offer protection against similar types of harms.

According to the Commission's 2021 UCPD Guidelines, the determination of whether a commercial practice materially distorts or is likely to materially distort the economic behaviour of the consumer is the test of whether the practice causes or is likely to cause a different transactional decision than the consumer would have taken in the absence of that commercial practice.[32] The Guidelines also note that the definition of 'transactional decision' is very broad, as also emphasised by the CJEU in the *Trento Sviluppo srl* case, where it was held that the definition 'covers not only the decision whether or not to purchase

[31] See Section IV(A) above.

[32] European Commission, Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320) [2021] OJ C-526/1.

a product, but also the decision directly related to that decision, in particular the decision to enter the shop'.[33] The Commission notes that this broad concept 'allows for the UCPD to apply to a variety of cases where a trader's unfair behaviour is not limited to causing the consumer to enter into a sales or service contract'.[34] As a consequence, the causal link or the likely causal link need not be solely considered with respect to a commercial practice and a purchase decision, but also additional aspects of consumer behaviour such as entering a shop, spending more time on an Internet booking process, deciding to continue using the services of the business engaging in unfair commercial practices, clicking on links or ads on the Internet, or even continuing to use Internet services through browsing or scrolling.[35] What is more, it is not only the actual distortion of economic behaviour that is covered by Article 5(2)(b) UCPD, but also the likelihood that this behaviour has been distorted.[36] Put differently, the assessment regards the potential impact a commercial practice may have on the average or the targeted consumer.[37]

By contrast, although Article 5(1)(a) AI Act operates along similar concepts, the causal or likely causal link is part of a more convoluted test. First of all, the article includes a number of specific practices deemed as 'artificial intelligence practices', which are all defined in Article 3. According to the latter, 'placing on the market' entails 'the first making available of an AI system on the Union market';[38] 'making available on the market' entails 'any supply of an AI system for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge';[39] and 'putting into service' entails the 'supply of an AI system for first use directly to the user or for own use on the Union market for its intended purpose'.[40] The causal or likely causal link bridges the aforementioned AI practices with the following additional conditions. These practices need to have a 'a significant potential to manipulate persons through subliminal techniques beyond their consciousness or exploit vulnerabilities of specific vulnerable groups such as children or persons with disabilities in order to materially distort their behaviour in a manner that is likely to cause them or another person psychological or physical harm'.[41] Recital 16 of the AI Act further clarifies that AI systems deploy 'subliminal components

[33] Case C-281/12, *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2013:859, [2014] 1 WLR 890, para 36.

[34] European Commission, Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320) [2021] OJ C-526/1.

[35] ibid.

[36] GB Abbamonte, 'The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach' (2006) 12 *Columbia Journal of European Law* 695.

[37] F Gomez, 'The Unfair Commercial Practices Directive: A Law and Economics Perspective' (2006) 2(1) *European Review of Contract Law* 4–34.

[38] Article 3(9) AI Act.

[39] Article 3(10) AI Act.

[40] Article 3(11) AI Act.

[41] AI Act, Explanatory Memorandum, §5.2.2.

individuals cannot perceive', and which are intended to materially distort a person's behaviour in a way that causes or is likely to cause that person (or someone else) physical or psychological harm.[42]

There is a lot to unpack in this test, to the extent that the article itself is very difficult to follow. In the UCPD, the concept of economic behaviour is central, and even though very specifically defined (eg in terms of transactional decisions), it still benefits from a wide interpretation, and it represents the manipulation benchmark: to the extent the behaviour is affected, there is manipulation. The AI Act speaks about the material distortion of individual behaviour not as an outcome in itself, but as a means to inflict physical or psychological harm, not only upon the person whose behaviour is materially distorted, but also upon others. Thus in other words, the subliminal techniques that lead to the material distortion of individual behaviour are supposed to cause or be likely to cause physical or psychological harm. Manipulation is not the outcome of the test; rather harm is the outcome, and manipulation is the way in which harm has been achieved. Furthermore, it has been pointed out that in this test, the AI Act also requires the element of intent, as 'the manipulator wants to intentionally but covertly make use of another's decision-making to further their own ends through exploiting some vulnerability'.[43]

Although this can be seen as a difference between the two articles, it is important to consider how the UCPD deals with consumer harms. The implicit general harm embedded in Article 5 UCPD is limiting consumer choice, and in the process, affecting consumer choice architecture.[44] Consumer harm is thus implied in the manipulation of economic behaviour. In this case, consumer harm can be a direct pecuniary loss given a purchasing decision which the consumer would not have taken in the absence of manipulation. However, a subcategory of unfair practices is that of aggressive practices, where the harm paradigm slightly changes, and where physical and psychological harm can also be considered. Although the UCPD is an unfair trade instrument which did not aim to harmonise any contractual matters at national level, its roots in the classical contractual concept of defects of consent are undeniable. As a matter of fact, in Article 9, where dealing with the context of aggressive commercial practices, the UCPD makes reference to 'harassment, coercion, including the use of physical force, or undue influence', which all have equivalents in national contract systems in concepts such as threat, undue influence or abuse of circumstances. Here, even if the underlying goal of an unfair commercial practice is to engage the consumer in a transactional decision, the psychological distress associated with threats, as well as the physical force which may result in physical harm, very much echo the types of harm and the causal discussions embedded in the AI Act.

[42] L Edwards, 'Regulating AI in Europe: four problems and four solutions' (Ada Lovelace Institute, March 2022), www.adalovelaceinstitute.org/wp-content/uploads/2022/03/Expert-opinion-Lilian-Edwards-Regulating-AI-in-Europe.pdf.

[43] Veale and Borgesius (n 29).

[44] J Trzaskowski, 'Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive' (2016) 27(1) *European Business Law Review* 25–49.

D. The Concept of Vulnerability

Moving on to the next cluster of terminological similarities identified, vulnerability is a concept that both frameworks use. Here too it can be argued that vulnerability is defined in similar ways across the UCPD and the AI Act's Articles 5.

According to the Commission, vulnerability is not merely limited to the characteristics described in UPCD Article 5(3), namely by relating to mental or physical infirmity or age. Rather, 'multi-dimensional forms of vulnerability are particularly acute in the digital environment, which is increasingly characterised by data collection on socio-demographic characteristics but also personal or psychological characteristics, such as interests, preferences, psychological profile and mood'.[45] The UCPD Guidelines further recognise the need to refer to commercial practices from the perspective of various age ranges, including, but not limited to, children, teenagers or elderly people.[46] Moreover, consumer vulnerability is linked to the condition that traders are supposed to reasonably be expected to foresee the existence of this vulnerability and its impact on the economic behaviour of vulnerable consumers. Particularly as a result of policy interest in the phenomenon of dark patterns, namely manipulative user interfaces, the Commission has taken the approach that 'the concept of vulnerability in the UCPD is dynamic and situational, meaning, for instance, that a consumer can be vulnerable in one situation but not in others'. The example offered by the Commission reflects a hypothetical situation in which some consumers may be more susceptible to manipulation through personalised digital practices, while not so much so when dealing with offline environments.[47] This is a modern interpretation of vulnerability, which at least in the European consumer *acquis* has until recently entailed a more traditional enumeration of demographic characteristics which could be detrimental to some individuals.

The AI Act does not define vulnerability, nor does it refer to the factors to be taken into account when contextualising vulnerability, as is the case with the UCPD. The only references to vulnerability in the Explanatory Memorandum revolve around the concept of exploiting vulnerabilities, and giving examples such as age (eg children as a vulnerable group) or disability (both physical and mental).[48] These examples are equally found in the UCPD, so from a terminological perspective it can be argued that the initial UCPD vulnerability framework can be read in the AI Act. What was, however, not borrowed was the recently emerged concern of the European Commission, particularly in relation to the UCPD and its implication in the regulation of dark patterns, that defining vulnerability ought to take into account a more situational context. As a result, vulnerability ought to be freed from traditional legal classifications such as those used in the wording

[45] European Commission, Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320) [2021] OJ C-526/1.

[46] ibid.

[47] ibid.

[48] AI Act, Explanatory Memorandum, §5.2.2.

of the AI Act, to reflect a digital reality where any individual, of any age and in any circumstance can be vulnerable against a commercial surveillance system.

V. Regulatory Siblings: If it Looks Like a Duck …

The preceding section aimed to compare two legal provisions in the AI Act and the UCPD which present considerable similarities. The paragraphs selected from Article 5 UCPD and Article 5 AI Act show that the two provisions are not only terminologically, but also conceptually similar. This section critically reflects on these similarities by introducing the notion of 'regulatory siblings', namely legal rules which bear a striking terminological resemblance, if not sometimes an identical form. Comparative law literature often refers to the borrowing of specific legal rules from one system of laws to another as a 'legal transplant'.[49] As a concept with a very rich connotation, the notion of legal transplants has been increasingly used to illustrate more systematic processes of legislative borrowing,[50] all in the context of legal reforms across different jurisdictions. Regulatory siblings are different in two ways. First, because they are rooted within one legal system, across different instruments pertaining to European law, as opposed to across different legal systems. European law has an inherent goal of legal harmonisation, that brings with it important questions of consistency across the European *acquis*. Second, because legal transplants are rarely (if at all) so granular as to only envisage specific provisions, but are rather discussed in a more systematic context, whereas the regulatory siblings discussed in this chapter are examples of specific (albeit central) provisions included in different European legal instruments adopted or proposed in different industry sectors and drafted by different Directorates-General.

Regulatory siblings can be identified across many laws. In the consumer *acquis*, we can see regulatory siblings particularly in the definitions that cross-pollinated the different instruments belonging to this sector of regulation. As early as 1993, the Unfair Contract Terms Directive[51] would define the notion of consumer, yet additional consumer protection instruments added self-standing, often identical definitions of the same concept (see Table 2 below), which have even been adopted beyond consumer protection, in regulatory sectors where consumers were an important stakeholder to consider, such as platform liability.

[49] A Watson, 'Legal transplants and law reform' (1996) 92 *Law Quarterly Review* 79. See also R Michaels, 'Make or buy – a new look at legal transplants' in H Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Beck, 2013).

[50] M Siems, 'Malicious Legal Transplants' (2018) 38 *Legal Studies* 103.

[51] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95 (UCTD).

Table 2 The evolution of the concept of 'consumer' as a regulatory sibling

Year	Directive	Article	Definition
2005			
1993	Unfair Contract Terms Directive (consumer protection)	Article 2(b)	'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession
2011	Consumer Rights Directive[52] (consumer protection)	Article 2(1)	'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession
2019	Digital Content Directive[53] (consumer protection)	Article 2(6)	'consumer' means any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession
2005	UCPD (consumer protection)	Article 2(a)	'consumer' means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession
2000	E-Commerce Directive[54] (intermediary liability)	Article 2(e)	'consumer' means any natural person who is acting for purposes which are outside his or her trade, business or profession
2022	Digital Services Act[55] (intermediary liability)	Article 3(c)	'consumer' means any natural person who is acting for purposes which are outside his or her trade, business, craft, or profession

[52] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304 (CRD).

[53] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136 (Digital Content Directive).

[54] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178 (ECD).

[55] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L 277 (DSA).

As an alternative to regulatory siblings, legal instruments can also cross-reference other, earlier or special instruments for concepts they ought to use. For instance, in its Article 2(5), the Copyright Directive[56] makes reference to the Information Society Services Directive[57] to define 'information society services', just as the DSA in Article 3(a). This is an anchoring mechanism aiming to preserve the conceptual consistency of European law by expressly linking instruments where this is desirable from a policy perspective. Regulatory siblings have a more implicit anchoring effect. If the regulator decides to duplicate an earlier concept and introduce it independently in a new regulatory instrument, it will become self-standing. Indeed, it is always possible – particularly in judicial proceedings – to find the rationale of specific sector regulation and extend it across multiple instruments and similar concepts. However, this is less cohesive than cross-referencing the same concept from earlier instruments. Thus it can be argued that while the use of regulatory siblings does contribute to the improvement of legal consistency across laws (see Table 2 above)), there might be better ways to enhance this consistency.

Definitions are of course different than manipulation tests. They are more basic, and generally, the repetition of definitions does not create any interpretational issues, provided that they do not conflict. The manipulation tests exemplified in the two Articles 5 are more complex than that, and they depict an example of when regulatory siblings, which otherwise might lead to some coherence in fragmentation, are too much of a good thing. Two specific dangers can be highlighted here, namely overlaps that may result in the cannibalisation of the instruments' scope of application; and their specific content in this case, namely the use of a general test which is future-proof to the detriment of legal certainty.

With respect to the first danger, in illustrating the type of situations it considers as falling under the private practices cluster of Article 5 AI Act, the European Commission referred to what Veale and Borgesius rightfully identified as examples that 'border on the fantastical': '[a]n inaudible sound [played] in truck drivers' cabins to push them to drive longer than healthy and safe [where] AI is used to find the frequency maximising this effect on drivers'; and '[a] doll with integrated voice assistant [which] encourages a minor to engage in progressively dangerous behavior or challenges in the guise of a fun or cool game'.[58] The first example reflects an employment situation where the behaviour of an employee would be surveilled and influenced. While this regards a private relationship between an employer and an employee, no commercial element is involved here.[59] However, the second

[56] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130 (Copyright Directive).

[57] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L 241.

[58] Veale and Borgesius (n 29) 99.

[59] There is of course a commercial element in the relationship between the employer and the seller/provider of the AI system. This point should also be investigated further, particularly as an additional scope similarity between the UCPD and the AI Act, namely the coverage of parties in the supply chain around the prohibited practices.

example refers to a product, which makes the situation likely to also fall under the ambit of the UCPD.[60] The Commission acknowledges in the Explanatory Memorandum that 'other manipulative or exploitative practices affecting adults that might be facilitated by AI systems could be covered by the existing data protection, consumer protection and digital service legislation that guarantee that natural persons are properly informed and have free choice not to be subject to profiling or other practices that might affect their behaviour'.[61] However, it does not acknowledge how exactly these additional sectors of regulation can and should interact with the AI Act, and what should guide a cross-sectoral interpretation. Would judges, in applying the AI Act, have to look into the case law and doctrinal debates around the UCPD to look for complementarity? Will enforcement authorities end up informally dividing their areas of expertise and deferring activities to one another based on unclear policy objectives, as has happened with data protection and consumer authorities in the aftermath of Cambridge Analytica? The only way in which these questions can be currently answered is through speculation. This remains a rather complex issue, since the AI Act and the UCPD will most likely have a considerable overlap. It could take strenuous and long-lasting interpretation cycles to delineate this overlap even if courts take terminological similarities as a starting point. Yet if they do not, and the AI Act manipulation test to be considered is completely different from the UCPD's similar test in technical legal arguments, this may pose even worse legal certainty issues.

Turning to the similarities between the general tests in terms of regulatory techniques, regulatory siblings that overlap across sectors of legislation, particularly when the content of the overlap reflects vague rules, risk disrupting the systematisation and consistency of European law as attributes of legal certainty. In the case at hand, basing a general behaviour test for manipulative AI practices on some of the structural and conceptual elements of the UCPD may be in some ways welcomed. Although the UCPD was updated in 2019, its general unfairness test is generally considered to be future-proof: a test that enumerates a set of conditions applicable to atemporal practices and technologies. Yet what is clear from less than two decades of UCPD, is that a general unfairness test is useless without further interpretation, in the form of guidelines, case law and commentaries, aimed at clarifying the scope of the test and its conditions. It is true that this is how the law works. Subsequently, it will be the job of companies, regulators and judges to interpret such legal tests. However, harmonisation techniques that leave too much discretion in the hands of complex national and supranational actors seldom lead to legal consistency. This is currently the case of the consumer law debate around dark patterns, where the general test can theoretically fit a very wide array of interface design options that may negatively impact the consumer's choice architecture, yet drawing a clear line to determine what is an unlawful dark pattern remains highly debatable. In this context, the result has been that the general test

[60] It is worth noting that product liability legislation would also likely apply.
[61] AI Act, Explanatory Memorandum.

has been too easily applied to design options, to the extent that any manipulation may be considered a dark pattern. The same can happen with the specific tests in the AI Act. Given their wide scope, and lack of clear definitions for what 'subliminal techniques' beyond 'a person's consciousness' may be, as well as what threshold is desirable for physical or psychological harm, these tests may end up covering a considerably broader category of practices than initially considered. The resulting effect can be the trivialisation of harm, just as in the case of dark patterns: if everything is harmful, then nothing is really harmful. To reduce this risk, it is important to have a clear understanding of what legal values and conduct can be expected to be protected with the adoption of the AI Act. The adoption process of the AI Act will most certainly not remedy this; so we must look to the Commission for further initial guidelines, and hope that case law will soon be available to define some of the more convoluted concepts.

VI. Conclusion

This chapter dealt with the terminological and conceptual similarities between selected provisions of Article 5 UCPD and Article 5 AI Act. The general similarity between these provisions was noted in earlier literature, but so far no in-depth comparisons were made between the two. This chapter fills this gap. In particular, it explored similarities linked to general tests versus specific tests for prohibited practices, causal links between conditions of the tests, and individual vulnerability. The analysis resulted in the conclusion that the articles, in spite of some differences in scope and terminology, share a considerable amount of characteristics: so much so, that they can could even be labelled as regulatory siblings – a novel concept introduced in this chapter to depict similar or identical legal rules used across regulatory instruments. Regulatory siblings can bring coherence in fragmented and complex legal systems, but they can also become too much of a good thing, and pose issues related to the overlap of policy scope, leading to cannibalisation between legal instruments. In addition, these particular legal siblings, based on general tests otherwise considered future-proof, may also lead to the reduction of legal certainty due to their unpredictable application. On a conceptual level, regulatory siblings should be further investigated, particularly in the field of technology legislation.

Regulatory siblings are starting to emerge as inspiration links between existing and upcoming instruments. Acknowledging these links and using them in judicial interpretation or regulatory clarifications such as guidelines can help sharpen the intention of the European legislator. If Article 5 AI Act has elements which are visibly common to Article 5 UCPD, this source of inspiration should be clarified. This can help not only with the interpretation and delineation of legal concepts, but also promote legal consistency in the current overly complex context of European regulation.