

**Trustworthy versus fake reviews on online marketplaces
and review platforms – Time for the EU to regulate
transparency of review systems?**

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A dissertation submitted in partial fulfilment of the degree of
Master of Laws (LL.M.) in European Business Law

Faculty of Laws
University of Malta
September 2020



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Abstract

In today's e-commerce environment, many consumers rely on online reviews from peers. They find these reviews nearly everywhere in the internet and trust former customers more than a trader's own advertisement. The possibilities to get information about a trader's reputation are limited online due to anonymity and distance. Over the last years, online reviews had become a powerful tool for the success of business. However, some traders started to boost their business by buying positive reviews from certain companies. Other traders tried to harm a competitor through false negative reviews. Some traders decided to use incentives in order to get more reviews. 'Fake reviews' had become an increasing problem. Therefore, platforms developed strategies in order to detect and remove them. Consumer organisations published guidelines for the handling of online reviews. Such voluntary codes of conduct and self-control are helpful but they are not sufficient because they are not binding. Thus, there is the need for clear legislation and enforcement in order to combat fake reviews.

Some Member States tackled the challenges posed by fake reviews in their own way. Several courts in Germany delivered decisions in this context, whereas France adopted a law in 2016 which directly imposes transparency requirements on online platforms. The experiences of these two countries are instructive.

Albeit Directive 2005/29/EC on Unfair commercial practices ('UCPD') tackles fake reviews, the provisions themselves do not explicitly mention them. The Commission's guidance of 2016 refers to online reviews, but it is not legally binding. The EU's 'New Deal for Consumers' introduced Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules. The new Directive explicitly addresses online reviews and amends the UCPD by introducing transparency requirements for review systems. This leads to more legal certainty for traders and consumers alike, although the new provisions are not detailed and may still allow room for further divergent practice among Member States implementing the said Directive.

Keywords: fake reviews, online reviews, consumer protection, online marketplace, unfair competition

Dedication

To my loving family

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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 328/7.

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Acknowledgments

I would like to thank my supervisor Dr Mireille-Martine Caruana LL.D. (Melit.), LL.M. (London), Ph.D. (Bristol) for her guidance and support from the very beginning. I am very grateful to have such an interested supervisor.

1. Introduction

*'Online reviews have the ability to make or break businesses.'*¹ The willingness of consumers to shop online is built on trust, which is crucial in e-commerce.² The increase in online shopping across the EU had an impact on the role of online reviews on online marketplaces, comparison platforms and review sites. They have become an increasingly essential element in a consumer's decision before choosing a product or service, as well as a trader.³ Consumers rely on them like on a trustworthy recommendation. Therefore, fake online reviews are a growing problem for consumers engaging in online shopping, leading to unfair competition and decrease in trust⁴. On the one hand, some companies have discovered the opportunity of business by selling online reviews for money. Big online marketplaces and review platforms suffer from being flooded with such fake reviews. On the other hand, traders and online marketplaces have developed different strategies to motivate a customer to write a review by sending a kind reminder or offering a discount for the next purchase. Organisations which aim to ensure fair business and consumer protection have also released guidelines with standards for appropriate consumer reviews. However, they are not sufficient for lack of binding character and enforcement.

In January 2020, the EU's 'New Deal for Consumers'⁵ entered into force. It introduced Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules⁶. The new Directive amends existing EU directives in order to strengthen and modernize consumer protection. One of the amended directives is

¹ Wayne R Barnes, 'The Good, the Bad, and the Ugly of Online Reviews: The Trouble with Trolls and a Role for Contract Law after the Consumer Review Fairness Act' (2019) 53 Ga L Rev 549, 553.

² Bob Rietjens, 'Trust and Reputation on eBay: Towards a Legal Framework for Feedback Intermediaries' (2006) 15 Info & Comm Tech L 55, 59, 60.

³ Commission, 'Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools' EAHC/FWC/2013 85 07, p. 74 < https://ec.europa.eu/info/publications/comparison-tools-and-third-party-verification-schemes_en > accessed 10 July 2020.

⁴ Kendall L Short, 'Buy My Vote: Online Reviews for Sale' (2013) 15 Vand J Ent & Tech L 441, 445, 450.

⁵ Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee' – A New Deal for Consumers' COM (2018) 183 final.

⁶ 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 328/7.

Directive 2005/29/EC on Unfair commercial practices ('UCPD')⁷. Apart from the development at EU level, some Member States – e.g. Germany and France – had tried to find their own way to protect consumers from misleading online reviews.

1.1 Research Question

The current academic literature mainly focuses on the phenomenon of fake reviews itself and the legal framework and situation in the US. This dissertation provides a current and vivid view from an EU perspective. It focuses on two core questions: Why was the need felt to introduce provisions at EU level concretely addressed to ensure appropriate standards for the transparency and disclosure of online reviews and related rankings? How does the EU try to achieve this objective by the recent 'New Deal for Consumers' and its Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules? The dissertation seeks to provide a genuine discussion concerning the combat against fake reviews at EU level and some selected Member States.

1.2 Sources and Methodology

The method will include undertaking a critical analysis of EU legislation, in particular the UCPD as well as the new and only recently adopted Directive (EU) 2019/2161. The analysis will take into account documents of the European Commission. Furthermore, a comparison of applicable national law and a study of relevant judgements at national level from Germany and France are undertaken in order to examine how both single Member States tackle the issue of fake online reviews. In addition to this, a review of the academic literature concerning the phenomenon of fake online reviews is undertaken. Apart from the juridical aspect, empirical material concerning e-commerce and the impact of online reviews on consumers and traders will inform the study. The qualitative and quantitative data collected and analysed by other researchers/research institutes within other academic disciplines includes studies conducted by the EU; such data and the findings of such analyses are analysed in order to seek a broader

⁷ 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 ('Unfair Commercial Practices Directive') [2005] OJ L 149/22.

perspective, a 'law and society' approach. Besides the legal provisions, user guidelines about rules for writing customer reviews provided by online marketplaces and comparison platforms will be reviewed.

1.3 Contents of the dissertation

The first chapter will deal with the importance of online reviews regarding consumer behaviour in an online shopping environment. It explains the role of trust and reputation in e-commerce and discusses the phenomenon of 'fake reviews', especially the different kinds and possibilities of classification of problematic review types as it is difficult to draw the line between genuine online reviews and other, misleading ones. The chapter also refers to common types of review systems and the business model of selling and buying reviews that has emerged. Moreover, this part examines user guidelines from review sites and comparison platforms in order to show how they publish online reviews and how they try to detect fake reviews.

The second chapter as the core part of this work examines Directive 2005/29/EC on Unfair commercial practices ('UCPD'). This will include an analysis of the relevant provisions and related documents of the European Commission like the UCPD guidance. As the directive concerns unfair commercial practices, one question will be whether fake reviews clearly fall under the scope and whether they can be classified as a 'tainted' practice according to the exhaustive 'blacklist' of Annex I of the UCPD. Moreover, this part will analyse amendments by the 'New Deal for Consumers' and Directive (EU) 2019/2161 for discussing whether they are able to ensure better protection from fake reviews.

The third chapter will compare how Member States combat fake reviews at national level. The comparison encompasses the situation in Germany and France. The case studies are chosen on the bases that they are Member States with case-law in this field. However, each of them focuses on one aspect more than on another. Germany provides a couple of court cases, even judgments from the Federal Court of Justice, whereas France introduced the French Digital Republic Act in 2016 which modifies the French Consumer Code by implementing rules for websites publishing consumer reviews. The

study at national shall not only serve as a comparison of past actions. It also analyses whether the decisions would have been different due to the changes at EU level.

The last part will provide a final conclusion. As voluntarily self-control and good governance do not mitigate the number and use of fake reviews, clear legislation and enforcement are required.

2. The role of consumer reviews in e-commerce - a literature review

2.1 Trust and reputation in an online environment

The anonymity of parties and the distance between them are a challenge in e-commerce. As consumers are not able to check and examine a product in the 'real' world, or to see or speak to a seller in person, the seller must find another way to create trust.⁸ And consumers need ways to deal with information asymmetry.⁹ Trust can be seen as a precondition for trade in an online environment.¹⁰ Over the years, different systems have been developed to create reputation and to gain trust.¹¹ According to Hurwitz, *'[t]rust is [...] a variable on two sides of an equation. Users' trust in the Internet affects their willingness to rely on the Internet.'*¹² Moreover, *'[r]eputational models are among the most successful responses to concerns about trust online'*.¹³ One example is eBay, a well-known online marketplace where users, both seller and buyer, can give feedback regarding concluded trades. The feedback score is a parameter for the next parties interested in concluding contracts with the concerned person.¹⁴ The better the score and satisfaction of a seller, the more a potential buyer will consider to enter into a contract because he or she believes in the trustworthiness of the seller with the good trading history.¹⁵

Given the example of eBay, it is uncomplicated to leave feedback after a successful transaction and eBay users can rely on existing feedback, taking the scores of other users into account before entering into a contract. The feedback system is a huge benefit for them.¹⁶ The feedback system provided by eBay may be not perfect, but it is nevertheless

⁸ Rietjens (n 2) 59-60.

⁹ Justin Malbon, 'Taking Fake Online Consumer Reviews Seriously' (2013) 36 J Consum Policy 139, 153.

¹⁰ Rietjens (n 2) 59-60.

¹¹ Susan Block-Lieb, 'e-Reputation: Building Trust in Electronic Commerce' (2002) 62 La L Rev 1199, 1199-1200.

¹² Justin Hurwitz, 'Trust and Online Interaction' (2013) 161 U Pa L Rev 1579, 1585.

¹³ *Ibid.*, 1603.

¹⁴ *Ibid.*; Rietjens (n 2).

¹⁵ Hurwitz (n 12) 1603.

¹⁶ Block-Lieb (n 11) 1199-1200, 1204.

functioning when taking into account the amount of transactions and the scores of the eBay members.¹⁷

Consumers do not only compare prices, but also other parameters. Many consumers look at online reviews prior to shop online and they trust such comments from former customers more than information provided by the concerned company. The posted consumer feedback reassures them a lot. In addition, consumers refer to review websites which seem to be more trustworthy than the official homepage of a company.¹⁸ Visible online reviews increase the likelihood of buying the concerned product and a high product rating also increases the likelihood of a purchase.¹⁹ Interestingly, albeit consumers are eager to read reviews because they trust them more than a seller's description, consumers are less eager to write them.²⁰

Both trust and reputation have ever since played an important role in commerce, long before the beginning of e-commerce. *Kadens*²¹ analysed the importance of trust and a merchant's reputation prior to the internet era, showing the parallels in the age of e-commerce. A good reputation can lead to new business relationships, a bad one will hinder them in the future. Trusting existing and accessible reputation is easier and cheaper than investing time, effort and money into the verification of underlying data. But reputation can be manipulated. Distortions can arise.²²

*Kadens*²³ highlighted five major aspects to consider regarding the value of a merchant's reputation: First, reputation is the sum of historical data. It is useful to analyse previous historical behaviour, but this has limited value when it comes to future actions. Historical data cannot predict future behaviour, nor for a merchant or trader. Second, some important information might be secret or hidden for various reasons, so that available data will be incomplete. Third, a merchant's reputation can change very quickly due to

¹⁷ *Ibid.*, 1210.

¹⁸ Commission, 'Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools' EAHC/FWC/2013 85 07, p. 74 < https://ec.europa.eu/info/publications/comparison-tools-and-third-party-verification-schemes_en > accessed 10 July 2020.

¹⁹ Commission, Behavioural Study on the transparency of online platforms, Final Report 2018, p. 44, < https://ec.europa.eu/info/files/transparency-online-platforms-final-report-2018_en >.

²⁰ Malbon (n 9) 143-144; Barnes (n 1) 563.

²¹ Emily Kadens, 'The Dark Side of Reputation' (2019) 40 *Cardozo L Rev* 1995.

²² *Ibid.*, 1996, 1998, 1999.

²³ *Ibid.*

some new information, be it true or false. Fourth, although it is reasonable to validate data, it is impossible to carry out such a background check for each transaction. To some extent, contracting parties have to trust each other. In addition, a convincing new opinion may lead to questioning the whole existing reputation. Overall, reputation is a mix of many opinions, right and wrong information as well as missing information. Business partners may be trustworthy, but appear to be not and vice versa. Whoever decides to trust, even if forced to do so, becomes vulnerable and a possible victim of fraud.²⁴ Therefore, some courage is inevitable as a regular intensive background check would be costly and it would slow down a promising lucrative trade.

2.2 Types of review systems

There is no uniform classification for customer review systems or sites. From a general point of view with regard to the access, one can distinguish review systems or review sites by looking at the group of eligible users. On the one hand, there are review sites where everybody can submit an online review. On the other hand, there are review systems where only a certain group of users can post feedback. They must be registered and have a user account (e.g. on eBay).²⁵ Online customer reviews can be found at many places within the internet – on online platforms or marketplaces (e.g. eBay, Amazon etc.), on search machines (e.g. reviews on Google), at travel sites like Tripadvisor or in social networks like Facebook as well as through comparison tools.²⁶

Looking at the characteristics of the websites, there are some differences. There are online marketplaces (e.g. Amazon) where people first and foremost purchase a product. In addition, they have the chance to submit a review regarding the product quality itself.²⁷ In this case, the rating is a one-way system. In contrast, eBay has a review system which works in both directions: a registered eBay user can buy or sell a product and both parties are eligible to submit feedback which refers to the product quality, shipping and payment but also other aspects like communication with the counterparty. This is especially interesting as the seller is not necessarily a merchant, but may be just another

²⁴ Ibid.

²⁵ Rietjens (n 2) 57.

²⁶ Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD (2016) 163 final, p. 126.

²⁷ Barnes (n 1) 558.

peer and consumer who wants to sell some items. In consumer-to-consumer business it is more difficult to build up reputation or to verify someone's credibility and trustworthiness.²⁸

Another common category of review sites are websites where people can share their experience about travelling. Websites like for example Tripadvisor are rather focused on presenting online reviews than offering and selling travel packages etc.²⁹ In contrast, websites like for example Booking.com³⁰ enable customers to book an accommodation and to read posted feedback from former visitors. By starting a search request on a search engine like Google, users will get a list of results and also a list of reviews if available.

Overall, people can write and read online reviews nearly everywhere in the e-commerce sector. Typically, mainly big companies and especially multinational companies have developed review systems. The more people make a purchase and leave a feedback the more they become well-known. On the contrary, smaller companies do not have the capacities to establish a review system on their homepage. For them, it is therefore sometimes more difficult to gain trust and to build up reputation.

2.3 Categories of fake reviews and the business of selling and buying reviews

Online reviews and reputation systems can fulfil their function only if users vote honestly and if their feedback mirrors the performance of the trader and the quality of the product. Otherwise, the benefit for consumers is limited and vague.³¹ Online reviews can be manipulated in different ways. There can be single cases. In contrast, huge marketplaces like Amazon can be flooded with fake reviews.³² An online review can be seen as a fake review for many reasons. First, the content can be untruthful. Someone

²⁸ Rietjens (n 2) 60.

²⁹ Tripadvisor, < <https://tripadvisor.mediaroom.com/US-about-us> > accessed 06 August 2020.

³⁰ Booking.com, How our online booking service works, < https://www.booking.com/content/how_we_work.en-gb.html?label=gen173nr-1DCAEoggI46AdIM1gEaDuIAQGyAQe4ARfIAQ_YAQPoAQGIAGoAgO4Apb0m_kFwAIB0gIkMDM2NmEzN2YtYTc0Yy00OWVmLWFmZDAtNjgxNTg1ZWUyYWYx2AIE4AIB&sid=2a7cba61b0ebf2c53210656847cead26&tmpl=docs%2Fhow_we_work&lang=en-gb&soz=1&lang_click=top;cdl=de;lang_changed=1 > accessed 06 August 2020.

³¹ Rietjens (n 2) 63.

³² Sarah Young, 'Amazon littered with thousands of 'fake' five-star reviews, Which? Report finds' *The Independent* (London 16 April 2019), < <https://www.independent.co.uk/life-style/amazon-fake-review-five-star-tech-which-cameras-headphones-a8872021.html> > accessed 06 August 2020.

can write a negative review although everything was fine and someone might submit positive feedback albeit the performance was low. One has to bear in mind that experience is subjective and not always objective. Every person has different expectations and sometimes these may be higher or lower than the one of an average consumer. But this category is less worrying.

Online reviews are only helpful for a consumer when they are genuine and accurate.³³ The more worrying type of fake reviews are the ones which are artificially generated. This means that someone writes a review without having ever purchased the concerned product – be it to boost someone’s business³⁴, to harm a competitor³⁵ or in order to get paid³⁶ for doing so. Some people receive money for buying and testing a certain product and then a payment for every written review about that product.³⁷ Some companies even create false identities and hire people who use them and write reviews.³⁸ The creation of many artificial reviews is also known as ‘opinion spam’.³⁹ Fake reviews do not only affect consumers. They can also have a negative impact on retailers. Asked about their experience of unfair commercial practices from competitors in a survey in 2018, about a third of the retailers stated that they had experienced *‘[w]riting fake reviews which are in fact hidden adverts or hidden attacks on competitors’*⁴⁰.

Although there might be genuine reviews, a review overview can become false and problematic if a review site suppresses negative reviews from real customers but does not disclose this pre-selection.⁴¹ Moreover, the ranking can be manipulated and users

³³ Barnes (n 1) 553.

³⁴ Short (n 4) 447; Barnes (n 1) 553-554.

³⁵ Short (n 4), 447; Barnes (n 1) 553-554.

³⁶ Malbon (n 9) 145.

³⁷ Matthew Cannon, Francesca Gillett & Patrick Evans, 'Why I write fake online reviews' *BBC* (17 April 2019), < <https://www.bbc.com/news/uk-47952165> > accessed 05 August 2020.

³⁸ Malbon (n 9) 145.

³⁹ Short (n 4) 447.

⁴⁰ Commission, 'Consumer Conditions Scoreboard: Consumers at home in the Single Market' 2019, p. 36 < https://ec.europa.eu/info/publications/consumer-conditions-scoreboard-consumers-home-single-market-2019-edition_en > accessed 05 August 2020.

⁴¹ Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD (2016) 163 final, p. 127; Wayne R Barnes, 'The Good, the Bad, and the Ugly of Online Reviews: The Trouble with Trolls and a Role for Contract Law after the Consumer Review Fairness Act' (2019) 53 *Ga L Rev* 549, 560.

often do not know how the underlying algorithms, like filtering by a search engine, work.⁴²

Another type of questionable reviews are the (typically positive) reviews customers submit because the trader offers them a discount or voucher for the next purchase if they give feedback.⁴³ Sometimes, customers can try a product for free, promote it and submit an online review (buzz marketing).⁴⁴ Both ways raise concerns. Under such circumstances, they may be influenced by the indirect 'reward' and their vote has less weight. This model might not be illegitimate, but one would expect the trader or platform to disclose such connection in order to ensure transparency.

Online reviews are mostly positive.⁴⁵ Interestingly, online reviews often give a very high mark or low mark – either very positive or very negative feedback - showing less nuance between both extremes.⁴⁶ This could mean that a consumer is either satisfied or not. But if someone only gets either very positive or negative feedback, it could also show a tendency for artificially generated reviews.

There are several ways fraudsters can distort reputation in the context of eBay. First, fraudsters can blackmail. Second, users seem to hesitate to post negative feedback because they fear a negative feedback in turn albeit their own performance had been good. Third, users can create multiple accounts and boost their reputation by writing reviews for themselves or by secretly colluding with other users. In addition, a user could also decide to collude with other users in order to post a lot of negative reviews with the intent of harming a competitor.⁴⁷ As consumers are aware of their power when posting feedback on a platform, it has crossed their minds to demand a benefit from a business owner, urging him to deliver the benefit. Otherwise he or she would post a negative review.⁴⁸ This shows that the consumer is not necessarily the victim.

⁴² Malbon (n 9) 145-146.

⁴³ Short (n 4) 453-454.

⁴⁴ Malbon (n 9) 146.

⁴⁵ Rietjens (n 2) 63.

⁴⁶ Kadens (n 21) 2019, 2001.

⁴⁷ Rietjens (n 2) 63-65.

⁴⁸ Barnes (n 1) 560.

Fake review types are a *'misleading online activity'*⁴⁹, especially opinion spamming⁵⁰ or astroturfing⁵¹ which means artificially generating online reviews by the trader himself or by someone else on behalf of the trader and presenting these reviews as genuine customer reviews.⁵² Astroturfing is therefore false advertising.⁵³ Nowadays, online reviews can be more powerful than traditional marketing.⁵⁴

One example of a company selling online reviews is 'Fivestar' from Belize (South America) which was sued in a German court in 2019. It had sold positive reviews from people who had never experienced the concerned product or service. Companies interested in boosting their image and business through positive reviews could buy such reviews from Fivestar even in a package. Mirroring the name, buyers could order five-star reviews. Fivestar had hired people to write them. Other companies also hire people, but some generate them by computer.⁵⁵

In contrast to such practices, there are companies which give – legitimate – advice on how to earn feedback from consumers. 'ReputationStacker'⁵⁶ for example advises to ask a customer for feedback and for a review with some details about the experience by sending them an invitation. Furthermore, one should direct them to common review sites. ReputationStacker also offers help for managing a reputation system and gives advice on how to deal with fake reviews. As fake reviews can seriously harm a company, there are also companies which discovered the business model of removing fake reviews on request, e.g. Removify⁵⁷.

⁴⁹ Malbon (n 9) 146.

⁵⁰ Short (n 4) 445, 447.

⁵¹ Malbon (n 9) 146.

⁵² Ibid.

⁵³ Matthew Barish, 'Reaching for the Stars: A Proposal to the FTC to Help Deter Astroturfing and Fake Reviews' (2018) 36 *Cardozo Arts & Ent LJ* 827, 829, 832-834.

⁵⁴ Barnes (n 1) 559.

⁵⁵ LG München I, Urteil vom 14.11.2019 - 17 HK O 1734/19; Redaktion beck-aktuell, Carsten Hofer, 'LG München I: Gekaufte Fake-Bewertungen auf Internetportalen rechtswidrig' 14. Nov 2019, < <https://rsw.beck.de/aktuell/daily/meldung/detail/lg-muenchen-i-fake-bewertungen-rechtswidrig> > accessed 05 August 2020.

⁵⁶ ReputationStacker, < <https://reputationstacker.com/get-more-five-star-reviews/> >, < <https://reputationstacker.com/how-it-works/> > accessed 05 August 2020.

⁵⁷ Removify, < <https://removify.com.au/fake-reviews/> > accessed 07 August 2020.

2.4 User guidelines and technical tools for posting and identifying genuine reviews

Being aware of the risk of fake reviews and related harm, some companies have published guidelines where users can find information for posting reviews. Amazon has for example 'Guidelines for Customer Reviews'⁵⁸ and so-called 'Amazon Verified Purchase Reviews'⁵⁹ which mean that Amazon has '*verified that the person writing the review purchased the product at Amazon and didn't receive the product at a deep discount*'⁶⁰.

Apart from that, Amazon tries to detect and remove fake reviews. In a statement, it explained that it expects customers and sellers to follow the guidelines and that Amazon has the right to remove reviews or to take further steps like legal actions. Asked about their strategy, Amazon revealed that it has staff which investigates reviews and also a machine learning technology. Apart from that, customers can report suspicious reviews. According to Amazon, nearly all inauthentic posted reviews are computer generated.⁶¹

Another example is Tripadvisor which also has a policy and guidelines for writing reviews.⁶² In 2019, it even has published the 'Tripadvisor Review Transparency Report'⁶³ for the first time with details in this context. The company clearly states that it monitors reviews by using technology and an investigation team. It gives information about fake reviews, detecting them and the further actions. In 2018, people had posted 66 million reviews on Tripadvisor. The company claims that it had screened all of them by an automated system and that 2.7 million of them had been additionally screened by so-

⁵⁸ Amazon, Community Guidelines: Guidelines for Amazon.com Community participation, < https://www.amazon.com/gp/help/customer/display.html/ref=amb_link_1/135-2363472-0959767?ie=UTF8&nodeId=201602680&pf_rd_m=ATVPDKIKXODER&pf_rd_s=center-1&pf_rd_r=K4JA76EK435HVA95PWDB&pf_rd_r=K4JA76EK435HVA95PWDB&pf_rd_t=7001&pf_rd_p=0899374c-d640-4eb5-b09a-46f41837ca2b&pf_rd_p=0899374c-d640-4eb5-b09a-46f41837ca2b&pf_rd_i=customer-reviews-guidelines > accessed 05 August 2020.

⁵⁹ Amazon, Amazon Verified Purchase Reviews, < <https://www.amazon.com/gp/help/customer/display.html?nodeId=202076110> > accessed 05 August 2020.

⁶⁰ Ibid.

⁶¹ Hannah Walsh, 'Thousands of 'fake' reviews removed from Amazon: it's not enough' *Which?* (26 April 2019), < <https://www.which.co.uk/news/2019/04/thousands-of-fake-reviews-removed-from-amazon-its-not-enough/> > accessed 06 August 2020.

⁶² Tripadvisor, Content Guidelines, < <https://www.tripadvisor.com/hc/en-us/articles/200614797-Our-guidelines-for-traveler-reviews> > accessed 06 August 2020.

⁶³ Tripadvisor, '2019 Tripadvisor Review Transparency Report', < <https://www.tripadvisor.co.uk/TripAdvisorInsights/w5144> > accessed 06 August 2020.

called 'content moderators'. Only 4.7 percent of the submitted reviews had been rejected.⁶⁴ Reviews are in line with the guidelines if they are '*relevant, non-commercial, based on first-hand experience and not biased by an affiliation with the business being reviewed*'⁶⁵. In 2018, Tripadvisor had identified 2.1 percent of the posted 66 million reviews as fraudulent.⁶⁶ The company explicitly states that it penalises businesses for fraudulent reviews, for example by a content ban, ranking penalty or a red penalty badge.⁶⁷ Moreover, Tripadvisor combats individuals who write reviews for money. In one case, its investigations had led to a prosecution in Italy where one person had been jailed for nine months for offering multiple written fake reviews under the business 'PromoSalento' about Italian restaurants and hotels. In addition, the man had to pay ca. EUR 8000.⁶⁸

2.5 Conclusion

Online reviews have become a powerful instrument to boost a business over the last years. Due to the distance and anonymity in the online environment, traders offering goods and services on online marketplaces or their own webpage have tried to gain trust through different review systems. Consumers have also welcomed reviews from peers and rankings on such websites or websites from third parties like comparison websites. They trust them more than a trader's advertisement and seek for genuine experiences from former customers. However, some traders do not behave in an honest manner. They buy good reviews for money. Some people started businesses for writing and selling online reviews, be it for a client who wishes to get an outstanding good image or for a client who wants to harm a competitor. Apart from that, it is questionable whether a customer would write a genuine review if the trader offers him a discount or voucher or free sample for submitting a review. In such a situation, it can be assumed that a consumer would rarely leave a negative comment, even if he or she had not been satisfied with the trader's performance. With regard to astroturfing and opinion

⁶⁴ Ibid., pp. 5, 10.

⁶⁵ Ibid., p. 10.

⁶⁶ Ibid., p. 15.

⁶⁷ Ibid., pp. 20-21.

⁶⁸ Ibid., pp. 21-22; Crispian Balmer, Mark Heinrich, 'Man jailed in Italy for writing fake TripAdvisor review: company' *Reuters* (Rome 12 September 2018), < <https://www.reuters.com/article/us-italy-tripadvisor/man-jailed-in-italy-for-writing-fake-tripadvisor-review-company-idUSKCN1LS2S3> > accessed 05 August 2020.

spamming, it becomes difficult to separate the wheat from the chaff when it comes to online reviews. Although some online marketplaces and other online platform operators released user guidelines demanding users to be compliant with rules for posting accurate reviews, these measures are difficult to enforce. Moreover, it is costly and difficult to detect suspicious and possible fake reviews by technical tools like Artificial Intelligence programmes (AI). Only big companies are able to invest in such strategies.

With regard to the available literature, online reviews are a key factor in the e-commerce environment and there is the need for regulating the business strategies. The manner in which review systems are regulated at law has not been explored in depth in the literature. Especially the legal framework within the EU is not a core topic. Thus, it is necessary to critically analyse the current EU legal framework to combat fake reviews in order to evaluate the regulatory strategy of the EU in this domain.

3. The legal framework at EU level to combat fake reviews

The legislation at EU level offers a wide range of directives aimed to protect consumer as consumer protection is an important element according to Art. 169 TFEU. Furthermore, an honest and fair online shopping environment is crucial for carrying out cross-border business and real competition in order to achieve the implementation of the internal market. Given the power of online reviews and the negative impact of fake reviews on consumers' and traders' trust, a legal framework for review systems is more than necessary – it is crucial for maintaining the success of e-commerce.

3.1 Directive 2005/29/EC on unfair commercial practices (UCPD)

3.1.1 Objective

Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive', UCPD)⁶⁹ aligns national law in this field and also addresses unfair advertising to the direct detriment of consumers and indirect detriment of competitors.⁷⁰ Overall, the directive has the aim to ensure a high level of consumer protection.⁷¹ According to the EU, the legislation at national level was not sufficient to tackle unfair commercial practices, leading to distorted competition and hindrances for the functioning of the internal market. Moreover, there was no harmonised consumer protection from misleading advertising.⁷² The UCPD '*addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products*'.⁷³ The directive has the aim to tackle such practices in order to influence relationships, business-to-consumer (directly) and business-to-business (indirectly), as it also seeks to ensure fair competition.⁷⁴ It contains one general rule which prohibits unfair commercial practices which have an impact on a consumer's

⁶⁹ 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 ('Unfair Commercial Practices Directive') [2005] OJ L 149/22.

⁷⁰ Ibid., Recital 6.

⁷¹ Ibid., Recital 11, Art. 1.

⁷² Ibid., Recital 3.

⁷³ Ibid., Recital 7.

⁷⁴ Ibid., Recital 8.

decision. The directive lays down rules against aggressive commercial practices and misleading commercial practices. The latter type includes misleading advertising which can be deceptive and therefore an obstacle for the consumer for making a reasonable decision.⁷⁵ In this context, the directive refers to the average consumer.⁷⁶

As the directive shall enhance the confidence of consumers⁷⁷ and provide legal certainty, Annex I contains an exhaustive list of practices which are unfair by their nature. This means that they are prohibited and there is no need for an additional assessment on a case-by-case basis under the concerned provisions of the directive.⁷⁸

3.1.2 Unfair commercial practices

Under the UCPD, a commercial practice is defined 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'*⁷⁹.

Art. 5 (1) UCPD provides a general prohibition of unfair commercial practices. Art. 5 (2) UCPD sets out the two main conditions which deem a commercial practice to be unfair. First, it must be *'contrary to the requirements of professional diligence'*⁸⁰. Second, *'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'*⁸¹. Art. 2 (e) UCPD defines the term *'to materially distort the economic behaviour of consumers'* as *'using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'*.

Art. 5 (4) UCPD refers to the two groups of unfair commercial practices – misleading ones under Art. 6 UCPD (misleading action) and Art. 7 UCPD (misleading omission) and

⁷⁵ Ibid., Recital 11, 13.

⁷⁶ Ibid., Recital 17.

⁷⁷ Ibid., Recital 13.

⁷⁸ Ibid., Recital 18.

⁷⁹ Art. 2 (d) UCPD.

⁸⁰ Art. 5 (2) (a) UCPD.

⁸¹ Art. 5 (2) (b) UCPD.

the aggressive ones under Art. 8 and 9 UCPD. Art. 5 (5) UCPD states the same as the recitals before – Annex I contains a list of practices which are deemed to be unfair without exception (blacklist).

3.1.3 Assessment with regard to fake reviews

Under Art. 6 (1) UCPD, a commercial practice is misleading if it *‘contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise’*. Given that, this part could address fake reviews. However, none of the elements listed under Art. 6 (1) (a) to (g) UCPD explicitly tackles customer reviews. But a closer look at the list of misleading commercial practices in Annex I can provide one possible link. Under No. 22 of Annex I, *‘[f]alsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer’* is a misleading commercial practice and in all circumstances considered as unfair.

If for example someone writes online reviews for money or if a member of staff is urged to write an online review for a business, he or she is *‘falsely representing oneself as a consumer’* in the sense of No. 22 of Annex I of the UCPD. Both online reviews would be not true or genuine, they would be fake reviews. Given that, a fake online review can be an unfair commercial practice – based on the interpretation and argumentation above, not on the wording itself.

3.1.4 Guidance by the Commission with regard to fake reviews

After the adoption of the UCPD, the European Commission had published twice a guidance in order to facilitate the application of the directive. The first time, the Commission had published a guidance was in 2009.⁸² In this guidance, the Commission had provided further explanations and also case law with regard to some definitions and encompassed commercial practices. In the context of misleading actions, the

⁸² Commission, ‘Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices’ SEC (2009) 1666 final.

Commission stated that it had considered the parameters a consumer typically looks at before making a purchase decision, reflecting the state of knowledge at the time of drafting the directive.⁸³ Moreover, the Commission explained in the guidance of 2009 that it is up to national courts and authorities to make an assessment and to take into account current conclusions from behavioural studies or similar data.⁸⁴ At this time, there was no explicit mentioning of 'fake reviews' or at least further guidance regarding the extent of No. 22 of Annex I of the UCPD concerning '*falsely representing oneself as a consumer*'. The guidance of 2009 referred to a couple of categories listed in Annex I and explained them⁸⁵, but the guidance did not refer to the category under No. 22 of Annex I. Apart from that, there was no mentioning of comparison platforms or review systems.

In 2013, the Commission had published a report where it had evaluated the application of the UCPD.⁸⁶ In this report, it had acknowledged the role of '*Customer Review Tools and Price Comparison Websites*'⁸⁷ and held that these can increase consumer confidence, provided that they present correct information and in a transparent way.⁸⁸ The Commission stated that there might be hidden advertising behind these tools and online reviews.⁸⁹ Due to multiple issues with regard to customer review tools and price comparison websites, the Commission considered a powerful enforcement action in the future for such problems in e-commerce.⁹⁰

Finally, in 2016 the Commission had published an updated guidance for the application of the UCPD.⁹¹ This guidance also did not refer to No. 22 of Annex I of the UCPD regarding fake reviews, but to some other categories. However, it referred to the application of

⁸³ Ibid., p. 31.

⁸⁴ Ibid., p. 31.

⁸⁵ Ibid., pp. 52-60.

⁸⁶ Commission, 'First Report on the application of 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 ('Unfair Commercial Practices Directive')' COM (2013) 139 final.

⁸⁷ Ibid., p. 22.

⁸⁸ Ibid., p. 22.

⁸⁹ Ibid., p. 23.

⁹⁰ Ibid., p. 23.

⁹¹ Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD (2016) 163 final.

the UCPD in the online sector and especially with regard to comparison tools and user review tools.⁹²

The guidance highlights that the UCPD applies to online and offline business-to-consumer relationships. In this context, the guidance refers to the business model of 'online platforms' which are not part of the definitions in the UCPD but which are part of new business models due to the fast developments in the digital world. The guidance gives various examples, e.g. user review tools like TripAdvisor, comparison tools like Booking.com and e-commerce platforms like Amazon or eBay, to name a few.⁹³ In addition, it points out that an assessment under the UCPD provisions is only possible if the platform provider can be seen as a trader in the sense of Art. 2 (b) UCPD and if the counterparty can be seen as a consumer under Art. 2 (a) UCPD. A platform considered as a trader under the UCPD should also make it possible for third party traders to be in line with existing consumer and marketing law at EU level.⁹⁴

With regard to customer review tools, the guidance reiterates, that the UCPD only applies to traders. If a consumer writes and posts feedback and shares his or her own experience, he or she is no trader as long as he or she does not write the review on behalf of the trader.⁹⁵ On the other hand, online platforms often offer the opportunity for customers or users to leave a review and if the platform provider is considered as a trader, the UCPD and its provisions become applicable.⁹⁶ In this context, the Commission went into detail and stated that a trader must provide correct information and be in line with Art. 6 (1) (b) and Art. 7 (4) (a) UCPD. In particular, customers shall not be misled with regard to the person who had written the review. Therefore, the platform shall ensure that feedback is posted by real persons. If the platform is not able to verify this, it shall not claim that the review is genuine. The Commission requires the platform to properly inform its users and to take the necessary steps for the verification of real reviews.⁹⁷ The Commission even gives examples of possible measures to ensure this: First, a platform could use technical tools like the pre-condition to register and to open

⁹² Ibid., pp. 5, 109-129.

⁹³ Ibid., p. 110.

⁹⁴ Ibid., p. 114.

⁹⁵ Ibid., p. 126.

⁹⁶ Ibid.

⁹⁷ Ibid.

an user account before being able to write a review. This way the platform could verify that a certain person had posted a review. Second, a platform could check the IP address of the person who had posted the online review. Third, the platform could require specific data in relation to the purchase, e.g. the booking code.⁹⁸

With regard to fake reviews, the Commission stated:

‘If a trader posts fake reviews in the name of consumers (or engages e-reputation agencies to do so) it is acting contrary to point No 22 of Annex I of the Directive, which prohibits ‘falsely representing oneself as a consumer’. Consequently, any review presented by a trader as information provided by a consumer must genuinely reflect real consumers’ opinions, findings, beliefs or experience.’⁹⁹

If a review site makes a pre-selection and only publishes positive reviews albeit real users had also posted genuine negative ones, such incomplete presentation can distort the overall picture for the average consumer who will make a decision based on incomplete facts. The Commission considers such behaviour and omission therefore as a misleading action under Art. 6 UCPD or misleading omission under Art. 7 UCPD. Besides, it interferes with the requirement of professional diligence under Art. 5 (2) UCPD.¹⁰⁰ The Commission concludes such a situation, where the overall impression regarding the trader’s role and the product’s features is incomplete and distorted, as deceptive because the dishonest trader would be favoured by the consumer – compared to a trader not engaged in such deceptive and unfair practices.¹⁰¹

Apart from that scenario, the Commission also gives guidance on the not unlikely situation where the provider of a platform is somehow connected to a trader. In such scenario, the Commission demands the disclosure of this business relationship if the connection may have an impact on the consumer’s choice, for example if there is hidden sponsoring for a trader by the platform, so displayed reviews might be influenced.¹⁰² In such case, there are no ‘fake reviews’ but the overall impression is nonetheless not true and because of this, it does not mirror the real trustworthiness of a trader due to

⁹⁸ Ibid., p. 127.

⁹⁹ Ibid., p. 127

¹⁰⁰ Ibid., pp. 127-128.

¹⁰¹ Ibid., p. 128.

¹⁰² Ibid., p. 129.

suppressed negative feedback. According to the Commission, this scenario may fall under Art. 6 (1) (c) UCPD.¹⁰³ Art. 6 (1) (c) UCPD concerns a misleading commercial practice with regard to *'the motives for the commercial practice and the nature of the sales process'* as category. Moreover, Art. 7 (2) UCPD and No. 22 of Annex I of the UCPD can be applied.¹⁰⁴ Pursuant to Art. 7 (2) UCPD, there is a misleading omission if the trader has concealed the *'commercial intent of the commercial practice'*. The Commission lastly considers No. 11 of Annex I of the UCPD as applicable.¹⁰⁵ This category deems the *'[u]sing [of] editorial content in the media to promote a product where a trader has paid for the promotion without making that clear'*¹⁰⁶ as misleading. Therefore, a not disclosed promotion is an unfair commercial practice.

When it comes to reviews on social media, 'likes' can be submitted by users. If a trader generates fake 'likes', this behaviour would not comply with Art. 6 UCPD as it would be a misleading action: Users or consumers would get a false impression about the trader's reputation and the fake 'likes' would distort the overall impression, causing purchase decisions that would have been different without fake likes. If the trader himself writes fake reviews, the Commission considers this as a misleading action under No. 22 of Annex I of the UCPD.¹⁰⁷

Albeit the Commission's guidance of 2016 explicitly refers to fake reviews and distortions due to preselected positive reviews due to suppressed negative ones, the UCPD in its original version is not sufficient for combating fake reviews and related transparency problems. One has to bear in mind that the guidance of 2016 is not legally binding, it shall only foster the implementation of the UCPD.¹⁰⁸ The introduction clearly highlights this ancillary function by stating the following: *'Any authoritative reading of the law should only be derived from Directive 2005/29/EC itself and other applicable*

¹⁰³ Ibid., p. 129.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ No. 11 of Annex I of the UCPD.

¹⁰⁷ Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD (2016) 163 final, p. 130.

¹⁰⁸ Ibid., p. 5.

*legal acts or principles. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law*¹⁰⁹.

3.2 Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules

The EU had monitored the developments in the area of consumer protection at EU level and also with regard to marketing law and decided on a 'Fitness Check'¹¹⁰ before deciding on changes and amendments to existing directives in this field. Moreover, a 'Behavioural Study on the Transparency of Online Platforms'¹¹¹ had examined the reliability of customer reviews and provided a set of recommendations for the Commission. As a part of the 'New Deal for Consumers'¹¹², the EU introduced Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules¹¹³ which tackles consumer reviews among other topics.

3.2.1 Findings from the Fitness Check and the Behavioural Study

The 'Fitness Check' of 2017 had evaluated the effectiveness of plural directives – among them the UCPD – in the area of consumer protection and marketing law. It was aimed to analyse whether they are still fit for purpose or whether it might be necessary to amend them, for example due to detected gaps.¹¹⁴ In general, the 'Fitness Check'

¹⁰⁹ Ibid.

¹¹⁰ Commission, 'Report of the Fitness Check on 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 ('Unfair Commercial Practices Directive'); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising' SWD (2017) 209 final.

¹¹¹ Commission, 'Behavioural Study on the Transparency of Online Platforms – Final Report' 2018, < https://ec.europa.eu/info/publications/behavioural-study-transparency-online-platforms-2018_en > accessed 10 August 2020.

¹¹² Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee' – A New Deal for Consumers' COM (2018) 183 final.

¹¹³ 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 328/7.

¹¹⁴ Commission, 'Report of the Fitness Check' SWD (2017) 209 final, p. 5.

concluded that all of the examined directives are fit for purpose, even in the online environment, but that the enforcement is not sufficient.¹¹⁵ With regard to the UCPD, according to the findings of the ‘Fitness Check’, the provisions of this Directive, combined with the blacklist in its Annex I are powerful tools for protecting consumers from unfair commercial practices.¹¹⁶ The *‘principle-based approach is ‘future-proof’ and ‘technology-neutral’*¹¹⁷. The blacklist was seen as sufficient albeit there had been ideas to amend it – however, without any concrete category.¹¹⁸ With regard to the increasing problem of fake reviews, the ‘Fitness Check’ took into account such developments on online review platforms as a worrying trend, be it concealed advertisements or concealed attacks to competitors.¹¹⁹ It also referred to the UCPD guidance for the assessment under the UCPD when it comes to online customer reviews,¹²⁰ but it did not further discuss a targeted amendment of the blacklist in Annex I or any additional paragraphs for the existing provisions.

The ‘Behavioural Study on the Transparency of Online Platforms’¹²¹ in 2018 referred to the results of the ‘Fitness Check’ of 2017 and examined three areas which had been identified as areas with the need of improvement. First, it looked at transparency with regard to search results. Second, the study examined transparency regarding the identity of contractual parties. Third, the study analysed transparency of consumer reviews and ratings. The overall aim was to understand the influence of increased transparency in these areas on online platforms. In the context of online reviews, the study referred to existing or missing quality controls for the verification of consumer reviews and authentication.¹²² The behavioural study referred to the ‘Fitness Check’ and reiterated that the legislation at EU level requires online platforms *‘to be transparent and to not mislead consumers’*¹²³ and that it is applicable on consumer reviews and related rankings. Moreover, the study highlights the conclusion made in the ‘Fitness

¹¹⁵ Ibid., p. 76.

¹¹⁶ Ibid., pp. 88-89.

¹¹⁷ Ibid., p. 88.

¹¹⁸ Ibid., p. 89.

¹¹⁹ Ibid., p. 91.

¹²⁰ Ibid.

¹²¹ Commission, ‘Behavioural Study on the Transparency of Online Platforms – Final Report’ 2018, <https://ec.europa.eu/info/publications/behavioural-study-transparency-online-platforms-2018_en>.

¹²² Ibid., pp. 7-8.

¹²³ Ibid., p. 10.

Check' whereby there are transparency problems in this field.¹²⁴ The existing legislation appears to be not sufficient to protect consumers as there is a significant lack of transparency, especially due to missing tools for verifying the identity of users posting reviews. Although many consumers take into account reviews from peers, they have some concerns regarding the reliability of such reviews. Therefore, better enforcement and compliance with existing rules would be able to facilitate the above-mentioned pillars.¹²⁵

With regard to results from an online enquiry included in the study, it appears that negative reviews have more weight than positive ones, in the sense of credibility. In case of a huge amount of reviews, consumers concluded that there are a lot of authentic ones even if there are influenced reviews. In addition, consumers rely on reviews supported by photographs. Such visible material serves as a proof. With regard to quality controls, measures for verification of an identity of the person who had submitted a review and the disclosure can increase the level of trust.¹²⁶ Consumers trust the reviews on online platforms with a kind of assumption '*that millions of people can't be wrong*'¹²⁷. More transparency concerning the originator of online reviews and the criteria beneath related ranking systems increases the likelihood of a consumer choosing the concerned product or service.¹²⁸

Based on the findings of the behavioural study, the study itself provides a set of recommendations for regulating transparency of online platforms in all three examined areas for facilitating the three essential pillars for business on online platforms: trust, transparency and fairness. In the area of online customer reviews and related rankings, the study strongly recommends quality controls for reviews. In addition, it would be useful to encourage more consumers to post reviews.¹²⁹ One measure could be a so-called '*quick rating system*'¹³⁰, meaning that customers could immediately leave a review after having been provided with a good or service without any further steps.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid., p. 39.

¹²⁷ Ibid., p. 45.

¹²⁸ Ibid., p. 47.

¹²⁹ Ibid., pp. 55-56.

¹³⁰ Ibid., p. 56.

Another one could be *'[l]everaging reciprocity'*¹³¹, for example by presenting consumer a pop-up window when entering a webpage for asking them to vote or to remind them of leaving a review after purchase.¹³² With regard to *'[m]inimising post-purchase rationalisation'*¹³³, the study recommends the Commission to require platforms to introduce a compulsory option for consumer to revise their posted reviews within a given time frame, e.g. a month after their purchase, in order to ensure accurate reviews.¹³⁴ The study also recommends the Commission to impose quality control requirements on online platforms in order to ensure the authenticity of customer reviews. Moreover, online platforms should become more transparent by disclosing their strategy for ensuring quality controls. The study gives the example of a double authentication system or AI technology for detecting fake review. In addition, the study suggests that platforms shall be ranked by their ability and eagerness to introduce effective quality controls. The publication of such a ranking could lead to a competition between platforms to be compliant as a top ranking would typically attract more consumers than a low-ranking number.¹³⁵ Apart from that, the study suggests that platforms implement the possibility to contact former customers to exchange experience. Moreover, customers could upload pictures to support their review. Another recommendation is to limit the time frame for posting a review.¹³⁶ The latter is reasonable as a precise and current review is more likely written by a person soon after the experience due to fading memories.

Overall, the recommendations address the detected problems of non-transparent reviews and possibly fake reviews on online platforms. In particular, the proposed quality controls for verification purposes could be able to reduce the amount of artificially generated or bought reviews. This way fake reviews would less occur. Furthermore, uploaded photographs could be a proof. Especially websites displaying reviews about travel experience (e.g. TripAdvisor) offer consumers a chance to get an inside look as former customers submit many pictures. This way a consumer will be able

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid., p. 57.

to check whether the hotel really looks like described in a booking magazine. However, it must be criticised that a platform operator should use incentives such as discounts for future purchases in order to encourage (more) customers to leave an accurate review. That could indeed lead to more reviews, but probably to mainly positive ones albeit some customers might have been not satisfied with the trader's performance. It is not unlikely that customers would seek to get the discount at any cost, even for a review which does not mirror their experience.

3.2.2 The EU's 'New Deal for Consumers'

In April 2018, the Commission adopted the 'New Deal for Consumers'¹³⁷ which was aimed to improve the level of consumer protection within the EU and to modernize the current legislation. The Commission relied on the findings of the 'Fitness Check' and decided on modernising the current legal framework for consumer protection law and filling gaps, taking into account the need for new provisions because of developments in the business environment, especially due to technological changes.¹³⁸ This package therefore included proposals for two directives. One proposal concerned a directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.¹³⁹ The other proposal was aimed to amend plural existing directives for a better enforcement and modernisation of consumer protection rules.¹⁴⁰ One main measure of the 'New Deal for Consumers' is the increase of transparency on online marketplaces.¹⁴¹ The package considered the role of consumers' trust and had the aim to *'promot[e] fairness and build[] trust within the Single Market'*¹⁴². Overall, the Communication itself did not go in detail about certain

¹³⁷ Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee' – A New Deal for Consumers' COM (2018) 183 final.

¹³⁸ Ibid., pp. 3-4.

¹³⁹ Commission, 'Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' COM (2018) 0184 final.

¹⁴⁰ Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules' COM (2018) 185 final.

¹⁴¹ Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee' – A New Deal for Consumers' COM (2018) 183 final, pp. 4-5.

¹⁴² Ibid., p. 16.

measures. But it set out the basic objectives of the package and the related two proposals.

3.2.3 Amendments of the UCPD by Directive (EU) 2019/2161 as part of the new package

Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules¹⁴³ as part of the 'New Deal for Consumers' provides different amendments for existing directives. In the recitals, the EU summarized its main considerations regarding the previous level of consumer protection and possible solutions for occurring problems. According to the EU, the 'Fitness Check' had shown that improvements are necessary due to existing gaps and the rise of new digital tools.¹⁴⁴ One relevant area in this context are rankings and online reviews, both have a perceptive influence on the consumer's purchase decision.¹⁴⁵ A ranking can be defined as *'relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication'*¹⁴⁶ One of the parameters having an impact on a ranking result are review mechanisms.¹⁴⁷ The directive seeks to ensure transparency and accuracy of customer reviews. It requires the trader to provide customers with sufficient information with regard to whether published reviews are written by customers who had made a purchase. In addition, the trader shall inform on how he is ensuring that only genuine reviews will be presented. He is also required to inform about the processing of reviews. This means the trader must provide information with regard to any pre-selection of reviews before publishing them. Moreover, he must disclose any sponsoring of reviews or other types of underlying contractual relationships between him and the author of a review.¹⁴⁸ Given these considerations in the directive, a trader's behaviour will be considered as misleading and as an unfair commercial practice if he declares that posted reviews are authentic and the opinion of former customers

¹⁴³ 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 328/7.

¹⁴⁴ Ibid., Recital 17.

¹⁴⁵ Ibid., Recital 18.

¹⁴⁶ Ibid., Art. 3 (1) (b).

¹⁴⁷ Ibid., Recital 19.

¹⁴⁸ Ibid., Recital 47.

although he did not check this fact. A trader could use technical tools in order to verify whether a person posting a review had indeed previously purchased the concerned product.¹⁴⁹ In contrast, it is usual that statements can be hyperbolic for marketing and this common practice does not interfere with rules on customer reviews.¹⁵⁰ Albeit it should be clear for an average consumer that advertisements and other marketing measures may praise a product to the skies, such clarification can reassure traders. They can rely on this statement, knowing that they are still allowed to praise a product by intensively mentioning all its benefits. Advertisements typically originate from the trader. In contrast, online reviews come from someone else, a former customer and consumer. Given that, advertisements and reviews are a different kettle of fish. However, the line between them blurs in an online environment, if there are no measures in place to disclose the source of reviews. As mentioned before, a lack of transparency and verification may lead to online reviews which are in fact just hidden adverts – or, maybe even worse, a concealed attack on a competitor.

According to the EU, traders shall be not allowed to submit fake reviews. The EU mentions ‘likes’ on social media platforms. The prohibition also refers to a scenario where a trader asks a third party to do this. The EU considers the suppression of negative reviews or even deleting them as a manipulation.¹⁵¹ This is reasonable as the incomplete display of reviews would distort the general impression of a searching consumer and could lead to a purchase decision to the detriment of the consumer. A consumer is interested in getting a full overview and wants to see the overall performance result. If the consumer is only interested in positive or negative reviews for making a decision, he or she will read the concerned reviews and leave out the rest. But this final choice must be left to the consumer, not to the trader. A cherry-picking by the trader would undermine the functions of online reviews – building up trust and reputation by honestly displaying all available reviews.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid., Recital 48.

¹⁵¹ Ibid., Recital 49.

Art. 3 of Directive (EU) 2019/2161 provides the corresponding provisions which contain amendments of the UCPD. One amendment concerns Art. 7 UCPD on misleading omissions. The inserted paragraph 6 of Art. 7 UCPD states the following:

*'6. Where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as material.'*¹⁵²

This can be understood as an obligation for the trader to take care of the chosen review system in order to ensure that really only former customers can submit reviews. If a trader wants to benefit from (positive) online reviews, he or she must take on responsibility for the authenticity of submitted reviews.

Moreover, Art. 3 of Directive (EU) 2019/2161 added new types of misleading commercial practices to Annex I of the UCPD which contains the exhaustive list of commercial practices that are in all circumstances considered as unfair, without further assessment. The UCPD had explicitly stated that a later review could be useful in order to ensure the high level of consumer protection, leading to amendments of the UCPD if necessary.¹⁵³ Moreover, the exhaustive list under Annex I can be modified through an amendment of the directive.¹⁵⁴ In the past, it was necessary to indirectly apply No. 22 of Annex I of the UCPD in order to tackle fake reviews. Due to the amendments, issues concerning online reviews are explicitly mentioned. The inserted No. 23b in Annex I of the UCPD considers the following commercial practice as misleading:

*'Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers.'*¹⁵⁵

This mirrors the considerations in the recitals of Directive (EU) 2019/2161 – a trader is obliged to verify that a person posting a review has indeed made the concerned experience. However, there are no further instructions with regard to the way a trader

¹⁵² Art. 3 (4) (c) of Directive (EU) 2019/2161.

¹⁵³ Recital 24 of the UCPD.

¹⁵⁴ Recital 17 of the UCPD.

¹⁵⁵ Art. 3 (7) (b) of Directive (EU) 2019/2161.

has to fulfil this requirement. This means that the Member States would have to find their own preferred measures. On the one hand, this offers flexibility for them with regard to the transposition. On the other hand, it is doubtful whether this can lead to harmonisation within the EU. Traders who are active in the e-commerce sector do business with consumers from various Member States. It would be difficult for them to comply with different requirements for verifications tools. Moreover, it would be expensive. As it is only a directive, the content has indeed to be transposed into national law – in contrast to the direct effect of an EU regulation. However, a directive should give enough guidance for a similar transposition in order to harmonise the concerned area within the EU. Given that, there might be a patchwork as a result regarding sufficient and effective verification tools because there is much room for interpreting the meaning of *'reasonable and proportionate steps'*.¹⁵⁶ The outcome of the intended transparency is doubtful. Nonetheless, the amendment is a next step in the right direction.

The inserted No. 23c in Annex I of the UCPD refers to fake online reviews and considers the following behaviour as a misleading commercial practice:

*'Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products.'*¹⁵⁷

This category clearly addresses fake reviews in plural scenarios. However, there is no amendment which inserts a definition or at least a detailed description for fake or false reviews. Some kinds of posted reviews can be typically categorized as false, others are part of a grey zone. A bought review without linked experience is false. But what about a review written by a person who received money for buying a certain product and posting a review about that experience? Therefore, a uniform definition would have been helpful for harmonisation purposes. This amendment is also a good development for regulating transparency of reviews and review sites etc. Furthermore, the ones with

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

illegal intentions will always find their way to continue unlawful activities. They would try to be more creative in concealing the origin of a review.

3.3 Conclusion

As a result, the UCPD can be seen as a legal tool to combat fake reviews. Posting or encouraging 'fake reviews' is misleading and therefore an unfair commercial practice. This interpretation of the law, based more or less on the non-legally binding guidance of the Commission for the application of the UCPD from 2016, can solve the problem as such practices are prohibited. However, taking into account the increasing number of occurring fake reviews and the increase of the e-commerce sector, it is not enough.

Overall, the amendments by the 'New Deal for Consumers' and its Directive (EU) 2019/2161 do not lead to big changes of the UCPD provision in the context of fake customer reviews. However, they address the right problems. One change is the widening of the scope, so that, apart from traditional traders, platforms also fall within the scope of the UCPD. They face increased obligations for ensuring genuine consumer reviews on their sites and platforms. In addition, submitting fake reviews is explicitly considered as a misleading and therefore unfair commercial practice. The amendments make it clear that the absence of quality controls may lead to a misleading omission under the UCPD which thus constitutes an unfair commercial practice. The directive introduced disclosure requirements for review systems. Transparency prevents the proliferation of non-genuine online reviews. Moreover, the added categories in the blacklist of Annex I of the UCPD lead to more certainty as an additional assessment is not necessary. The amended legal framework at EU level is far better placed to combat fake reviews than in the past. In doing so, consumers are better informed and protected. In theory, this leads to more transparency. In practice, it is doubtful whether this is enough guidance for Member States to transpose these broad rules into national law. Member States must adopt the provisions of Directive (EU) 2019/2161 by 28 November 2021 and apply the measures from 28 May 2022.¹⁵⁸

It is likely that the Commission will release another updated version of the guidance on the UCPD. Despite the approaching deadline for transposition, Member States have not

¹⁵⁸ Art. 7 (1) of Directive (EU) 2019/2161.

rushed to draft proposals in the first months. The amendment of the UCPD is not simply a clarification of previous legislation as the ancillary guidance is not binding and the European Court of Justice (CJEU) has not handed down any judgements in this field to date.

However, the Commission did not consider all of the recommendations of the 'Behavioural Study' which had proposed a couple of concrete measures to tackle fake reviews and to ensure more transparency for consumers shopping online and relying on online reviews. Moreover, the amendments remain somewhat vague compared to the recommendations of the study. The Commission did not introduce provisions imposing concrete requirements on operators of review sites or online marketplaces to ensure the authenticity of submitted reviews. On the one hand, this gives the Member States some flexibility. They have different experiences and regulatory needs. On the other hand, clear measures for quality control with regard to online reviews would have been desirable. It can be assumed that the implementations will differ. It is doubtful whether such a patch work will lead to legal certainty for traders as online marketplaces, review sites and comparison platforms normally do cross-border business. In other words, the transposition might not lead to harmonized rules and traders might face higher costs for being compliant with different national transparency rules when it comes to the disclosure of their review systems. But for consumers, it will be nonetheless a higher level of protection.

4. Fake reviews under national law

Like the whole e-commerce business often has a cross-border element, online consumer reviews can occur in each Member State and therefore concern each country and raise questions about consumer protection. Apart from transposing EU legislation into national law, (e.g. the UCPD), Member States had begun to combat fake reviews differently. The following part examines and compares the situation in two Member States - Germany and France.

4.1. Evidence from Germany

Over the past years, there had been several civil cases at German courts regarding online customer reviews, including fake reviews. Even the Federal Court of Justice (Bundesgerichtshof – BGH), Germany’s highest court of civil and criminal jurisdiction¹⁵⁹, delivered judgements. Besides, the German Consumer Organisations (‘Verbraucherschutzzentralen’) inform about online consumer reviews and the problem of fake reviews. Moreover, consumers have the possibility to complain and to report incidents.

4.1.1 Study by the Bavarian Consumer Organisation

A study from 2018¹⁶⁰, conducted by a regional German Consumer Organisation, the Bavarian Consumer Organisation, described the typical business models of online reviews, the monitoring and management of online reviews and possible mechanisms for protection against manipulation. According to the findings, a minimum standard for quality control would be a suitable tool against manipulation. Control tools could be for example automatic filtering. The level of protection depends on the online platform. According to the study, one can distinguish between three types or levels of protection.

¹⁵⁹ Bundesgerichtshof, < https://www.bundesgerichtshof.de/EN/Home/homeBGH_node.html;jsessionid=73B6DD219C6EFF1E3214BAF2215F0F61.2_cid294 > accessed 17 August 2020.

¹⁶⁰ Verbraucherzentrale Bayern e. V., 'Fälschungen bei Bewertungen - Bekämpfen Online-Portale sie wirksam? Eine Untersuchung der Verbraucherzentralen' (April 2018), < <https://www.verbraucherzentrale-bayern.de/pressemeldungen/digitale-welt/koennen-verbraucher-onlinebewertungen-vertrauen-25017> > accessed 23 August 2020, < https://www.verbraucherzentrale.nrw/sites/default/files/2018-12/Bewertungen_Untersuchung_Marktwaechter.pdf accessed 23 August 2020>.

The 'diligent' one has three control mechanisms or processes, leading to the most trustworthy reviews. There is an automatic, a manual and a user-related check. The 'ambitious' ones use a combination of automatic and manual check. The core control mechanism is the manual control. The 'reserved' ones are a bit reluctant. They hesitate to implement control mechanisms and are focused on collecting as much reviews as possible, focusing on quantity. The study concludes that transparency is essential for mitigating the risk of fake reviews. If an operator informs the consumer about rules for submitting a review and the control mechanisms, this can increase the level of consumer protection. The study points out that an operator does not have to disclose details of the algorithms etc., but a consumer should be able to understand the main steps of the process. An embedded button for reporting suspicious reviews was also seen as useful.¹⁶¹

4.1.2 Case law

The County Court Munich I (Landgericht München I) ruled that it is unlawful to sell online reviews from people who never experienced the concerned product or service as the company Fivestar Marketing from Belize had done in the past.¹⁶²

The Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) delivered a decision concerning the delayed display of neutral or negative reviews.¹⁶³ A company had a business of dental products, e.g. artificial dentition. On its homepage the company referred to customer reviews based on a star system combined with a comment. The company claimed and guaranteed that the customer reviews were real. By clicking on the comment, the user could reach another website, a review site. The review site only published positive reviews immediately. In contrast, it took more time to publish a neutral or even negative review due to an additional content check. The claimant, the German Centre for Protection against Unfair Competition (Wettbewerbszentrale)¹⁶⁴ argued that this behaviour was not legal. In 2013, the Higher Regional Court of

¹⁶¹ Ibid., pp. 40-42.

¹⁶² LG München I, Urteil vom 14.11.2019 - 17 HK O 1734/19.

¹⁶³ OLG Düsseldorf, Urteil vom 19.02.2013 - I-20 U 55/12.

¹⁶⁴ Wettbewerbszentrale, The Role of the Wettbewerbszentrale in the Enforcement System against Unfair Commercial Practices in Germany, <
<https://www.wettbewerbszentrale.de/de/informationenglfranz/engl/>> accessed 20 August 2020.

Düsseldorf (Oberlandesgericht Düsseldorf) held that this way of differing publication to the detriment of neutral or negative reviews is not objective. The overall impression by the published reviews does not mirror the result of all submitted reviews. According to the Higher Regional Court of Düsseldorf, this resulted in a prohibited misleading advertisement.¹⁶⁵

Another case was about submitting reviews for taking part in a prize game¹⁶⁶. A trader had sold whirlpools online and offline. The trader submitted a post on Facebook about a prize game – any user who would like to win a whirlpool may take part after submitting a ‘like’ about the post, sharing the post or submitting a review about the trader’s site. The submitted reviews had been displayed on the Facebook page of the trader as well as on another platform. A competing company claimed that such behaviour has to be seen as ‘buying’ customer reviews and that it was an unfair commercial practice. The Higher Regional Court of Frankfurt a. M. (Oberlandesgericht Frankfurt a. M.) ruled that the behaviour was indeed unlawful. Although the customer reviews had not been really bought, the reviews were not authentic. It can be assumed that some users submitted a review just in order to be eligible to take part in the game and to get a chance to win the prize. According to the court, it is not unlikely that users would tend to submit a positive review because they would fear putting their chances to win at risk. The court highlighted that customer reviews play an important role and that other consumers rely on them more than on statements made by a seller. Reviews from peers seem to be objective. For an objective review, the customer must act independently and voluntarily. If a trader creates a situation where a consumer gets the impression that the other peer had acted independently although he or she was influenced in a way as it was in the described scenario, it would be misleading and could have an impact on the consumer’s purchase decision.¹⁶⁷ The judgment makes it clear that incentives for writing an online review may distort competition, even a low chance of winning a prize. In other words,

¹⁶⁵ OLG Düsseldorf, Urteil vom 19.02.2013 - I-20 U 55/12, paras 1, 6-8, 28-32, < <https://openjur.de/u/633719.html> accessed 20 August 2020>.

¹⁶⁶ OLG Frankfurt, Urteil vom 16.05.2019, Az. 6 U 14/19.

¹⁶⁷ Sarah Freytag, OLG Frankfurt a.M.: Durch ein Gewinnspiel "erkaufte" Kundenbewertungen wettbewerbswidrig, News vom 02.07.2019, < <https://www.it-recht-kanzlei.de/olgfam-gewinnspiel-kundenbewertungen.html> > accessed 20 August 2020.

the judgments show that it is risky for a trader to offer any kind of reward or consideration to a consumer for submitting a review.¹⁶⁸

Another case¹⁶⁹ dealt with a similar question: Is it allowed to publish online reviews without informing that the customers had been testers who had been rewarded with an advantage? The applicant was a branch of Amazon EU Srl and also the seller of the products offered on the platform 'amazon.de' if these were labelled with the addition 'Sale and dispatch by Amazon'. The respondent made an offer to third-party suppliers on amazon.de. If they are interested, the respondent could generate and publish customer reviews for a fee. They would have to register and the respondent would organise a person for testing a certain product. A tester would try the product, write a review and he or she would be allowed to keep the product, maybe for a small contribution. The review would be published on amazon.de, via the portal of the respondent.¹⁷⁰ The applicant argued that it was unfair to publish such 'paid' customer reviews on the platform amazon.de without disclosing that the person who had written the review had received a kind of benefit. The Higher Regional Court of Frankfurt a. M. (Oberlandesgericht Frankfurt a. M.) held that it is prohibited to publish 'purchased' customer reviews without informing about the received benefit. According to the court, the commercial purpose of the submitted reviews was not disclosed. Therefore, an average consumer would not be able to clearly understand the commercial background. Such an average consumer normally assumes that a submitted review is independent and not written in exchange for a consideration. This means he or she can expect an authentic and genuine review, not a purchased one.¹⁷¹

In one recent case from February 2020, the Federal Court of Justice (Bundesgerichtshof – BGH) held that the seller of a product which he had offered on the online marketplace Amazon is not liable under competition law rules for online reviews posted by customers.¹⁷² The claimant was a registered competition association. The defendant

¹⁶⁸ Ibid.

¹⁶⁹ OLG Frankfurt, Beschluss vom 22.02.2019, Az. 6 W 9/19.

¹⁷⁰ Ibid., OLG Frankfurt am Main, Pressemitteilung: 'Amazon kann sich gegen „gekaufte“ Produktbewertungen wehren' (5 March 2019), < <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/amazon-kann-sich-gegen-%E2%80%9Egekaufte%E2%80%9C-produktbewertungen-wehren> > accessed 20 August 2020.

¹⁷¹ Ibid.

¹⁷² BGH, Urteil vom 20. Februar 2020 - I ZR 193/18.

offers and sells 'kinesiology tapes' and also uses the online marketplace Amazon for offering and selling them. Each product has an EAN (European Article Number) and via this number, each product gets a certain generated ASIN (Amazon standard identification number). The ASIN ensures that a user will see all offers for a certain product. If the user makes a search request, he or she will see all traders who offer this product on Amazon. Users can also submit online reviews for products. Amazon receives the reviews and assigns them to the concerned product by using the ASIN without any further check. As a result, a user will see all reviews related to a certain product, not to a certain trader. When the defendant offered kinesiology tapes on the Amazon marketplace, users could read online reviews about the product itself. Some of the reviews claimed that the product can reduce pain. The defendant demanded Amazon to delete the reviews but Amazon refused to do so. The claimant argued that the defendant had made use of the online reviews from customers and was therefore liable for the content. As the reviews claimed that the product could give relief from pain albeit there is no verified medical proof of such, the claimant argued this is misleading; therefore, the trader must ensure the deletion of such misleading reviews if necessary, and if this is not possible, the defendant should not offer the products on the Amazon marketplace.¹⁷³ According to the court, the concerned reviews had been indeed misleading. But the court did not follow the argumentation that the defendant had advertised the product by customer reviews. The defendant did not actively advertise the product through customer reviews. He also did not initiate them. In addition, the defendant did not become responsible for the content. The court highlighted that the customer reviews had been labelled as reviews and that they had been separately displayed on the Amazon marketplace, only linked to the product itself, not to the trader.¹⁷⁴

In another case, the Federal Court of Justice had to deal with the publication of reviews on a separate review site (Yelp).¹⁷⁵ The claimant is the owner of a gym and did not agree with the way the defendant had published reviews about the gym. The defendant is the operator of the review site Yelp under www.yelp.de where registered users can submit

¹⁷³ Ibid., paras 1-4.

¹⁷⁴ Ibid., paras 9-23.

¹⁷⁵ BGH, Urteil vom 14. Januar 2020 - VI ZR 496/18.

a review about a company by using a five star system and leaving a text. The platform shows all submitted reviews and makes an automatic and daily classification by using a software. Without any manual control mechanisms in place, the classification of the review leads to one the following categories: 'recommended' or '(currently) not recommended'. If someone makes a request for a certain company, Yelp displays the name and description of the company along with the star rating. The stars show the average rating of the 'recommended' user reviews. Next to this information, the number of reviews is displayed. Below the company's description, a user will find the corresponding number of reviews with the headline 'Recommended reviews for [company]' and the stars and texts. At the end of the presentation, the user will find a section with the headline '[number] of other reviews which are currently not recommended'. If a user clicks on the button, he or she will get information regarding so-called 'recommended reviews'. At this point, Yelp explains that the platform receives millions of reviews and that it uses an automatic software in order to highlight the most useful reviews. This software takes into account many parameters, such as the quality of the review, the reliability of the user and his or her previous activity on the Yelp platform. According to the platform, there is no difference between companies having advertisements on Yelp and the ones without such relationship. Reviews not included in the displayed overall rating can be found below the presentation. The claimant argued that the user gets a wrong impression as he or she would think that the overall rating is the average mark of all reviews. Moreover, the chosen distinction between recommended reviews and the other ones is random and arbitrary. The criteria are not comprehensible. As a result, the display of the reviews leads to a distorted and incomplete impression.¹⁷⁶ The Federal Court of Justice ruled that the platform operator did not state that the displayed average rating was the result of all submitted reviews concerning the gym. A reasonable average user would first take into account the number of the reviews chosen for the average rating. Such a user would understand that only reviews labelled as 'recommended' had been the basis for the average rating.¹⁷⁷ Given this judgment, the filtering algorithm of Yelp for detecting fake reviews was allowed.

¹⁷⁶ Ibid., paras 1-5.

¹⁷⁷ Ibid., paras 28-31.

And the explanations by Yelp about the review system below a company's presentation were seen as sufficient for the court to declare the system as transparent.

4.2 Evidence from France

France has its own experience with online consumer reviews and the fake ones. So far, online reviews had been a topic in court and in parliament, too.

4.2.1. Case law

In 2015, a French Court (Tribunal de Grande Instance de Dijon) delivered a decision regarding a detected fake consumer review.¹⁷⁸ It was in 2013, when someone using the pseudonym 'le clarifieur' posted a very negative review about the noble restaurant 'Loiseau des Ducs' in Dijon on a French website 'www.pagesjaunes.fr' (similar to Yellow Pages) five days before the official opening. The owners spend ca. EUR 5000 in order to investigate and to track down the person who had published the false review. According to the director of the restaurant group, customer reviews are welcomed as long as they are authentic, based on real experience.¹⁷⁹ The court held that the review cannot be authentic due to a lack of real experience and that such a fake online review would deter future guests from dining in the concerned restaurant. The findings of the court referred to French tort law. The user who had written the fake review had to pay EUR 2500 in damages. In addition, the user had to pay ca. EUR 5000 as this had been the amount of money the owner had had to spend on the investigations.¹⁸⁰ The user as the defendant did not accept the decision and appealed. However, the 'Cour d'Appel Dijon' as the court of appeal confirmed the judgement of the first instance.¹⁸¹

In contrast, another French court¹⁸² fined a blogger EUR 1500 in damages for a negative online review about a restaurant in Cap-Ferret. According to the 'Tribunal de Grande Instance de Bordeaux', the blogger had posted a review which could not be seen as

¹⁷⁸ Jugement du 06 octobre 2015 rendu par le tribunal de grande instance de Dijon - RG : 14/03897.

¹⁷⁹ Ibid., 'Un internaute condamné pour un commentaire faux et malveillant sur un restaurant' *LePoint* (Lyon 27 October 2015), < https://www.lepoint.fr/societe/un-internaute-condamne-pour-un-commentaire-faux-et-malveillant-sur-un-restaurant-27-10-2015-1977264_23.php > accessed 21 August 2020.

¹⁸⁰ Jugement du 06 octobre 2015 rendu par le tribunal de grande instance de Dijon - RG : 14/03897.

¹⁸¹ Cour d'appel, Dijon, 1re chambre civile, 20 Mars 2018 - n° 15/02004, http://web.lexisnexis.fr/LexisActu/CADijon_20mars_2018.pdf accessed 21 August 2020.

¹⁸² Jugement du 30 juin 2014 rendu par le tribunal de grande instance de Bordeaux.

solely criticism, but as a defamation. It was the harsh headline of the blog post that had been the last straw.¹⁸³ Although the case was about online reviews, the case did not concern fake reviews but the limits of freedom of speech on the internet.

4.2.2 AFNOR Standard and the French Digital Republic Act

Consumer reviews had been a topic in France years before the judgements. In July 2013, the French association and 'hub of the French standardization system'¹⁸⁴ called 'AFNOR' ('Association française de normalisation')¹⁸⁵ had published a voluntary standard for consumer reviews, the '*NF Z74-501 standard - Avis en ligne de consommateurs - Principes et exigences portant sur les processus de collecte, modération et restitution des avis en ligne de consommateurs*'¹⁸⁶. It took over 40 organisations (e.g. companies, persons from the e-commerce sector, consumer associations and authorities) to work on the standard for 18 months. The NF Z74-501 standard as a tool of self-regulation was aimed to provide principles and requirements for collecting, moderating and displaying online consumer reviews for products, tourism and services in general.¹⁸⁷ According to AFNOR, the standard can help companies to improve their relationship with their customers, creating confidence and trust. Consumers will be enabled to rely on authentic reviews as the standard requires websites to ensure transparency and to verify that a user submitting a review is a consumer.¹⁸⁸

The NF Z74-501 standard has three elements or steps: collection, moderation and display of online reviews. With regard to the collection of online reviews, it is forbidden

¹⁸³ Joshua Melvin, 'Blogger fined €1,500 for harsh restaurant review' *The Local fr* (11 July 2014), < <https://www.thelocal.fr/20140711/blogger-fined-for-insulting-restaurant-review> > accessed 21 August 2020; 'Une blogueuse condamnée pour la critique d'un restaurant' *Le Monde* (11 July 2014), < https://www.lemonde.fr/m-styles/article/2014/07/11/la-justice-condamne-une-blogueuse-pour-la-critique-d-un-restaurant_4455290_4497319.html > accessed 21 August 2020.

¹⁸⁴ AFNOR France, < <https://www.iso.org/member/1738.html> > accessed 22 August 2020.

¹⁸⁵ AFNOR, Who we are?, < <https://www.afnor.org/en/about-us/who-we-are/> > accessed 22 August 2020.

¹⁸⁶ AFNOR, NF Z74-501 standard - Avis en ligne de consommateurs - Principes et exigences portant sur les processus de collecte, modération et restitution des avis en ligne de consommateurs, < <https://www.boutique.afnor.org/norme/nf-z74-501/avis-en-ligne-de-consommateurs-principes-et-exigences-portant-sur-les-processus-de-collecte-moderation-et-restitution-des-avi/article/808897/fa178349?codeaff=1> > accessed 22 August 2020.

¹⁸⁷ AFNOR Normalisation, 'AFNOR publie la première norme volontaire pour fiabiliser le traitement des avis en ligne de consommateurs' (03 Jul 2013), < <https://normalisation.afnor.org/information-communication-numerique/afnor-publie-la-premiere-norme-volontaire-pour-fiabiliser-le-traitement-des-avis-en-ligne-de-consommateurs/> > accessed 22 August 2020.

¹⁸⁸ Ibid.

to purchase customer reviews. The operator of the website must verify the identity of the person who wrote the review. It must be possible to get in touch with this person. However, the identity will not be published to the public on the website. If necessary, the experience must be proved. When it comes to the second step, moderation, there are rules and these shall be explained on the website, e.g. under terms and conditions. The reasons for rejecting a review and any deadlines must be listed. There is no possibility to modify the content of an online review but the consumer behind a posted review must have the opportunity to withdraw his or her review. Online reviews must be published without any unnecessary delay. The competent person for moderation must be capable of understanding the language used in the submitted review.¹⁸⁹

In the context of the third step, the display, the operator must ensure transparency regarding the method of calculating the average rating and any timeframe for the rating. All reviews must be published. The order shall mirror the date of submission. This means that new online reviews shall be displayed at the top, followed by older reviews. Any methods used for sorting of online reviews shall be disclosed. There must be a possibility to submit a response (counterstatement) for published reviews within seven days.¹⁹⁰

The standard works like a code of conduct which means that a company complying with the NF Z74-501 standard can improve its reputation as compliance would make them eligible for using the logo provided by AFNOR and consumers would consider the weight of it.

However, as the standard did not lead to improvements, the French legislator stepped in and decided to draft a law which among other aspects deals particularly with transparency requirements for online reviews. In October 2016, the French Parliament adopted the French Digital Republic Act (*'LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique'*¹⁹¹). Art. 52 of the French Digital Republic Act contains a provision which had to be implemented into the existing French Consumer Code (*'Code de la consommation'*). This way, the French Consumer Code got an Art. L. 111-7-2.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique.

Art. L. 111-7 of the French Consumer Code defines the characteristics of the operator of an online platform as well as the operator's duties like providing transparent and clear information, e.g. about the terms and any business relationships with regard to offered products and services. In practice, the online platform provision is applicable to online marketplaces (e.g. Amazon), search engines (e.g. Google), comparison tools and social media platforms (e.g. Facebook).¹⁹²

The first paragraph of the inserted new Art. L. 111-7-2 of the French Consumer Code states that every natural person or a legal person, who - within the main or ancillary business activity - collects, moderates and displays online consumer reviews, is obliged to provide the user with fair, clear and transparent information about the modalities of the publication and treatment of these online reviews. The new article also provides details regarding this transparency requirement: The operator has to disclose whether there are measures implemented for controlling submitted online reviews and has to disclose the main parameters of such a (quality) control and verification. Moreover, the operator must indicate the date of the online review and any occurring updates of the published review. In addition, it is necessary to inform a consumer about the reason of rejection in case his or her submitted online review is not published. The operator must also implement a function free of charge for the person responsible for the product or service mentioned in an online review which enables this person to report suspicions in case a review appears not to be authentic, provided that the person can provide a reason for such doubts.

The Decree No 2017-1436 of 29 September 2017 (*'Décret n° 2017-1436 du 29 septembre 2017 relatif aux obligations d'information relatives aux avis en ligne de consommateurs'*) refers to these transparency requirements in Art. L. 111-7-2 of the French Consumer Code. The Decree lays down the content and the application of the information required in Art. L. 111-7-2 of the French Consumer Code. The Decree has led to changes in the

¹⁹² Flore Foyatier, 'Handbook on the new transparency and fairness requirements imposed on operators of digital platforms since January 1, 2018', < <https://www.soulier-avocats.com/en/handbook-on-the-new-transparency-and-fairness-requirements-imposed-on-operators-of-digital-platforms-since-january-1-2018/> > accessed 23 August 2020.

French Consumer Code by implementing the articles D. 111-16, D. 111-17, D. 111-18 and D. 111-19. The Decree entered into force in January 2018.¹⁹³

Art. D. 111-16 of the French Consumer Code now contains a definition for online reviews. They can be understood as the expression of the opinion of a consumer about his or her consumption experience through an element of evaluation, be it quantitative or qualitative – regardless of a purchase. A sponsoring of users, recommendations of online review by users and opinions from experts are not covered by the definition. They explicitly fall out of the scope of online reviews in the sense of Art. L. 111-7-2 of the French Consumer Code.

The new Art. D. 111-17 of the French Consumer Code requires the online platform operator to provide the information required in Art. L. 111-7-2 of the French Consumer Code near the online reviews. There, the operator has to inform about the control mechanisms, the date of publication, classification criteria etc. in a clear and visible way. Moreover, the operator is obliged to inform whether a consumer had received any kind of consideration for submitting an online review. The operator also has to inform about the maximum time period for submitting and storage of online reviews. This information can be disclosed in a separate section on a website, but it must be easily accessible.

Art. D. 111-18 of the French Consumer Code deals with data protection in the context of online reviews. According to Art. D. 111-19 of the French Consumer Code, the operator has to inform a consumer about the reasons for refusing to publish a received online review.

Overall, the French legislation explicitly addresses operators of online platforms. The introduced provisions have imposed several transparency obligations on these operators. The content of the mandatory information is set out, the place on the website as well. Given that, an operator cannot hide mandatory information about the monitoring of online reviews etc. in a corner somewhere in a subsection.

¹⁹³ Décret n° 2017-1436 du 29 septembre 2017 relatif aux obligations d'information relatives aux avis en ligne de consommateurs.

4.3 Conclusion

The Member States have implemented the UCPD provisions regarding misleading actions or omissions in their national law. Given the examples of the national laws of Germany and France, Member States are able to combat fake reviews in different ways at national level. Apart from (consumer) organisations, civil courts have found their way to deal with occurring cases. So far, there are several court decisions in the context of online consumer reviews and fake reviews. The cases from Germany mainly concern the way some companies display online reviews, for example by delaying or suppressing non-positive reviews. They also highlight that incentives for writing a review can be risky. The decision regarding the automatic assignment of reviews in the Amazon system is correct. If the review system leads to matches between products and reviews about the concerned product, irrespective of the involved trader, it is not fair to blame the trader. The ‘Yelp-decision’ of the German Federal Court of Justice also addresses the right questions. At first glance, the decision seems to be hard for the affected party or companies in a similar situation as it is difficult for them to solve problems with powerful online platforms. But the concerned platform had informed the user about all steps of the publication process. It was transparent, the information was not hidden somewhere on the website. One might argue that the distinction between ‘recommended’ and ‘(currently) not recommended’ makes no sense or that it confuses a user. But as long as the platform explains the distinction and discloses the composition of the average mark, there is no misleading character. The findings mainly referred to provisions about unfair commercial practices which are the transposed version of the UCPD provisions at EU level. Overall, the examined cases show that transparency is crucial. Consumers can trust online reviews if they see and understand the steps behind the publication of the online reviews. They must know about incentives, pre-selection and related parameters and control mechanisms. This is the only way to permanently gain and maintain trust in e-commerce. The changes by Directive (EU) 2019/2161, namely the introduction of transparency requirements and new categories of unfair commercial practices, confirm the German decisions. Under the new law, the courts would deliver similar decisions.

The French cases concerned individuals who had written online reviews. In contrast, in Germany those being sued were mainly traders. In addition, the German cases mainly

dealt with rules of unfair commercial practices whereas the French cases referred to tort law.

Unlike Germany, France decided to directly address online review standards by adopting a law which introduced transparency requirements for online platform operators into the existing French Consumer Code instead of tackling the issue under competition law. The concerned provision of the French Digital Republic Act appears to be unique. France was very proactive in the context of regulating transparency of online platforms, especially with regard to online consumer reviews. The French legislation tried to solve the problem of fake reviews and non-transparent review display long before the EU. The new provisions in the French Consumer Code were a logical step after the dissatisfaction with regard to the success of the AFNOR standard. As the compliance with the standard was voluntary, only clear and binding legislation could force more online platform operators to improve the level of consumer protection. The comparison between the two Member States is a good example for differing consumer protection within the EU which means that there is a need for clear rules and harmonisation.

Given the examined cases and the recommended and also mandatory transparency requirements, more transparency should indeed improve the situation for consumers in the e-commerce area. With regard to the changes through the new Directive (EU) 2019/2161, as part of the 'New Deal for Consumers', the French way is generally already in line with the upcoming transparency requirements. France only has to introduce similar provisions into its national law for unfair commercial practices as the amended UCPD will be mirrored there. In contrast, the upcoming transparency requirements will be a challenge for Germany as there are no existing transparency rules of such kind. It can be assumed that the examined decisions concerning incentives, selection and suppression of online reviews would lead to similar findings under the new transparency rules. Furthermore, it can be assumed that clear transparency requirements would lead to a firm decision at first instance and that there would be less need to appeal.

5. Conclusion

As online consumer reviews can indeed *'make or break businesses'*¹⁹⁴, there must be effective measures in place to protect companies from aggressive competitors which seek to harm them by generating fake reviews. Similarly, consumers must be protected from such unfair commercial practices as these can mislead them to make a purchase they would not make if they would have sufficient and transparent information about a trader or platform. Several studies have shown the impact of online customer reviews and especially fake reviews in e-commerce. Albeit online platforms, online marketplaces (e.g. Amazon) and organisations (e.g. the French AFNOR) have tried to implement self-regulation, the experience has shown that such voluntary measures can solve the problem only to a limited extent. Moreover, the review systems are not free of errors as can be seen in the German court case of Amazon and its assignment system. In contrast, eBay's review system appears to be more sophisticated as users can submit a review which refers to all essential elements of the transaction – the product quality itself, the price, delivery and payment and the trader's reliability and trustworthiness as such. Online reviews are not only a problem due to fake reviews, but also due to a lack of diligence when operators do not monitor the submission, the selection and display. A pre-selection of certain reviews may be legitimate, but the user must be informed about such a step. A secret suppression of non-positive reviews improves the overall impression and rating, but this leads to distortions as it does not mirror the complete consumer experience.

Albeit fake online consumer reviews fall under the scope of the UCPD and can be classified under one of the prohibited commercial practices of the UCPD's blacklist, it was solely the UCPD guidance of 2016 which explicitly referred to fake reviews and a possible combat by the UCPD provisions. But as the guidance itself is not binding, it was reasonable to amend the UCPD by Directive (EU) 2019/2161. This way, the role of online consumer reviews is explicitly mentioned in the recitals and provisions of the new Directive. The amended UCPD requires traditional traders and online platforms to fulfil

¹⁹⁴ Barnes (n 1) 553.

the transparency requirements if they want to make use of online consumer reviews. The transparency requirements will make it more difficult to manipulate online customer reviews, including the overall ranking. In addition, the amendments in the blacklist strengthen these requirements because a practice of the blacklist makes a case-by-case assessment redundant. The combination should deter 'black sheep' from buying fake reviews, posting reviews written by themselves and distorting rankings by pre-selecting certain submitted reviews. Consumers will be enabled to make a reasonable purchase decision. A solution at EU level is the only chance to harmonise consumer protection within the EU. Online shopping is not just a domestic business, it is often a cross-border activity. Therefore, traders and online platforms should comply with an EU standard. Otherwise, consumers would face different levels of protection in each Member State. As can be seen in the comparative analysis regarding the situation in Germany and France, the French legislation is more developed and imposes a set of clear transparency requirements on operators of online platforms, whereas Germany does not have a specific piece of legislation to protect consumers from misleading online reviews. So far, it mainly applies the national provisions which are the result of the transposition of the UCPD. Operators might choose arbitrage and prefer to do business in other Member States than France in order to circumvent the strict French transparency regime. But a standard at EU level would force all operators to be compliant. Compared with the French regime, the new rules at EU level are vague, they do not go in detail about clear measures to ensure transparency for online reviews. Given the specific obligations under the French Consumer Code, a more detailed framework in the amended UCPD would have been helpful. Without such details, it will be up to the Member States to choose suitable measures to ensure the required transparency. It will be seen whether such a patchwork will lead to harmonisation in this field and whether France will remain a pioneer.

It is remarkable how long it took the EU to react. Although the European Commission was aware of the problems of fake online reviews for years, the problem had remained unresolved. In addition, albeit the studies by the European Commission (e.g. the Behavioural Study) had analysed the impact of online reviews, fake reviews and the legal framework, the final draft of Directive (EU) 2019/2161 and the concerned amendments

are not profound. The adopted directive is a step in the right direction, but it is doubtful whether it will be sufficient. Although the recitals of Directive (EU) 2019/2161 and the directive's name itself suggest that the EU is serious about solving or at least mitigating the problem of misleading and fake online reviews, the related provisions are short and not detailed. The recitals may help to interpret the provisions' aims and scope, but the concrete handling is up to the Member States. The implementation at national level remains to be seen. Nonetheless, the consumer still has to be mindful and cautious when shopping online and relying on consumer reviews.

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