Consequences of nullifying an agreement on account of personalised pricing

A Dutch and Belgian perspective on the consequences of consumers exercising nullification and price reduction rights in cases of online personalised pricing infringing upon the EU Unfair Commercial Practices Directive (UCPD) and whether they are effective, proportionate and dissuasive

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Abstract. Personalised pricing uses (big) data and artificial intelligence to allow suppliers to sell goods and services to each consumer at the maximum price that each individual consumer is prepared to pay for such good or service. Quite a lot of research focuses on whether suppliers using personalised pricing infringe upon EU laws and if so, what measures can be taken to act against such infringement. In general, EU consumer laws seem to allow for personalised pricing as long as the consumer has been duly informed thereof. However, if a consumer has not been so informed and national law allows for nullification of an agreement concluded under the influence thereof, the question arises what the civil law consequences of such nullification are. On this area of law, surprisingly little research has been conducted. It is this void I attempt to fill, in particular in relation to (national law implementing) the EU Unfair Commercial Practices Directive 2005/29. This is important because the EU has left it up to individual EU Member States to provide “effective, proportionate and dissuasive” sanctions against infringements of that directive. If research shows that the consequences of nullification do not meet that test and are perhaps even dead letters, other measures must be considered. Using Dutch and Belgian law as an example, three possible consequences of nullification will be analysed against the backdrop of this test: (1) let the consumer keep the good delivered or service provided free of charge, (2) let the consumer return the good or service delivered in exchange for the price paid minus a compensation for the use he/she has made of such product or service or (3) achieve a price reduction by means of partial nullification or full nullification with conversion. In this article, it will be shown that what makes this research challenging, especially in relation to the second option, is that existing laws with respect to the consequences of nullification are ill-equipped to deal with situations where the good or service acquired is perfectly fine, as is the case in case of personalised pricing. In this article, it will also be demonstrated that additional difficulties are encountered when focusing instead on the pricing side of the equation, as the third option does, because judges would effectively reduce a sanction and that is contrary to case law of the European Court of Justice. The compensatory nature of a personalised pricing system - a loss on one transaction is compensated by a profit on another transaction - makes it even more difficult for a judge to intervene in individual cases. The conclusion reached is that, in light of these and other difficulties, measures other than the exercise of individual nullification rights should be considered in further research, for instance damages claim, collective actions and administrative sanctions.

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1. Introduction

According to the OECD Secretariat's background note titled 'Personalised Pricing in the Digital Era', personalised pricing can be defined as "any practice of price discriminating final consumers based on their personal characteristics and conduct, resulting in prices being set as an increasing function of consumers' willingness to pay…".[1] Using personalised pricing, suppliers seek to sell goods and services to each individual consumer at the maximum price they are prepared to pay for such good or service. Personalised pricing is becoming easier day by day because of developments in big data, bandwidth, storage, artificial intelligence and computing power. By using tracking and other cookies, for example, the consumer's surfing behaviour can be monitored and, combined with more data, used to determine the maximum price a consumer is prepared to pay for the good or service to be offered. In light of these technological developments, the question whether personalised pricing is desirable and permissible is becoming more and more topical, as is the question what measures can be taken in the event it is deemed non-permissible, e.g. because it is considered to be an infringement of EU consumer or privacy laws. Although quite a lot of research has been done to answer these questions, there are not yet clear-cut answers.[2] In spite of this, I will not try to answer these questions in this article, save to say (and explain in more detail below) that in general, EU consumer laws seem to allow for personalised pricing as long as the consumer has been duly informed thereof.

Instead, I will focus on one specific question on which far less research has been conducted: assuming that personalised pricing amounts to an infringement of (national law implementing) the Unfair Commercial Practices Directive 2005/29 (UCPD) due to lack of information on personalised pricing,[3] what are the consequences of individual consumers[4]

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[1] OECD, 'Background Note by the Secretariat, Personalised Pricing in the Digital Era' DAF/COMP (2018) 13, <oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm>, accessed 15 September 2019, section 17-19, which also distinguishes personalised pricing from dynamic pricing which "involves adjusting prices to changes in demand and supply, often real time, not implying any kind of discrimination between consumers." and other forms of online personalisation, such as A/B testing, targeted advertising and price steering (explained in section 19).

[2] See OECD (n 1) for an economic analysis (section 3), a competition policy analysis (section 4), consumer protection analysis (section 5) and privacy and data protection analysis (section 6), as well as the literature mentioned therein; Commission, 'Commission Staff Working Document Guidance on the Implementation/Application Of Directive 2005/29/EC on Unfair Commercial Practices' COM (2016) 320 final, paragraph 5.2.13 and the UK Office of Fair Trading (now the Competition and Markets Authority — CMA) 'Personalised Pricing, Increasing Transparency to Improve Trust, OFT 1489' (2013) <https://webarchive.nationalarchives.gov.uk/20140402165101/http://oft.gov.uk/shared_oft/markets-work/personalised-pricing/oft1489.pdf>, accessed 15 September 2019. See also Willem H van Boom, 'Price Intransparency, Consumer Decision Making and European Consumer Law' (2011) 34 J Consum Policy 359. For a privacy law analysis see Richard Steppe, 'Prijsdiscriminatie in het digitale tijdperk. Beschouwingen over de nieuwe Algemene Verordening Gegevensbescherming' in Matthias E Storme and Frederic Helsen (eds.), *Innovatie en disruptie in het economisch recht* (Intersentia 2017) 105-149, Frederik J Zuiderveen Borgesius and Joost Poort, 'Online price discrimination and EU data privacy law' (2017) 40 J Consum Policy 347, for an empirical study Joost Poort and Frederik J Zuiderveen Borgesius, 'Does everyone have a price? Understanding people's attitude towards online and offline price discrimination' (2019) 8 Internet Policy Review 1 DOI: 10.14763/2019.1.1383 and Joost Poort and Frederik J Zuiderveen Borgesius, 'Prijsdiscriminatie, privacy, en publieke opinie' (2019) July/August Ars Aequi 580. For an economic point of view, see Rosa-Branca Esteves & Sofia Cerqueira, 'Behavior-based pricing under imperfectly informed consumers' (2017) 40 Information Economics and Policy 60 and the sources referred to therein.

[3] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22.

[4] I recognise that lodging individual claims may not be practical in those cases where the disadvantage/damage suffered is low, yet an analysis of individual claims makes sense because it is often a precondition or precursor of collective action. See for a discussion of collective enforcement

successfully nullifying an agreement on account of such infringement?[5] This is important because the EU has left it up to individual EU Member States to provide "effective, proportionate and dissuasive" sanctions against such infringements, see art. 13 UCPD. If research shows that the consequences of nullification do not meet that test and are perhaps even dead letters, other measures must be considered. However, given the scope, focus and length of this article, I will only briefly touch upon the existence of such other measures and leave it up to others to conduct further research on the effectiveness, proportionality and dissuasiveness of such other measures. Such measures could be collective enforcement as well as enforcement by competitors and administrative authorities.[6] And such measures may well lead to the conclusion that although certain individual sanctions do not pass the "effective, proportionate and dissuasive" test, the entire arsenal of sanctions does.

I will proceed to answer the foregoing question as follows. First, I will give a short overview of consumer law insofar relevant to personalised pricing and, in particular, the UCPD (in section 2). Subsequently, I will analyse possible consequences of nullification against the back-drop of this "effective, proportionate and dissuasive" test: (1) let the consumer keep the product (i.e. good delivered or service provided[7]) free of charge (in section 3, using Belgian law as an example), (2) let the consumer return the product in exchange for the price paid minus a compensation for the use he/she has made of such product (by means of full nullification and subsequently mitigating the consequences; in section 4, using Dutch law as an example) or (3) achieve a price reduction (by means of partial nullification or full nullification with conversion; in section 5, again using Dutch law as an example). When discussing each of these three possible scenarios, in each case a conscious choice has been made to use either Dutch or Belgian law by way of example and not in each case discuss both Dutch and Belgian law in depth. In the first scenario, this is because Dutch law does not contain a similar sanction. In the second and third scenario, I will do so because I prefer an in-depth analysis on the basis of a system of law I have been educated in and practiced for many years and because my analysis of Belgian law will presumably not be of the same quality. I will also do so because Dutch law is used merely as an example and I invite the reader to decide him-/herself, on the basis of the intricacies and nuances of the law which he/she is most familiar with, whether the same or similar reasoning as the reasoning provided for Dutch law is or needs be used for his/her own system of law. Nonetheless, I will briefly touch upon certain aspects of Belgian law in the second and third scenarios to provide to the reader a starting point for further research and analysis and will do so mostly in footnotes so as not to interrupt the flow of the arguments presented.

2. EU consumer law and the UCPD

Although this article assumes that personalised pricing is considered an unfair commercial practice and focuses on the consequences of nullification, it is insightful to briefly explain, by way of introduction, how personalised pricing could constitute an infringement of national law

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and more generic actions resulting in nullification (based e.g. on error or fraud) Willem H van Boom, 'Inpassing en handhaving van de Wet oneerlijke handelspraktijken' (2008) 1 Tijdschrift voor Consumentenrecht en handelspraktijken 4 and Willem H van Boom, 'Oneerlijke handelspraktijk is onrechtmatige daad. Maar wat schieten we daar mee op?' (2008) 3 NTBR 125.

[5] See also Carla H Sieburgh, *Tertium Datur. De niet uitgesloten derde in het burgerlijk recht. Inaugural lecture Nijmegen* (Kluwer 2004), who argues that in deciding whether an agreement is valid, both the invalidity as well as its consequences need to be considered.

[6] See for an overview with respect to Dutch law: DW Feer Verkade, *Oneerlijke handelspraktijken jegens consumenten (Monografieën BW nr. B49a*) (Wolters Kluwer 2016) nr. 75-80 (collective enforcement), nr. 74 (competitors) and nr. 81-87 (administrative enforcement by the Authority for Consumers & Markets and others). See for an overview with respect to Belgian law: Sofie De Pourcq, *De bescherming van ondernemingen tegen oneerlijke handelspraktijken in de contractuele verhouding. Doctoral Thesis KU Leuven* (Intersentia 2018) nr. 411 (collective enforcement), nr. 416 (cessation order, monetary penalty and damages) and nr. 417 (competitors).

[7] Art. 2 paragraph (c) UCPD defines "product" as "any goods or service including immovable property, rights and obligations;".

implementing EU consumer laws, in particular unfair commercial practices laws.[8] As a starting point, the latest proposal for an EU directive on a better enforcement and modernisation of EU consumer protection rules[9] seeks to make the following additions to the Consumer Rights Directive 2011/83 ("CRD").[10] According to that proposal, the new recital 45 of the CRD will read "Traders may personalise the price of their offers for specific consumers or specific categories of consumers based on automated decision making and profiling of consumer behaviour allowing traders to assess the consumer's purchasing power. Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of an automated decision, so that they would take into account the potential risks in their decision-making. Consequently, a specific information requirement should be added to Directive 2011/83/EU to inform the consumer when the price is personalised based on automated decision-making. This information requirement should not apply to techniques such as 'dynamic' or 'real-time' pricing that involves changing the price in a highly flexible and quick manner in response to market demands when it does not involve personalisation based on automated decision making." And, according to that proposal, the new article 6 paragraph 1 under (ea) of the CRD will read "Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner: (ea) where applicable, that the price was personalised on the basis of automated decision making;". From these additions, it can be deduced that from an EU consumer law perspective, personalised pricing is permissible as long as the consumer is informed thereof. Otherwise, the legislative proposal would have sought to prohibit personalised pricing in whole or in part.

Seeing, however, that this legislative proposal has not yet been adopted and, if adopted, gives Member States 24 months to transpose this legislation into national law, it is time to focus on existing EU consumer laws. Having said that, this is more difficult, because existing EU consumer laws do not contain specific rules about personalised pricing, but 'only' (1) general information requirements about the price charged or (2) general rules about unfair trade practices. There are two examples of general information requirements about the price charged which may perhaps be applied to personalised pricing. First of all, it has been argued that (national law implementing) art. 5 paragraph 2 of the E-Commerce Directive 2000/31[11] requires that the service provider informs the consumer that personalised pricing is used, failing which the consumer is entitled to sue the service provider for damages on account of tort.[12] Secondly, it has been argued that the trader is required to inform the consumer that personalised pricing is used on the basis of (national law implementing) the aforementioned article 6 paragraph 1, but in this case under (e) of the CRD. Failing to abide by this information requirement would allow the consumer to nullify the agreement on account of national law implementing this mandatory article 6 (see article 25).[13]

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[8] See in general Vanessa Mak, 'Gedachten bij een 'gepersonaliseerd' consumentenrecht' (2018) 6 Tijdschrift voor Consumentenrecht en handelspraktijken 274.

[9] European Parliament, Position of the European Parliament adopted at first reading on 17 April 2019 with a view to the adoption of Directive (EU) 2019/… of the European Parliament and of the Council amending Council Directive 93/13/EEC, 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 COD (2018) 0090.

[10] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

[11] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1.

[12] Evert DC Neppelenbroek, 'Wat de gek ervoor geeft. Big Data en de bescherming van de contractuele wederpartij bij prijsdiscriminatie' (2017) 7110 WPNR 447-448 with respect to the Dutch law implementation art. 3:15d paragraph 2 Dutch Civil Code (DCC).

[13] Neppelenbroek (n 13) with respect to the Dutch law implementation art. 6:230m paragraph 1 under e, art. 6:230i paragraph 1 and art. 3:40 paragraph 2 DCC and see footnote 33 of Neppelenbroek's

However, it has also been argued - and I tend to agree - that it is stretching it to deduce such information obligations about personalised pricing from general obligations requiring suppliers to inform consumers about the price of the product or service offered.[14] Therefore, attention has tended to shift to the question whether a failure to inform the consumer about personalised pricing could or should be considered an infringement of the UCPD. Before answering this question, I make the following preliminary observations about the UCPD. The UCPD is a maximum harmonisation directive.[15] This means that EU Member States must implement the directive into their national laws and in doing so, may not provide for more consumer protection, but also not less. The directive does not list personalised pricing as a commercial practice which is regarded as unfair in all circumstances (art. 5 paragraph 5 jo. Annex I). Also, it is unlikely that personalised pricing is considered to be aggressive (art. 8-9) or actively misleading (art. 6).

If personalised pricing can be considered to be an infringement of the UCPD at all, it will most likely be on the basis of the supplier not informing the consumer that personalised pricing is used. Such omission could amount to an infringement of the UCPD either on account of it being an unfair commercial practice because it is a misleading omission within the meaning of art. 5 paragraph 4 (a) jo. 7 or, more generally, an unfair commercial practice within the meaning of art. 5 paragraph 2. In both cases, a causality requirement and materiality threshold need to be met. In the case of a misleading omission, “material information” needs to be omitted which “causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.” (art. 7 paragraph 1 and 2). In the case of the more general unfair commercial practice, the commercial practice is only considered unfair if “it materially distorts or is likely to materially distort the economic behaviour with regard to the product”, i.e. “appreciably impair[s] the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise” (art. 5 paragraph 2 jo. 2 paragraph e).[16] Whether the average consumer would have procured the product had that consumer known that personalised pricing was used to set the price is quite a difficult question to answer. On the one hand, it can be argued that personalised pricing results in the average consumer paying the maximum price that he/she is prepared to pay and therefore he/she would likely have concluded the agreement and pay that price even if he/she had known personalised pricing was used. On the other hand, it can also be argued that had the average consumer known that personalised pricing was used, he/she would have searched elsewhere and procured the same or a similar product or service from another webshop at a lower price. In any case, merely proving that the average consumer would have bought the product from the webshop at a lower price had he/she been informed of personalised pricing would presumably be insufficient because the webshop, had it informed the consumer that personalised pricing was used, would not have provided the consumer with a possibility to procure the product at a lower price (because webshop offers are almost always take-it-or-leave-it and even if they are not, allowing

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article for a discussion on whether or not causality between the conclusion of the agreement and the failure to provide the information should be proven and by whom.

[14] ME Bulten, ‘Online prijspersonalisatie in het Nederlandse consumentenrecht’ (2018) 4 Tijdschrift voor Consumentenrecht en handelspraktijken 186-187.

[15] See art. 4 UCPD: “Member States shall neither restrict the freedom to provide services nor restrict the free movement of products for reasons falling within the field approximated by this Directive.” and ECJ Cases C-261/07 and C-299/07 *VTB v Total Belgium and Galatea v Sanoma* [2009] ECLI:EU:C:2009:244 paragraph 51-52: “That having been determined, it must first be recalled that the Directive is intended to establish, in accordance with recitals 5 and 6 in the preamble thereto and Article 1 thereof, uniform rules on unfair business-to-consumer commercial practices in order to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection. Thus, the Directive fully harmonises those rules at the Community level. Accordingly, as Article 4 thereof expressly provides …, Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection.”

[16] The UCPD provides more guidance on the applicability of the causality requirement in recital 6 in that it “does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision.”

for this possibility would defeat the purpose of his pricing mechanism). Answering this question in more detail is, however, out of scope for the purposes of this article.

Moving on: the aforementioned definitions of what constitutes an unfair commercial practice are harmonised and should therefore be the same in each EU Member State. The sanctions for infringements of those provisions are, however, not harmonised. Each Member State may choose how to sanction those infringements, as long as those sanctions are, as the UCPD prescribes, "effective, proportionate and dissuasive" (art. 13).[17] As explained, I will now analyse the consequences of a number of possible consequences resulting from nullification against the backdrop of this test, taking Dutch and Belgian law as an example because these systems of law allow for nullification in the situations to be described. Having said that, nullification may not be possible in all countries, something which I also ask the reader to consider on the basis of his/her own system of law. For sake of brevity, I will analyse such consequences by mentioning that a consumer nullifies an agreement on account of personalised pricing when I should be referring more precisely to the situation that a consumer nullifies an agreement on account of it having been concluded as a result or under the influence of personalised pricing constituting, for the average consumer, an unfair commercial practice within the meaning of the UCPD and that all the relevant requirements have been met.

3. Keep product free of charge

In case an agreement has been concluded as a result of an unfair commercial practice, Belgian law provides for the possibility to have the consumer keep the product provided free of charge. A Belgian judge may, in case of an unfair commercial practice comprised of a misleading omission - which we assume personalised pricing to be - order the supplier to refund to the consumer all amounts paid without the consumer being required to return the goods received or reimburse the value of the services provided to the supplier (art. VI.38, VI.94 under 1° and VI.99 *Wetboek van economisch recht* (Belgian Code of Economic Law)).[18] According to legislative history, a Belgian judge may only exercise this discretionary power if a high threshold has been met: it needs to established that the contract would never have been concluded without the personalised pricing.[19] Given the gravity of the sanction, which some say is punitive[20] or even draconian,[21] it is

[17] Art. 13 UCPD speaks of "penalties", but it is evident from *inter alia* the Dutch, German and French language versions that this word is used as a synonym for "sanctions". See for an analysis of the terms "effective, proportionate and dissuasive" in light of European case law D Poelzig, 'Private or Public Enforcement of the UCP Directive? Sanctions and Remedies to Prevent Unfair Commercial Practices' in Willem H van Boom and others (eds.), *The European Unfair Commercial Practices Directive. Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014) 240-242. Also, during a symposium on 6 September 2019 in The Hague and in furtherance of her inaugural address on sanctions in consumer law on 5 March 2019 at the University of Groningen, Charlotte MDS Pavillon presented preliminary results of empirical research in which she asked district court judges and aids to comment on statements and rule on fictitious cases relating to the criteria of effectiveness, proportionality and dissuasiveness in consumer law.

[18] This used to be art. 41 of the Belgian *Wet Marktpraktijken en Consumentenbescherming* (act Market Practices and Consumer Protection (WMPC)). See for a concise summary of that law Bert Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Hart 2011) 472-474.

[19] This follows from legislative history: Verslag Commissie Bedrijfsleven, Parl. St. Kamer, 2006-07, DOC 51, 2983/004 at 9. Other authors have, however, argued that this interpretation in legislative history is too strong and that it is sufficient that there is a causal link between the unfair commercial practice and the conclusion of the contract, see Reinhard Steennot and Paul GFA Geerts, 'De implementatie van de richtlijn oneerlijke handelspraktijken in België en Nederland' (2011) 3 Tijdschrift voor Privaatrecht 754-756.

[20] Paul GFA Geerts, H Bart Krans, Reinhard Steennot and Albert J Verheij, *Oneerlijke handelspraktijken: praktijkervaringen in België met de sanctie van artikel 41 WMPC* (Boom Juridische uitgevers 2011) 72-77.

[21] Evelyne Terryn, 'Misleidende en vergelijkende praktijken na de omzetting van de richtlijn oneerlijke handelspraktijken' in Gert Straetmans and others (eds.), *De wet handelspraktijken anno 2008* (Kluwer 2008) 82-84; Evelyne Terryn, 'De omzetting van de Richtlijn oneerlijke handelspraktijken in België: reculer pour mieux sauter?' (2008) 1 Tijdschrift voor Consumentenrecht en handelspraktijken 24; and

understandable that the threshold is high. Generally, the more extreme the sanction, the higher the threshold required to trigger it. To be fair, the application of the sanction in practice may be less draconian than may seem at first sight. Once the threshold for triggering it has been passed, a Belgian judge may exercise his discretionary power to apply the sanction as he/she deems fit: in whole or in part. In doing so, he/she may take into account the gravity of the infringement, the extent to which the consumer's behaviour was influenced, the financial consequences of the infringement for the consumer (including damages suffered) as well as the sanction's proportionality.[22]

The question is whether this sanction is in line with the "effective, proportionate and dissuasive" requirement set out in art. 13 UCPD. Before deciding to dismiss any sanction resulting in a free ride as being disproportional, it needs to be borne in mind that EU consumer law already provides for sanctions allowing consumers to keep goods and services free of charge. The CRD, for instance, seeks to counter inertia selling by allowing the consumer to keep, without consideration, unsolicited goods delivered and services provided (art. 27). However, the difference between the Belgian unfair commercial practices sanction and the EU inertia selling sanction is that in the personalised pricing case, the consumer has actively sought to acquire the relevant good or service, whereas in the inertia selling case, the consumer was passive and did not seek to acquire that good or service. In light of this difference between active and passive, the Belgian 'consumer takes all' approach seems disproportional. The mere fact that the sanction may in practice not be applied to the fullest extent does not take away from the fact that the sanction as such is disproportional on the basis of its statutory text. When determining whether a sanction is "effective, proportionate and dissuasive", I believe the full application of the sanction provided should be considered, not whether a judge may apply the sanction to a lesser extent. Applying the latter criterion would not only provide less legal certainty, but also bring many sanctions out of scope of art. 13 UCPD because judges in many cases are at liberty to apply sanctions to a lesser extent than full application of the statutory text would allow for.

In any case, the Belgian sanction seems effective and dissuasive in theory. Ironically, this does not seem to be the case in practice. In 2011, a report on this Belgian sanction was published at the request of the Dutch Ministry of Justice and Security's Research and Documentation Centre (WODC).[23] On the basis of extensive research, the researchers concluded that the sanction seems to be a dead letter and that businesses do not appear to be deterred in their conduct by the sanction's existence.

4. Return product, get money back and pay usage compensation (full nullification with mitigation of consequences)

In light of the seemingly disproportional, ineffective and insufficiently dissuasive character of the Belgian 'consumer takes all' approach, it is worthwhile to consider how more nuanced approaches play out and whether they are effective, proportionate and dissuasive, as required by the UCPD. One approach could be to fully nullify an agreement concluded as a result of an unfair commercial practice and subsequently mitigate the consequences of such nullification, e.g. by letting the consumer pay a compensation for the use he/she has made of the product prior to nullification. I will discuss this option below, using Dutch law as an example. As will be shown, what makes this challenging, is that existing statute with respect to the consequences of nullification is ill-equipped to deal with situations where the good or service acquired is perfectly fine, as is the case in case of personalised pricing.

Bert Keirsbilck, 'Vijf jaar toepassing van de Richtlijn oneerlijke handelspraktijken in België (2007-2012)' (2012) 11 SEW 469.

[22] Herman de Bauw, 'De algemene verbodsbepalingen in de relatie verkoper-consument' in Straetmans (n 21) 141-142 and Reinhard Steennot, Filip Bogaert, Diederik Bruloot and Delphine Goens, *Wet marktpraktijken* (Intersentia 2010) 65-66.

[23] Geerts and others (n 20). After the research was published, the following judgment was rendered in a case where failure to provide certain information was considered an unfair trade practice and the Belgian 'consumer takes it all' sanction was applied: J.P. Charleroi 1 February 2017 *Journal des juges de paix et de police* 2017 510, with case annotation by prof. Hervé Jacquemin and with thanks to him for pointing this out to me and providing me with a copy of the judgment.

An agreement that has been concluded as a result of an unfair commercial practice (in this case personalised pricing) is subject to nullification (art. 6:193j paragraph 3 of the Dutch Civil Code (DCC)).[24] If such a nullification right is exercised by the consumer, the entire agreement is nullified and therefore considered null and void with retroactive effect as of the moment it was concluded (art. 3:53 DCC). As a result, performances rendered are considered to have lacked a legal basis *ab initio* and each party can demand restitution of whatever it has performed for the other party (art. 6:203 DCC). In case an agreement is nullified on account of personalised pricing, the consequences will depend on whether goods were delivered or services provided, as will be shown below.

4.1. Goods and unjust enrichment

In case an agreement with respect to *goods* sold and delivered (e.g. a car) is nullified on account of personalised pricing, the consumer who has purchased such goods must return those goods to the supplier who has sold such goods, and the supplier must pay back the purchase price to the consumer. Is the consumer subsequently required to pay a compensation for the use he/she made of the goods prior to the moment the agreement was nullified, i.e. a usage charge? Given that paying a usage charge is a more common consequence of rescinding a contract on account of non-conformity (defect) of goods sold, it makes sense to first consider this easier, yet similar situation and subsequently use the lessons learnt when discussing the more difficult situation of determining whether a usage charge should be paid in case an agreement is nullified on account of personalised pricing.

In the Quelle case, the ECJ ruled that no usage charges may be charged in case a defective product is *replaced*, noting that the Sale and Guarantee Directive 1999/44[25] "preclud[es] national legislation under which a seller who has sold consumer products which are not in conformity may require the consumer to pay compensation for the use of those defective products until their replacement with new products."[26] Nonetheless and more importantly for the purposes of this article, the ECJ also noted that this hard-and-fast rule should not be automatically applied to the *rescission* of an agreement on account of a defect. To substantiate, the ECJ pointed to recital 15 of the Sale and Guarantee Directive, which allows Member States to provide that a reimbursement to the consumer in case of rescission "may be reduced to take account of the use the consumer has had of the products since they were delivered to him".[27] It

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[24] Interestingly, this nullification was not introduced into Dutch law when the law implementing the UCPD entered into force on 15 October 2008 (*Staatsblad* 2008, 397 and 398), but when the law implementing the CRD entered into force on 13 June 2014 as a result of approving a motion brought forward by a member of parliament (*Staatsblad* 2014, 140). See for the reasons why Leonieke BA Tigelaar, *Sanctionering van informatieplichten uit de Richtlijn consumentenrechten. Doctoral Thesis Groningen* (Uitgeverij Paris 2017) nrs. 308-312 and 407-414. For a free English version of the DCC, see http://dutchcivillaw.com.

[25] 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 [1999] OJ L171/12.

[26] ECJ Case C-404/06 *Quelle v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECLI:EU:C:2008 paragraph 43. The facts of the case are summarized as follows by the ECJ in paragraph 12: "In August 2002, Quelle delivered a 'stove-set' to Ms Brüning for her private use. In early 2004, Ms Brüning noticed that the appliance was not in conformity. Since repair was not possible, Ms Brüning returned the appliance to Quelle, who replaced it with a new appliance. However, Quelle required Ms Brüning to pay EUR 69.97 by way of compensation for the benefit which she had obtained from use of the appliance initially delivered."

[27] ECJ Quelle (n 25) paragraph 38-39 pointing to recital 15 of Directive 1999/44 (n 25) which reads in full "Whereas Member States may provide that any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him; whereas the detailed arrangements whereby rescission of the contract is effected may be laid down in national law;". See also Jaap Hijma, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Internationaal privaatrecht. Deel I*. Koop en ruil* (Kluwer 2013) nr. 522a, with a reference to Hof Arnhem 23 November 2004 ECLI:NL:GHARN:2004:AV1205 *NJF* 2006 66 (*Pouw/Mans*) (Neth.). See also Vanessa Mak, ''Kosteloze' vervanging bij non-conformiteit: is de consument een vergoeding verschuldigd voor het genoten gebruik van een gebrekkige zaak?' 1 (2009) 34, who also sees possibilities to charge a usage fee in case of replacement.

is this freedom that can be used in case of rescission (art. 6:265 DCC) to reimburse the supplier for usage charges on account of unjust enrichment (art. 6:212 DCC), which charges amount to reasonable usage charges[28] (or, some may argue, depreciation,[29] though this seems less likely in a B2C context because consumers usually do not have a personal balance sheet, put goods purchased on their balance sheet and subsequently depreciate them).[30]

And it is also this freedom which could be used by analogy to reimburse the supplier for usage charges in case of nullification. After all, nullification bears resemblance to rescission, in any case more resemblance to rescission than to replacement. Both in case of nullification and in case of rescission, the supplier is required to reimburse the purchase price to the consumer and the agreement is no longer in effect.[31] And in both those cases, the consumer's right to exercise a remedy is triggered by something attributable to supplier, either his conduct (in case of nullification) or his goods (in case of rescission). In contrast, in case of replacement, the supplier is not required to reimburse the purchase price to the consumer and the agreement remains in force.

It could even be argued that there is more of a need to award a usage compensation in case an agreement is nullified on account of personalised pricing than when an agreement is rescinded on account of a defective good. After all, when a good is defective, there is less of a need to protect the seller's interests. As the Dutch legislator explained long before the Quelle judgment, a usage charge need not be paid in case of *replacement* of a defective good because the supplier's interests are already adequately protected given that, among other things: (i) in most cases the good has only been used for a short period of time before the defect manifests itself; (ii) given this short period of time, significant usage charges seldom arise; and (iii) dealing with replacements should not be complicated by disputes about minor usage charges.[32] Similar arguments could also apply in case an agreement is *rescinded* on account of a defective good in order to argue against awarding usage charges in case a good has only been used for a short period of time. However, chances are that it will take far longer for personalised pricing to come to light than it will for a defect to manifest itself, in which case the good will have been used for a far longer period of time and significant usage charges are more likely to arise. In case an agreement concluded under the influence of personalised pricing is *nullified*, there is therefore more of a need to take into account the seller's interests by requiring the consumer to pay usage charges and by doing so let the sanction be proportional. This is especially true given that in

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[28] Stijn R Damminga, *Ongerechtvaardigde verrijking en onverschuldigde betaling als bronnen van verbintenissen. Doctoral Thesis Nijmegen* (Kluwer 2014) 240-242. See also Teun van der Linden, *Aanvullend Verrijkingsrecht. Doctoral Thesis Leiden* (Boom juridisch 2019) 157-159, who advocates that the market value of the use of the good should be used as criterion.

[29] Hijma (n 27) nr. 400.

[30] Inspiration can also be drawn from Belgian law, which seems to allow for a usage compensation by extrapolating the rule that the possessor of a good is, in certain cases, required to provide the good's fruit to the owner, see Rafaël Jafferali, *La rétroactivité dans le contrat* (Bruylant 2014) nr. 259, whilst referring to (at the time) art. 549, 550, 1382 and 1383 Belgian Civil Code as well as Hof van Cassatie 2 October 2008 *Pas.* 2008, 521 *J.L.M.B.* 2009 1257 (Belgium).

[31] Albeit that with respect to the past, in case of nullification, termination has retroactive effect, the agreement is considered never to have come into existence (art. 3:53 DCC) and each party can demand restitution of whatever it has performed for the other party (art. 6:203 DCC); whereas in case of rescission, the termination does not have retroactive effect (art. 6:269 DCC) and results in parties being required to undo their past obligations (art. 6:270 DCC).

[32] Wim HM Reehuis and Evelieke E Slob, *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 7 (Invoering boeken 3, 5 en 6)* (Kluwer 1991) 136-137 (MvT) and 141-142 (MvA II). Article 14 paragraph 4 of the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28, to be transposed into national law by 1 July 2021, explicitly provides that "The consumer shall not be liable to pay for normal use made of the replaced goods during the period prior to their replacement." However, the latter rule only pertains to replacement and care should be taken not to apply that rule to rescission in light of art. 3 paragraph 6 of the directive, which states in furtherance of its recital 60 that it "shall not affect the freedom of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects or contracts, including the consequences of the termination of a contract, in so far as they are not regulated in this Directive, or the right to damages."

case of personalised pricing there was (and is) nothing wrong with the good delivered, whereas in most cases of nullification the supplier's conduct entitles the consumer to nullify, but the supplier's good is also defective.[33] Take for example a seller who fails to inform a consumer that the car's odometer has been tampered with or that the soil is heavily polluted. In those cases, the benefit the consumer has had of the goods in question is far less than the benefit he/she has had in cases of personalised pricing where the goods were not defective.

However, it can also be argued that no usage compensation in case or rescission should be awarded to the seller in light of the following. In case of a consumer sale, the rescission remedy is of a secondary nature when compared to the specific performance remedies of repair and replacement, i.e. and more specifically, the consumer may only rescind the sales agreement if (i) the seller has not repaired or replaced the product within a reasonable period of time and without significant inconvenience for the consumer or (ii) repair or replacement is impossible or cannot be required of the seller, see article 7:22 paragraph 2 DCC.[34] Especially with respect to the first scenario it may not be logical to award the seller a usage compensation for the period of time between the moment the consumer required the seller to repair or replace the defective product and the moment the consumer rescinded the agreement.[35]

Also, a comparison can be made to usage charges payable in case the consumer exercises his statutory right to withdraw from a distance sales contract regardless of whether the good is defective (art. 9 CRD). That withdrawal right was introduced to allow the consumer to test and inspect the goods purchased by means of distance sales contract (e.g. from a webshop). This is something he/she cannot do prior to the purchase and which he/she could have done, had he/she purchased from a brick-and-mortar store, see recital 37 CRD. In those situations, the consumer may need to pay an amount to the supplier "in the case where he/she has made use of those products in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment…", as the ECJ ruled in the Messner case.[36] Later on, this rule was codified and transformed to a specific statutory right in art. 14 paragraph 2 CRD, which states that the consumer is "liable for any diminished value of the products resulting from the handling of the products other than what is necessary to establish the nature, characteristics and functioning of the products." Yet it was the Messner judgement which, from an EU perspective, trailblazed the path for unjust enrichment claims in cases where the consumer used products prior to returning them.

It should also be noted that art. 14 paragraph 2 CRD provides that the consumer is not liable for such diminished value if the supplier has not informed the consumer about his withdrawal right. Similarly, it could be argued that if a consumer is not informed about personalised pricing, the consumer should not be liable for a diminished value of the goods purchased, and therefore not be required to pay a usage compensation. However, unlike in case of the CRD, even the proposal for amending the CRD (n 9) does not specifically provide for such a sanction in case the consumer is not informed about personalised pricing. In the absence of such a statutory rule, the comparison with the CRD does not allow for the argument that the consumer should not be required to pay a usage compensation to the supplier.

Furthermore, the consumer may lodge a supplementary damage claim because the statute specifically provides that an unfair commercial practice (which we assume personalised pricing to be) is an act of tort (art. 6:193b paragraph 1 DCC). It is here that the supplier's conduct will be of more relevance than in case of deciding on the amount of usage compensation due by the consumer. If, for example, the defect of a good is caused by the seller's supplier and not

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[33] See e.g. HR 14 November 2008 ECLI:NL:HR:2008:BF0407 *NJ* 2008 588 (*Van Dalfsen/Gemeente Kampen*) (Neth.).

[34] See with respect to the order of remedies (repair/replacement first, rescission second) also art. 3 paragraph 5 of Directive 1999/44 (n 25), to be repealed and replaced by art. 13 paragraph 4 under (a) and (d) Directive 2019/711 (n 32) as of 1 January 2022.

[35] See Marco BM Loos, *Consumentenkoop (Monografieën BW nr. B65b*) (Wolters Kluwer 2019) nr. 37 with a reference to analogous application of art. 7:10 paragraph 4 DCC and Hof Arnhem-Leeuwarden 24 May 2016 ECLI:NL:GHARL:2016:3985 (*Lekkende camper*) (Neth.).

[36] ECJ Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECLI:EU:C:2009:502. This judgement was rendered under the predecessor of the CRD, the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

known by the seller (but the seller is still responsible for such defect[37]), this may be 'less worse' than the conscious decision of a supplier not to inform the consumer about the fact that he uses personalised pricing. Seeing that the usage compensation focuses more on the benefit the consumer has had of the product than the supplier's conduct, it seems more logical to consider this 'worse behaviour' when deciding upon a damage claim.

Having said that, from the consumer's point of view, lodging a damage claim on account of tort is best avoided because of the additional requirements which need to be met by the consumer and the additional defences available to the supplier, e.g. limitations of liability, reduction of damages because of failure to mitigate damages or own fault (art. 6:101 DCC). Nonetheless, the existence of such a claim may convince those who believe that awarding the supplier a usage charge is not sufficiently effective and dissuasive, as required by art. 13 UCPD. Admittedly, case law by the Dutch Supreme Court seems to point in a different direction. In a case where all-in mobile telephony agreements (i.e. agreements combining the provision of a 'free' mobile phones with mobile subscriptions) were nullified, the Dutch Supreme Court ruled that consumers did not need to pay usage charges on the basis of unjust enrichment.[38] This, the court ruled, would not be reasonable[39] because it would detract from the effectiveness and dissuasiveness of the sanction and not protect consumers adequately. This judgment has rightfully been heavily criticised as being disproportional.[40]

I believe that the sanctions I propose are, on the other hand, proportional because they balance the interests of the consumer (by allowing for full nullification, with a right to sue for damages, if need be) with those of the supplier (by requiring the consumer to pay usage charges, on account of unjust enrichment, in case the agreement is nullified). Furthermore, softening the effects of sanctions by means of unjust enrichment is an option which the ECJ itself entertained in the Quelle and Messner judgments discussed above. I also believe the sanctions proposed are sufficiently "dissuasive" as required by art. 13 UCPD. Even though the supplier may be awarded usage charges and the grave consequences of nullification are therefore mitigated for him, he/she still receives back the goods concerned and will need to resell them in order to make a similar profit as he/she would have made had the agreement remained intact. Also, in order to resell, the supplier will most likely need to repackage (or even repair) the good, offer it for sale at a discounted price (because it has been used) as well as incur marketing and other costs to sell that good again. Those costs are unlikely to be fully recuperated by the usage charges to be paid by the consumer.

At the end of the day, whether or not a supplier is entitled to a usage compensation in case an agreement is nullified on account of personalised pricing depends on whether proportionality or rather dissuasiveness and effectiveness is favoured. Weighing the arguments, I believe a usage compensation should be paid for the reasons set out above.

4.2. Services and value compensation

[37] HR 27 April 2001 ECLI:NL:HR:2001:AB1338 *NJ* 2002 213 (*Oerlemans/Driessen*) (Neth.).

[38] HR 12 February 2016 ECLI:NL:HR:2016:236 *NJ* 2017 282 (*Lindorff/Nazier*) (Neth.) paragraph 3.16 and Verkade (n 6) nr. 71a. The Dutch Supreme Court's decision was based, among other things, on the argument that the mobile telephony agreements were in conflict with Dutch legislation implementing the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

[39] Reasonableness is one of the statutory requirements for an unjust enrichment claim to be awarded on account of art. 6:212 DCC.

[40] See e.g. Jaap Hijma in his annotation of HR Lindorff/Nazier (n 38), paragraph 19-20 and Jaap Hijma, 'Ontwikkelingen overeenkomstenrecht (III)' (2017) 7166 WPNR 783 as well as Charlotte MDS Pavillon, 'Materieelrechtelijke beschouwingen naar aanleiding van de tweede gratis-mobieltjes-uitspraak van de Hoge Raad. HR 12 February 2016, ECLI:NL:HR:2016:236.' (2016) 5 Tijdschrift voor Consumentenrecht en handelspraktijken 239. See also Nicolaas Huppes, Charlotte MDS Pavillon & Thomas L Wildenbeest, 'De fabel van het gratis mobieltje' (2019) 5 NTBR 20 who advocate an alternative sanction.

In case an agreement with respect to *services* fully[41] provided (e.g. a flight) is nullified on account of personalised pricing, as explained, the legal ground for past performances is considered to have been absent *ab initio* (art. 3:53 DCC) and each party can demand restitution of whatever it has performed for the other party (art. 6:203 DCC). However, unlike goods delivered, services provided cannot, by their nature, be given back to the supplier. Therefore, Dutch statute specifically provides: "If the performance by its nature precludes reversal, reimbursement of the value of the performance at the time of its receipt shall be made instead of restitution, insofar as is reasonable, provided that the recipient has been enriched by the performance or was responsible for the performance being effected or if he had agreed to give some value in exchange." (art. 6:210 paragraph 2 DCC).[42] In the given situation, the consumer who took a flight from A to B, but subsequently nullified the agreement, was clearly enriched by the flight. Therefore, he/she should, in principle, reimburse the value of the service, objectively set at the market value at the moment of its receipt insofar reasonable (art. 6:210 paragraph 2 DCC).[43] There seem to be two ways to determine such usage charge, each of which has its own advantages and disadvantages, as I will now show.

The first way to determine the usage charges to be paid (if any) is to have the consumer pay a value reimbursement to the supplier set at the market value at the time of receipt, i.e. the day of the flight (as the main rule of nullification prescribes in art. 6:210 paragraph 2 DCC). However, price fluctuations between the moment of booking and the day of the flight could work in favour, but also to the detriment of the consumer, the fairness of which leaves much to be desired. Given this uncertainty, this option is not viable and should be ruled out.

The second way to determine the usage charges to be paid, is to apply the more detailed statute and legal literature on the consequences of *rescission* on account of breach of contract (art. 6:272 DCC) by analogy.[44] That regime distinguishes between the situation where performance has been rendered properly and the situation where it has not. In the former case, the value to be reimbursed by the consumer almost always amounts to the contract price, whereas in the latter case the value is set at the value the service has actually had for the consumer.[45] Seeing that in case of personalised pricing, the service has been provided properly and in full and the consumer has enjoyed the full benefit thereof, the value reimbursement would

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[41] In order to not complicate matters even further, I will assume in this article that all services have been fully performed, not partially.

[42] All translations of articles from the Dutch civil code are from the online version of Hans Warendorf and others, *Warendorf Dutch Civil and Commercial Law Legislation* (Wolters Kluwer 2013).

[43] CJ van Zeben, JW du Pon and MM Olthof, *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 6* (Kluwer 1981) 818-9 (TM) and HR 5 December 2014 ECLI:NL:HR:2014:3532 *NJ* 2016 159 (*Michielse/gemeente Reusel-De Mierden*) (Neth.). See with respect to Belgian law Joke Baeck, *Restitutie na vernieting of ontbinding van overeenkomsten. Doctoral Thesis Gent* (Intersentia 2012), who notes that the current *communis opinio* is that the recipient of the service is required to reimburse the costs which he/she has saved by receiving the service with a maximum of the price which a reasonably acting and interested service provider and a reasonably acting and interested service recipient would have agreed upon at the moment of receipt of the service (nr. 52) and that a modern *sui generis* approach entails that the value reimbursement is equal to the objective value at the moment the service is received and may not be based on the price contractually agreed upon because the contract in which such price was agreed upon was nullified (nr. 103 and with a useful table on various scenario's nr. 246). Claeys adds that in some cases, the value to be reimbursed may coincide with the contractually agreed upon price, see Ignace Claeys, 'Nietigheid van contractuele verbintenissen in beweging' in Orde van Advocaten Kortrijk, *Sancties en nietigheden* (Larcier 2003) nr. 79.

[44] Art. 6:272 DCC reads: "Where the nature of performance is such that it cannot be reversed, compensation takes its place up to its value at the time of receipt." (paragraph 1) and "Where the performance did not conform to the obligation, this compensation is limited to the amount of the value which the performance has really had for the recipient at that time and in the given circumstances." (paragraph 2).

[45] Carla H Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht* (Wolters Kluwer 2018) nr. 704, René JQ Klomp and Harriët N Schelhaas (ed.), *Groene Serie Verbintenissenrecht* (Wolters Kluwer online), art. 6:272 DCC comment 3 (Willem H van Boom) 1-3-2018 and Van der Linden (n 28) 157-159.

be set at the contract price. The net result of the supplier paying back the money received and the consumer paying the contract price would of course be zero, i.e. the consumer would not receive back any money.

This may not seem reasonable to the consumer and he/she will likely argue that the mere fact that the service has been provided in full and properly is insufficient to effectively deprive him of rights to act against personalised pricing, especially in those cases where personalised pricing only came to light after the service was fully and properly provided. This may also not be dissuasive for the supplier. However, not empowering the individual consumer with a sufficiently dissuasive nullification remedy does not necessarily mean that the arsenal of available sanctions is not sufficiently dissuasive. Again, a supplementary damages claim could be lodged by the consumer because the statute specifically provides that an unfair commercial practice (which we assume personalised pricing to be) is an act of tort (art. 6:193b paragraph 1 DCC). Although, as explained, this route is best avoided from the consumer's point of view because of the additional requirements which need to be met by the consumer and the additional defences available to the supplier, it seems to be the only viable option if the consumer wishes to receive some form of compensation.

5. Purchase price reduction (partial nullification or full nullification with conversion)

Given these discussions, the question arises whether, instead of fully nullifying the agreement and subsequently mitigating unwanted consequences (both for the supplier and the consumer), it would be simpler to nullify the agreement only partially. That not only seems less complicated, but also mitigates unwanted consequences, is in line with the (perceived) interests of the consumer and is propagated in legal literature.[46] However, from a dogmatic perspective, this solution poses all sorts of problems. Nullification on account of unfair commercial practices (such as personalised pricing) pertains to the entire agreement (art. 6:193j paragraph 3 DCC). The statute does not, in other words, specifically allow for partial nullification. However, on the basis of the general concept that 'whoever is entitled to more, is also entitled to do less', it is accepted that, in general, a partial quantitative nullification is permitted, but a partial qualitative nullification is not.[47] So, for example, it is permitted to nullify an agreement with respect to a part of the goods delivered, resulting in the consumer being required to return that part (e.g. 20 of the 100 crates of apples delivered) and the supplier being required to return the purchase price pertaining thereto (in this example the purchase price of 20 crates of apples). On the other hand, it is not permitted for the consumer to use partial nullification to achieve a purchase price reduction (*actio quanti minoris*), resulting in the consumer keeping the entire delivery, but the supplier being required to pay back part of the purchase price.[48]

Instead, the Dutch legal system is structured in such a way that once nullification is invoked, the entire agreement is nullified and, by operation of law, converted into a valid

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[46] Charlotte MDS Pavillon and Leonieke BA Tigelaar, 'Vernietiging van de overeenkomst bij een oneerlijke handelspraktijk; een hanteerbare sanctie?' (2018) 3 Contracteren 78.

[47] Klomp and others (n 45), art. 6:228 BW nr. 1.2.4.2 (Jaap Hijma) 1-8-2017, whilst referring to a case of Hof Arnhem 24 March 1976 ECLI:NL:GHARN:1976:AC5717 *NJ* 1978 421 (Neth.) where nullification was permitted with respect to 3040 of the 4000 crates of apples delivered. A judge may, however, achieve results which would have been achieved had partial nullification been recognised by using art. 3:53 paragraph 2 and, in case of error, 6:230 paragraph 2 DCC, but the judge may only do so if parties have so requested (so not *ex officio*). These options will be disregarded to not complicate matters even further.

[48] Sieburgh (n 45) nr. 698, Jaap Hijma (ed.), *Groene Serie Vermogensrecht* (Wolters Kluwer online), art. 3:41 nr. 5.1.4.1 (Saskia de Loos-Wijker) 1-11-2017; Jaap Hijma, *Nietigheid en vernietigbaarheid van rechtshandelingen. Doctoral Thesis Leiden* (Kluwer 1988) 287-294; Mirella EMG Peletier, *Rechterlijke vrijheid en partij-autonomie. Over de toepassing van discretionaire wijzingsbevoegdheden in het contractenrecht*, *Doctoral Thesis VU Amsterdam* (Boom Juridische Uitgevers 1999) 30-36; and Jaap Hijma, 'Koopprijsvermindering' (2018) 7202 WPNR 568-569. However, in case of breach of contract, price reduction with respect to quality is possible by means of partial rescission (art. 6:265 and 6:270 DCC) or by means of a specific statutory instrument on account of non-conformity of the goods sold in case of a B2C sale (art. 7:22 paragraph 1 under b DCC), see Hijma (n 27) nr. 531-531b.

agreement if (and only if) it can be assumed that the parties would have concluded that valid agreement if they would have abandoned the invalid agreement had they known about its invalidity (art. 3:42 DCC). The Belgian legal system seems to be structured in a similar manner.[49] Therefore, with respect to the case at hand, the question needs to be answered whether the parties would have concluded another agreement in the absence of online personalised pricing and what the contents of that agreement would have been.

This is where the system may rear its ugly head. If the supplier is able to prove that he/she would not have concluded the agreement without personalised pricing, he/she is able to prevent conversion of the nullified agreement kicking in and thereby retain full nullification with the mitigating consequences set out in section 4 above, i.e. the payment of a usage compensation. This scenario is not as far-fetched as it might seem at first sight. If the supplier's entire pricing system is based upon personalised pricing, cherry picking would seriously undermine this system and may ultimately lead to a loss-making business and therefore its collapse. And that is precisely why, from the supplier's perspective, it should not be permitted to achieve a purchase price reduction by means of conversion of a nullified agreement. Let me explain this with an example. If a fair and reasonable price of a product without personalised pricing would normally be 110 (comprised of 50 fixed costs per month, 50 variable costs for each sale, at a profit margin of 10%), the supplier may use personalised pricing to sell that product for 130 to one consumer in one month and for 90 to another consumer in another month.[50] If the consumer to whom the product has been sold for 130 nullifies the agreement, but argues that the nullified agreement can continue to exist insofar he/she pays 110, the supplier may well be able to successfully argue that he/she would not have sold the good for 110 because in such a case he/she would not have been able to compensate the loss-making sale for 90 with the profit-making sale for 130. In such a case, the supplier would much rather have the entire sale for 130 nullified and receive the good back so that he/she has another chance of selling that good for 130 to another consumer (possibly after repairing the good with the money received by the consumer for the use he/she has made of the product prior to the nullification). The supplier would, in other words, not have concluded another agreement in the absence of online personalised pricing, which means that the nullified agreement cannot be converted into a valid one and that full nullification takes effect with the mitigating consequences set out in section 4 above.

Interestingly, forcing full nullification upon the consumer in such a way may also not be in the consumer's best interest. Seeing that personalised pricing is aimed at selling to the consumer at the maximum price he/she is prepared to pay for such good, it can safely be assumed that the consumer was indeed prepared to and paid such maximum price of 130. In that case, the consumer may well wish to keep the entire agreement intact if a price reduction to 110 is not awarded because of the reasons described above. The alternative of having the entire agreement nullified, return the product and pay a usage compensation may be even worse for

[49] Thijs Tanghe, *Gedeeltelijke ontbinding en vernietiging van overeenkomsten. Doctoral Thesis Gent* (Intersentia 1015) nr. 190-196, who subsequently criticises this criterion (in nrs. 198-209) and proposes (in nrs. 210-263) a *topoi*-based approached to determine whether keeping the agreement partially intact can reasonably be expected from contractual parties. See also Frederik Peeraer, *Nietigheid en aanverwante rechtsfiguren in het vermogensrecht. Doctoral Thesis KU Leuven* (Intersentia 2019), who summarises the *communis opinio* (in nrs. 333-335) and who advocates a nullity which acts as specifically as possible (in nr. 346 e.a.).

[50] Assuming that each consumer pays the maximum amount he/she is prepared to pay, but no more than the price set by the supplier, using personalised pricing (and selling one product to one consumer for 130 and another product to another consumer at 90) is more beneficial to the supplier than not using personalised pricing (and trying to sell all his products at 110). In the former case, he/she would sell two products in two months (one for 130 and another for 90) and make a profit of 20 (turnover of 130 minus costs of 50 + 50 for the first deal in the first month and turnover of 90 minus costs of 50 + 50 for the second deal in the second month). In the latter case, he/she would only sell one good for 110 (because the other consumer is only prepared to buy at a maximum price of 90) and thus make a loss of 40 (turnover of 110 minus costs of 50 + 50 in the first month and fixed costs of 50 in the second month assuming the good is made to order).

him.[51] If we would wish to protect the consumer seeking a price reduction against a full nullification rearing its ugly head with unintended consequences, perhaps a creative interpretation of EU consumer law may come to the rescue. In the recent Santander case, the ECJ has ruled that "a national court may substitute a supplementary provision of domestic law for an unfair contractual term …" and that "that possibility is limited to situations in which the invalidation of that contractual term would require the court to annul the agreement in its entirety, thereby exposing the consumer to such consequences that he would be penalised as a result."[52] Admittedly, the judgment is limited to the situation at hand, but perhaps a more general concept may be deduced from it: invalidating an agreement in whole or in part may not result in the consumer being placed in a situation which is worse than he/she would have been in, had that agreement or part not been invalidated. This leads to all sorts of interesting procedural law questions, the answering of which is beyond the scope of this article.[53] If that general concept may be used and those procedural law hurdles taken in case a consumer is not successful in achieving a price reduction by means of nullification, a judge could rule that the agreement remains intact.

Another question is whether price reduction by means of converting a nullified agreement is permissible in light of the fact that in quite a number of legal systems (including in the Netherlands), the concept that the price needs to be just (*iustum pretium*) is rejected for reasons of party autonomy and legal certainty.[54] Also in EU consumer law, the *iustum pretium* concept seems to be rejected. Article 4 paragraph 2 of the Unfair Terms in Consumer Contracts Directive 1993/13 (Unfair Contract Terms Directive)[55] determines: "Assessment of the unfair nature of the terms shall [not] relate … to … the adequacy of the price and remuneration, on the one hand, as against the services or products supplies in exchange, on the other…".[56] Is it that rejected concept which the judge would need to apply in case he/she wishes to nullify the sale for 130 and convert it to another sale, for say 110? Arguably, that is not the case. After all, when converting a nullified agreement and determining a price, the judge is not assessing whether the price of 130 is fair or unfair, but 'merely' dealing with the consequences of nullification. Having said that, it will still be extremely difficult for him to determine what the price would be in practice (in our example: 110) because if the entire pricing mechanism is based on personalised pricing, a set baseline price for that particular supplier and that particular product or service no longer

[51] See also A(Bert) C van Schaick, 'Partiële vernietigbaarheid' (2018) 7 NTBR 196-203, who points out that full nullification could be forced upon the consumer against his will and argues in favour of allowing for a more direct right of partial nullification in order to prevent that risk from materialising.
[52] ECJ Cases C-96/16 and C-94/17 *Banco Santander v Demba & Bonet and Escobedo Cortés v Banco de Sabadell* [2018] ECLI:EU:C:2018:643 paragraph 74, in furtherance of, among other judgments ECJ Case *Kásler v Jelzálogbank* [2014] ECLI:EU:C:2014:282.
[53] Such questions include (and the answering of which also depends on the way parties litigate): (i) must the judge give each party the opportunity to react to the anticipated consequences of full nullification or may this instrument only be used in those cases where the consumer has not requested nullification, but the judge wishes to nullify *ex officio* and, before doing do, is required to provide said opportunity to the parties in order to protect parties from surprise decisions (see HR 13 September 2013 ECLI:NL:HR:2013:691 *NJ* 2014 274 (*Heesakkers/Voets*) (Neth.) paragraphs 3.9.1-3.9.3)? and (ii) should the judge, in a simpler manner, interpret the consumer's nullification claim in such a way that it is limited to the situation that price reduction can be achieved and, if this is not successful, deny the claim (or *ex officio* add to the legal ground put forward (nullification) that the nullification is provisional on it resulting in price reduction (art. 25 Dutch Code of Civil Procedure))?
[54] Hijma (n 27) nr. 212 and Ton Hartlief, *Iustum pretium: op weg naar een rechterlijke toetsing van de rechtvaardigheid van het contractuele evenwicht?* In Ton Hartlief and others (eds.), *Contractvrijheid* (Kluwer 1999) 239-253.
[55] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.
[56] However, because the CRD is a minimum harmonisation directive, Member States which, unlike the Netherlands, have legislation implementing the *iustum pretium* concept, may continue to apply that legislation, see ECJ Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Ausbanc* [2010] ECLI:EU:C:2010:309. See also art. 8a of the Unfair Contract Terms Directive (n 49), which was added by means of art. 32 CRD and which requires a Member State to inform the Commission if it adopts provisions which "extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration;…".

exists and benchmarking against competitors could result in comparing oranges to apples. It is that difficulty which may make a judge think twice before deciding to embark on that adventure.

EU consumer law also seems in favour of all-or-nothing sanctions and violently opposed to discretionary powers of the judiciary to convert or mitigate its consequences. A good example of this is the Banesto case, in which the ECJ ruled that if a term is found to be unfair within the meaning of the Unfair Contract Terms Directive, a court may not use national law which provides him with the power to "modify that contract by revising the content of that term" because "[t]hat power would contribute to eliminating the dissuasive effect on sellers or suppliers … in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers."[57]

For all the reasons set out above, partially nullifying or fully nullifying and subsequently converting an agreement are not viable options.

6. Conclusion

On the basis of the foregoing, I conclude the following with respect to agreements which I assumed have been concluded as a result of personalised pricing constituting an unfair commercial practice and can therefore be nullified. The 'consumer takes it all approach' (of letting the supplier refund to the consumer all amounts paid and the consumer keeping the goods received or services provided free of charge) seems disproportional, ineffective and insufficiently dissuasive and is therefore not a viable solution (see section 3). With respect to the more nuanced approaches, I conclude that it is not a viable solution to partially or fully nullify an agreement concluded as a result of an unfair commercial practice and subsequently convert it (see section 5). By doing so, the supplier would be forced into an agreement which he/she would not have concluded in the absence of personalised pricing, at a price which a judge may be hard-pressed to determine (due to manner in which personalised pricing works) and which (contrary to EU case law) effectively reduces a sanction. What I believe should happen from a civil law perspective, is that if the consumer nullifies the agreement, he/she should receive back the purchase price in exchange for returning the goods and paying a usage charge (in case of goods) or not be entitled to receive back the contract price (in case of services performed fully and properly) (see section 4). Admittedly, the consequences of some of the individual nullification actions proposed may not be very dissuasive. However, I believe that they are proportional and that any lack of dissuasiveness may be compensated with other sanctions available, such as damages claims, as well as collective actions and administrative sanctions, though given the scope, focus and length of this article, this is for others to consider.

[57] ECJ Case C-618/10 *Banesto v Calderón Camino* [2012] ECLI:EU:C:2012:349 paragraphs 69 and 73; and also ECJ Case C-488/11 *Asbeek Brusse & de Man Garabito v Jahani* [2013] ECLI:EU:C:2013:341 paragraph 60; ECJ Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco and Caixabank* [2015] ECLI:EU:C:2015:21 paragraph 31; ECJ Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo* [2016] ECLI:EU:C:2016:980 paragraph 60. See also Arthur S Hartkamp, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht* (Wolters Kluwer 2018) nr. 253. However, European consumer law does not preclude national law which *requires* a judge, subject to certain restrictions, to adjust a contractual interest rate to a certain statutory interest rate, see ECJ *Unicaja Banco and Caixabank* paragraph 42.