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Bram B. Duivenvoorde

# The Consumer Benchmarks in the Unfair Commercial Practices Directive

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Bram B. Duivenvoorde
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Amsterdam
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Amsterdam, October 2014

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# Abbreviations

| | |
|---|---|
| 1.UWGÄndG | Erstes Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb |
| A.C.D. | Administrative Court Digest |
| AGCM | Autorità Garante della Concorrenza e del Mercato |
| AGCOM | Autorità per le Garanzie nelle Comunicazioni |
| All ER | All England Law Reports |
| BeckRs. | Beck-Rechtsprechung (Beck-Online database) |
| BERR | Department for Business, Enterprise and Regulatory Reform |
| BGB | Bürgerliches Gesetzbuch |
| BGBl. | Bundesgesetzblatt |
| BGH | Bundesgerichtshof |
| BIS | Department for Business, Innovation and Skills |
| BT-Drs. | Drucksache des Deutschen Bundestages |
| BTLC | Buttersworth's Trade Law Cases |
| CC | Codice Civile |
| CJEU | Court of Justice of the European Union |
| CMAR | Control of Misleading Advertisements Regulations |
| Cons. | Consiglio di Stato |
| CPUTR | Consumer Protection from Unfair Commercial Practices Regulations |
| DTI | Department of Trade and Industry |
| EC | European Commission |
| ECJ | European Court of Justice |
| ECR | European Court Reports |
| EC Treaty | Treaty establishing the European Community |
| EESC | European Economic and Social Committee |
| E.T.M.R. | European Trade Mark Reports |
| EU | European Union |
| EWHC | England & Wales High Court |

| | |
|---|---|
| FSR | Fleet Street Reports |
| Gazz. Uff. | Gazzetta Ufficiale |
| GC | General Court (European Union) |
| GRUR | Gewerblicher Rechtsschutz und Urheberrecht |
| GRUR Int. | Gewerblicher Rechtsschutz und Urheberrecht: Internationaler Teil |
| K.B. | Law Reports, King's Bench |
| LFGB | Lebensmittel- und Futtermittelgesetzbuch |
| LG | Landesgericht |
| LMBG | Lebensmittel- und Bedarfsgegenständegesetz |
| LSG | Law Society's Gazette |
| NJW | Neue Juristische Wochenschrift |
| OFT | Office of Fair Trading |
| OHIM | Office for Harmonization in the Internal Market |
| OJ | Official Journal of the European Union |
| OLG | Oberlandesgericht |
| Riv. Dir. Comm. | Rivista del diritto commerciale e del diritto generale delle obbligazioni |
| S.I. | Statutory Instruments |
| Tar | Tribunale Amministrativo Regionale |
| TFEU | Treaty on the Functioning of the European Union |
| UCPD | Unfair Commercial Practices Directive |
| UklaG | Unterlassungsklagengesetz |
| UWG | Gesetz gegen den unlauteren Wettbewerb |
| WL | Westlaw Transcripts |
| WLR | Weekly Law Reports |
| WRP | Wettbewerb in Recht und Praxis |

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# Chapter 1
# Introduction

**Abstract** This chapter introduces the Unfair Commercial Practices Directive and the consumer benchmarks in the Directive. It presents the aim and the research question of the book, its general research design and structure as well as the method and scope of each part of the book.

**Keywords** Consumer benchmarks · Unfair Commercial Practices Directive · Introduction · Research question · Methodology

## 1.1 Consumer Benchmarks and the Unfair Commercial Practices Directive

This Unfair Commercial Practices Directive (2005/29/EC) harmonises national laws on unfair commercial practices and has a broad scope, covering *inter alia* misleading advertising and other forms of marketing strategies, including post-sale practices.[1] The Directive aims to achieve a high level of consumer protection and to increase the smooth functioning of the internal market. The latter goal is to be achieved by increasing consumer confidence, and by removing barriers for traders, both of which should lead to an increase in cross-border trade.[2] In addition, the Directive aims more broadly to improve competition on the market.[3]

To a large extent, the Directive relies on general clauses that prohibit traders to act unfairly towards consumers. For example, one of the central clauses in the Directive prohibits traders from distorting the economic behaviour of consumers by misleading them. When a court or enforcement authority has to decide whether a commercial practice is unfair, e.g., because it is potentially misleading, that court or enforcement authority needs to determine what consumer benchmark it should

[1] See also paragraph 2.2 of this book.

[2] See Article 1 Directive.

[3] This is not one of the formal goals as mentioned in Article 1 of the Directive, but it does follow from the Directive's Preamble (e.g. Recital 8) and the EC Guidance to the Directive (SEC (2009) 1666, p. 6). See also paragraphs 2.3 and 11.4 of this book.



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apply. Should it decide on the basis of the benchmark of a critical consumer, who actively seeks the information he or she needs, and who is aware of potentially misleading marketing strategies? Or alternatively, on the basis of the benchmark of a trusting and perhaps somewhat naïve consumer, who relies on the good intentions of the seller?

The answer to this question can be decisive for the outcome of the case, i.e., for the decision whether a practice is found unfair.[4] It is, therefore, also an important indicator of the level of protection offered to consumers and of the extent to which intervention in the market by an enforcement authority or through a court judgment is legally possible.[5] Setting the benchmark at a critical consumer implies a low level of intervention in the market and an emphasis of the consumer's own responsibility. Setting the benchmark at a more trusting or naïve consumer, on the contrary, emphasises the trader's responsibility to act fairly, and allows for more intervention in the market. Hence, the choice of the consumer benchmark has important implications in relation to who is 'worthy' of protection and as to what type of commercial practices are found to be acceptable.[6]

Due to its central importance, the issue of the consumer benchmarks in the Unfair Commercial Practices Directive was one of the central subjects of debate in the Directive's adoption process.[7] The discussion reflects different political viewpoints, as well as differences in how Member States used to deal with this issue in their national laws.[8]

Already prior to the adoption of the Unfair Commercial Practices Directive, the Court of Justice of the European Union (CJEU)[9] held in *Gut Springenheide* (1998) that the benchmark should in principle be set at—what it called—the *average consumer*.[10] This average consumer is assumed to be 'reasonably observant and reasonably well-informed and circumspect'.

The average consumer benchmark was later incorporated into the Unfair Commercial Practices Directive and complemented by two alternative benchmarks that are supposed to prevent the exploitation of vulnerable consumers, i.e., the target group benchmark and the vulnerable group benchmark.[11] The *target group benchmark* applies if a commercial practice is directed at a particular group of

[4] See also J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 6.

[5] See also S Niemöller, *Das Verbraucherleitbild in der deutschen und europäischen Rechtsprechung* (Munich, Beck, 1999) 5–6.

[6] See also S Weatherill, 'Who is the average consumer?', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart, 2007) 115.

[7] See also paragraph 2.4 of this book.

[8] See also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 5–6 and 111–112.

[9] Formerly known as the European Court of Justice (ECJ). Throughout this book, the Court will be referred to as the CJEU.

[10] CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*). See also paragraph 3.2.8 of this book.

[11] See also Chap. 2 of this book.

consumers.[12] If that is the case, the average member of that group functions as the benchmark. This means that the benchmark can be set at, for example, the average member of a group of teenagers, in case of advertising directed at this group. However, even if the commercial practice is not targeted at a vulnerable group, such a group can be protected: the *vulnerable group benchmark* offers the possibility to set the benchmark at the average member of a vulnerable group that is particularly affected by the practice, without the need for this group to have been targeted by the commercial practice.[13]

## 1.2 Aim and Research Question

Despite the fact that the consumer benchmarks were a central subject of debate during the adoption process of the Directive, much uncertainty has arisen regarding how they are to be applied.[14] Moreover, the application of the average consumer benchmark has raised criticism in academic literature, both in terms of how realistic the assumptions of the behaviour of the average consumer are, and in terms of the suitability of the benchmark to reach the Directive's objective of achieving a high level of consumer protection.[15] Despite this criticism, the present state of the debate lacks an in-depth assessment of the consumer benchmarks as currently in place in the Unfair Commercial Practices Directive. Moreover, although attention has been paid to the average consumer benchmark in terms of the level of protection it offers to consumers, the discussion on the consumer benchmarks also lacks an assessment in relation to the other objectives of the Directive.

This book, therefore, investigates the Directive's regime of consumer benchmarks and assesses the benchmarks against each of the Directive's objectives. Accordingly, it addresses the following question:

> To what extent does the regime of consumer benchmarks in the Unfair Commercial Practices Directive meet each of the goals of the Directive?

[12] Article 5(2) Directive.

[13] Article 5(3) Directive.

[14] See, for example T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law 2007* (Aldershot, Ashgate, 2007) 217.

[15] See, for example, G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 248–249, J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 5, T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law 2007* (Aldershot, Ashgate, 2007) 219 and R Incardona and C Poncibò, 'The average consumer, the Unfair Commercial Practices Directive, and the cognitive revolution' (2007) *Journal of consumer policy* 21–38.

In this way, this research assesses whether the consumer benchmarks are suitable in terms of achieving the three goals of the Directive, namely (1) achieving a high level of consumer protection, (2) increasing the smooth functioning of the internal market and (3) improving competition in the market as such.

Through this assessment, this book aims to contribute to the discussion in academic literature on the consumer benchmarks in European unfair commercial practices law, by providing a thorough analysis of the consumer benchmarks and their relationship to the goals of the Directive. At a more practical level, it aims to provide insight into the working and consequences of the benchmarks that can be used in the evaluation of the Unfair Commercial Practices Directive and its application by the CJEU.[16] This assessment is important in particular because the Directive, while promising to regulate unfair commercial practices in a way that achieves the Directive's goals, has removed the possibility for Member States to regulate unfair commercial practices themselves.[17]

## 1.3 General Research Design and Structure

In order to address the main research question, four steps are taken. These steps also provide the four-part structure of this book.

Part I of this book (Chaps. 2–4) investigates the Directive's benchmarks at the European level. It analyses the benchmarks in the Unfair Commercial Practices Directive itself, as well as the application of the consumer benchmarks in the case law of the CJEU. This part forms the foundation to the book and, in the end, also to the assessment of the Directive's benchmarks against its goals.

Part II (Chaps. 5–8) discusses the application of the Directive's consumer benchmarks at the national level. The question is addressed to what extent and how the consumer benchmarks are applied in national law, and whether and to what extent the introduction of the European consumer benchmarks has resulted in changes compared to prior legislation and case law.

Although the assessment in this book focuses on the benchmarks as prescribed by European law, national law is relevant in two ways. Firstly, it is directly relevant for the assessment in terms of the extent to which the consumer benchmarks harmonise national unfair commercial practices laws. Harmonisation is one of the central elements of the objective to increase the smooth functioning of the internal

[16] It is important to note that the focus is on the consumer benchmarks in the Unfair Commercial Practices Directive and in the national legislation implementing the Directive. In particular, this means that the use of the consumer benchmarks in other areas of law are only discussed to the extent that it is relevant for the application of the benchmarks in unfair commercial practices law. It also means that the focus is on the Unfair Commercial Practices Directive and not on consumer law in general. Some short remarks on the possibility of broader application of the Directive's consumer benchmarks are made in the epilogue of this book, see paragraph 12.4.

[17] Important in this context is that the Directive fully harmonises national unfair commercial practices laws, see also paragraph 2.2 of this book.

market.[18] Secondly, although the assessment focuses on the consumer benchmarks at the European level, national law can provide further insight into the concrete application of the consumer benchmarks.[19] This is especially important because of the limited number of cases in which the CJEU has applied the consumer benchmarks so far, and because the CJEU mostly limits itself to providing general guidelines on the application of the benchmarks, rather than applying the benchmarks to the facts of a particular case. The richness of national cases can, therefore, provide further insight into the suitability of the consumer benchmarks to reach the Directive's goals, also in terms of the level of consumer protection and/or the improvement of competition. Outcomes in concrete cases can show who is protected and under which circumstances. Furthermore, non-conform or non-uniform application of the rules at the national level may reveal problems presented by the consumer benchmarks as prescribed by European law, e.g., in terms of the level of consumer protection or of the traders' freedom to compete.

Part III (Chaps. 9 and 10) investigates the relationship between the consumer benchmarks and actual consumer behaviour, on the basis of existing consumer behaviour studies. It addresses how the behaviour assumed in light of the consumer benchmarks relates to actual consumer behaviour as understood in the field of behavioural sciences. The relationship between the consumer benchmarks and actual consumer behaviour is relevant for the level of protection that is offered by the Directive: unrealistically high expectations lead to a lower level of protection, whereas unrealistically low expectations lead to a higher level of protection for consumers. This, in turn, also has consequences for the other goals of the Directive, e.g., in terms of consumer confidence (relevant for the smooth functioning of the internal market) and in terms of traders' freedom to advertise for products and services (relevant for the competitive working of the market).[20]

Part IV (Chap. 11) of this book measures the consumer benchmarks in the Unfair Commercial Practices Directive against the Directive's goals. It first discusses the Directive's goals and then assesses the regime of consumer benchmarks in the Directive with respect to each goal. The assessment builds upon the previous chapters of the book, taking into account the application of the consumer benchmarks at both European and national level, as well as the relationship between the benchmarks and consumer behaviour.

As an epilogue, Chap. 12 of this book provides a number of recommendations to improve the Directive in relation to the Directive's consumer benchmarks. These recommendations build upon the assessment provided in part IV, but at the same time go beyond providing an answer to the main research question of this book.

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[18] See also paragraph 11.3.

[19] This is especially important because of the limited number of cases in which the CJEU applies the consumer benchmarks, and because the CJEU generally limits itself to giving general guidelines to their application rather than applying the benchmarks to the facts of the case.

[20] See also the more elaborate discussion on the Directive's goals in Chap. 11 of this book.

## 1.4 Method and Scope

### *1.4.1 Part I: European Law*

As indicated above, part I of this book provides a legal analysis of the consumer benchmarks in the Unfair Commercial Practices Directive and their application in the case law of the CJEU.

Chapter 2 discusses the consumer benchmarks in the Unfair Commercial Practices Directive. It introduces the Directive and its goals, describes the legislative history of the consumer benchmarks in the Directive, and describes how the benchmarks are to be applied according to the Directive, on the basis of the Directive itself as well as the Guidance provided by the European Commission.[21]

Chapter 3 describes and analyses the case law of the CJEU on the consumer benchmarks in order to determine how the benchmarks are applied at the European level—and thus how they should be applied by national courts and enforcement authorities. The focus here is broader than simply the consumer benchmarks as applied in the context of the Unfair Commercial Practices Directive. In order to investigate the background of the Directive's consumer benchmarks, they are traced back in the case law of the CJEU. Furthermore, the application of the benchmarks in other fields of law (such as trademark law) is also discussed.[22]

Chapter 4 provides a further analysis of the main themes in relation to the Directive's consumer benchmarks, taking into account the case law of the CJEU on the consumer benchmarks, as well as the discussion on the consumer benchmarks in legal academic literature.

### *1.4.2 Part II: National Law*

The second part of this book describes and analyses the application of the consumer benchmarks in the unfair commercial practices laws of EU Member States. It provides an analysis for each of the three selected Member States (Chaps. 5–7), followed by a comparative analysis in Chap. 8. The question addressed for each selected legal system is what consumer benchmarks are being applied and what behaviour is expected of the consumer in light of these benchmarks. Furthermore, the consumer benchmarks as applied before the introduction of the average consumer benchmark by the CJEU in *Gut Springenheide* are discussed in order to gain insight into the extent the introduction of the consumer benchmarks at the European level has changed (and possibly harmonised) the laws of the Member States.

This part of the book offers a three-pronged comparative analysis. Firstly, it provides an historical analysis of the consumer benchmarks as they were applied

[21] SEC (2009) 1666.

[22] See on the selection of cases also paragraph 3.1 of this book.

in the selected Member States prior to the introduction of the average consumer benchmark by the CJEU in *Gut Springenheide* and the application of the 'European' consumer benchmarks thereafter. Secondly, it compares the application of the consumer benchmarks as between the selected legal systems. Thirdly, it compares the application of the consumer benchmarks at the national level with the benchmarks and their application at the European level. As mentioned above, these comparisons are directly relevant in terms of the degree of harmonisation that is reached by the Directive and they also contribute to providing insight into the application of the Directive's consumer benchmarks at a more concrete level.

The objects of analysis and comparison are determined by using a conceptual approach.[23] Using the consumer benchmarks in the Unfair Commercial Practices Directive as a starting point, the application of these benchmarks in the selected systems forms the basic object of analysis and comparison. It must be noted that the object of comparison includes what the legal system under consideration expects with regard to the behaviour of the consumer in the context of allegedly unfair practices. As a consequence, in cases in which the consumer benchmarks are not explicitly applied, the object of analysis consists exclusively of what is expected of the consumer in this context.

The choice has been made to investigate a small sample of EU legal systems in order to allow for an in-depth analysis, rather than a more superficial discussion of the consumer benchmarks in a large number of jurisdictions. The legal systems that have been selected are Germany (Chap. 5), England[24] (Chap. 6) and Italy (Chap. 7). The primary reason for selecting these legal systems is that they have different reputations in terms of the application of consumer benchmarks prior to the introduction of the average consumer benchmark by the CJEU in the *Gut Springenheide* case.[25] While German law had a reputation for being particularly protective of consumers,[26] English law had a reputation for having a rather *laissez-faire* (but generally moderate) attitude towards advertising and commercial practices, thus offering less protection to consumers.[27] Finally, Italian law had a reputation for

[23] See on this approach M Oderkerk, 'The CFR and the method(s) of comparative legal research' (2007) *European review of contract law* 328 and L Constantinesco, *Rechtsvergleichung (Band II): die rechtsvergleichende Methode* (Köln, Heymann, 1972) 75.

[24] For the purpose of this research, reference to English law includes the territory of Wales, but not Scotland and Northern Ireland. Some of the laws discussed are, however, also applicable in those territories.

[25] See for comparative overviews A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) and T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004).

[26] See, for example, G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 5 and N Reich and H Micklitz, *Europäisches Verbraucherrecht* (Baden-Baden, Nomos, 2003) 297. The discussion in Germany on the type of consumer to be taken as a standard in the determination of unfair advertising was in fact the cause of the introduction of the notion of the average consumer.

[27] See, for example, G Schricker, 'Die Bekämpfung der irreführenden Werbung in dem Mitgliedstaaten der EG' (1990) *GRUR Int.* 118–119, T Lettl, 'Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa' (2004) *GRUR Int.* 90, G Howells, H Micklitz and T Wilhelmsson,

being particularly permissive towards traders, generally expecting the consumer to be critical towards (and thus unaffected by) advertising.[28] These three legal systems should thus provide for different points of departure in applying the Unfair Commercial Practices Directive. This is interesting from the point of view of harmonisation, in terms of how these legal systems deal with the now fully harmonised legal concepts. Moreover, these different starting points can enrich the discussion as to how Member States can deal with problems and uncertainties as presented by the consumer benchmarks at the European level. Secondly, the systems have been selected for having sufficient availability of sources in the field of unfair commercial practices law, allowing for the in-depth analysis striven for.[29]

The sources used for the comparative analysis are legislation (including, if available, *travaux préparatoires* and guidance documents), academic literature and case law.[30] As the focus of this part is on the application of the Directive's consumer benchmarks in national legal practice, case law plays a more essential role than national legal doctrine. By focusing on case law, insight can be provided into the extent to which harmonisation is achieved at a relatively practical level, and problems related to the application of the benchmarks in concrete cases can be identified. A more detailed description of the process of case selection can be found in each of the chapters dealing with German, English and Italian law.[31]

### *1.4.3 Part III: Consumer Behaviour*

In order to ascertain how the consumer benchmarks and the behaviour assumed under the application of those benchmarks relate to actual consumer behaviour, Part III examines the field of behavioural sciences, in particular the discipline of 'consumer behaviour'. Chapter 9 discusses the average consumer benchmark from a behavioural perspective. In Chap. 10, the same is done for the protection of vulnerable groups through the target group and vulnerable group benchmarks.

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*European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 5–6 and C van Dam, 'De gemiddelde euroconsument – een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 10. See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 136.

[28] G Schricker, *Italien* (Munich, Beck, 1965) 204. See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 242–243 and A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 329–331.

[29] In this sense German law was particularly indispensable due to the ongoing discussion in both academic literature and case law on the issue of consumer benchmarks. At a more practical level, these legal systems were also selected for accessibility in terms of the author's language ability.

[30] Unlike in Germany and Italy, *travaux préparatoires* are in principle excluded as a source of law in English law. However, they can provide insight into how the law will be applied and into how the new law is expected to bring a change compared to prior law.

[31] See the introductory paragraphs of Chaps. 5, 6 and 7 of this book.

As mentioned above, the perspective of consumer behaviour is relevant for the main question of this research, as it provides insight into how the benchmarks relate to reality and what their impact is in terms of the level of consumer protection. The focus is on the benchmarks as applied at the European level, because this is the legal framework that is subject to the assessment.

The field of consumer behaviour studies can be described as the study of when, why, how, and where people do or do not buy products. In itself consumer behaviour studies is already a blend of different disciplines, most notably psychology, sociology, social anthropology and economics.[32] Besides research in the field of the largely marketing-oriented discipline of consumer behaviour studies, these chapters also use sources from the field of behavioural economics, which in essence rely on the same sources. Moreover, a number of consumer surveys on unfair commercial practices are used, as they provide valuable information for unfair commercial practices specifically.

It must be noted that this book does not offer new and original research in the field of consumer behaviour studies, but rather uses the knowledge from this field in order to gain a clearer understanding of how the assumptions made in the legal domain relate to reality, and what the effects of the legal rules are. Hence, the aim is to put the law into perspective rather than to add to the knowledge of the discipline of consumer behaviour studies. Moreover, these chapters present the main insights from the discipline of consumer behaviour studies on this topic, but by no means provide an exhaustive overview of all that is known on consumer decision making related to unfair commercial practices.

### *1.4.4 Part IV: Assessment*

In the last part of this book, the regime of the consumer benchmarks in the Unfair Commercial Practices Directive is measured against the Directive's goals, i.e., achieving a high level of consumer protection, increasing the smooth functioning of the internal market and improving competition in the market as such. It assesses to what extent the regime of consumer benchmarks meets each of the goals of the Directive.

It must be noted that the goals of the Directive cannot logically all be met in their entirety at the same time; a very high level of consumer protection may be detrimental to the competitive working of the market, thus limiting the possibility for traders to compete. Similarly, striving for optimally uniform application of the Directive through clearly circumscribed norms, although effective in removing barriers to trade, may be detrimental for consumer protection in terms of flexibility. Taking this into account, the Directive logically will not fully satisfy each of the goals of the Directive. As the assessment aims to provide insight into how the

[32] See on different approaches in consumer behaviour also J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 9–10.

regime of benchmarks scores in terms of each of the goals, it does not provide a comprehensive assessment of the Directive as a whole. This also means that this part of the book allows the reader to determine for himself or herself whether the outcomes are to be regarded as satisfactory. Some suggestions for improvement of the Directive are made in the epilogue of this book (Chap. 12), but it must be noted that these are meant to provide a starting point for further discussion rather than being definite conclusions on the basis of the assessment.

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# Part I
# European Law

*This part investigates the consumer benchmarks of the Unfair Commercial Practices Directive at the European level. It discusses and analyses the benchmarks in the Unfair Commercial Practices Directive itself (Chap. 2), as well as the application of the consumer benchmarks in the case law of the CJEU (Chap. 3). A thematic analysis of the Directive's consumer benchmarks is provided in Chap. 4, which takes into account the case law of the CJEU on the consumer benchmarks, as well as the discussion on the consumer benchmarks in academic literature.*

# Chapter 2
# The Unfair Commercial Practices Directive

**Abstract** The Unfair Commercial Practices Directive was adopted in 2005 and fully harmonises unfair commercial practices law in Europe. It aims to achieve a high level of consumer protection, to smoothen the functioning of the internal market and to increase competition in the market as such. The main consumer benchmark in the Directive is that of the average consumer, introduced by the CJEU in 1998. The Unfair Commercial Practices Directive introduced two alternative benchmarks to that of the average consumer, i.e., the target group benchmark and the vulnerable group benchmark. The latter was introduced specifically to take away the criticism that the Directive offered insufficient protection to consumers. Both the target group benchmark and the vulnerable group benchmark aim to offer additional protection to more vulnerable groups. Under what circumstances the two alternative benchmarks can be applied, remains somewhat unclear on the basis of the Directive. However, the requirements for their application emphasise that they remain exceptions to the main benchmark of the Directive, i.e., the average consumer benchmark.

**Keywords** Unfair Commercial Practices Directive · Goals · Legislative history · Average consumer benchmark · Target group benchmark · Vulnerable group benchmark

## 2.1 Introduction

This chapter discusses and analyses the consumer benchmarks in the Unfair Commercial Practices Directive. It first introduces the Directive in general (paragraph 2.2) and its goals (paragraph 2.3). After that, the Directive's benchmarks are dealt with, including their legislative history (paragraph 2.4) and a more detailed discussion of the average consumer benchmark (paragraph 2.5), the target group benchmark (paragraph 2.6) and the vulnerable group benchmark (paragraph 2.7).



B. B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive,* Studies in European Economic Law and Regulation 5,
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## 2.2 The Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive, adopted on 11 May 2005, is an ambitious effort to harmonise the laws of Member States on unfair commercial practices.[1] Due to the full harmonisation nature of the Directive, its scope is of particular importance; it determines not only the cases in which the Directive is to be applied (and thus those areas for which Member States have to provide implementation), but also determines the extent to which Member States can continue to regulate unfair commercial practices.[2] The choice for full harmonisation is perhaps the most controversial aspect of the Directive,[3] and ushers in a clear break from the minimum harmonisation tradition established by previous European consumer legislation.[4]

The scope of the Directive is particularly broad, as it covers any commercial practice; a concept defined in the Directive 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'.[5] This basically includes any type of advertising and marketing, but also post-sale practices.[6] Non-commercial practices, such as those concerning political or societal matters, fall outside the scope of the Directive.[7]

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[1] 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'). *OJ* 2005 L 149/22. See on the legal basis of the Directive I Eriksson and U Öberg, 'The Unfair Commercial Practices Directive in context', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart, 2007) 91–94 and G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 12–13.

[2] G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 50.

[3] See similarly G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 1.

[4] See, for example, the Consumer Sales Directive (1994/44/EC), the Misleading and Comparative Advertising Directive (2006/114/EC) and the Unfair Terms Directive (1993/13/EEC). Note that the Unfair Commercial Practices Directive is, however, not the first full harmonisation instrument. For example, the Product Liability Directive (85/374/EEC) and the E-commerce Directive (2000/31/EC) are also full harmonisation Directives.

[5] Article 2(d). The broad scope of application is also emphasised in the case law on the Directive. See CJEU 23 April 2009, Joined cases C-261/07 and C-299/07, *ECR* 2009, p. I-2949 (*VTB-VAB v Total/ Galatea v Sonoma*) and CJEU 14 January 2010, Case C-304/08, *ECR* 2010, p. I-217 (*Plus*).

[6] See also U Bernitz, 'The Unfair Commercial Practices Directive: its scope, ambitions and relation to the law of unfair competition', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart 2007) 35 and C Gielen (ed), *Kort begrip van het intellectuele eigendomsrecht* (Deventer, Kluwer, 2011) 617–618.

[7] G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 53.

The Directive regulates commercial practices as far as they have the potential to affect the economic behaviour of the consumer.[8] Most notably, this means that issues of taste and decency (e.g., rules on nudity and violence in advertising) are excluded from the scope of the Directive, and that these matters are left to Member States.[9] Apart from the issue of taste and decency, the Directive excludes a number of other issues from the Directive's scope. In particular, the Directive excludes matters of intellectual property, as well as immovable property.[10] Financial services are included in the scope of the Directive, but they are excluded from full harmonisation. Member States are thus permitted to continue to adopt more restrictive measures in this field.[11]

The Directive offers a mix of general and specific clauses prohibiting unfair commercial practices. Article 5 provides the general clause prohibiting unfair commercial practices. A commercial practice is regarded as unfair if it is contrary to the requirements of professional diligence and if it materially distorts or is likely to distort the consumer's economic behaviour.[12] Articles 6 and 7 of the Directive offer more specific (but still general) prohibitions of misleading actions and misleading omissions, whilst Articles 8 and 9 prohibit aggressive commercial practices. In the *Trento Sviluppo* case (2013), the CJEU clarified that these more specific general clauses should be applied in accordance with the general clause of Article 5.[13] The first annex to the Directive contains a 'black list' of practices that are unfair under all circumstances, with a list of twenty-three misleading practices and eight aggressive practices.

Little has been regulated with respect to the enforcement of the Directive. Despite the full harmonisation nature of the Directive, this important issue is thus left to Member States. Article 11 of the Directive does impose an obligation on the Member States to ensure that there are adequate and effective means to combat unfair commercial practices, but the substantiation of this obligation is essentially left

[8] This includes, for example, the decision to go or not to go to a store, see CJEU 19 December 2013, Case C-281/12 (*Trento Sviluppo*) (not yet published in *ECR*).

[9] Preamble to the Directive, Recital 7. See also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 59–62.

[10] Article 3 of the Directive.

[11] See Article 3(9) of the Directive. See also the Preamble to the Directive, Recital 9. See on the topic of financial services in relation to unfair commercial practices also P Rott, 'A plea for special treatment of financial services in unfair commercial practices law' (2013) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/Journal of European consumer and market law* 61.

[12] Professional diligence is defined in Article 2(h) of the Directive as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.

[13] CJEU 19 December 2013, Case C-281/12 (*Trento Sviluppo*) (not yet published in *ECR*). This means, amongst others, that providing false information in the sense of Article 6(1) of the Directive is not misleading *per se*.

to Member States.[14] Member States are not required to provide individual remedies for consumers.[15] In general, the underlying idea of the Directive—although explicit reference to such a principle is absent and enforcement is left to Member States—seems to be more about protecting the collective interests of consumers than about providing individual remedies in individual cases.[16]

The interpretation of the Directive, in particular of the general clauses, is generally left to Member States. In order to provide further meaning to the general clauses of the Directive and to support uniform interpretation, the European Commission has produced the EC Guidance, providing guidelines to the Directive.[17] The EC Guidance was first published in 2009, but is designed to be a 'living document' and should thus be regularly updated online.[18] It has been drawn up by the services of the Directorate-General for Health and Consumers and has been drafted in cooperation with Member States and stakeholders. It has no formal legal status and it thus binds neither the European institutions nor the Member States.[19]

## 2.3 Goals of the Directive

Article 1 of the Unfair Commercial Practices Directive encapsulates the two formal goals of the Directive, i.e., increasing the smooth functioning of the internal market and achieving a high level of consumer protection:

> The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.

As the Preamble to the Directive notes, the goal to achieve a high level of consumer protection also follows from the legal basis of the Directive.[20] The Unfair Commercial Practices Directive has been adopted on the basis of the internal market

[14] See G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 217–218.

[15] On the enforcement practice in Member States, see G de Cristofaro, 'Die zivilrechtlichen Folgen des Verstoßes gegen das Verbot unlauterer Geschäftspraktiken: eine vergleichende Analyse der Lösungen der EU-Mitgliedstaaten' (2010) *GRUR Int.* 1017–1025. See also the EU online database on application of the Unfair Commercial Practices Directive in Member States.

[16] See in this sense also, for example, J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 2. This approach is in line with, for example, the previously existing German *Gesetz gegen den unlauteren Wettbewerb* (UWG).

[17] SEC (2009) 1666.

[18] It must be noted, though, that no update has been published so far (last accessed 8 September 2013).

[19] SEC (2009) 1666, p. 6.

[20] See Recital 1 of the Preamble.

clause,[21] and the Treaty on the Functioning of the European Union (at the time the EC Treaty) requires the EU to achieve a high level of consumer protection, including in the context of internal market measures.[22]

The Directive fails to elucidate upon the rationale of consumer protection and thus what can be regarded as a high level of consumer protection. To some extent consumer protection is instrumental to the internal market, in the sense that a high level of consumer protection is meant to increase consumer confidence, leading to more cross-border trade. However, the Directive also emphasises the importance of the protection of vulnerable consumers.[23] This element of consumer protection is not linked to the internal market and provides a more socially oriented perspective on consumer protection in the Directive, by taking into account the needs of the weakest members in society.[24]

Lacking a clear rationale for consumer protection in the Directive, consumer protection in the context of this book is understood in a broad sense, i.e., as the degree of protection of the consumer with regard to his or her position vis-à-vis the trader.[25] More specifically within the context of unfair commercial practices, this means that the more emphasis there is on the trader not to act unfairly (rather than on the consumer being responsible not to be affected by the trader's potentially unfair behaviour), the higher the level of consumer protection is regarded to be.

The other formal goal of the Directive, i.e., increasing the smooth functioning of the internal market, is two-fold. Firstly, as seen from the perspective of traders, the Directive aspires to remove barriers to trade by harmonising national laws. As in many other areas of European consumer law, differences between national laws were seen as barriers to cross-border trade, as they increase costs for businesses who wish to engage in cross-border marketing, advertising campaigns and sales promotions.[26] Secondly, as seen from the perspective of consumers, the Directive aims to increase consumer confidence. It is argued that in order for consumers to have confidence in cross-border shopping, they need to be certain of their rights and should enjoy a sufficiently high level of consumer protection.[27]

In line with the Directive's legal basis, the goal of increasing the smooth functioning of the internal market is limited to increasing cross-border trade, by enabling

[21] Article 95 EC, currently Article 114 TFEU.

[22] Article 151(1) and 151(3)(a) EC (currently Article 169(1) and 169(2)(a) TFEU).

[23] See Recital 18 of the Preamble to the Directive. See also paragraph 2.5 below.

[24] See on this goal also T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law* 2007 (Aldershot, Ashgate, 2007) 211.

[25] Also EU consumer law in general lacks a clear rationale of consumer protection. See for further discussion, e.g., J Stuyck, 'European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market? (2000) *Common market law review* 367, I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) (in particular Chap. 2) and H Micklitz, 'The expulsion of the concept of protection from the consumer law and the return of social elements in the civil law: a bittersweet polemic' (2012) *Journal of consumer policy* 283–296.

[26] Preamble to the Directive, Recital 4. See for a more elaborate discussion on this sub-goal paragraph 11.3.2 of this book.

[27] Preamble to the Directive, Recital 4. See more elaborately paragraph 11.3.3 of this book.

businesses to sell their products in other Member States and by promoting cross-border shopping for consumers. However, although it is not one of the formal objectives enshrined in Article 1 of the Directive, the Directive also aims to improve competition in the marketplace as such.[28] In the EC Guidance to the Unfair Commercial Practices Directive, a clear reference is made to this broader goal of regulating the market, where it is argued that the Directive, apart from providing protection to consumers, also 'aims to ensure, promote and protect fair competition'.[29] Unfair commercial practices not only harm consumers, but also competitors. They take away market share from those who do act fairly, and thus harm competition.[30] The broader goal of improving competition is also clear from the Directive's Preamble, where it is stated that:[31]

> This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it.

As is discussed in further detail in Chap. 11 of this book, the goal of improving competition requires intervention if competition is hindered as a consequence of unfair commercial practices.[32] However, the goal of improving competition also requires that businesses are provided with room to compete and to market their products to consumers. In this sense, competition also requires that over-protection of consumers is prevented.[33]

## 2.4 Legislative History on the Consumer Benchmarks

In preparing for the adoption of the Unfair Commercial Practices Directive, the European Commission pointed to the differences between the consumer benchmarks applied in different Member States as one of the main divergences between the national legal systems and thus as one of the main obstacles to cross-border

[28] See also the goals discussed by Gomez in his economic analysis of the Unfair Commercial Practices Directive: F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 4.

[29] SEC (2009) 1666, p. 6.

[30] H Collins, 'EC regulation of unfair commercial practices', in H Collins (ed), *The forthcoming Directive on Unfair Commercial Practices* (The Hague, Kluwer Law International, 2004) 2. See also C Gielen (ed), *Kort begrip van het intellectuele eigendomsrecht* (Deventer, Kluwer, 2011) 615.

[31] Recital 8 of the Preamble to the Directive.

[32] See in particular paragraph 11.4 of this book.

[33] See also R van den Bergh and M Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int*. 593, F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 8 and A MacCulloch, 'The consumer and competition law', in G Howells et al (eds), *Handbook of research on international consumer law* (Cheltenham/Northampton, Edward Elgar, 2010) 90–91.

trade.[34] The CJEU had already introduced the average consumer benchmark in the 1998 *Gut Springenheide* case, defining the average consumer as 'reasonably well informed and reasonably observant and circumspect'.[35] The Commission pointed out that, despite the introduction of this uniform notion, some national courts were still applying other benchmarks. In particular, the Commission pointed to Belgian and German case law, in which the courts referred to an uncritical or a casually observant consumer, at least in some circumstances.[36]

Accordingly, the Commission deemed it necessary to codify the average consumer benchmark in the Directive. It also stressed that the average consumer test is based on a consumer who is reasonably able to protect his or her own interests, and not on a particularly vulnerable or gullible consumer.[37]

When the Directive was first proposed by the European Commission in 2003, the average consumer notion was included in the definitions section of the Directive, reiterating the definition as introduced in *Gut Springenheide*.[38] The Preamble to the proposed Directive noted the following on the average consumer:[39]

> [The Directive] establishes the ECJ's average consumer, rather than the vulnerable or atypical consumer as the benchmark consumer. This test, which is an expression of the principle of proportionality, applies when the generality of consumers is addressed or reached by a commercial practice. It is modulated when a commercial practice is specifically targeted at a particular group (e.g., children), when the average member of that group will be considered. This will clarify the standard to be applied by national courts and significantly reduce the scope for divergent assessments of similar practices across the EU, while providing a means to take into account relevant social, cultural or linguistic characteristics of targeted groups as allowed for by the Court.

Hence, apart from referring to the case law of the CJEU on the average consumer, the Preamble to the proposed Directive also pointed out that if the commercial practice is specifically targeted at a particular (and possibly vulnerable) group of consumers, the average member of that group will be considered.[40]

Despite the fact that this exception aimed at protecting vulnerable groups, the proposed codification of the average consumer benchmark met significant resistance in the further legislative process. In fact, it was one of the major points of debate in

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[34] See the Extended Impact Assessment, SEC (2003) 724, p. 8.

[35] CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*). See also paragraph 3.2.8 below.

[36] See the Extended Impact Assessment, SEC (2003) 724, p. 8. The Commission refers to the Belgian case Cour de Cassation 12 October 2000 (*Saint-Brice NV/Etat Belge*) and the German cases BGH 20 December 2001, I ZR 215/98, WRP 2002, 977—*Scanner-Werbung* and BGH 20 October 1999, I ZR 167/97, WRP 2000, 517—*Orient-Teppichmuster*. The German cases are discussed in more detail in Chap. 5 of this book.

[37] SEC (2003) 724, p. 8. See also the Preamble to the proposed directive, COM (2003) 356 final, Recital. 21.

[38] COM (2003) 356 final, Article 2(b).

[39] Recital 30 of the Preamble to the proposed directive, COM (2003) 356 final.

[40] Although this exception to the average consumer benchmark may to some extent be supported by the *Buet* case, the CJEU had never formulated a general exception to that effect. See CJEU 16 May 1989, Case C-382/87, *ECR* 1989, p. 1235 (*Buet*) and paragraph 3.2.2 of this book.

the Directive's process of adoption.[41] The criticism commenced at an early stage in the process, namely in the Opinion of the European Economic and Social Committee (EESC). In their advice on the adoption of the Directive, the Committee noted the following:[42]

> The EESC fears that the use of this interpretive criterion [i.e. the average consumer benchmark] will mean that consumer-protection policy loses its protective nature and, notwithstanding the special attention that the proposal devotes to the most vulnerable groups, fails to protect less well-informed or less well-educated consumers.

Alongside the EESC, the European Parliament was also worried that vulnerable consumers would not be protected sufficiently. It argued, therefore, that the interest of vulnerable consumers (being vulnerable due to, for example, age, infirmity, mental state or level of literacy) should be taken into account.[43] The European Council took this criticism into account when drafting the proposals for amendment. The Council proposed to remove the average consumer notion from the definitions section of the Directive and to move it to the Preamble.[44] Moreover, the Council proposed to pay more attention to the interests of vulnerable consumers, both in the Preamble to the Directive and in the form of an alternative benchmark aimed specifically at the protection of vulnerable groups.[45]

## 2.5 The Average Consumer Benchmark

The proposals of the European Council were accepted by the Commission and made it into the final version of the Directive.[46] Recital 18 now deals with the average consumer benchmark, but also emphasises the importance of preventing the exploitation of vulnerable consumers:

> (18) It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer.

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[41] G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 20.

[42] *OJ* C 108/81, para. 3.6.

[43] A5-0188/2004, amendments 8 and 31. Bernitz notes that it was in particular the Nordic countries that called for special protection of vulnerable groups. See U Bernitz, 'The Unfair Commercial Practices Directive: its scope, ambitions and relation to the law of unfair competition', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart 2007) 39.

[44] As discussed below, this could possibly be seen as a paradigm shift in terms of the level of protection. It should be noted, however, that the official reason given by the Commission for moving the removing the notion of the average consumer notion was that there were concerns that giving a definition in the Directive would prevent the concept from evolving in line with CJEU jurisprudence. See COM (2004) 753 final, p. 3.

[45] See OJ C 38 E/1.

[46] See COM (2004) 753 final.

> In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

Recital 19 specifies how vulnerable groups are offered additional protection:

> (19) Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

The Directive thus still generally sets the benchmark at the average consumer, but at the same time provides for alternatives aimed at preventing the exploitation of vulnerable consumers. Micklitz has raised the question whether the removal of the average consumer benchmark from the definitions section of the Directive should be seen as a paradigm shift in terms of the level of protection offered by the Directive.[47] However, although the legislative procedure illustrates that there was resistance against the standard of protection offered by the average consumer benchmark as introduced by the CJEU, the level of protection is, in principle, still set at the average consumer. Also on the basis of the Preamble, the conclusion should be that—despite the protests—the average consumer benchmark is still the leading benchmark in the Directive. Vulnerable groups can be protected under certain circumstances, but the Directive also clearly adheres to the case law of the CJEU on the average consumer; the *Gut Springenheide* formula is repeated in the Preamble, it is made clear that the average consumer test is not a statistical test and, as in the case law of the CJEU, it is emphasised that social, cultural and linguistic factors can be of relevance in determining the expected behaviour of the average consumer.[48] Moreover, the Preamble emphasises the relationship between the average consumer benchmark and the principle of proportionality. In its case law establishing the average consumer benchmark, the CJEU argues that only a certain

[47] G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 112. See also M Broekman, 'De Richtlijn Oneerlijke Handelspraktijken' (2005) *Tijdschrift voor consumentenrecht & handelspraktijken* 178.

[48] The European Parliament in its position in the first reading of the Unfair Commercial Practices Directive meant to include *economic factors*, but this in the end did not make it into the Directive. See A5-0188/2004, Amendment 12.

amount of consumer protection is required, and that exceeding this level—i.e., protecting the less than averagely informed, observant and circumspect consumer—is disproportionate in relation to the free movement of goods.[49]

In the main text of the Directive, the average consumer benchmark, together with the other benchmarks, is placed in the general clause on unfair commercial practices. Article 5 of the Directive reads as follows:

> 1. Unfair commercial practices shall be prohibited.
> 2. A commercial practice shall be unfair if:
>
> (a) it is contrary to the requirements of professional diligence,
> and
>
> (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.
>
> 3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

In a similar vein to Recitals 18 and 19 of the Preamble, Article 5 illustrates the relationship between the average consumer benchmark and the other benchmarks; the average consumer benchmark is the main rule and the target group and vulnerable group benchmarks are the exceptions.

How is the average consumer benchmark to be interpreted? The fact that the benchmark is set at the average or typical consumer implies first of all that less than averagely informed, observant and circumspect consumers are not protected—at least insofar as the average consumer is not affected. In principle, this means that it is permitted to distort the economic behaviour of consumers 'below average', even though the practice may be deemed to breach professional diligence.[50]

Apart from the fact that the average consumer benchmark sets the benchmark at the average and not the sub-average consumer, the CJEU in its case law (discussed in more detail in the next chapter) seems to have rather high expectations of the average consumer. Several commentators have noted that the presumptions as to the behaviour of the average consumer are unrealistically high, and that these high expectations are functional for the market order as envisaged by the European Commission, emphasising the importance of free trade and limiting intervention.[51] As

[49] See, e.g., CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*). See also the discussion of the case law of the CJEU in the following chapter.

[50] J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 1–2.

[51] See e.g., R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* 21 and J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 13–14.

will be shown in the next chapter, at least some of the case law indeed supports the view that the CJEUs average consumer is not exactly 'average'. The EC Guidance seems to confirm this, as it stresses that the average consumer is a critical person, conscious and circumspect in his or her market behaviour.[52]

At the same time, however, the EC Guidance contains indications that the average consumer benchmark should not be interpreted too strictly. It emphasises that 'the average consumer under the Directive is not somebody who needs little protection because he/she is always in a position to acquire available information and act wisely on it.'[53] Moreover, the EC Guidance emphasises that the concept of the average consumer should be interpreted in line with Article 114 TFEU, which provides for a high level of consumer protection,[54] and that several situational factors (e.g., the product or service at hand and the market conditions) must be taken into account.[55] Interestingly, the EC Guidance also states that 'the current state of scientific knowledge including the most recent findings of behavioural economics' are to be taken into account.[56] This can thus be regarded as leaving room to consider the weaknesses of consumers.

However, it remains to be seen whether these statements are in conformity with the case law of the CJEU and therefore how relevant they will be in practice. As noted earlier, the EC Guidance document is not a formal legal document, and the answer will thus still depend on the CJEUs interpretation of the relevant provisions.[57]

## 2.6 The Target Group Benchmark

As follows from the text of Article 5, there are two alternatives to the average consumer benchmark. The first is the target group benchmark; the text of Article 5(2) shows that there has to be a distortion of the economic behaviour of the average consumer who is reached by the commercial practice or to whom it is addressed, or, if the commercial practice is aimed at a particular group of consumers, the average member of that group. Careful reading suggests that there is in fact no clear demarcation between the average consumer benchmark and the target group benchmark, because the average consumer is also determined on the basis of who is reached by the practice or to whom the practice is directed. Hence, the average consumer benchmark may also depend on the target group of the practice.

[52] SEC (2009) 1666, p. 25.

[53] *Ibid*.

[54] SEC (2009) 1666, p. 56.

[55] SEC (2009) 1666, p. 26.

[56] SEC (2009) 1666, p. 32. See also C Willet, 'Fairness and consumer decision making under the Unfair Commercial Practices Directive' (2010) *Journal of consumer policy* 270.

[57] See on this issue also paragraph 4.2 of this book.

In any case, the target group benchmark does provide for the opportunity to take into account the specific reaction of a more vulnerable group or of an expert group, if such a group is specifically targeted by the practice.[58] An example of a practice aimed at a particular group mentioned in the EC Guidance is the advertising for ringtones targeted at teenagers. In that case, the advertising is to be judged from the point of view of the average teenager targeted.[59]

From this example it is clear that the use of the target group benchmark can be an important method to protect vulnerable consumers; if a commercial practice is aimed at a group consisting of consumers who are less than averagely informed, observant or circumspect, the average member of that group (rather than the average consumer) is taken as the standard. So in the example of ringtones targeted at teenagers, the public addressed is perhaps less experienced or less knowledgeable of advertising practices, leading to a stricter assessment of the advertising involved.

## 2.7 The Vulnerable Group Benchmark

While the target group benchmark is limited to cases in which a certain (possibly vulnerable) group is targeted by the commercial practice, the vulnerable group benchmark focuses on who is *affected* by the commercial practice. Hence, the vulnerable group benchmark can also be applied if the practice is aimed at a broader public, but affects the economic behaviour of a particularly vulnerable group.[60]

The vulnerable group benchmark exists alongside the average consumer and target group benchmarks and aims to provide additional protection to groups such as the elderly, adolescents, children and mentally or physically infirmed, but—and this seems to be often overlooked—also to other vulnerable groups. Article 5(3) only mentions age, mental or physical infirmity and credulity as instances of vulnerability, and from the wording of the provision it seems that this list is exhaustive. However, both the Preamble and the EC Guidance make clear that this list is non-exhaustive; Recital 19 of the Preamble to the Directive speaks of vulnerability due to certain characteristics *such as* age, mental or physical infirmity or credulity (see the quoted section in paragraph 2.5 above) and in the EC Guidance it is said that 'the reasons mentioned by Article 5 as the basis to establish the vulnerability of a specific category of consumers are listed indicatively and cover a wide range of situations'.[61]

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[58] See in this respect the Extended impact assessment on the Directive on Unfair Commercial Practices, SEC (2003) 724, p. 26. The EC Guidance also stresses that an expert group can be taken as the benchmark if such a group is targeted. See SEC (2009) 1666, p. 29.

[59] SEC (2009) 1666, pp. 28–29.

[60] See also G Howells, 'The scope of European consumer law' (2005) *European review of contract law* 367 and G Abbamonte, 'The Unfair Commercial Practices Directive: an example of the new European consumer protection approach' (2006) *Columbia journal of European law* 708.

[61] SEC (2009) 1666, p. 29.

From the text of Article 5(3), it follows that the vulnerable group benchmark is subject to two (or possibly three) requirements. These requirements prevent that the vulnerable group benchmark would become the rule rather than the exception. For all commercial practices aimed at the public in general, one can imagine that some consumers are misled because they would not correctly perceive or understand its message.[62] Without setting further requirements, every commercial practice would have to be—unkindly expressed—'idiot proof'.

The first of the requirements for application of the vulnerable group benchmark is that the vulnerable group must be *clearly identifiable*. Exactly what can be regarded as clearly identifiable and to whom the group must be clearly identifiable remains unclear. It is also important to note that it may often be difficult to determine whether certain groups of consumers are particularly vulnerable to a commercial practice, and whether these groups are sufficiently homogeneous in order to be identified.[63] In practice, this may prove to be a significant barrier for application of the benchmark.[64]

A further requirement may be that the commercial practice must materially distort the economic behaviour *only* of the vulnerable group. Looking at the wording of Article 5(3), this seems to imply that *only* the particularly vulnerable group must be affected, while other consumers remain unaffected.[65] This would mean that the commercial practice would have to affect the vulnerable group, for example children, *exclusively*. If some other consumers (including other vulnerable consumers) are also affected, the vulnerable group benchmark cannot be applied. Interpreted in

[62] The fear that this could be the consequence of the Directive's vulnerable group benchmark is expressed by Scherer, who warns that a broad application of the vulnerable group benchmark would make mass media marketing practically impossible. See I Scherer, 'Ende der Werbung in Massenmedien?' (2008) *Wettbewerb in Recht und Praxis* 563–571.

[63] See also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 113–114. See also J Stuyck, E Terryn and T van Dyck, 'Confidence through fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market' (2006) *Common market law review* 151.

[64] See also T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law 2007* (Aldershot, Ashgate, 2007) 218 and J Stuyck, E Terryn and T van Dyck, 'Confidence through fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market' (2006) *Common market law review* 151. This issue is investigated in more detail in Chap. 10 of this book, where the Directive's approach to vulnerability is discussed in relation to vulnerability as seen by the behavioural sciences.

[65] A quick survey of language versions of the Directive shows that most versions examined (English, Italian, Portuguese, Spanish, Danish, Swedish, Dutch, German and Czech) include a similar term (i.e., only, or sometimes even 'solely', e.g., Spanish) to the English language version. The exception is the French language version, which omits reference to such a term: 'Les pratiques commerciales qui sont susceptibles d'altérer de manière substantielle le comportement économique d'un groupe clairement identifiable de consommateurs parce que ceux-ci sont particulièrement vulnérables à la pratique utilisée ou au produit qu'elle concerne en raison d'une infirmité mentale ou physique, de leur âge ou de leur crédulité, alors que l'on pourrait raisonnablement attendre du professionnel qu'il prévoie cette conséquence, sont évaluées du point de vue du membre moyen de ce groupe.'

this way, this requirement may prove to be difficult to satisfy; it will be difficult to ascertain that the commercial practice only affects a particular group of vulnerable consumers, leaving other consumers unaffected. For example, if a practice mainly affects vulnerable elderly persons, but also some non-elderly adults who do not qualify as vulnerable consumers in the context of Article 5(3), does that mean that the elderly cannot receive additional protection through the application of the vulnerable group benchmark? Similarly, if a commercial practice affects people with mental infirmity, but also elderly persons, does that mean that neither is protected? These examples show that if the word 'only' is to be regarded as a requirement, it will be difficult (if not impossible) to satisfy. The alternative interpretation of Article 5(3) on this point would be that it merely indicates the role of the vulnerable group benchmark compared to the other benchmarks. In that case, the word 'only' merely makes clear that Article 5(3) does not address the economic behaviour of the average consumer or target group, but rather of a vulnerable group. Based on the text of Article 5(3) this is not the most logical explanation, but at the same time the strict interpretation would hinder the objectives of the introduction of the benchmark, and without good reason. So far, the CJEU has not addressed this question. Looking at the literature on the Unfair Commercial Practices Directive, the issue appears unaddressed by scholars, but they also do not regard it as a requirement within the context of Article 5(3).[66] This thus seems to support the second interpretation, i.e., that the word 'only' should not be seen as a requirement.

The second (possibly third) requirement of Article 5(3) is that the fact that a particularly vulnerable group is harmed by the commercial practice must be *reasonably foreseeable* to the trader. In other words, the vulnerable group benchmark only applies if the trader knows or should have known that the vulnerable group was going to be affected by the commercial practice. This seems to be more likely if the practice is also targeted at this group, or if at least the group comprises a large part of the customers of the product.[67]

Taking all of this into consideration, it is difficult to say at this moment what the practical relevance is of the vulnerable group benchmark. As a matter of fact, it is difficult to provide a clear example of the application of the vulnerable group benchmark that would not also lead to application of the target group benchmark. The EC Guidance does provide a few examples, but these tend to relate to situations in which either the vulnerable group is targeted or in which it is questionable whether the group concerned is really more vulnerable in the sense that they are less capable than the average consumer to make a decision.[68]

[66] See, for example, G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 115–116.

[67] See also J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 13.

[68] See on the latter distinction also Chap. 10 of this book.

## 2.8 Conclusion

The Unfair Commercial Practices Directive protects the consumer against unfair commercial practices that affect his or her economic behaviour. The standard of protection is in principle set at the average consumer, who is assumed to be reasonably informed, observant and circumspect. However, there are also two alternative benchmarks, namely the target group benchmark and the vulnerable group benchmark. These benchmarks are in place mainly to protect more vulnerable groups, such as children. To a large extent it remains unclear in what cases these benchmarks can be applied and to what extent they can provide a solution to combat the exploitation of consumer vulnerability. In the next chapter, the case law of the CJEU related to the consumer benchmarks (most notably the average consumer benchmark) will be discussed, in order to clarify the benchmarks provided by the Directive, and how they are to be applied according to the CJEU.

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# Chapter 3
# Case Law of the CJEU

**Abstract** The average consumer benchmark has its origins in the free movement of goods case law of the CJEU. In this context, the average consumer benchmark was used by the CJEU to tackle what it regarded as over-protective national laws related to unfair commercial practices. Introducing the average consumer benchmark in the *Gut Springenheide* case in 1998, the CJEU explicitly based the benchmark on its earlier case law. It also made clear that the average consumer benchmark should not be seen as a statistical test, but that empirical evidence can be used by notional courts if deemed necessary. In later cases, the CJEU emphasised that social, cultural and linguistic factors can be taken into account in the application of the average consumer benchmark. Overall, the case law of the CJEU applying the average consumer benchmark elucidates that the average consumer is not expected to be misled easily. In fact, some cases clearly point towards the average consumer as a careful and rational decision maker. This is different in the CJEUs cases applying the average consumer benchmark in trademark law.

**Keywords** CJEU case law · Average consumer benchmark · Free movement of goods · Misleading advertising · Trademark law

## 3.1 Introduction

As has been discussed in the previous chapter, the Unfair Commercial Practices Directive relies on the case law of the CJEU for the interpretation of its benchmarks, in particular in relation to the benchmark of the average consumer. This chapter, therefore, discusses the case law of the CJEU on the consumer benchmarks in order to derive guidelines that can be used in the application of the Unfair Commercial Practices Directive.

Bearing in mind that there is little case law applying the Unfair Commercial Practices Directive itself, and—in particular—little case law applying the benchmarks of the Directive, this chapter mainly discusses case law applying other EU law instruments in which the benchmarks were developed. Many of the early cases discussed in this chapter concern national laws on unfair commercial practices that



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were brought before the CJEU because of possible infringements to the free movement of goods principle. It is in this context in which the average consumer benchmark was developed, before it was formally adopted by the CJEU in the 1998 *Gut Springenheide* case. Many of these cases are explicitly mentioned by the CJEU itself in *Gut Springenheide* as establishing the European consumer benchmark. Later cases of the CJEU, in which the court refined the average consumer benchmark and from which further guidelines for interpretation can be derived, are also discussed.[1] This includes the considerable body of case law applying the average consumer benchmark in trademark law.

Due to the distinct developments in the case law of the CJEU in the misleading commercial communication cases (related to the free movement of goods and consumer protection), on the one hand, and trademark law, on the other, this chapter is divided into two sections: paragraph 3.2 will discuss the case law on misleading commercial communication and paragraph 3.3 will discuss the CJEUs case law in the field of trademarks.

## 3.2 Misleading Commercial Communication

### *3.2.1 Cassis de Dijon and Commission v Germany*

As is shown below, most of the cases referred to by the CJEU in *Gut Springenheide*, establishing the average consumer benchmark, concern the clash between national consumer protection measures on unfair commercial practices, on the one hand, and the free movement of goods as protected by Article 28 TFEU and onwards, on the other.

Amongst others, the free movement of goods prohibits quantitative restrictions (Article 34 TFEU). Quantitative restrictions consist not only of national restrictions of the amount of goods to be imported, but also include so-called 'measures having equivalent effect'. In the *Dassonville* case (1974), the CJEU made clear that these 'measures having equivalent effect' should be understood broadly; all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade, are to be considered as measures having an effect equivalent to quantitative restrictions.[2]

As a consequence of the broad definition of 'measures having equivalent effect' given in *Dassonville*, a significant number of national consumer protection measures was at risk of being in conflict with the EC Treaty (currently TFEU). To compensate for this, the CJEU formulated a general exception to the strict rule of

[1] Not all cases in which the benchmarks are applied or mentioned are discussed in this chapter. This chapter focuses on those cases in which the CJEU either makes relevant general remarks on the application of the benchmarks or in which the application of the benchmarks provide further insights.

[2] CJEU 11 July 1974, Case C-8/74, *ECR* 1974, p. 837 (*Dassonville*), paragraph 5.

*Dassonville* in its *Cassis de Dijon* decision (1979).[3] The CJEU ruled that national provisions relating to the marketing of products are acceptable if they are 'necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions [or] the defence of the consumer'.[4] In order to qualify for this exception, the national measure must be proportional. This means that the national measure, taking in consideration the different interests at hand, must not unreasonably limit the free movement of goods.

The *Cassis de Dijon* case concerned a conflict between foods company Rewe-Zentral and the German *Bundesmonopolverwaltung für Branntwein*, a state agency that had the task to decide on import permits for *Branntwein* (brandy). Rewe-Zentral applied for a permit for the importation of *Cassis de Dijon*, a liqueur from France, but the *Bundesmonopolverwaltung* denied the request stating that *Cassis de Dijon* did not contain a sufficiently high alcohol percentage in order to be sold on the German market. The rationale behind this rule was that consumers could be misled by traders selling similar liquor as that of competitors, but with a lower alcohol level, in particular because the percentage of alcohol is a major determinant in the price of liquor.[5] Moreover, the rule was meant to protect public health by making a clear distinction between light alcoholic beverages and strong liquors, which would be undermined by allowing the distribution of alcoholic beverages with alcohol percentages such as that of *Cassis de Dijon*.

The CJEU, however, ruled that these reasons were insufficient to justify the limitation of the free movement of goods. Although the German rule did address a mandatory requirement, the CJEU argued that in this case the consumer was sufficiently protected if it was ensured that 'suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of the products'.[6] Therefore, an overall prohibition on the import of this type of liquor was not proportional, and could not be justified by the doctrine of mandatory requirements.

The CJEU did not apply an explicit consumer benchmark in its judgment, but the judgment can be seen as a starting point for the development of the average consumer benchmark.[7] In this context it is interesting to note that the Court did not find it necessary to commission consumer opinion research or to produce an expert opinion. In this sense, the CJEU applied an abstract test in order to assess the misleading character of the product at hand. Moreover, as to the expected behaviour of the consumer, the judgment shows the implicit assumption that consumers do not

[3] CJEU 20 February 1979, Case C-120/78, *ECR* 1979, p. 649 (*Cassis de Dijon*). See on this case also R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 36–47.

[4] Paragraph 8 of the judgment.

[5] Paragraph 12 of the judgment.

[6] Paragraph 13 of the judgment.

[7] See also N Reich and H Micklitz, *Europäisches Verbraucherrecht* (Baden-Baden, Nomos, 2003) 298.

base their purchasing decisions merely on the general impression of the product. Rather, consumers are assumed to read product labels, or at least take note of the indication of the country of origin and the alcohol percentage on those labels.[8]

A similar line of reasoning can be found in *Commission v Germany* (1995).[9] German food law at the time prescribed that for certain food products any deviation from the original recipe (in this case, e.g., the use of vegetable oils instead of eggs and butter in the production of certain biscuits) should be clearly stated on the product packaging. The CJEU again found German law to be in conflict with the free movement of goods, and again the Court argued that consumers are protected sufficiently by information given on product labels:[10]

> As the Advocate General rightly observed […], consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 6 of the [Labelling and Presentation of Foodstuffs] Directive. Even though consumers may sometimes be misled, that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue.

In addition, the CJEU stressed that competitors using the original ingredients can draw the consumer's attention to the quality of the product,[11] thus assuming that if there is a problem, the market will take care of it.

The argument that the consumer is sufficiently protected by information provided on the product label has been held by the CJEU in numerous cases[12] concerning the free movement of goods and has become known as the 'labelling doctrine'.[13] The labelling doctrine is important in the creation of the internal market, as it restricts Member States in their power to keep foreign products off their domestic markets. The labelling doctrine can be seen as part of the information paradigm in EU consumer law, i.e., the view that consumers are, at least in principle, sufficiently protected if they are supplied with the relevant information. The CJEU in this context requires the consumer to be sufficiently attentive in order not to be misled by foreign products due to their different composition, naming and packaging.[14] In this sense an active market player rather than a passive and inattentive consumer is a

[8] See also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 70.

[9] CJEU 26 October 1995, Case C-51/94, *ECR* 1995, p. I-3599 (*Commission v Germany*).

[10] Paragraph 34 of the judgment.

[11] Paragraph 36 of the judgment.

[12] See, amongst others, CJEU 21 May 1987, Joined Cases C-133–136/85, *ECR* 1987, p. 2289 (*Walter Rau*), CJEU 12 March 1987, Case C-178/84, *ECR* 1987, p. 1227 (*Reinheitsgebot*) and CJEU 14 July 1988, Case C-407/85, *ECR* 1988, p. 4233 (*Drei Glocken*).

[13] M Dauses, 'Consumer information in the case law of the European Court of Justice: a German view (1998) *British Food Journal* 244–253. See also G Davies, 'Consumer protection as an obstacle to the free movement of goods' (2003) *ERA-Forum* 57.

[14] See in this sense also U Franck and K Purnhagen, 'Homo economicus, behavioural sciences, and economic regulation: on the concept of man in internal market regulation and its normative basis' (2012) 26 *EUI working paper LAW* 5–6.

key to the creation of the internal market.[15] Both *Cassis de Dijon* and *Commission v Germany* reflect this view.

### *3.2.2 Buet*

In the *Buet* case (1989), the CJEU afforded Member States with more leeway to prohibit commercial practices, if the practice is targeted at particularly vulnerable consumers.[16]

The case concerned the alleged infringement of a French prohibition on doorstep selling of teaching materials by EBS, a company engaged in doorstep selling of materials for an English language course. Buet, manager of EBS, was prosecuted under criminal law for violating the prohibition, and EBS itself was being held liable under civil law.

Buet and EBS argued that the French prohibition of doorstep selling of teaching materials was irreconcilable with the free movement of goods, but the CJEU ruled that the prohibition, although restricting the free movement of goods, was in fact legitimate:[17]

> [C]anvassing at private dwellings exposes the potential customer to the risk of making an ill-considered purchase. To guard against that risk it is normally sufficient to ensure that purchasers have the right to cancel a contract concluded in their home.
> It is necessary, however, to point out that there is greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material. The potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects. Moreover, as is apparent from the documents, it is as a result of numerous complaints caused by such abuses, such as the sale of out-of-date courses, that the legislature enacted the ban on canvassing at issue.

Hence, although a right to cancellation is generally adequate to protect the consumer against ill-considered purchases in doorstep selling, the CJEU found the prohibition of doorstep selling of educational materials permissible due to the vulnerable target group of this particular trade practice. The CJEU examined the permissibility of the measure not from the point of view of the average consumer, but from the

[15] See also H Rösler, *Europäisches Konsumentenvertragsrecht* (Munich, Beck, 2004) 116, S Ulbrich, Irreführungs- und Verwechslungsgefahr im *Lauterkeits- und Markenrecht: empirische oder normative Feststellung?* (Diss. Würzburg) (Berlin, Köster, 2005) 17 and J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 13–14.

[16] CJEU 16 May 1989, Case C-382/87, *ECR* 1989, p. 1235 (*Buet*). See also R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 226 and H Micklitz, J Stuyck and E Terryn, *Consumer law* (*Ius commune casebook*) (Oxford, Hart, 2010) 43–45.

[17] Paragraph 12 and 13 of the judgment.

point of view of 'a category of people who […] are behind with their education and are seeking to catch up'. This group was recognised by the Court to be especially vulnerable in relation to doorstep selling and thus in need of additional protection. The case thus provides a good example of the possibility to protect target groups if they are vulnerable,[18] as is also possible—at least under circumstances—in the Unfair Commercial Practices Directive. It also shows that there are limits to the information paradigm, especially if vulnerable target groups are involved.[19]

### *3.2.3 GB-INNO-BM and Yves Rocher*

In a similar vein to the cases discussed above, the *GB-INNO-BM* case (1990)[20] and the *Yves Rocher* case (1993)[21] concern the conflict between national consumer protection measures and the free movement of goods as laid down in Article 34 TFEU. Both cases concern the comparison of old and new prices in advertising. In the same manner as the cases establishing the labelling doctrine, these cases are examples of the information paradigm and thus of the tendency of the CJEU to prefer consumer information over and above prohibitions of commercial practices.[22]

The *GB-INNO-BM* case deals with a Belgian supermarket spreading advertising leaflets in Luxembourg. At the time, Luxembourg law prohibited mentioning the pre-sale prices and the time period of the discount in advertising. According to the Luxembourg Government, these rules were aimed at the protection of the consumer, preventing confusion between bi-annual sales (which were regulated by Luxembourg law) and other temporary discounts. Moreover, the Government argued that the consumer is usually not able to check the correctness of the reference price, so that this too can be a source of deception.[23]

The CJEU, however, was not willing to follow this line of reasoning. Rather, the Court agreed with the European Commission that the normally aware consumer knows that there is a difference between regular discounts and the regulated bi-an-

[18] *Buet* is one of the few cases before the CJEU on the free movement of goods that does not interfere with European law and that shows a more permissible approach to national laws of Member States. Another example is the *Oosthoek* case, which deals the Dutch Wet Beperking *Cadeaustelsel* (Law on the restriction of free gift schemes), which, under circumstances, prohibited the offering or giving of products as free gifts within the framework of a commercial activity. See CJEU 15 December 1982, Case C-286/81, *ECR* 1982, p. 4575 (*Oosthoek*). See also H Micklitz, J Stuyck and E Terryn, *Consumer law (Ius commune casebook)* (Oxford, Hart, 2010) 44.

[19] N Reich and H Micklitz, *Europäisches Verbraucherrecht* (Baden-Baden, Nomos, 2003) 87. See also S De Vries, 'Consumer protection and the EU Single Market rules—The search for the 'paradigm consumer' (2012) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/Journal of European consumer and market law* 228–242.

[20] CJEU 7 March 1990, Case 362/88, *ECR* 1990, p. I-667 (*GB-INNO-BM*).

[21] CJEU 18 May 1993, Case C-126/91, *ECR* 1993, p. I-2361 (*Yves Rocher*).

[22] See also N Reich and H Micklitz, *Europäisches Verbraucherrecht* (Baden-Baden, Nomos, 2003) 23.

[23] Paragraph 11 of the judgment.

nual discount, and that the use of reference prices cannot be prohibited unless they are in fact false.[24] Hence, national authorities are allowed to challenge actual deceptions, but cannot prohibit the use of reference prices as such. The CJEU defended this decision by pointing out that reference prices are in fact a useful source of information for the consumer and that access to information is an essential requirement for the protection of the consumer.[25] The CJEU referred to the Preliminary and Second Consumer Protection Programs (1975, 1981) of the European Council, stating that the protection of the economic interests of the consumer is aimed to 'ensure the accuracy of information provided to the consumer, but without refusing him access to certain information'.[26]

The *Yves Rocher* case is highly similar to *GB-INNO-BM*, both as to its facts and its judgment. Yves Rocher sold mail order cosmetics in Germany, advertising with discount prices using the slogan 'Save up to 50% and more on 99 of your favourite Yves Rocher products'. Alongside the pictures of the products the crossed-out old price and, in large red characters, the new price, was mentioned.[27] A German consumer organisation challenged this practice, arguing that it breached one of the provisions of the *Gesetz gegen den unlauteren Wettbewerb* (German Act Against Unfair Competition, UWG), holding a prohibition of individual price comparisons.

The German Government argued that this prohibition was a necessary restriction of the free movement of goods, arguing that it is 'particularly easy to deceive consumers, since they are generally not in a position to verify the comparison between the old and the new prices'. Moreover, the German Government argued that price comparisons might have suggested a low price level for the entire range of products, while in fact it only applied to part of the products.[28]

Analogously to the *GB-INNO-BM*-case, the CJEU was not willing to follow these types of arguments; it ruled that the prohibition of the UWG did not satisfy the proportionality requirement because, apart from prohibiting cases of actually misleading advertising, it also prohibited non-misleading advertising. As in *GB-INNO-BM*, the Court referred to the argument that price comparisons can help the consumer, enabling him to make a fully informed purchase decision.[29] This fits the general tendency of the CJEU to prefer the consumer's access to information over general prohibitions of certain types of trade practices.[30]

Due to the fact that the emphasis in this case was on the inadmissibility of a general prohibition, it is difficult to draw conclusions as to the consumer benchmark in this case. The Court did not argue that price comparisons cannot mislead

[24] Paragraph 12 of the judgment.

[25] Paragraphs 13–18 of the judgment.

[26] Paragraph 16 of the judgment. See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 135.

[27] Paragraph 5 of the judgment.

[28] Paragraph 14 of the judgment.

[29] Paragraph 17 of the judgment.

[30] See also G Davies, 'Consumer protection as an obstacle to the free movement of goods' (2003) *ERA-Forum* 55–57.

the consumer, but rather that a general ban was unnecessary. However, the different points of view taken by the Court and the German Government are clearly based on different assumptions as to the behaviour of the consumer and his or her need for protection. While the German Government presented the consumer as a generally weak party in need of extensive protection against practices such as comparative pricing, the CJEU postulated the image of a more autonomous consumer, who, at least in general, is able to deal with trade practices such as price comparisons, and to whom more information is beneficial rather than a threat.[31] As Weatherill has argued, the vision of the CJEU in this case of the consumer is one who is able to process and act on proffered information.[32]

### *3.2.4 Nissan*

In contrast to the cases discussed above, the *Nissan* case (1992) is not related to the free movement of goods as laid down in the EC Treaty, but about the interpretation of the Misleading Advertising Directive (84/150/EEC).[33]

The Directive on Misleading and Comparative Advertising prohibited advertising which 'deceives or is likely to deceive the persons to whom it is addressed or whom it reaches'. The Directive did not specify how this should be determined and what consumer benchmark should be applied. Although this issue had been discussed in the preparations of the Directive, the Member States were unable to achieve consensus.[34]

The case deals with the parallel import of new Nissan vehicles from Belgium into France. The vehicles were cheaper, but also had fewer accessories than the regular Nissan vehicles sold in France. The French company Richard-Nissan, exclusive dealer for Nissan in France, filed a complaint against the parallel importer, arguing that it was breaching the *Loi Royer*, the French law on unfair competition that served as the implementation of the Misleading and Comparative Advertising Directive. The competent court, the *Tribunal du grande instance de Bergerac*, requested a preliminary ruling from the CJEU, asking 'whether such a marketing practice is in compliance with the European rules currently in force'.[35]

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[31] See also R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 77, 80 and S Ulbrich, *Irreführungs- und Verwechslungsgefahr im Lauterkeits- und Markenrecht: empirische oder normative Feststellung?* (Diss. Würzburg) (Berlin, Köster, 2005) 19.

[32] S Weatherill, 'Who is the average consumer?', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart, 2007) 127.

[33] CJEU 16 January 1992, Case C-373/90, *ECR* 1992, p. I-131 (*Nissan*).

[34] Interestingly, the proposal for the Misleading Advertising Directive mentioned the exploitation of trust, credulity or lack of experience of the consumer. See G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 14.

[35] Paragraph 5 of the judgment.

In his Opinion in the case, Advocate General Tesauro emphasised that the average consumer, when buying a car, will make a careful comparison and will actively collect information in order to make the right decision:[36]

> In determining whether such advertising is really likely to affect the economic behaviour of the persons to whom it is addressed, one should bear in mind that the car market is characterized by a certain price transparency and that the average consumer, who I am convinced is not wholly undiscerning, is inclined, not least in view of the considerable expense he is contemplating, to make a careful comparison of the prices on offer and to enquire of the seller, sometimes very meticulously, about the accessories with which the vehicle is equipped. In this regard, I hope I will be forgiven for recalling the old saying "vegliantibus non dormientibus iura succurrunt".[37]

The CJEU formulated it differently, emphasising that 'a significant number of consumers' must be misled and that this is not the case under the circumstances presented.[38]This is somewhat remarkable as it implies a quantitative rather than an abstract test, as was later prescribed in *Gut Springenheide*,[39] but it seems to imply first and foremost that consumers are not thought to be misled easily, especially if information is available on the basis of which the consumer can make a sound decision.[40] Smaller groups of more ignorant consumers are thus not protected.[41]

### *3.2.5 Clinique*

The 1994 *Clinique* case offers another example of the clash between the free movement of goods and German consumer protection law.[42] The case is of importance for the average consumer benchmark because it deals—albeit implicitly—with the choice for an abstract benchmark rather than the use of consumer opinion research or expert opinions, and gives direction as to what can be expected of the consumer. The case also marks the starting point for the discussion on social, cultural and linguistic factors in the light of the European consumer benchmark.

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[36] Paragraph 9 of the Opinion.

[37] This Latin phrase expresses that 'the law is there to assist those who are vigilant, not those who are asleep'.

[38] Paragraphs 15–16 of the judgment. See in this sense also the more recent *Lidl Belgium* case in the field of comparative advertising, CJEU 19 September 2006, Case C-356/04, *ECR* 2006, p. I-8501 (*Lidl Belgium*), paragraph 80.

[39] See also J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 12 and C van Dam, 'De gemiddelde euroconsument—een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 6.

[40] See also R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 63.

[41] T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 243.

[42] CJEU 2 February 1994, Case C-315/92, *ECR* 1994, p. I-317 (*Clinique*).

The case concerns a dispute between a German consumer organisation and Estée Lauder, the latter selling cosmetics on the German market under the name '*Clinique*'. The consumer organisation started proceedings at the *Landgericht Berlin* to prohibit the use of the name '*Clinique*' in Germany, arguing that it made the consumer believe that the products in question have medicinal properties.[43] According to the consumer organisation, this constituted a breach of Article 27 of the *Lebensmittel- und Bedarfgegenständegesetz* (German Foods Act, LMBG),[44] which prohibited selling cosmetics under misleading names, descriptions or promotions, including the attribution of characteristics the product does not have.

The *Landgericht Berlin* requested a preliminary ruling from the CJEU, asking whether it would be contrary to the principle of free movement of goods to prohibit cosmetics under the name '*Clinique*' on the ground that it would mislead the consumer, even if the product is lawfully marketed under the same name in other Member States.[45]

In its judgment, the CJEU made clear that the prohibition constituted a limitation of the free movement of goods, because it forced producers to market its products under a different name as in other Member States and to bear additional costs for packaging and advertising.[46] As the products were not being sold in pharmacies, but instead in perfumeries and department stores, and since they were not presented as medicinal products and apparently did not mislead consumers in other Member States, the CJEU concluded that the consumer was not misled and that there was no justification to limit the free movement of goods.[47]

Although the CJEU did not explicitly discuss the consumer's expected understanding of the product name, the judgment once more clearly shows the different lines of thought of the CJEU and German unfair competition law. The *Landgericht Berlin* took the claim seriously, 'since it is possible that an appreciable proportion of the sector of the market concerned might attribute prophylactic or curative medical effects on the skin to the *Clinique* range of cosmetics'. To prove this, the national court argued that it may be necessary to commission consumer opinion research. If this would show that 10–20 % of consumers would be misled, it would be necessary to prohibit the use of the name '*Clinique*'.[48] Without making its reasons explicit, the CJEU opted for an approach that is clearly different. The misleading nature of the product name is decided upon by a test in which 'the consumer' *in abstracto* is taken as the standard and not whether a certain percentage of consumers is actually being deceived. In that sense, *Clinique* is a clear forerunner of *Gut Springenheide*. Also, it is clear that the consumer, as understood by the CJEU, is not naïve and does

[43] Paragraph 5 of the judgment.

[44] This law has been replaced by the *Lebensmittel- und Futtermittel-Gesetzbuch* (LFGB) in 2005.

[45] Paragraph 6 of the judgment.

[46] Paragraph 19 of the judgment.

[47] Paragraph 21 of the judgment.

[48] Paragraph 2 of the Opinion of the Advocate General.

not draw conclusions lightly on the basis of advertising slogans and product names. The same line of reasoning can be found in the *Mars* judgment, discussed below.[49]

Interestingly, Advocate General Gulmann was more reserved in his Opinion than the Court was in its final judgment. Although the Advocate General found the Commission's arguments feasible (which argued against the misleading nature of the product name and which were largely followed by the Court), he argued that there should be room for Member States to determine what level of consumer protection is desirable. Moreover, he argued that there may be differences between consumers in different Member States that may justify differences in the assessment of the same practice in different Member States:[50]

> [I]t can be argued that the Commission fails to take sufficient account of the fact that the starting point, according to the case-law of the Court, is that it is for the individual Member States to decide the degree of protection they deem to be correct with a view to safeguarding the matters which under Article 36 of the Treaty and the Court' s case-law may properly be taken into consideration by the Member States—even though the rules adopted may give rise to barriers to trade.
>
> It may be appropriate in this connection to refer to an argument submitted to the Court by the defendants in the main proceedings. They contended that nothing can justify the view expressed that German consumers require a greater level of protection than consumers in the other Member States. It should be noted in this connection that, as just mentioned above, under Community law it is primarily a matter for national legislatures to determine the level of protection desired in each country. Moreover, as already mentioned, there may be specific differences in linguistic, social and cultural conditions which have the result that something which does not mislead consumers in one country may do so in another.

Both the argument that Member States should in principle be free to determine their level of consumer protection and the argument that there may be differences between consumers in different Member States were ignored by the Court, which decided that the name '*Clinique*' is simply not misleading. According to Keirsbilck, by arguing that the name is not misleading as it apparently does not mislead consumers in other Member States, the CJEU in this case appears to have opted for a uniform European consumer benchmark, leaving little room for differences between Member States.[51]

### *3.2.6 Mars*

In the *Mars* case (1995) the CJEU assumed the consumer to be critical towards advertising techniques, applying the benchmark of the 'circumspect consumer'.[52]

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[49] See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 138.

[50] Paragraph 25 of the Opinion of the Advocate General. For the social, cultural and linguistic factors, see also paragraph 18.

[51] See also B Keirsbilck, *The new European law of unfair commercial practices and competition law* (Oxford, Hart, 2011) 44.

[52] CJEU 6 July 1995, Case C-470/93, *ECR* 1995, p. I-1923 (*Mars*). See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 139, H Mick-

It is one of the clearest and most specific examples of the expectations of the CJEU towards consumers. It is also another clear example of the clash between the benchmark applied in German unfair competition law and the free movement of goods.[53]

Mars had launched a European-wide marketing campaign selling 10% larger ice cream bars for the regular price. The product packaging stated that the ice cream bars were 10% bigger than they were normally and part of the packaging was marked in colour to catch the consumer's attention to the fact that the bars were bigger. However, this part of the packaging took up considerably more than 10% of the total surface area of the wrapping. A German consumer organisation claimed a prohibition of the packaging in Germany on the basis of the general clause against unfair competition in the UWG, arguing that the coloured part of the wrapping, indicating a bigger advantage to the consumer than was actually the case, misled the consumer. The *Landgericht Köln* sought a preliminary ruling explaining whether such a prohibition would be in conflict with the free movement of goods.

In its judgment, the CJEU made clear that such a prohibition would indeed limit the free movement of goods and that this prohibition could not be justified in the light of mandatory requirements. The main reason given by the Court was that 'reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase.'[54] Hence, the Court applied the 'reasonably circumspect consumer' as the benchmark, and expected that this consumer is sufficiently critical not to be affected by the fact that the coloured part of the wrapping was in fact bigger than 10%.[55]

Schulte-Nölke and Jones point out that the Court's ruling 'served to strengthen the tendency [of the CJEU] to impose an obligation on the consumer to take responsibility for protecting his own interests. The consumer, who has a right to information […], must also take note of this information and consider it.'[56] The case also shows that the Court is determined to allow companies to adopt pan-European marketing strategies, without being held back by some Member States.[57]

litz, J Stuyck and E Terryn, *Consumer law* (*Ius commune casebook*) (Oxford, Hart, 2010) 14 and I. Ramsay, *Consumer law and policy,* Oxford: Hart (2012) 170.

[53] R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 116.

[54] Paragraph 24 of the judgment.

[55] A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 93.

[56] Schulte-Nölke and Jones also raise the question why the CJEU in *Mars* has not taken into account the specific interests of children and teenagers, who probably make up a large number of consumers of the product. See R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 114.

[57] C Bernard, *The substantive law of the EU* (Oxford University Press, 2007) 106.

### 3.2.7 *Graffione*

The last of the cases leading up to *Gut Springenheide* discussed here is the *Graffione* case (1996), which deals with the relevance of social, cultural and linguistic factors.[58] The case was referred to the CJEU by the Italian *Tribunale di Chiavari* and concerns a dispute between wholesale business Graffione and supermarket owner Ditta Fransa. At an earlier stage in the legal procedure, the *Corte d'appello di Milano* had forbidden Scott, producer of toilet paper and disposable handkerchiefs, to continue importing these products into Italy. The reason for the prohibition was that the products—although they were made out of paper—were being sold under the name 'Cottonelle', which, according to the *Corte d'appello di Milano*, had the potential to mislead consumers.[59] As a consequence of the judgment, wholesale business Graffione could no longer sell the products. Ditta Fransa's supermarkets still did so, as Ditta Fransa imported the products independently from another Member State, in which the products were still being sold.

Before the *Tribunale di Chiavari*, Graffione ordered a prohibition for its competitor Ditta Fransa to continue importing the products from other Member States, on the basis of the unfair competition clause in the Italian Civil Code. Ditta Fransa objected that such a prohibition would infringe the free movement of goods.

The CJEU, after making clear that the prohibition would constitute a limitation of the free movement of goods, addressed the question whether the prohibition could be justified by the need to protect the consumer.[60] Although the argument had been made that the name was not regarded as misleading in other Member States, the Court argued that this in and of itself did not mean that the name was not misleading in Italy:[61]

> The possibility of allowing a prohibition of marketing on account of the misleading nature of a trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States. As the Advocate General has observed in paragraph 10 of his Opinion, it is possible that because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another.

Hence, after the CJEU had ignored these types of arguments in the *Clinique* case, it accepted in *Graffione* for the first time that differences between consumers in different Member States may be taken into account as a result of social, cultural and

[58] CJEU 26 November 1996, Case C-313/94, *ECR* 1996, p. I-6039 (*Graffione*). See on this case also S Weatherill, 'Consumer image: linguistic, cultural and social differences', in E Terryn, G Straetmans and V Colaert (eds), *Landmark cases of EU consumer law* (*in honour of Jules Stuyck*) (Mortsel, Intersentia, 2013) 8–12.

[59] Paragraphs 3–4 of the judgment.

[60] It is important to note here that the CJEU refers to two different situations in its judgment: (1) the case in which only the producer is prohibited to import the products or (2) the case in which nobody is allowed to import the products. In the first case, the Court argued, the claimant has no ground for the prohibition whatsoever (see paragraphs 18–20 of the judgment). Here only the considerations concerning latter case are mentioned.

[61] See paragraph 22 of the judgment.

linguistic factors.[62] As a result of this, the determination of the misleading nature of product names or other commercial communication may lead to different results in different Member States, and the benchmark applied can at least to some extent be based on a national rather than a European consumer.[63]

Since a statement may be misleading in some Member States but not in others, the CJEU left the final decision in *Graffione* to the national court, stating that the national court will have to decide whether 'the risk of misleading consumers is sufficiently serious to limit the free movement of goods'.[64] In the determination thereof, the national court should take into account 'all the relevant factors, including the circumstances in which the products are sold, the information set out on the packaging of the products and the clarity with which it is displayed, the presentation and content of advertising material, and the risk of error in relation to the group of consumers concerned'.[65]

### *3.2.8 Gut Springenheide*

*Gut Springenheide* (1998) is the landmark case for the introduction of the average consumer benchmark in European law.[66] For the first time, the CJEU explicitly made clear which consumer is to be taken as the benchmark with regard to potentially misleading commercial communication.[67] The judgment was a result of ongoing discussions in German consumer law and unfair competition law on the applicable consumer benchmark. German courts had been applying the benchmark of a superficially observing and uncritical average consumer.[68] German legal scholars, on the basis of earlier judgments of the CJEU such as *Mars* and *Clinique*, had already argued that the German benchmark was in breach of European law.[69] However, this had not yet had any effect on the case law of the German courts.[70] The CJEU judgment had therefore been awaited eagerly in Germany.[71]

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[62] See on the discussion of social, cultural and linguistic factors in the *Clinique* case paragraph 2.3.6. See also C van Dam, 'De gemiddelde euroconsument—een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 6.

[63] See also B Keirsbilck, *The new European law of unfair commercial practices and competition law* (Oxford, Hart, 2011) 49.

[64] Paragraph 27 of the judgment.

[65] Paragraph 26 of the judgment.

[66] CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*).

[67] B Keirsbilck, *The new European law of unfair commercial practices and competition law* (Oxford, Hart, 2011) 50 and R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 225.

[68] See on this benchmark also Chap. 5 of this book.

[69] See R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 523.

[70] R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 229.

[71] *Ibid*. See also S Leible, 'Anmerkung zu EuGH vom 16.7.1998 (Gut Springenheide)' (1998) *Europäische Zeitschrift für Wirtschaftsrecht* 528 and U Reese, 'Das "6-Korn-Eier"-Urteil des EuGH—Leitentscheidung für ein Leitbild?' (1998) *Wettbewerb in Recht und Praxis* 1035.

The case deals with the sale, packaging and labelling of eggs, which have been subject to uniform European rules since 1975.[72] Amongst others, EU law regulates the naming, packaging and distribution of eggs. The German company Gut Springenheide sold ready-packed eggs under the name '6-Korn—10 frische Eier' ('six-grain—10 fresh eggs'). The company stated that 'the six varieties of cereals in question account for 60% of the feed mix used to feed the hens.'[73] Each box of eggs included an information leaflet, praising the quality of the eggs resulting from this high quality feed.

The local Office for the Supervision of Foodstuffs challenged this practice, arguing that the product name and the information provided were misleading. In the proceedings, the *Bundesverwaltungsgericht* (the highest German federal administrative court) was faced with the question whether the marketing practices of Gut Springenheide conformed to Article 10 of the Regulation on the marketing standards for eggs, which prohibits providing misleading information and displaying misleading symbols as to the marketing of eggs.[74] The company argued that the appeal court was wrong in judging that the given name and information were misleading, without producing an expert opinion to prove this. The *Bundesverwaltungsgericht* turned to the CJEU for guidance on this issue. In its preliminary questions, the *Bundesverwaltungsgericht* in essence requested the CJEU to determine which 'type' of consumer it should use to determine whether the given statements were misleading, and, if at all relevant, what percentage of consumers would need to be misled in order to draw the conclusion that consumers are likely to be misled within the meaning of the Regulation. This last question should be seen against the background of the German practice that 10–15% of consumers was required to be misled in order to justify a prohibition.

In its judgment, the CJEU pointed out that the question how to determine the misleading nature of a statement was not only relevant in the context of the Regulation on the marketing standards for eggs, but also in the context of other European secondary legislation, such as other sector-specific regulations and directives and the Misleading Advertising Directive.[75] The answer provided by the CJEU is thus applicable not only to the Regulation on the labelling and marketing of eggs, but to European rules related to potentially misleading information in general.[76] As Schul-

[72] Regulation 2772/75/EEC, replaced by Regulation 1907/90/EC. At the time of the proceedings, Regulation 2772/75/EEC applied. Because the Regulation has not been changed on any of the relevant issues for this case, the Court refers to the more recent edition (see paragraphs 3, 16 and 17 of the judgment). The same will be done here.

[73] Paragraph 9 of the judgment.

[74] On the basis of Article 10(1) of the Regulation, the seller is obliged to supply certain information on the packaging, such as the origin of the eggs, the quality and weight class and the 'best before' date of consumption. Apart from the information listed in Article 10(1), the seller is only allowed to give information complying with the second paragraph of the same provision. Amongst others, this means that information and symbols, used for marketing purposes, can only be given if they cannot mislead the consumer (Article 10(2)(e)).

[75] Paragraphs 28–29 of the judgment.

[76] See also and U Reese, 'Das "6-Korn-Eier"-Urteil des EuGH—Leitentscheidung für ein Leitbild?' (1998) *Wettbewerb in Recht und Praxis* 1036.

te-Nölke and Jones point out, the CJEU was 'clearly concerned with establishing a uniform concept of the consumer for these provisions.'[77]

In addition, the CJEU explained how, in the past, it had decided itself on the issue of potentially misleading commercial communications, and stated that national courts should decide in the same way:[78]

> There have been several cases in which the Court of Justice has had to consider whether a description, trade mark or promotional text is misleading under the provisions of the Treaty or of secondary legislation. Whenever the evidence and information before it seemed sufficient and the solution clear, it has settled the issue itself rather than leaving the final decision for the national court […].
> In those cases, in order to determine whether the description, trade mark or promotional description or statement in question was liable to mislead the purchaser, the Court took into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect, without ordering an expert's report or commissioning a consumer research poll.
> So, national courts ought, in general, to be able to assess, on the same conditions, any misleading effect of a description or statement designed to promote sales.

Hence, national courts should be able to decide themselves whether a trader's communication is misleading, without having recourse to expert opinions or consumer research polls. In a similar manner as the CJEU had done itself in the past, national courts can assess the misleading nature of commercial communications on the basis of its own judgment of how the average consumer, being reasonably well-informed and reasonably observant and circumspect, would react. In principle, national courts should thus determine on the basis of the abstract benchmark of the average consumer whether commercial communication is misleading.

However, the CJEU also emphasised that this does not mean that national courts cannot take into account expert opinions or consumer research polls:[79]

> The Court has not […] ruled out the possibility that, in certain circumstances at least, a national court might decide, in accordance with its own national law, to order an expert's opinion or commission a consumer research poll for the purpose of clarifying whether a promotional description or statement is misleading or not.
> In the absence of any Community provision on this point, it is for the national court, which may find it necessary to order such a survey, to determine, in accordance with its own national law, the percentage of consumers misled by a promotional description or statement that, in its view, would be sufficiently significant in order to justify, where appropriate, banning its use.

Remarkably, no further guidelines are provided about the circumstances under which national courts can use these types of evidence and how the use of this evidence relates to the abstract benchmark of the average consumer.[80]

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[77] R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 225.

[78] Paragraphs 30–32 of the judgment. The case law it referred to in the judgment by the Court will be discussed in detail in paragraph 2.3.

[79] Paragraphs 35 and 36 of the judgment, with reference to the Nissan-case (see also paragraph 2.3.5 above) in paragraph 34.

[80] See for further discussion on the use of empirical evidence also paragraph 4.6 of this book.

### 3.2.9 *Lifting*

Particularly important for the further development of the average consumer benchmark after the *Gut Springenheide* decision is the *Lifting* case (1999), dealing with the issue of social, cultural and linguistic factors and the role of consumer opinion research.[81]

As to the facts, *Lifting* was largely similar to the *Clinique* case (see paragraph 3.2.5 above). One of the parties in the case was cosmetics company Lancaster, which sold firming cream for the skin under the name 'Monteil Firming Action Lifting'. Lancaster was brought before the *Landgericht Köln* by competitor Estée Lauder (note: the defendant in the *Clinique* case), who argued that the name 'Lifting' misled consumers 'because it gives purchasers the impression that use of the product will obtain results which, above all in terms of their lasting effects, are identical or comparable to surgical lifting, whereas this is not the case so far as the cream in point is concerned'.[82] In this light, Estée Lauder argued that the name was misleading in the sense of the German *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act, UWG) and Article 27 of the *Lebensmittel- und Bedarfgegenständegesetz* (German Foods Act, LMBG).[83]

The *Landgericht Köln* made clear that according to German law a not inconsiderable proportion of consumers (approximately 10–15%) would need to be misled in order to justify a prohibition.[84] However, it had doubts whether this test was in accordance with European law, taking into consideration the case law of the CJEU on the average consumer.[85] The question referred to the CJEU was whether prohibiting the name would breach the free movement of goods principle, taking into account the fact that the name was used in other Member States without being contested.

In his Opinion in the case, Advocate General Fennelly emphasised that it is the task of the CJEU to provide guidelines for the national court on how to balance the interests of the free movement of goods, on the one hand, and the protection of the consumer, on the other.[86] Similarly to Advocate General Gulman in *Clinique*, Fennelly also argued that it is not up to the European Court to decide upon the facts at hand, but only to give general guidelines.[87] Fennelly emphasised that the

[81] CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*). After Gut Springenheide, the general applicability of the average consumer benchmark in European law was already confirmed in CJEU 28 January 1999, Case C-303/97, *ECR* 1999, p. I-513 (*Sektkellerei Kessler*), on the application of Regulation 2333/92/EC on the description and presentation of sparkling wines. See also R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 226.

[82] Paragraph 13 of the judgment.

[83] See on this provision in the UWG also the discussion on the *Clinique* case in paragraph 3.2.5 above.

[84] Paragraph 15 of the judgment.

[85] Paragraph 17 of the judgment.

[86] Paragraph 22 of the Opinion of the Advocate General.

[87] Paragraph 31 of the Opinion of the Advocate General.

average consumer benchmark plays an important role in the context of balancing the interests of the free movement of goods and consumer protection, and that the interpretation of this concept—especially in the context of a Directive such as the one in question (which exhaustively harmonises its field of application[88])—should be strict. Moreover, the fact that in the current case the name 'Lifting' did not cause problems in other Member States, should be an important factor.[89] Fennelly also emphasised that 'the presumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices'.[90]

Moreover, Fennelly argued that the national court can itself determine the expected consumer behaviour and that empirical evidence can only play a secondary role therein:[91]

> Having regard to all the relevant surrounding circumstances of the case, and especially the selling arrangements employed by the vendor, the national court must be satisfied that the average consumer, who is reasonably well informed and observant about the product in question and who exercises reasonable circumspection when using his critical faculties to assess the claims made by or in respect of it, would be confused. The approach is thus not statistical. Market surveys may, in certain cases, be of assistance, although it must be remembered that they are subject to the frailties inherent in the formulation of survey questionnaires and often subject to diverging interpretation as to their significance. Accordingly, they do not absolve the national court from the need to exercise its own faculty of judgment based on the standard of the average consumer as defined in Community law.

Hence, Fennelly argued that if national courts decide to commission consumer opinion research, they should interpret the results in the light of the average consumer benchmark. The CJEU in *Gut Springenheide* had left this question open, arguing that the percentage of consumers required to be misled was left to the national laws of Member States. Despite the arguments of Fennelly in this regard, the CJEU in *Lifting* merely repeated its earlier statement and the question remained unresolved.[92]

As to the benchmark of the average consumer, the Court emphasised that it is based on the principle of proportionality, and that this principle is also relevant in the context of the harmonised law on cosmetics.[93] Moreover, the CJEU, in line with

[88] Paragraph 23 of the judgment.

[89] The Advocate General does refer to the possibility of social, cultural and linguistic differences, but he seems to see this as an exception to the main rule of equal application of the notion in all Member States (see paragraph 30 of the Opinion). The assumption that the name 'Lifting' does not cause any problems in Member States seems to be derived from the preliminary question of the *Landgericht Köln* (paragraph 20 of the judgment). The CJEU also takes this for granted. However, the fact that the name has not been contested does not necessarily mean that it does not cause problems for consumers.

[90] Paragraph 25 of the Opinion of the Advocate General.

[91] Paragraph 29 of the Opinion of the Advocate General.

[92] Paragraph 31 of the judgment.

[93] Paragraph 28 of the judgment. See also B Keirsbilck, *The new European law of unfair commercial practices and competition law* (Oxford, Hart, 2011) 52.

its earlier judgment in *Graffione*, pointed out the relevance of social, cultural and linguistic factors:[94]

> In order to apply [the average consumer] test to the present case, several considerations must be borne in mind. In particular, it must be determined whether social, cultural or linguistic factors may justify the term 'lifting', used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word 'lifting'.

The CJEU thus essentially repeated what it had already made clear in *Graffione* and thereby confirmed the relevance of social, cultural and linguistic factors for the application of the average consumer benchmark.[95] It is made clear by the Court that social, cultural and linguistic differences between consumers in different Member States can lead to the conclusion that while a commercial statement is not misleading in one Member State, it may be misleading in another. As we have seen above, this formula has been codified in the Preamble to the Unfair Commercial Practices Directive.[96]

The judgment indicates that the CJEU in its more recent case law is less determined to decide a case on its own: general guidelines are given, but the final decision is left to the national court, which can take into account all relevant circumstances at hand.[97] Moreover, although it remains to be seen to what extent the EU will take differences between consumers in different Member States into account, and respect those differences, it is clear that the CJEU, following the *Graffione* case, does not prescribe a strictly *European* consumer to be taken as a benchmark.

### *3.2.10 Adolf Darbo*

The *Adolf Darbo* case (2000) is of importance for the average consumer benchmark because it further interprets the characteristics of being 'informed' and 'observant'.[98]

Adolf Darbo manufactured jam in Austria and sold it in Germany under the name 'd'Arbo Naturrein'. A German consumer organisation demanded a prohibition of the name 'Naturrein' (naturally pure) because the jam contained the additive pectin and held residues of lead, cadmium and pesticides because of pollution of soil and

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[94] Paragraph 29 of the judgment.

[95] See also C van Dam, 'De gemiddelde euroconsument—een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 7.

[96] See Recital 18 of the Directive's Preamble. See paragraph 2.4 of this book.

[97] However, it must be remarked that the Court does give a strong indication towards the direction of the final decision (see paragraph 31 of the judgment). See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 72, H Micklitz, J Stuyck and E Terryn, Consumer law (Ius commune casebook) (Oxford, Hart, 2010) 14 and B Keirsbilck, *The new European law of unfair commercial practices and competition law* (Oxford, Hart, 2011) 64–65.

[98] CJEU 4 April 2000, Case C-465/98, *ECR* 2000, p. I-2297 (*Adolf Darbo*).

air. Darbo argued that the consumer was not misled, because the consumer was aware that such residues are present in a product like jam, and that pectin is a common ingredient needed to make jam. The *Oberlandesgericht Köln* sought advice of the CJEU, asking whether the name 'Naturrein' was allowed by Directive 79/112/EEC (on the labelling, presentation and advertising of foodstuffs),[99] taking into consideration that pectin was added to the jam and that the jam contained residues of pollution.

Referring to *Commission v Germany,*[100] the CJEU argued that the use of pectin in the product did not mislead the consumer, because the additive is named in the list of ingredients.[101] It thereby linked the labelling doctrine to the average consumer benchmark; the average consumer is expected to read labels of food products before purchasing a good for the first time.

As to the presence of residues of pollution in the jam, the Court appeals to the common sense of the consumer: garden fruit is inevitably exposed to a certain degree of pollution, and the consumer is aware of this.[102]

### *3.2.11 Douwe Egberts v Westrom Pharma and Mediaprint*

The Advocate Generals' Opinions in *Douwe Egberts v Westrom Pharma* and *Mediaprint* are interesting for their general remarks on the average consumer benchmark, which provide insight into the nature of the benchmark.

Westrom Pharma produced coffee, which it claimed to be 'the absolute breakthrough in weight control' and of which it also promised 'slimming, better weight control and slowing down of excess fat deposits'. It also claimed that 'the formula [is] patented in the United States by Dr Ann de Wees Allen, in association with the Glycemia Research Institute'. These statements were presented to the consumer on the product packaging as well as in the instructions for use.[103]

Competitor Douwe Egberts filed a complaint against this practice before a Belgian court, arguing that the statements were in conflict with Belgian food law. Belgian food law prohibited references to slimming and to medical recommendations, attestations, declarations or statements of approval in the labelling and presentation of foods.

Before the CJEU, one of the issues under debate was whether Belgian food law on this point was in line with the Directive on the Labelling and Presentation of Foodstuffs (2000/13/EC) and the principle of free movement of goods.[104]

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[99] Now replaced by Directive 2000/13/EC.

[100] CJEU 26 October 1995, Case C-51/94, *ECR* 1995, p. I-3599 (*Commission v Germany*). See paragraph 3.2.2 above.

[101] Paragraph 22 of the judgment.

[102] Paragraph 27 of the judgment.

[103] CJEU 15 July 2004, Case C-239/02, *ECR* 2004, p. I-7007 (*Douwe Egberts v Westrom Pharma*), paragraphs 15–16.

[104] Paragraph 32 of the judgment.

The CJEU ruled that a general prohibition as had been laid down in Belgian law was neither permissible under Directive 2000/13/EC, nor under the principle of free movement of goods.[105] Rather than having a general prohibition, it should be decided on a case-by-case basis whether a statement is possibly fraudulent, taking into account the presumed expectations of the average consumer.[106]

To this point, the case merely offers a confirmation of the benchmark of the average consumer and emphasises, as is now also common practice under the Unfair Commercial Practices Directive, that general prohibitions of certain types of commercial practices are not allowed.[107] What makes the case of particular interest is the more general statement on the average consumer by Advocate General Geelhoed:[108]

> It should be remembered in this context that, when assessing whether or not product information is misleading, the Court takes as its point of reference the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect. This presupposes that, before acquiring a given product (for the first time), a consumer will always take note of the information on the label and that he is also able to assess the value of that information. It seems to me that a consumer is sufficiently protected if he is safeguarded from misleading information on products and that he does not need to be shielded from information whose usefulness with regard to the acquisition and use of a product he can himself appraise.

According to Geelhoed, the average consumer—in line with the *Adolf Darbo* judgment—is thus expected to always study the label of a product before buying it for the first time and to be able to assess that information.

Moreover, Geelhoed acknowledged that consumers may experience information provided in advertising and on food labels differently, but pointed out that this does not lead to a different appraisal of the misleading nature of those forms of information:[109]

> Statements on a label and in advertising messages perform a similar function when it comes to informing the consumer. They differ in that advertising may focus the consumer's attention on products with which he would not otherwise have come into contact. While advertising messages are normally to be found in isolation from the product concerned, information in the case of labelling is by definition placed on or accompanies the product. This difference does not, however, lead to a different assessment of national provisions applicable to labelling and advertising. In both cases the consumer has an interest in not being misled. So long as the information concerned is correct, it must be assumed that the average consumer who is reasonably well informed and reasonably observant and circumspect will be capable of forming an opinion on the products advertised without his

[105] The Belgian legislation was partly tested (concerning labelling) against Article 18(2) of the Directive, which allows certain limitations but subject to the principle of proportionality, while another part (concerning advertising of foodstuffs) was tested directly against Article 28 and 30 EC Treaty. Both lead to the same result in this case. See paragraphs 43–44 and 54–56 of the judgment.

[106] Paragraphs 43–46 of the judgment.

[107] See e.g. CJEU 23 April 2009, Joined Cases C-261/07 and C-299/07, *ECR* 2009, p. I-2949 (*VTB-VAB v Total/Galatea v Sonoma*) and CJEU 14 January 2010, Case C-304/08, *ECR* 2010, p. I-217 (*Plus*).

[108] Paragraph 54 of the Opinion.

[109] Paragraphs 78–79 of the Opinion.

> economic and health interests being harmed. An outright prohibition on obtaining the information concerned therefore goes further than necessary for the protection of those interests. To put it in stronger terms, those interests might well be harmed if information on the properties of a product that contribute to slimming was not obtained.

Hence, because the consumer has an *interest* not to be misled and because he or she is *capable* of critically assessing the information, he or she is assumed to act accordingly. This line of reasoning seems to illustrate that the average consumer, at least in the interpretation of Geelhoed, is not a simplified reflection of reality, but reflects how the consumer *could* or *should* behave. If the consumer does not pay attention, he or she should bear the risks. In other words, the interpretation of the average consumer by Geelhoed seems to reflect desired consumer behaviour, irrespective of how the average consumer actually behaves.

This view is reflected perhaps even more clearly by Advocate General Trstenjak's Opinion in the *Mediaprint* case.[110] The Opinion mainly addresses the consequences of the full harmonisation character of the Unfair Commercial Practices Directive, but also contains an interesting exposé on the average consumer benchmark. Trstenjak emphasised that the average consumer benchmark is based on the principle of proportionality and that the benchmark is meant to prevent that the same commercial practices are judged differently in different Member States.[111] She also pointed out that the notion of the average consumer should be interpreted as setting high standards for the fulfilment of Article 5(2)(b) of the Unfair Commercial Practices Directive (requiring that the commercial practice distorts the economic behaviour of the average consumer), in order to strike the right balance between the goals of consumer protection and the creation of the internal market. According to Trstenjak, the average consumer is considered 'to be capable of recognising the potential risk of certain commercial practices and to take rational action accordingly'.[112] Like Advocate General Geelhoed's Opinion in *Douwe Egberts v Westrom Pharma*, this supports the view that the average consumer benchmark is not meant to reflect actual consumer behaviour, but rather is a reflection of desired behaviour.[113]

### *3.2.12 Kásler*

The *Kásler* case is interesting because it, for the first time, applies the average consumer benchmark in the context of the Unfair Terms Directive (93/13/EC).[114]

The case concerns a mortgage loan supplied by a Hungarian bank to two Hungarian consumers. In order to diminish inflation risks, the loan was calculated in Swiss Francs rather than in Hungarian Florins. However, the standard terms of the mortgage contract contained a clause on the calculation of the outstanding amount

[110] CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*).

[111] Paragraph 102 of the Opinion.

[112] Paragraph 103 of the Opinion.

[113] See on this issue more elaborately paragraph 4.2 of this book.

[114] CJEU 30 April 2014, Case C-26/13 (Kásler) (not yet published in *ECR*).

and the instalments of the loan, which was rather beneficial to the bank. The terms stipulated that the outstanding amount (i.e. the amount supplied to the consumer) was calculated at the buying rate of Swiss Francs, while the instalments (i.e. the amount paid back periodically by the consumer) were calculated at selling rate, the latter usually being higher than the first. As a consequence, consumers were in fact paying back a higher amount than they actually borrowed—not taking into account interests.

One of the questions before the Court was whether the clause in the standard terms was sufficiently transparent. In this context the CJEU made clear that this should be decided from the point of the average consumer:[115]

> As regards the particularities of the mechanism for conversion of the foreign currency such as those set out in Clause III/2, it is for the referring court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.

It is in itself already interesting that the CJEU, for the first time, applies the average consumer benchmark—as usual defined as being reasonably informed, observant and circumspect—in the context of unfair terms, more in particular in the context of determining the required transparency of terms.

Unfortunately, the CJEU is not very articulate as to the expected behaviour of the average consumer in this context: it is made clear that the average consumer should be made aware of the difference between the selling rate and the buying rate, but also that the average consumer should be enabled to assess the financial consequences of the term. When that is the case and what is expected of the average consumer in this context is left to the national court, but the CJEU does seem to suggest that the mere insertion of the term is not sufficient to inform the consumer. While it is uncertain how the information should be provided in order to satisfy the transparency requirement, it is thus clear that—at least for complex contracts—the average consumer needs more than a 'technical' standard contract term to realise its meaning and consequences. In that sense, the *Kásler* judgment may be more consumer-friendly than many of the cases discussed above.

### *3.2.13 Conclusion*

The case law discussed above indicates that the average consumer is generally regarded by the CJEU as a consumer who is not merely a weak party in need of extensive protection, but rather as a consumer who is typically able to look after

[115] Paragraph 74 of the judgment.

his own interests.[116] For example, the consumer is generally assumed to be attentive and circumspect in the sense that he or she is expected to read product labels prior to purchasing goods (*Cassis de Dijon*, *Commission v Germany*, *Adolf Darbo*). Moreover, the consumer is not misled by somewhat suggestive names (*Clinique*, *Graffione*) or product packaging (*Mars*). Generally speaking, it can be said that the consumer is expected to process the information available and assess it somewhat critically (*Cassis de Dijon*, *GB-INNO-BM*, *Yves Rocher*, *Nissan*). This image is further confirmed by the Opinions in *Douwe Egberts v Westrom Pharma* and *Mediaprint*, although it must be noted that the recent judgment in *Kásler* seems to be more consumer-friendly.

Both the fact that the benchmark is set at the average and that the average consumer is generally seen as a consumer who is able to look after his own interests, should be seen against the background of the free movement of goods and the principle of proportionality. Also in the Unfair Commercial Practices Directive the average consumer benchmark has the role of preventing what is seen as excessive consumer protection. At the same time, the CJEU in *Buet* did also leave room for the protection of particularly vulnerable groups. In this sense, European law, also before the Unfair Commercial Practices Directive, left some room for exception from the average consumer benchmark.

## 3.3 Trademark Law

### *3.3.1 Introduction*

The cases described above cover a wide range of legal instruments dealing, in one way or another, with deception of the consumer. The average consumer benchmark is used to determine whether the consumer is misled by commercial communication, be it in the context of labelling, product information, advertising or product names.

Yet, there is another important field of application of the average consumer benchmark in European law: the law of trademarks. As a matter of fact, the notion of the 'average consumer' is referred to more often in trademark cases than in all other fields taken together. Interestingly, the application of the average consumer benchmark in the field of trademark law is different from its application in the case law discussed above.

[116] See also V Mak, 'Standards of protection: in search of the 'average consumer' of EU law in the proposal for the Consumer Rights Directive' (2011) *European review of private law* 27–29 and J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 12.

### *3.3.2 Field of Application*

Trademarks, such as brand names, logos, signs and slogans, have the function to indicate the commercial origin of the product or service, but also to hold a psychological message about the product.[117] The purpose of legal protection of trademarks is two-fold. Firstly, trademarks enable the consumer to distinguish between goods from different sources. Without legal protection of trademarks, the consumer cannot be sure whether the Asics running shoes he or she is buying are actually made by Asics or whether they are in fact (low-quality) imitation products. The second reason to protect trademarks is that companies are protected from infringements by competitors, so that fair competition is promoted and goodwill is protected.[118]

At the European level there are two important instruments dealing with Trademarks. Firstly, the Trade Mark Directive (2008/95/EC[119]) harmonises the trademark laws of the Member States, prescribing rules on *inter alia* the registration and protection of trademarks. Secondly, the Community Trade Mark Regulation (207/2009/EC) gives the possibility to apply for a Community Trademark at the Office for Harmonization in the Internal Market (OHIM). If the application is successful, the applicant is granted a Community Trademark that applies for the entire European Union. The decision of the OHIM can be challenged by an appeal to the European General Court (GC; formerly known as the Court of First Instance[120]), followed by the possibility of another appeal to the CJEU. Questions concerning the Trade Mark Directive, as the instrument does not concern European registration at the OHIM, can reach the CJEU by means of preliminary references of national courts on the ground of Article 267 TFEU.

The substantive rules in the Community Trade Mark Regulation are almost identical to those of the Trade Mark Directive. For that reason, this paragraph discusses corresponding issues from both instruments together.

The average consumer benchmark is used in trademark law to determine how a mark is perceived by the public. This is important in the context of three different issues in trademark law:

1. *Identical trademarks concerning identical products or services*
   Trademarks can be refused registration if they are identical to trademarks which have been registered earlier and concern the same types of goods or services.[121] Moreover, identical trademarks can lead to infringement procedures instigated by the holder of the earlier trademark.[122] The average consumer benchmark is

[117] G Tritton, *Intellectual property in Europe* (London, Sweet & Maxwell, 2008) 227.

[118] G Tritton, *Intellectual property in Europe* (London, Sweet & Maxwell, 2008) 225.

[119] Originally: 89/104/EEC.

[120] This change was brought about by the 2009 Lisbon Treaty.

[121] Article 4(1)(a) of the Trade Mark Directive and Article 8(1)(a) of the Community Trade Mark Regulation.

[122] Article 5(1)(a) of the Trade Mark Directive and Article 9(1)(a) of the Community Trade Mark Regulation.

occasionally used to determine whether the public perceives the trademarks as being identical.[123]

2. *Identical or similar trademarks concerning identical or similar products or services*
   If the requirements for the first category (identical trademarks and identical products or services) are not met, a mark can still be refused registration or give ground for infringement proceedings, if the marks are identical or similar and concern identical or similar products.[124] In that case the identical nature or similarity is required to likely cause confusion of the public. In many cases, this likelihood of confusion is measured by the benchmark of the average consumer.[125]

3. *Distinctiveness of trademarks*
   Trademarks cannot be registered if they are devoid of any distinctive character.[126] This is especially relevant if it concerns a trademark which is descriptive in relation to the product (e.g., the brand name 'Cannabis' for hemp beer[127]) or when registration is sought for the shape of a product (e.g., the three-headed shape of Philips shaving machines[128]). The distinctiveness of a trademark is often judged on the perception thereof by the average consumer.[129]

Although the benchmark of the average consumer is applied in the context of different issues in trademark law, its application is similar. The following remarks are, therefore, made with reference to case law on all of the above issues.[130]

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[123] See, for example, CJEU 20 March 2003, Case C-291/00, *ECR* 2003, p. I-2799 (*LTJ Diffusion v Sadas Vertbaudet*), paragraph 52.

[124] Articles 4(1)(b) (ground of refusal of registration) and 5(1)(b) (ground for infringement procedure) of the Trade Mark Directive and Articles 8(1)(b) (ground for refusal of registration) and 9(1)(b) (ground for infringement procedure) of the Community Trade Mark Regulation.

[125] See e.g. CJEU 12 January 2006, Case C-361/04, *ECR* 2006, p. I-643 (*Picasso*), paragraph 36, CJEU 3 September 2009, Case C-498/07 P, *ECR* p. I-7371 (*Aceites del Sur v Koipe*), paragraph 74 and CJEU 10 April 2008, Case C102/07, *ECR* 2008, p. I-2439 (*Adidas*), paragraph 35.

[126] Article 3(1)(b) of the Trade Mark Directive and Article 7(1)(b) of the Community Trade Mark Regulation.

[127] GC 19 November 2009, Case T-234/06, *ECR* II-4185 (*Cannabis*).

[128] CJEU 18 June 2002, Case C-299/99, *ECR* 2002, p. I-5475 (*Philips v Remington*).

[129] Apart from the two cases mentioned above, see, for example, CJEU 29 April 2004, Joined Cases C-473/01 and C-474/01, *ECR* 2004, p. I-5141 (*Proctor & Gamble*), paragraph 57, CJEU 16 September 2004, Case C-329/02 P, *ECR* 2004, p. I-8317 (*Sat.1*), paragraph 24, GC 10 October 2007, Case T-460/05, *ECR* 2007, p. II-4207 (*Bang & Olufsen*), paragraph 35, CJEU 21 October 2004, Case C-64/02, *ECR* 2004, p. I-10031 and (*Erpo Möbelwerk*), paragraph 43. See also A Puttemans, 'The average consumer's degree of attention in trade mark cases', in E Terryn, G Straetmans and V Colaert (eds), *Landmark cases of EU consumer law (in honour of Jules Stuyck)* (Mortsel, Intersentia, 2013) 28.

[130] It must be noted that there is little case law with regard to the first category, so that the further remarks are mainly based on case-law on the second and third category.

### *3.3.3 Lloyd Schuhfabrik*

Not long after its judgment in the *Gut Springenheide* case, the CJEU decided that the average consumer, being reasonably well informed and reasonably observant and circumspect, should also serve as the benchmark for the likelihood of confusion (the second category above) in trademark law. This was decided in the *Lloyd Schuhfabrik* case (1999), which concerned an infringement procedure on the basis of Article 5(1) of the Trade Mark Directive.[131]

German shoe manufacturer Lloyd argued that its trademark had been infringed by the Dutch company Klijsen, selling shoes under the name 'Lloint's'. The *Landgericht München I*, where the case was pending, submitted a preliminary reference to the CJEU, asking how it should determine the likelihood of confusion.[132]

In its answer, the CJEU clarified that the likelihood of confusion should be determined globally, taking into consideration 'the visual, aural or conceptual similarity of the marks in question'.[133] In determining this, the average consumer benchmark applies:[134]

> For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (see, to that effect, Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657, paragraph 31). However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.

Although it is clear that the application of the average consumer benchmark extends to trademarks, it is important to note that the CJEU emphasised that the average consumer cannot compare the marks directly and that the level of attention depends on the type of good or service. Especially the remark on consumers not being able to make a direct comparison between trademarks seems to pose lower expectations of the behaviour of the consumer than can be found in the case law discussed in the previous paragraphs.[135] This is particularly striking in relation to the labelling doctrine, according to which consumers are assumed to carefully study product labels and ingredient lists before purchasing a good. From the use of the word 'however' (start of the second sentence of the citation above), it seems that the Court is in fact aware of this contradiction: although the average consumer is reasonably well

[131] CJEU 22 June 1999, Case C-342/97, *ECR* 1999, p. I-3819 (*Lloyd Schuhfabrik*).

[132] See paragraph 12 of the judgment.

[133] See paragraph 25 of the judgment. The CJEU refers to the *Sabel* case (CJEU 11 November 1997, Case C-251/95, *ECR* 1997, p. I-6191), in which it already uses the term 'average consumer', but does not use the *Gut Springenheide* formula. See also A Puttemans, 'The average consumer's degree of attention in trade mark cases', in E Terryn, G Straetmans and V Colaert (eds), *Landmark cases of EU consumer law* (*in honour of Jules Stuyck*) (Mortsel, Intersentia, 2013) 26.

[134] See paragraph 26 of the judgment.

[135] See also J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006).

informed and reasonably observant and circumspect, he or she is not expected to memorise and compare trademarks in detail.

This remark on the limited nature of the comparison of trademarks by the consumer has become a standard consideration in trademark law in the context of assessing the identical nature and similarity of trademarks, as well as in the context of the determination of the 'distinctiveness' of the trademark.[136]

### *3.3.4 Type of Product or Service*

As the CJEU pointed out in *Lloyd Schuhfabrik*, the average consumer's level of attention differs between products. The subsequent case law of the CJEU and GC shows that the level of attention is not high when it concerns *every day consumer products*, such as dishwasher tablets,[137] lighters[138] or olive oil.[139] This is different when the trademark concerns more expensive products, especially if they are luxury products or more technologically advanced products. A good example of this is the *Picasso* case (2006), which concerned the question whether there would be likelihood of confusion between 'Picasso' (trademark licensed to car manufacturer Citroën by the Picasso family) and 'Picaro' (trademark filed for registration by DaimlerChrysler). The CJEU argued that:[140]

> [T]he Court of First Instance was fully entitled to hold […] that, for the purposes of assessing […] whether there is any likelihood of confusion between marks relating to motor vehicles, account must be taken of the fact that, in view of the nature of the goods concerned and in particular their price and their highly technological character, the average consumer displays a particularly high level of attention at the time of purchase of such goods.
> Where it is established in fact that the objective characteristics of a given product mean that the average consumer purchases it only after a particularly careful examination, it is important in law to take into account that such a fact may reduce the likelihood of confusion between marks relating to such goods at the crucial moment when the choice between those goods and marks is made.

Hence, the CJEU assumed that the average consumer, in buying an expensive and highly technological product such as a car, pays particular attention to the prod-

[136] See e.g. CJEU 16 September 2004, Case C-329/02 P, *ECR* 2004, p. I-8317 (*Sat.1*), paragraph 24 and GC 29 September 2009, Case T-139/08, *ECR* 2009, p. II-3535 (*Smiley Company*) paragraph 40.

[137] CJEU 12 February 2004, Case C-218/01, *ECR* 2004 p. I-1725 (*Henkel*). CJEU 29 April 2004, Joined Cases C-473/01 and C-474/01, *ECR* 2004, p. I-5141 (*Proctor & Gamble*). For a critical appraisal of the latter, see J Davis, 'Locating the average consumer: his judicial origins, intellectual influences and current role in European trade mark law' (2005) *Intellectual property quarterly* 201–202.

[138] GC 15 December 2005, Case T-262/04, *ECR* 2005, p. II-5959 (*Bic*).

[139] CJEU 3 September 2009, Case C-498/07 P, *ECR* p. I-7371 (*Aceites del Sur v Koipe*). See also A Puttemans, 'The average consumer's degree of attention in trade mark cases', in E Terryn, G Straetmans and V Colaert (eds), *Landmark cases of EU consumer law* (*in honour of Jules Stuyck*) (Mortsel, Intersentia, 2013) 21.

[140] CJEU 12 January 2006, Case C-361/04, *ECR* 2006, p. I-643 (*Picasso*), paragraphs 39–40.

uct and, therefore, also to the trademark. The same line of reasoning can be seen in *Leclerc*[141] (regarding watches), *Bang & Olufsen*[142] (regarding electronics) and *IVG Immobilien*[143] (regarding financial services). However, the General Court in *Live Richly* took a different approach.[144] Although the consumers of the products (again financial services) were seen as being very attentive due to the commitment incurred, and the highly technical nature of the service, the awareness can be relatively low when it comes to purely promotional indications.[145] In other words, as not all consumers confronted with the trademark will be in the process of making a purchasing decision, the average consumer will not be assumed to be more attentive to the trademark of financial services than to the trademark of other products.

### *3.3.5 Target Group*

Related to the question whether the average consumer reacts differently depending on the type of product, is the question whether the target group is relevant for the application of the average consumer benchmark.[146] In the application of the average consumer benchmark in European trademark law, the target group can be relevant in three ways.

Firstly, the CJEU and General Court often speak of the average consumer *of,* for example, toys, motorcycles, computers, etc. The *Lloyd Schuhfabrik* case has already illustrated the CJEUs use of 'the average consumer of the products or services concerned'.[147] This, however, seems to have little relevance to the expected behaviour of the average consumer. If the type of product is relevant to the level of attention, this is usually expressed in the context of the relevance of the type of product to the reaction of the average consumer (see above), rather than by distinguishing between different average consumers. In theory, the target group could be of relevance, for example in the sense that golf clubs may have a different audience (e.g., affluent consumers with a high level of education) than that of video games (e.g., a young, but mixed audience). The General Court, however, seems reluctant to accept this argument.[148]

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[141] GC 12 January 2006, Case T-147/03, *ECR* 2006, p. II-11 (*Leclerc*).

[142] GC 10 October 2007, Case T-460/05, *ECR* 2007, p. II-4207 (*Bang & Olufsen*).

[143] GC 13 June 2007, Case T-441/05, *ECR* 2007, p. II-1937 (*IVG Immobilien*). See also GC 6 October 2004, Joined Cases T-117/03 to T-119/03 and T-171/03, *ECR* 2004, p. II-3471 (*New Look*).

[144] GC 15 September 2005, Case T-320/03, *ECR* 2005, p. II-3411 (*Live Richly*).

[145] Paragraphs 73–74 of the judgment. See also GC 5 December 2002, Case T-130/01, *ECR* 2002, p. II-5179 (*Real People, Real Solutions*), paragraphs 24–29.

[146] See on this issue also J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 16.

[147] See also, for example, CJEU 25 January 2007, Case C-48/05, *ECR* 2007, p. I-1017 (*Adam Opel*) ('average consumer of products of the toy industry').

[148] The argument was tried by one of the parties in the Zipcar case. The argument was made that because car rental for tourists was a luxury service, the consumers of that service would be more

Secondly, the CJEU and General Court sometimes limit the geographical area of the relevant public, speaking of the average consumer *in,* for example, Germany or Spain. This is relevant to the registration of a trademark in one or more specific Member States, especially if the likelihood of confusion or the question whether a trademark is sufficiently distinctive depends on how a trademark name is understood or pronounced in different languages.[149] In this sense, there is a link with the relevance of 'social, cultural and linguistic factors' mentioned by the CJEU in cases like *Graffione* and *Lifting*, although in trademark law this formula of 'social cultural and linguistic factors' is not used.

Thirdly, the target group of the product or service may lead to the conclusion that not the average consumer is the relevant public, but rather that a professional or specialist public should be taken into account. In these cases the products, such as chemicals[150] or laser devices,[151] are clearly not aimed at ordinary consumers. The consequence of not taking the average consumer into account, but rather a specialist section of the public, can be that the public is assumed to know certain technical terms,[152] is able to understand English[153] or has a higher level of attention.[154]

It is important to note that there are no examples of protection of more vulnerable groups, as is the case in *Buet* and in the Unfair Commercial Practices Directive.

### *3.3.6 Conclusion*

European trademark law has adopted the average consumer benchmark as formally introduced in *Gut Springenheide*. In its standard application, the average consumer is, however, not assumed to be particularly attentive. This is in contrast with its application in the cases discussed in the previous paragraph, in which the average consumer is often expected to carefully read product labels and to have a rather critical stance towards commercial communication.[155]

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affluent in English, and therefore less likely to confuse the marks at stake. The GC rejected the argument. See GC 25 June 2008, Case T-36/07 (*Zipcar*), paragraphs 19 and 32–33.

[149] See e.g. GC 20 November 2007, Case T-149/06, *ECR* 2007, p. II-4755 (*Castellani*), paragraphs 48 and 56 and GC 25 June 2008, Case T-36/07 (*Zipcar*) (see hyperlink above), paragraph 34.

[150] GC 20 April 2005, Case T-211/03, *ECR* 2005, p. II-1297 (*Naber*).

[151] GC 20 July 2004, Case T-311/02, *ECR* 2004, p. II-02957 (*Lissotschenko*).

[152] GC 26 November 2003, Case T-222/02, *ECR* 2003, p. II-4995 (*Robotunits*), paragraph 36 and GC 14 September 2004, Case T-183/03, *ECR* 2004, p. II-3113 (*Applied Molecular Evolution*), paragraphs 15–16.

[153] GC 26 November 2003, Case T-222/02, *ECR* 2003, p. II-4995 (*Robotunits*), paragraph 36 and GC 25 May 2005, Case T-288/03, *ECR* 2005, p. II-1767 (*TeleTech*), paragraph 79.

[154] GC 20 July 2004, Case T-311/02, *ECR* 2004, p. II-2957 (*Lissotschenko*), paragraph 28, GC 20 April 2005, Case T-211/03, *ECR* 2005, p. II-1297 (*Naber*), paragraphs 23, 43 and 50 and GC 4 May 2005, Case T-359/02, *ECR* 2005, p. II-1515 (*Star TV*), paragraphs 28–29.

[155] See similarly J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 17.

This leads to the conclusion that the development of the average consumer benchmark in trademark law is isolated from the case law on misleading commercial communication, which is related to the free movement of goods and consumer protection.[156] This also shows from the fact that, apart from mentioning the *Gut Springenheide* case, there is hardly any or no reference to case law applying the average consumer outside trademark law. The relevance for application of the benchmarks in the Unfair Commercial Practices Directive, therefore, seems to be limited. However, the EC Guidance on the Unfair Commercial Practices Directive does refer to some of the trademark cases and explicitly argues that the arguments made by the CJEU can also be applied in the application of the Unfair Commercial Practices Directive:[157]

> The Court of Justice and the General Court (formerly known as the Court of First Instance), in assessing the likelihood of confusion of certain trade marks, have given some indications as to the behaviour of the average consumer and the fact that his/her behaviour may be influenced by other factors. This can apply by analogy to the concept of the average consumer in the Directive.
> According to the General Court, "[t]he average consumer normally perceives a mark as a whole and does not proceed to analyse its various details… In addition, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but has to place his trust in the imperfect image of them that he has retained in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question.

It remains to be seen whether these considerations will indeed be taken into account more broadly in the application of the Directive. So far, there are no signs of the CJEU going in that direction.

## 3.4 Conclusion

The cases discussed in this chapter provide background and give guidelines to the interpretation and application of the consumer benchmarks in the Unfair Commercial Practices Directive, in particular of the average consumer benchmark. At the same time it must be concluded that in relation to the average consumer benchmark, the case law of the CJEU does not always seem to be consistent, especially when considering, for example, the differences between the judgments in the field of trademark law and those in the field of misleading commercial communication.

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[156] See similarly J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006). Also Puttemans points out that the two fields of application are not in line. A Puttemans, 'The average consumer's degree of attention in trade mark cases', in E Terryn, G Straetmans and V Colaert (eds), *Landmark cases of EU consumer law* (*in honour of Jules Stuyck*) (Mortsel, Intersentia, 2013) 34.

[157] SEC (2009) 1666, p. 26.

The cases discussed above raise several important questions, e.g., in relation to the nature of the average consumer benchmark (is it meant to reflect actual or desired behaviour?) and as to the possibility to take into account empirical evidence. These and other questions are further dealt with in the next chapter, providing a thematic analysis in relation to the Unfair Commercial Practices Directive's consumer benchmarks.

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# Chapter 4
# Thematic Analysis

**Abstract** Questions can be raised as to the main themes in relation to the consumer benchmarks in the Unfair Commercial Practices Directive. Firstly, it initially appears that the nature of the average consumer benchmark is unclear. Although the benchmark with its reference to the 'average' seems to reflect behaviour of the actual average of consumers or an abstraction thereof, the CJEUs case law indicates that the expected behaviour of the average consumer, at least in part, also reflects *desired* behaviour. Secondly, a question that should be addressed is what is expected of the average consumer in terms of being 'reasonably informed, observant and circumspect'. Thirdly, as has been mentioned above, it is unclear under what circumstances the target group and vulnerable group benchmarks can be applied, and how these benchmarks relate to one another. Fourthly, also the relevance of social, cultural and linguistic factors raises questions. Fifthly and finally, questions can be raised in relation to the possibility for courts and enforcement authorities to use empirical evidence in determining the expected behaviour of the consumer.

**Keywords** Nature of the average consumer benchmark · Characteristics of the average consumer · Target groups · Vulnerable groups · Social · Cultural and linguistic factors · Use of empirical evidence

## 4.1 Introduction

The two previous chapters have discussed the benchmarks of the Unfair Commercial Practices Directive and have attempted to ascertain guidelines for their application, both in the Directive itself as in the CJEUs case law.

This chapter identifies and analyses five central themes on the topic of the Directive's consumer benchmarks, on the basis of the issues that arose in the previous two chapters. Firstly, this chapter deals with the nature of the average consumer benchmark, i.e., the question whether the benchmark reflects actual or desired behaviour (paragraph 4.2). Secondly, it discusses the characteristics of the average consumer (i.e., the characteristics of being informed, observant and circumspect) and aims to specify what is expected of the average consumer in relation to these characteristics



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(paragraph 4.3). Thirdly, it focuses on target groups and vulnerable groups (paragraph 4.4). This is followed by a discussion on social, cultural and linguistic factors (paragraph 4.5). Finally, this chapter deals with the question as to what extent empirical evidence such as consumer research polls and expert opinions can play a role in the determination of expected consumer behaviour (paragraph 4.6).

## 4.2 The Nature of the Average Consumer Benchmark

In the previous chapters, the question has repeatedly been raised what the nature of the average consumer benchmark is, i.e., whether it refers to *actual behaviour* or to *desired behaviour*.[1] This fundamental question is not easy to answer. The Unfair Commercial Practices Directive itself does not address this question and the case law of the CJEU also leaves room for different interpretations.

It must again be noted that the average consumer benchmark, like any benchmark setting a standard for behaviour, is in and of itself abstract and normative, setting a standard for protection.[2] As it sets a standard, it refers by its very nature to desired behaviour. In this sense, the determination of whether a commercial practice is misleading is always normative and cannot be seen as a purely objective, factual assessment.[3]

The analysis in terms of the nature of the average consumer benchmark requires an additional step, i.e., going beyond the fact that setting a standard is by definition a normative exercise. The question here is: does the average consumer benchmark refer to *actual* behaviour of the average consumer, or to what behaviour is *desired* of the average consumer? In other words, should it be determined how the average consumer behaves, or how the average consumer could or should behave?[4]

This additional step is needed because some of the case law of the CJEU applying the average consumer benchmark, as has been illustrated in the previous chapter, indeed seems to refer to *desired*, rather than *actual* behaviour of the average consumer. The clearest example of this is the labelling doctrine, i.e., the presumption that the average consumer carefully reads product labels before purchasing a product. The idea underlying the labelling doctrine is that the consumer is expected to read product labels *or else he or she does not deserve protection*, rather than that the average consumer is actually being expected to always read product labels.

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[1] See on this discussion also N Reich and H Micklitz, *Europäisches Verbraucherrecht* (Baden-Baden, Nomos, 2003) 292 and onwards.

[2] See also paragraph 1.1 of this book.

[3] See also R Schweizer, 'Die "normative Verkehrsauffassung" – ein doppeltes Missverständnis. Konsequenzen für das Leitbild des "durchschnittlich informierten, verständigen Durchschnittverbrauchers"' (2000) *GRUR* 923.

[4] In previous discussions these two steps have often been confused. See on this issue e.g., R Schweizer, 'Die "normative Verkehrsauffassung" – ein doppeltes Missverständnis. Konsequenzen für das Leitbild des "durchschnittlich informierten, verständigen Durchschnittverbrauchers"' (2000) *GRUR* 923–933 in his analysis of the discussion on this subject in Germany.

These sometimes unrealistic expectations[5] seem to be the result of the balancing of interests of consumer protection and the free movement of goods, the result of which emphasises that the consumer is generally expected to take care of him or herself, and that extensive state intervention is not easy to justify. This also seems to be the background of the statements by Advocate General Geelhoed in *Douwe Egberts v Westrom Pharma* and Advocate General Trstenjak in *Mediaprint*, who both explicitly link high expectations of the average consumer's behaviour with the consumer's own responsibility to make an informed decision and to beware of potentially unfair trade practices.[6]

In this context, Howells sees the expectations of the average consumer as being 'reasonably informed, observant and circumspect' as probably being an 'idealised image' of how consumers behave.[7] Trzaskowski notes in relation to the average consumer benchmark in the Unfair Commercial Practices Directive that 'if the actual average consumer is not well informed and reasonably observant and circumspect, one will in his assessment have to lift the benchmark to represent one who is, and thereby raise the standard above the 'real' average consumer.'[8] Trzaskowski thus argues that because of the CJEUs case law, the idealised image of the consumer prevails over actual consumer behaviour. Trzaskowski also notes, similarly to what has been argued earlier by Incardona and Poncibò, that the average consumer is a 'normative abstraction derived from economic fiction', which 'has little in common with the behaviour of the real average consumer'.[9]

However, there are also indications that the average consumer benchmark may not (or may not always) be as strict for consumers as has just been suggested. First of all, the benchmark itself through reference to the *average* seems to indicate actual consumer behaviour.[10] When setting the benchmark at an idealised image of the consumer, it would make more sense to speak of what is expected of 'the consumer' rather than what is expected of 'the average consumer', because the benchmark applies to everyone and not only to the average consumer.

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[5] See on the question whether the expected behaviour of the average consumer is realistic Chap. 9 of this book, which deals with the relationship between the average consumer benchmark and consumer behaviour as seen from the perspective of the behavioural sciences.

[6] See CJEU 15 July 2004, Case C-239/02, *ECR* 2004, p. I-7007 (*Douwe Egberts v Westrom Pharma*) and CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*). See also paragraph 3.2.11 of this book.

[7] G Howells, 'The scope of European consumer law' (2005) *European review of contract law* 366.

[8] J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 9.

[9] J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 9. See also R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* and J Trzaskowski, 'Behavioural economics, neuroscience, and the Unfair Commercial Practices Directive' (2011) *Journal of Consumer Policy* 377–392.

[10] The word 'reasonably' to indicate the level of being informed, observant and circumspect, rather than 'normally' or 'averagely', may however be an indication again for *desired* rather than *actual* behaviour.

Secondly, the CJEUs case law in the field of trademarks seems more realistic in its assumptions regarding consumer behaviour, and does not at all emphasise the consumer's own responsibility not to be misled or confused. In this context, it is emphasised that the consumer 'only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind'.[11] The EC Guidance to the Unfair Commercial Practices Directive mentions the assumptions made in trademark cases as being applicable also in the context of the Directive.[12] Taking into consideration the case law of the CJEU, this remark, however, is seriously doubtful. The lower expectations as to the behaviour of the average consumer can be found only in cases in the field of trademarks and this indicates that it is also limited to this field. This is most likely a consequence of the different nature of trademark law, on the one hand, and consumer protection law, on the other.[13] Although consumer protection by definition aims at the protection of consumers, it also more directly deals with the responsibilities of consumers themselves. This responsibility of consumers is not emphasised in trade mark law, which primarily deals with the position of competitors vis-à-vis one another.

Still, there are also other indications in the EC Guidance to the Directive that indicate that the expectations of the average consumer's behaviour are not necessarily high. In particular, the EC Guidance stresses that the average consumer benchmark should be interpreted in the light of Article 114 TFEU, ensuring a high level of consumer protection.[14] The EC Guidance also states that the most recent scientific findings, including those in behavioural economics, should be taken into account in the application of the Directive.[15] It is in particular this behavioural movement that presses for a more realistic view of consumer behaviour.[16] The big question is how this fits with an average consumer benchmark that would generally appear to presuppose rational decision-making.

Although the issues mentioned indicate that the average consumer does not necessarily have to be seen as a rational consumer and that it leaves some room for national enforcement authorities and courts (and perhaps in the future also for the CJEU) to take into account actual problems in consumer decision-making, the general line of the CJEUs case law so far is still that of expecting the average consumer

[11] CJEU 22 June 1999, Case C-342/97, *ECR* 1999, p. I-3819 (*Lloyd Schuhfabrik*), para. 26. One could still question whether the Court's assumptions regarding the behaviour of the average consumer in this field are correct (see for a critical note A Puttemans, 'The average consumer's degree of attention in trade mark cases', in E Terryn, G Straetmans and V Colaert (eds), *Landmark cases of EU consumer law (in honour of Jules Stuyck)* (Mortsel, Intersentia, 2013 21–34.), but the intention nonetheless seems to be to reflect actual behaviour.

[12] SEC (2009) 1666, p. 26. See also paragraph 3.3.6 above.

[13] See also J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 17.

[14] SEC (2009) 1666, p. 26.

[15] SEC (2009), 1666, p. 32. See also C Willet, 'Fairness and consumer decision making under the Unfair Commercial Practices Directive' (2010) *Journal of consumer policy* 270.

[16] See also Chap. 9 of this book.

to be rather attentive and critical, and not to be in need of extensive protection. At least as far as unfair commercial practices are concerned, there is much more emphasis on the consumer's own responsibility than on the trader's responsibility to act fairly. The EC Guidance may point towards a more consumer friendly interpretation in this respect, but it is important to bear in mind that this is merely a Commission working staff document without formal legal status. In the end, it is the CJEU that will decide the direction to be followed, and up to now there are no signs of what could be called a 'behavioural turn'.[17] Hence, there is sufficient reason to be confused, but the case law has not changed so far and still shows more signs of reflecting desired behaviour than actual behaviour of the average consumer.

## 4.3 The Characteristics of the Average Consumer

The CJEU assumes certain typical behaviour of the 'reasonably informed and reasonably observant and circumspect' average consumer. What is meant by these characteristics and what is expected of the average consumer in terms of these characteristics?

First of all, the characteristic of being informed relates to the *level of knowledge* the consumer is assumed to have.[18] It refers to the knowledge the consumer has or is expected to have, independent of the information provided by a trader in a particular case. This knowledge may concern the product or service at hand, such as in the *Adolf Darbo* case. In that case, the average consumer was assumed to know that garden fruit inevitably contains pollution residue, as the fruit was grown outside and was, therefore, exposed to air pollution.[19] In this context little guidance can be found in the CJEUs case law, and it is difficult to say whether the CJEU has high or low expectations of the consumer in this respect. Apart from information about the product or service itself, the knowledge can also concern the marketing techniques used to sell a product or service. For example, in *GB-INNO-BM* the average consumer is assumed to be informed about the local sales conditions, in particular the difference between temporary sales and bi-annual sales.[20] Note that in this context, the characteristic of being informed has considerable overlap with the characteristic of being circumspect, because the assumed knowledge of marketing techniques is closely related to the critical attitude of the consumer.

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[17] See on this issue also U Franck and K Purnhagen, 'Homo economicus, behavioural sciences, and economic regulation: on the concept of man in internal market regulation and its normative basis' (2012) 26 *EUI working paper* LAW.

[18] H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 124, S Ulbrich, *Irreführungs- und Verwechslungsgefahr im Lauterkeits- und Markenrecht: empirische oder normative Feststellung?* (Diss. Würzburg) (Berlin, Köster, 2005) 151 and T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 93.

[19] CJEU 4 April 2000, Case C-465/98, *ECR* 2000, p. I-2297 (*Adolf Darbo*), para. 27. See also paragraph 3.2.10 of this book. See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 124.

[20] CJEU 7 March 1990, Case 362/88, *ECR* 1990, p. I-667 (*GB-INNO-BM*). See paragraph 3.2.3 of this book.

While being informed is about the level of knowledge of the consumer, being observant is about the *intensity of the observations* made by the consumer and the *absorption of that information*.[21] It relates to the question what the level of attention of the consumer is regarding the information provided by the trader.[22] A good example of this characteristic is offered by the labelling doctrine, under which the consumer is assumed to study the label of a product—including the list of ingredients—before making a purchase decision.[23] Generally, it can be said that the CJEU mostly expects the consumer to process available information and to make informed choices.[24] At the same time, the discussion above has shown that in trademark law the reaction of the consumer is assumed to be dependent on the type of product or service. While the level of attention of the consumer is assumed to be low when it concerns every day, low value products, the level of attention is generally expected to be higher when it concerns luxury goods or highly technical goods.[25] As pointed out, this line of reasoning can, however, not be retraced in the misleading commercial communication cases of the CJEU.

The third and final characteristic, 'being circumspect', refers to the degree of critical attitude of the consumer towards the communication of traders. Hence, while being observant refers to the degree and intensity in which the consumer absorbs the information available, being circumspect refers to the *processing of this informati*on, i.e., how the consumer deals with the information, and the decision what to do with this information.[26] A certain degree of criticism is expected of the consumer, as is shown by the cases of *Mars, Clinique* and *Lifting*.[27] On the basis of these judgments the conclusion can be drawn that exaggerated advertising and product names

[21] See also S Ulbrich, *Irreführungs- und Verwechslungsgefahr im Lauterkeits- und Markenrecht: empirische oder normative Feststellung?* (Diss. Würzburg) (Berlin, Köster, 2005)162.

[22] See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 124.

[23] See, for example, CJEU 20 February 1979, Case C-120/78, *ECR* 1979, p. 649 (*Cassis de Dijon*), CJEU 26 October 1995, Case C-51/94, *ECR* 1995, p. I-3599 (*Commission v Germany*) and CJEU 4 April 2000, Case C-465/98, *ECR* 2000, p. I-2297 (*Adolf Darbo*).

[24] See also S De Vries, 'Consumer protection and the EU Single Market rules—The search for the 'paradigm consumer' (2012) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/ Journal of European consumer and market law* 229. See in this sense also the Dutch Court of Cassation, Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2822 (*Spaarbeleg Sprintplan*).

[25] See paragraph 3.3 of this book.

[26] See also also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 124, T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 93 and A Beater, 'Zum Verhaltnis von europäischem und nationalem Wettbewerbsrecht – Überlegungen am Beispiel des Schutzes vor irreführender Werbung und des Verbraucherbegriffs' (2000) *GRUR Int.* 84. The characteristic of being circumspect can sometimes be difficult to distinguish from the characteristic of being informed: the consumer can be assumed to *know* about a certain marketing practice or may *be critical* towards it. In such cases it depends on the wording of the Court what characteristic determines the assumed behaviour of the consumer.

[27] CJEU 6 June 1995, Case C-470/93, *ECR* 1995, p. I-1923 (*Mars*), CJEU 2 February 1994, Case C-315/92, *ECR* 1994, p. I-317 (*Clinique*) and CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*).

generally are not expected to mislead the average consumer. Even more articulate on the critical attitude of the average consumer is Advocate General Trstenjak in *Mediaprint*, with the remark that the consumer is expected 'to be capable of recognising the potential risk of certain commercial practices and to take rational action accordingly'. [28] The characteristic of being circumspect also covers the question whether the consumer gathers more information before making a purchasing decision. The Opinion of Advocate General Tesauro in *Nissan* suggests that, at least for high value products like cars, the consumer is expected not only to carefully compare, but also to extensively gather information in order to make the right purchasing decision, and thus not to merely rely on the information that is handed to him.[29]

## 4.4 Target Groups and Vulnerable Groups

Chapter 2 has shown that the Unfair Commercial Practices Directive in several ways provides the opportunity to take into account the specific behaviour of target groups and particularly vulnerable groups. In this sense the Unfair Commercial Practices Directive, with its emphasis to prevent the exploitation of vulnerable groups, gives a different impression than the majority of the CJEUs case law.

Firstly, the relevance of target groups and vulnerable groups is expressed by the wording in the Directive that the commercial practice should distort the economic behaviour of the average consumer 'whom [the commercial practice] reaches or to whom it is addressed'. This seems to indicate that the average consumer benchmark can be adjusted on the basis of the targeted public.[30] In some judgments the CJEU also mentions that the benchmark of the average consumer may depend on the public in issue.[31]

Secondly and more prominently, the Unfair Commercial Practices Directive recognises the relevance of target groups through the target group benchmark; if a commercial practice is directed at a particular target group, the average member of that group is taken as a standard rather than the average consumer. This benchmark enables protection of targeted vulnerable groups, but could also raise the threshold of protection if the practice is targeted at, for example, particularly knowledgeable consumers.[32]

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[28] CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*). See also paragraph 3.2.11 of this book.

[29] CJEU 16 January 1992, Case C-373/90, *ECR* 1992, p. I-131 (*Nissan*). See also paragraph 3.2.4 of this book.

[30] Similar wordings have been used in CJEU judgments. See e.g. CJEU 26 November 1996, Case C-313/94, *ECR* 1996, p. I-6039 (*Graffione*) and CJEU 28 January 1999, Case C-303/97, *ECR* 1999, p. I-513 (*Sektkellerei Kessler*).

[31] See e.g. CJEU 26 November 1996, Case C-313/94, *ECR* 1996, p. I-6039 (*Graffione*) and CJEU 28 January 1999, Case C-303/97, *ECR* 1999, p. I-513 (*Sektkellerei Kessler*).

[32] See e.g. the trademark cases mentioned in paragraph 3.3.5 of this book.

An important question as to the interpretation of the target group benchmark—a question that remains unanswered in the CJEUs case law—relates to what can be seen as 'targeting'. Should the target group be seen as the public that is reached by the commercial practice, e.g., the viewers of a TV ad or the readers of a magazine ad? Or should the public that the trader has in mind as its potential clientele, for example, be the benchmark? The EC Guidance mentions the advertising of ring tones for teenagers as an example of application of the target group benchmark.[33] The benchmark applied in that case would be the average teenager. Yet, what if ringtone advertising is broadcasted on, for example, a sports channel watched by a general audience? Does it suffice that teenagers are the main purchasing group of the ringtones, or must teenagers be the main (or even the only) addressees of the advertising?

Thirdly and finally, the Unfair Commercial Practices Directive introduced the vulnerable group benchmark, which can protect vulnerable groups even if they are not targeted by the commercial practice. As has also been noted in Chap. 2, it is uncertain how and to what extent this benchmark can provide additional protection to vulnerable consumers. Although the benchmark was introduced to prevent the exploitation of vulnerable groups, the requirements for application of the benchmark seem to severely limit its potential to actually achieve this aim.[34] Moreover, the requirements of Article 5(3) are not effective in identifying which groups should receive additional protection and under which circumstances. The vulnerable consumer benchmark indicates that exploitation of vulnerable consumers is to be prevented, but to what extent it can proffer solutions in actual cases remains unclear.

The CJEUs case law does not provide any clear guidance in this respect. The CJEU so far has not dealt with the alternative benchmarks of the Unfair Commercial Practices Directive. So far, the 1989 *Buet* case is the only example of the protection of a vulnerable group in the case law of the CJEU, and it does not provide any clarity on the conditions under which the alternative benchmarks of the Directive can be applied.[35]

Apart from the fact that there are many questions as to the interpretation of the target group and vulnerable group benchmarks, the question should also be raised what the relationship of these benchmarks is to the average consumer benchmark and its underlying ideas.[36] This is relevant taking into account that the behaviour assumed in the light of the average consumer benchmark in several cases seems to be deliberately unrealistic and thus seems to reflect *desired* rather than *actual*

[33] SEC (2009) 1666, pp. 28–29.

[34] See also J Stuyck, E Terryn and T van Dyck, 'Confidence through fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market' (2006) *Common market law review* 151.

[35] CJEU 16 May 1989, Case C-382/87, *ECR* 1989, p. 1235 (*Buet*). See paragraph 3.2.2 of this book.

[36] See also C Lieverse and J Rinkes, *Oneerlijke handelspraktijken en handhaving van consumentenbescherming in de financiële sector (Preadvies voor de Vereniging voor Effectenrecht 2010)* (Deventer, Kluwer, 2010) 178.

behaviour.[37] Bearing this in mind, the question can be posed whether this means that also the target group or vulnerable group benchmarks should be interpreted as reflecting—at least to some extent—desired rather than actual behaviour.

Scherer argues that also in the context of the protection of vulnerable groups, the ideas underlying the average consumer benchmark (i.e., that consumers are expected to take care of themselves and try their best to make a rational decision) should be borne in mind. According to her, vulnerable groups are, therefore, only protected if they are *unable* to make an informed decision (rather than that they perhaps *tend to make* bad decisions).[38] This means that in particular consumers who are credulous without a specific reason that would make them *unable* to make an informed decision, are not protected. This reasoning indeed makes sense in relation to the ideas underlying the average consumer benchmark, but at the same time undermines the goal of preventing exploitation of vulnerable consumers. Again, it must be pointed out that the CJEU has not provided any answers so far.

## 4.5 Social, Cultural and Linguistic Factors

To what extent does the average consumer benchmark refer to one *European* consumer, and to what extent is there room for differences between consumers in different Member States? With reference to the CJEUs case law, the Unfair Commercial Practices Directive notes that in applying the average consumer benchmark, social, cultural and linguistic factors can be taken into account. Although at first the CJEU was reluctant to recognise that these factors may lead to different assessments of the same commercial practice in different Member States (see *Clinique*),[39] the Court in *Graffione* and *Lifting* recognised that these factors can be taken into account in the application of the average consumer benchmark.[40] As a consequence, the same commercial practice may be found misleading in one Member State while being allowed in another.[41] In this sense, national courts—also under the Unfair Commercial Practices Directive—are allowed more freedom in deciding on a particular case than in accordance with previous case law of the CJEU in relation to the free movement of goods.

What exactly is meant by the CJEU referring to the 'social, cultural and linguistic factors' and how much room it leaves to Member States, nonetheless, remains

[37] See the cases referred to in paragraph 4.2 above.

[38] K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 860–861 and 878–881. This remark is made for the application of the German *UWG*, but is motivated by European rather than German law.

[39] CJEU 2 February 1994, Case C-315/92, *ECR* 1994, p. I-317 (*Clinique*).

[40] CJEU 26 November 1996, Case C-313/94, *ECR* 1996, p. I-6039 (*Graffione*) and CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*).

[41] See also G Abbamonte, 'The Unfair Commercial Practices Directive: an example of the new European consumer protection approach' (2006) *Columbia journal of European law* 708–709.

unclear. The CJEU most often refers to social, cultural and linguistic factors as a general formula to indicate that there may be differences between consumers in different Member States, giving little further explanation as to the substance of these factors.

Both in *Graffione* and in *Lifting* the Court mentioned the formula in the context of possibly misleading product names which refer to characteristics which the goods do not possess, i.e., 'Cotonnelle' referring to cotton and 'Lifting' to a lasting effect of the product on the skin. In such cases one can imagine that the brand name may give rise to different expectations in different Member States, depending on the languages spoken in those Member States.

It is thus clear that different linguistic understandings of consumers can lead to different assessments. At least in theory, the factors could, however, have a much broader significance. One could also argue that due to the relevance of social, cultural and linguistic factors one should take into account that, for example, German consumers are possibly generally more trusting towards advertising messages than English consumers, or that Danish consumers generally have more knowledge about online purchasing techniques than Italian consumers. On the other hand, one could even go further and argue that different ideas on what is regarded as fair or unfair should lead to different assessments in this context, or that on the basis of these factors Member States can maintain their own ideas on the desirable level of consumer protection, as has been argued by Van Dam.[42]

However, the way in which the CJEU formulates the exception in *Lifting* (and the same in essence applies to *Graffione*), seems to indicate a narrow interpretation. The emphasis is clearly only on the linguistic issue that the *term* 'lifting' could be interpreted differently, rather than that consumers in some Member States—be it in general or regarding certain products—may be more credulous than consumers in other Member States.[43] This also seems to be the likely interpretation if one takes into account the free movement of goods case law of the CJEU, in which different beliefs of consumers in different Member States are usually not taken into account as this would obstruct the creation of a single market. In this context the European Union requires consumers to learn and become acquainted with different products and marketing techniques.[44] This is also the general idea underlying the full harmonisation Unfair Commercial Practices Directive, with its aim to contribute to

[42] See also C van Dam, 'De gemiddelde euroconsument – een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 10. He makes the connection with the remark of the CJEU in *Gut Springenheide* that national courts, if using empirical evidence, can themselves determine the percentage of consumers that is required to be misled, based on national law.

[43] See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhemsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 248.

[44] See also U Franck and K Purnhagen, 'Homo economicus, behavioural sciences, and economic regulation: on the concept of man in internal market regulation and its normative basis' (2012) 26 *EUI working paper* LAW 5–6, H Rösler, *Europäisches Konsumentenvertragsrecht* (Munich, Beck, 2004) 116 and S Ulbrich, *Irreführungs- und Verwechslungsgefahr im Lauterkeits- und Markenrecht: empirische oder normative Feststellung?* (Diss. Würzburg) (Berlin, Köster, 2005) 17.

a single market without internal frontiers.[45] In this sense, the European motto of 'unity in diversity' seems to refer much more to delicate issues such as national cultural heritage and education than to consumer markets and their regulation. European law, and the Unfair Commercial Practices Directive in particular, aims to remove barriers to trade and to make pan-European advertising possible. Extensive recognition of local differences between consumers—let alone different ideas on the desirable level of consumer protection—does not fit those goals.[46]

It must also be noted that—looking at the formulations in *Graffione* and *Lifting*—social, cultural and linguistic factors seem to be limited to differences between Member States. Hence, local differences within Member States do not seem to be covered. If this would be the case, the fact that courts can take into account social, cultural or linguistic factors could have a much broader meaning and could perhaps also be used to protect vulnerable groups.[47]

The fact that the possibility to take into account social, cultural and linguistic factors only seems to concern differences between Member States, raises questions as to the significance of 'social' factors. It is easy to think of linguistic and cultural differences between consumers in different Member States, but what could be an example of a *social* factor causing a difference between consumers in different Member States? Would differences in general levels of wealth or education count as such, as far as they cause differences in consumer behaviour? Or perhaps, as Van Dam argues, differences between ex-socialist and other EU Member States, because consumers in ex-socialist Member States may be less used to commercial practices that are common in a free market?[48]

A final issue that should be noted in relation to social, cultural and linguistic factors is that these factors have so far only been mentioned in relation to the average consumer benchmark and not in relation to the other benchmarks. It remains to be seen to what extent these factors can also play a role in relation to, for example, the protection of vulnerable groups such as children. Cultural differences in how children are raised in different Member States, also in relation to their role as consumers, may cause significant differences between those groups in different Member States.[49]

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[45] See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 248.

[46] See in this sense also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 248–249.

[47] See also J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, (2013) 15.

[48] C van Dam, 'De gemiddelde euroconsument – een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 3–11.10. It is the question whether this assumption on consumers in ex-socialist Member States is (still) true. In fact, because of the rapid deregulation in some ex-socialist Member States, it may now be the other way around, at least compared to some other Member States.

[49] See also T Wilhelmsson, 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) *Journal of consumer policy* 245.

## 4.6 The Use of Empirical Evidence

In principle, national courts and enforcement authorities should apply the benchmark of the average consumer or, alternatively, the target group or vulnerable group benchmark. In this context, the expected behaviour of the average consumer or of the average member of the target group or vulnerable group is to be determined *in abstracto*. This means that the court or enforcement authority can determine itself what the expected behaviour of the benchmark consumer is, without the need to investigate the actual reaction of this consumer.

The CJEU has emphasised, however, that the use of empirical evidence such as consumer research polls or expert opinions is not excluded. In *Gut Springenheide*, the CJEU clarified that, at least under some circumstances, if a national court has doubts about the reaction of the consumer, it can commission further investigations (or can allow such investigations), and use this information in the determination of the expected impact of the commercial practice on the consumer. The CJEU also emphasised that if a national court or enforcement authority commissions consumer opinion research, it is left to national law what percentage of consumers is required to be misled in order to justify a prohibition. At the same time, however, the CJEU has stated in some cases that a 'considerable' or 'significant' number of consumers must be misled in order to assess the practice as unfair.[50]

The CJEUs directions in this context raise several questions. First of all, the question should be raised what the significance is of the remark of the CJEU in *Gut Springenheide* that 'under circumstances at least' empirical evidence can be used. Which circumstances are covered? Who determines these circumstances? Is this left to the national courts?

Secondly, the remarks of the CJEU raise the important question of how the possibility to take into account empirical evidence relates to the sometimes—seemingly deliberate—unrealistic expectations of the CJEU regarding consumer behaviour. If a national court has doubts regarding whether the average consumer reads product labels and commissions research to find out whether the consumer does so, can it disregard the labelling doctrine if the investigation discovers that consumers hardly ever read product labels? In other words, if the average consumer benchmark is meant to reflect desired rather than actual behaviour, what role can empirical evidence play?[51]

Thirdly and finally, the question can be raised whether there should be a link between the percentage of consumers that is required to be misled and the ideas underlying the average consumer benchmark. Can national courts really decide on the basis of national law what percentage is required, also if that percentage is very low?

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[50] CJEU 16 January 1992, Case C-373/90, *ECR* 1992, p. I-131 (*Nissan*) and CJEU 19 September 2006, Case C-356/04, *ECR* 2006, p. I-8501 (*Lidl Belgium*).

[51] See similarly J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 5–6.

As to this last question, two lines of thought are possible.[52] On the basis of the remarks of the CJEU in *Gut Springenheide*, it seems that as soon as empirical evidence is taken into account, it is entirely up to national law what number of consumers would need to be misled in order to justify a prohibition. This would mean that German law could have maintained its practice of requiring that a not inconsiderable part of consumers (10–15 %) would be misled.[53] However, on the basis of the benchmark of the average consumer and the ideas underlying this benchmark (i.e., setting a considerable threshold for prohibiting commercial practices) it would make sense that a larger number (perhaps even a majority) of consumers would have to be misled.[54] The latter view seems to be the more likely interpretation, also taking into account the case law mentioned above, in which the CJEU has argued that a considerable or significant number of consumers needs to be misled in order to justify a prohibition.

## 4.7 Conclusion

This chapter has illustrated that the consumer benchmarks in the Unfair Commercial Practices Directive continue to raise many important questions that still require attention. The themes discussed in this chapter will also play a central role in the investigation of how the benchmarks are applied in the laws of the Member States presented in the following chapters. The issues discussed are also important with regard to the relationship between the benchmarks and the goals of the Directive, i.e., the objectives to achieve a high level of consumer protection, to increase the smooth functioning of the internal market and to improve competition. For example, how effective can consumer protection be if the impact of commercial practices is measured on the basis of an idealised image of the consumer? And how can trade barriers be removed if the harmonised legislation leaves so many questions unanswered? These questions will be addressed in detail in Chap. 11 of this book.

[52] See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 105.

[53] See in this sense C van Dam, 'De gemiddelde euroconsument – een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 7.

[54] See on this issue also S Leible, ´Anmerkung zu EuGH vom 16.7.1998 (Gut Springenheide)´ (1998) *Europäische Zeitschrift für Wirtschaftsrecht* 529, C van Dam, 'De gemiddelde euroconsument – een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 7 and S Weatherill, 'Consumer image: linguistic, cultural and social differences', in E Terryn, G Straetmans and V Colaert (eds), *Landmark cases of EU consumer law (in honour of Jules Stuyck)* (Mortsel, Intersentia, 2013) 16.

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# Part II
# National Law

*This part discusses the application of the consumer benchmarks at the national level. Accordingly, this part deals with the issue to what extent and how the consumer benchmarks are applied in national law, and whether and to what extent the introduction of the average consumer benchmark in the case law of the CJEU and the other benchmarks in the Unfair Commercial Practices Directive have caused a change compared to prior legislation and case law. Chapter 5 discusses the consumer benchmarks in German law. The same is done for English law in Chap. 6 and for Italian law in Chap. 7. A comparative analysis is provided in Chap. 8, which also comprises a comparison with European law.*

# Chapter 5
# German Law

**Abstract** In Germany, unfair commercial practices are regulated by the *Gesetz gegen den unlauteren Wettbewerb* (Act Against Unfair Competition, UWG). Before the introduction of the average consumer benchmark by the CJEU in *Gut Springenheide*, German courts applied the benchmark of the *flüchtigen und unkritischen Durchschnittsverbraucher* (the casually observing and uncritical average consumer). This consumer was thought to be affected by commercial practices rather easily. In 1999, the *Bundesgerichtshof* adopted the CJEUs average consumer benchmark. The level of attention of the average consumer is, however, expected to depend on the situation at hand (i.e., the *situationsadäquate Durchschnittsverbraucher*). It is questionable whether this way of applying the average consumer benchmark is in accordance with European law.

**Keywords** German law · Gesetz gegen den unlauteren Wettbewerb · Bundesgerichtshof · Flüchtigen Durchschnittsverbraucher · Situationsadäquate Durchschnittsverbraucher average consumer · Target groups · Vulnerable groups

## 5.1 Introduction

This chapter discusses the consumer benchmarks applied according to German unfair commercial practices law. As mentioned in the introduction of this book, German law had a reputation for having low expectations as to the behaviour of the consumer. This also follows from many of the cases discussed in Chap. 3 of this book, in which German unfair competition law was held to infringe the free movement of goods.

This chapter first introduces the legal context in which the German consumer benchmarks developed, i.e., the *Gesetz gegen den unlauteren Wettbewerb* (paragraph 5.2). Thereafter, the 'old' consumer benchmark will be discussed, i.e., the benchmark applied prior to adoption of the European average consumer benchmark in the second half of the 1990s (paragraph 5.3). Paragraph 5.4 provides an overview of the current application of the average consumer benchmark in German law, followed by an overview of the application of the target group and vulnerable group benchmarks in paragraph 5.5.



B. B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive,* Studies in European Economic Law and Regulation 5,
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The emphasis in this chapter (and the same applies to the following chapters on English and Italian law) is on case law. The discussion is in principle limited to the (large) body of case law of the *Bundesgerichtshof* (German Supreme Court, BGH). Judgments of lower courts are mentioned if the case law of the BGH does not provide sufficient clarity. Cases have been selected primarily on the basis of commentaries on German unfair competition law,[1] the literature on consumer benchmarks,[2] and on the case selection made by the major journals reporting in this field of law.[3]

## 5.2 Legal Context: Gesetz gegen den unlauteren Wettbewerb

In Germany, unfair commercial practices are regulated through the UWG. The UWG has a history dating back to 1896 and covers unfair competition in general.[4] The last major reform was in 2004[5] and it was again amended in 2008 in order to implement the Unfair Commercial Practices Directive.[6] Prior to 2008 it already served as the implementation of the Misleading and Comparative Advertising Directive.[7]

From 1909 until 2004, the central provisions of the UWG were §1 (the general clause on the prohibition of unfair competition) and §3 (providing the general prohibition of misleading statements).[8] As is illustrated below, §3 was the central

[1] See in particular K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010), H Piper, A Ohly and O Sosnitza (eds), *Gesetz gegen den unlauteren Wettbewerb: UWG* (Munich, Beck, 2010) and H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012).

[2] See, for example, B Ackermann, 'Die deutsche Umweltrechtsprechung auf dem Weg zum Leitbild des verständigen Verbrauchers?' (1996) *Wettbewerb in Recht und Praxis* 502, U Doepner, 'Verbraucherleitbilder zur Auslegung des wettbewerbsrechtlichen Irreführungsverbots' (1997) *Wettbewerb in Recht und Praxis* 999, U Reese, 'Das "6-Korn-Eier"-Urteil des EuGH—Leitentscheidung für ein Leitbild?' (1998) *Wettbewerb in Recht und Praxis* 1035, S Niemöller, *Das Verbraucherleitbild in der deutschen und europäischen Rechtsprechung* (Munich, Beck, 1999), R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 521 and H Omsels, 'Kritische Anmerkungen zur Bestimmung der Irreführungsgefahr' (2005) *GRUR* 548, and also more general works that pay considerable attention to the topic of consumer benchmarks, such as T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) and A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001).

[3] In particular the journals *Wettbewerb in Recht und Praxis* (WRP) and *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR).

[4] See V Emmerich, *Unlauterer Wettbewerb* (Munich, Beck, 2009) 1.

[5] BGBl. I, p. 1414.

[6] *Erstes Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb* (1. UWGÄndG), BGBl. I, p. 2949. For the Government proposal, see BT-Drs. 16/10145.

[7] Comparative advertising still also falls under the UWG and the UWG thus also still functions as the implementation of the Comparative Advertising Directive (2006/114/EC).

[8] V Emmerich, *Unlauterer Wettbewerb* (Munich, Beck, 2009) 3–6.

provision for the development of the German consumer benchmark. From 2004–and this structure has survived the 2008 reform for the implementation of the Unfair Commercial Practices Directive—the general prohibition of unfair competition is incorporated in §3 UWG and the prohibition of misleading commercial practices in §5 UWG.[9]

The name *Gesetz gegen den unlauteren Wettbewerb*, i.e., 'Act against unfair competition', raises the question as to the role of consumer protection in the Act. This issue has been subject to discussion in German legal literature for a long time. That the UWG, apart from protecting competitors, also aimed to protect consumers was expressed by the legislature in 1965, when consumer organisations were granting judicial standing to challenge unfair competition. In 2004, the importance of consumer protection was further emphasised when it was incorporated into the aims of the Act in the new §1 UWG.[10]

Although the UWG aims to protect the interests of consumers, individual consumers—unlike competitors—do not have judicial standing for damage claims based on the UWG.[11] Furthermore, a claim based on §823(2) of the *Bürgerliches Gesetzbuch* (German Civil Code, BGB) is impossible.[12] This section, part of the general tort clause in the BGB, qualifies a statutory breach as a tort, but only if the statute protects the claimant in particular. In order to qualify as a *Schutzgesetz*, the UWG must not merely provide general protection to consumers, but it must protect *individual* consumers.[13] This is not the case for the UWG.[14]

In practice, consumers for the enforcement of the UWG are, therefore, dependent on the action undertaken by competitors, competitors' interest groups and consumer interest groups.[15] These parties do have judicial standing, although it must be noted that they can only start injunction procedures and cannot claim damages.[16] This has not changed with the implementation of the Unfair Commercial Practices Directive in 2008, even though some authors argued that it should have.[17]

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[9] Because of the implementation of the Unfair Commercial Practices Directive the UWG now speaks of 'unfair commercial practices' rather than 'unfair competition'.

[10] See also V Emmerich, *Unlauterer Wettbewerb* (Munich, Beck, 2009) 17–21.

[11] §9 UWG gives competitors the possibility to claim damages, not consumers.

[12] T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 168.

[13] See J Schapp and W Schurr, *Einführung in das bürgerliche Recht* (Munich, Vahlen, 2007) 119.

[14] See T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 168 (also for further references). An exception to this may be those provisions in the UWG that are sanctioned under criminal law, but that is not the case for the general clauses in the UWG. See H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 1219.

[15] See §8(3) UWG. Compared to other countries, Germany has a particularly strong tradition of enforcement sought by consumer organisations.

[16] See §8(1) UWG. See the *Unterlassungsklagengesetz* (Injunctions Act, UklaG) for more details on the procedure currently in force.

[17] For a more elaborate discussion and reference to the discussion in German legal literature, see W Kalski, *Individualansprüche des Verbrauchers bei Lauterkeitsverstößen* (Frankfurt am Main, Lang, 2009), in particular 64–66.

## 5.3 The Old German Benchmark of the flüchtigen Durchschnittsverbraucher

### *5.3.1 General Remarks*

Under the old §3 UWG a commercial practice was found misleading if 'a not inconsiderable section' of the consumers at which the commercial practice was aimed were believed to be misled.[18] In some cases this was measured with the use of consumer opinion polls.[19] However, in most cases the German Courts determined the misleading nature of the commercial practice not on the basis of empirical evidence, but on the basis of their own assessment of the commercial practice.

In this context and until the mid-1990s, the *Bundesgerichtshof* consistently applied the benchmark of what it usually referred to as the *flüchtigen und unkritischen Durchschnittsverbraucher*, i.e., the casually observing and uncritical average consumer, often described in short as the *flüchtigen Durchschnittsverbraucher* or *flüchtigen Verbraucher*.[20] The image of the *flüchtigen und unkritischen Durchschnittsverbraucher* was meant to be realistic in the sense that it was the characterisation of the behaviour of the consumer as expected by the BGH, without it reflecting how the consumer *should* behave. In this sense the benchmark of the *flüchtigen Verbraucher* was also contrasted in literature to the European benchmark that emerged out of the CJEUs cases such as *Cassis de Dijon* and *Mars*, which was thought to reflect *desired* rather than actual behaviour and which was often characterised as the *verständige Verbraucher*, i.e., the circumspect consumer.[21]

The benchmark of the *flüchtigen Durchschnittsverbraucher* led to criticism, perhaps most famously and strongly expressed in the context of the *Prantl* case before the CJEU in 1984. The defendant in that case described the consumer taken as the benchmark in German law as an 'image of an infantile, almost pathologically stupid

[18] See also R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 117 and R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 525.

[19] See, e.g., BGH 23 January 1959, I ZR 14/58, GRUR 1959, 365—*Englisch-Lavendel*.

[20] See the case law discussed in paragraph 5.3.2 below. See also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 155, H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 124–125, R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 66 and R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 523.

[21] See also H Piper, A Ohly and O Sosnitza (eds), *Gesetz gegen den unlauteren Wettbewerb: UWG* (Munich, Beck, 2010) 193 and U Doepner, 'Verbraucherleitbilder zur Auslegung des wettbewerbsrechtlichen Irreführungsverbots' (1997) *Wettbewerb in Recht und Praxis* 1000–1001. See also paragraph 4.2 of this book.

and negligently inattentive average consumer'.[22] Similar voices could be heard in legal literature.[23]

In order to understand the old German consumer benchmark, it is important to appreciate the context in which it functioned. The German courts showed an overall strict attitude towards unfair competition and in this sense had a reputation for being considerably less liberal than many other Member States.[24] For example, advertising was sometimes found to be misleading as soon as the attention of the consumer was drawn in a misleading way, so that even limited influence on the consumer's behaviour was sufficient for a prohibition.[25] Moreover, as mentioned above, advertising was found misleading as soon as 'a not inconsiderable section' of the public was thought to be misled.[26] While the not particularly high expectations of the behaviour of the average consumer contributed to the strict application of the UWG, it must thus be noted that the consumer benchmark was just one aspect that ensured that the UWG strongly interfered with potentially unfair commercial practices.[27]

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[22] CJEU 13 March 1984, Case C-16/83, *ECR* 1984, p. 1299 (*Prantl*) (see p. 1306 for the citation). See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 523–524 and R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 80.

[23] For an overview, see R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 523–524 and S Ulbrich, *Irreführungs- und Verwechslungsgefahr im Lauterkeits- und Markenrecht: empirische oder normative Feststellung?* (Diss. Würzburg) (Berlin, Köster, 2005) 63. See also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 162.

[24] See also A Beater, 'Zum Verhaltnis von europäischem und nationalem Wettbewerbsrecht—Überlegungen am Beispiel des Schutzes vor irreführender Werbung und des Verbraucherbegriffs' (2000) *GRUR Int.*99–100 and R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002) 80.

[25] See BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128—*Steinhäger*, BGH 23 January 1959, I ZR 14/58, GRUR 1959, 365—*Englisch-Lavendel*, BGH 29 April 1970, I ZR 123/68, GRUR 1970, 425—*Melitta-Kaffee*, BGH 18 February 1982, I ZR 23/80, GRUR 1982, 563—*Betonklinker*, BGH 5 October 1989, I ZR 56/89, GRUR 1990, 282, 286—*Wettbewerbsverein IV* and BGH 13 December 1990, I ZR 103/89, GRUR 1991, 554, 555—*Bilanzbuchhalter*. This is sometimes referred to as the separate requirement of *Wettbewerblichen relevanz*. See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 522. It must be noted that the case law of the BGH was not always consistent. See also S Niemöller, *Das Verbraucherleitbild in der deutschen und europäischen Rechtsprechung* (Munich, Beck, 1999) 51.

[26] Expressed in percentages, this was often set at an approximate 10–15 % of the targeted public. H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 717, H Omsels, 'Kritische Anmerkungen zur Bestimmung der Irreführungsgefahr' (2005) *GRUR* 548, R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 525 and A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 160–161.

[27] See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 524. It must be noted that the BGH often made (and still makes) no clear distinction between the different aspects of the determination of the misleading nature of statements. It is thus not always clear what element (e.g., the consumer benchmark, the percentage of consumers assumed to be misled or the degree of influence of the practice on the economic behaviour of the consumer) is responsible for the outcome in a particular case.

### 5.3.2 Application

In its case law prior to the adoption of the average consumer benchmark, the BGH made clear that it was not to be expected of the consumer, when reading an advertising slogan, that he or she would read the message precisely, comprehensively and critically.[28] The consumer was expected to observe the information only superficially and was not assumed to extensively reflect upon what he or she had read.[29] The following paragraph from the *Steinhäger* case (1956), dealing with a product name potentially misleading consumers as to the place of origin of the product, shows how the BGH typically characterised the expected behaviour of the consumer:[30]

> DE Bei Prüfung der Frage, ob die beanstandeten Bezeichnungen der Bekl. unrichtig oder irreführend im Sinne des §3 UWG sind, ist nach ständiger Rechtsprechung nicht der Sinn maßgebend, den der Ankündigende mit dieser Ankündigung verbunden hat oder verbunden wissen will, entscheidend ist vielmehr die Auffassung des in Frage kommende Abnehmerkreise, wie sie sich bei der Flüchtigkeit, mit der der Verkehr derartige Bezeichnungen aufzunehmen pflegt, bildet. Das hat das BerG an sich auch nicht verkannt. Es hat dabei jedoch nicht berücksichtigt, daß nach der Lebenserfahrung ein flüchtiger Betrachter einer solchen Ankündigung—Fachkenntnisse dürfen bei ihm nicht vorausgesetzt werden—grammatikalische Überlegungen der vom BerG erörterten Art nicht anstellen wird. Es darf nicht von einem Leser ausgegangen werden, der die Ankündigung genau, vollständig und mit kritischer Überlegung würdigt.
> EN In answering the question whether the defendant's designation contested by the plaintiff is false or misleading in the sense of §3 UWG, it is settled case law that not the meaning as understood by the trader or the meaning as intended by the advertiser is decisive. Rather, it is the meaning as understood by the customers at hand in their superficial observation, which is how customers tend to encounter these types of designations. This in itself has not been denied by the Court of Appeal. However, it did not sufficiently take into account that experience shows that a superficial observer of such a designation—who should not be assumed to have professional knowledge—will not reflect on the grammatical meaning to a degree as assumed by the Court of Appeal. One should not reason from the point of view of the reader who assesses an advertisement precisely, completely and critically.

This section clearly shows that the BGH expected the consumer to generally observe superficially and not to look critically at statements.[31]

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[28] BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128—*Steinhäger*, BGH 23 January 1959, I ZR 14/58, GRUR 1959, 365—*Englisch-Lavendel* and BGH 29 April 1970, I ZR 123/68, GRUR 1970, 425—*Melitta-Kaffee*. See also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 135–142 and U Doepner, 'Verbraucherleitbilder zur Auslegung des wettbewerbsrechtlichen Irreführungsverbots' (1997) *Wettbewerb in Recht und Praxis* 1000.

[29] See, for example, BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128—*Steinhäger*, BGH 23 January 1959, I ZR 14/58, GRUR 1959, 365—*Englisch-Lavendel*, BGH 26 February 1969, I ZR 108/67, GRUR 1969, 415—*Kaffeerösterei*, BGH 29 April 1982, I ZR 111/80, GRUR 1982, 564, 566—*Elsässer Nudeln*, BGH 5 July 1984, I ZR 88/82, GRUR 1984, 741—*patented* and BGH 5 April 1990, I ZR 19/88, GRUR 1990, 604—*Dr. S.-Arzneimittel*.

[30] BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128–130—*Steinhäger*. The translations provided in this chapter are made by the author, with the help of native speakers.

[31] Note that the BGH talks about the *flüchtigen Verbraucher* (the superficially observing consumer) and not the *flüchtigen Durchschnittsverbruacher* (superficially observing average consumer).

Another good example of the consumer's superficial observation and uncritical attitude is given by the *Betonklinker* case (1982).[32] The defendant in this case sold construction products, one of them being marketed as 'Betonklinker' ('Concrete Clinkers'). This product looked like a clinker (a type of brick), but was in fact made out of concrete. The plaintiff argued that the name was misleading, because the public would think that the product, apart from looking like a clinker, would also have the same qualities, while this was in fact not the case.

The BGH made clear that concrete and bricks are distinctly different products with different qualities, and that the public on the basis of the product name would attach the properties of clinkers to the product made out of concrete. These expectations were not taken away by the product information given in somewhat smaller (but still prominent) print, containing, for example, the remark that the product 'combines the rustic look of a brick and the technical advantages of concrete'. According to the BGH, experience shows that the casually observing public often does not pay attention to the information apart from the main slogan.[33]

Two clear assumptions of the consumer (or, as it is referred to in this case, the general public) arise from this case. Firstly, the attention of the public was assumed to be limited in the sense that the consumer was not expected to read all the information offered to him in an advertisement. A headline or slogan could be found misleading even if the further information given could have removed any misinterpretation. The BGH investigated product names, slogans or other eye-catching statements in isolation, i.e., independent from the further information. This was known as the concept of *Blickfangwerbung* and was a prominent feature of the case law of the BGH regarding §3 (old) UWG.[34]

Secondly, the *Betonklinker* case is a clear example of the limited critical attitude expected of the consumer in the old case law. As in other cases of the BGH of that time, consumers were assumed to attach meaning to advertising claims rather easily.[35] In some of the cases the BGH explicitly characterised the consumer as being *unbefangen*, i.e., as having an open, unsuspecting attitude.[36] This was true not only for statements that were open to varying interpretations, such as the name *Betonklinker*, but also for slogans which were objectively true yet may have invoked false impressions. For example, the slogan *'Der meistgekaufte der Welt*' ('the most purchased in the world') for electric shavers was found misleading, because the name

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The text of the judgment does not make clear whether the standard is set at a below-average or an average consumer, but the BGH does note that consumers (in general) tend to encounter these types of designations in this way.

[32] BGH 18 February 1982, I ZR 23/80, GRUR 1982, 563—*Betonklinker*.

[33] BGH 18 February 1982, I ZR 23/80, GRUR 1982, 563, 564—*Betonklinker*.

[34] See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 756.

[35] See also BGH 26 September 1961, I ZR 55/60, GRUR 1962, 97—*Tafelwasser* and BGH 18 December 1981, I ZR/79, GRUR 1982, 242—*Anforderungsscheck für Barauszahlungen*.

[36] See, for example, BGH 26 February 1969, I ZR 108/67, GRUR 1969, 415—*Kaffeerösterei*. See also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 153.

was assumed to make a section of the public expect that the leading market position would also apply for Germany, while this was in fact not the case.[37]

### 5.3.3 Environment-Related and Health-Related Advertising

The BGH was especially reserved in attributing a critical attitude to consumers in the fields of environment-related and health-related advertising.[38] A prime example of this is the *aus Altpapier* case (1988).[39] The defendant, owner of a shop chain, promoted in its advertising and shop-windows toilet paper and paper towels named 'Hygiene-Krepp'. The defendant promoted the products using the slogan '*Hygiene-Krepp aus Altpapier ist umweltfreundlich. Denn die Verwendung von Altpapier schont unsere Baumbestände*' ('Hygiene-Krepp made from recycled paper is environmentally friendly, because the use of recycled paper saves the forest'). Under the slogan, the icon of an environmental hallmark was displayed. An explanation of the hallmark was given in smaller print, making clear that it was being attributed to products that were environmentally friendly, sound and safe. The smaller print also explained that the hallmark was awarded because the product was made out of at least 51 % recycled paper, reduced the amount of waste and waste-water, saved the forest and saved fresh water and energy. The advertisement was accompanied by a picture of a wooden toilet in the countryside and displayed another slogan at the bottom, stating '*Der Umwelt zuliebe*' ('For the sake of the environment').

The BGH pointed out that environment-related advertising, like health-related advertising, was to be judged particularly strictly.[40] Consumers were assumed to react particularly emotionally towards environment-related advertising because it concerns issues of health and the protection of the environment for future generations. This, together with the fact that consumers were believed to often have no clear understanding of claims such as 'does not harm the environment' or 'environmentally friendly', was assumed to make consumers particularly vulnerable to be misled.[41] In its judgment the BGH made clear that on the basis of the advertisement for Hygiene-Krepp, the consumer would expect that the product is made entirely out of recycled paper. As the product only comprised 80 % recycled paper,

[37] BGH 1 October 1971, I ZR 51/70, GRUR 1972, 129—*Der meistgekaufte der Welt*.

[38] S Niemöller, *Das Verbraucherleitbild in der deutschen und europäischen Rechtsprechung* (Munich, Beck, 1999) 94 and K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 1455–1457.

[39] BGH 20 October 1988, I ZR 238/87, GRUR 1991, 546—*aus Altpapier*. See also BGH 20 October 1988, I ZR 219/87, GRUR 1991, 548—*Umweltengel* and BGH 4 October 1990, I ZR 39/89, GRUR 1991, 550—*Zaunlasur*.

[40] See more in general also U Doepner, 'Verbraucherleitbilder zur Auslegung des wettbewerbsrechtlichen Irreführungsverbots' (1997) *Wettbewerb in Recht und Praxis* 1002 and B Ackermann, 'Die deutsche Umweltrechtsprechung auf dem Weg zum Leitbild des verständigen Verbrauchers?' (1996) *Wettbewerb in Recht und Praxis* 502.

[41] BGH 20 October 1988, I ZR 238/87, GRUR 1991, 546, 547—*aus Altpapier*.

the consumer was being misled. The explanation in smaller print did not negate the misleading nature of the advertisement, because consumers—even when buying the product—often would not read it.[42]

### 5.3.4 Vulnerable Groups

Although the benchmark of the *flüchtigen Verbraucher*—in combination with the requirement that only a 'not inconsiderable section of the public' needed to be misled—already provided protection to most people in society, there are some examples of cases in which certain groups were seen as particularly vulnerable. In particular, this was the case for children and teenagers, whose exploitation was already specifically forbidden under the 1909 version of the UWG.[43] Moreover, in a number of cases children and teenagers were generally seen as incapable of dealing with sales promotions.[44] Also, there are some examples of cases in which the participants of organised excursions that include sales presentations, often elderly or housewives, were labelled as particularly vulnerable.[45] Finally, also people suffering from illness were under circumstances seen as a vulnerable group.[46] In *Fachkrankenhaus* (1988), the BGH noted that these consumers can be easily misled in their search for effective treatment of their disease.[47] Their assumed vulnerability thus concerned specific claims regarding treatment of their disease, rather than general vulnerability towards commercial practices.

### 5.3.5 Conclusion

Prior to the introduction of the average consumer benchmark, the BGH applied the benchmark of the *flüchtigen Durchschnittsverbraucher*. On the basis of the latter benchmark, the BGH expected the general public to observe only casually and not to be particularly critical towards advertising.[48] Advertising was judged on the

[42] Para. 3 of the judgment.

[43] K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 857.

[44] See K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 866–867.

[45] See on these so-called *Kaffeefahrten*: K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 877–878.

[46] See W Gloy, M Loschelder and W Erdmann (eds), *Wettbewerbsrecht* (Munich, Beck, 2010) §59, No. 80.

[47] BGH 15 June 1988, I ZR 51/87, GRUR 1988, 841, 842—*Fachkrankenhaus*, with reference to BGH 6 November 1981, I ZR 158/79, GRUR 1982, 311, 313—*Berufsordnung für Heilpraktiker*.

[48] See also, for example, H Piper, A Ohly and O Sosnitza (eds), *Gesetz gegen den unlauteren Wettbewerb: UWG* (Munich, Beck, 2010) 193 (§2, No. 95) and A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 155.

basis of the consumer's first impression, without the consumer being expected to overthink its content.[49] The expected consumer behaviour was based on the BGHs assumptions of actual consumer behaviour rather than on how the consumer *should* or *could* act. Together with other aspects of the UWG, this contributed to an overall strict approach to commercial practices, even leading to prohibitions of slightly ambiguous claims that are not very likely to be misunderstood by many consumers.[50] An even stricter assessment took place in the field of health-related and environment-related advertising, as consumers were assumed to react particularly emotionally towards these types of advertising and because they were not assumed to have a clear understanding of the claims in these fields. Finally, there was also room for additional protection for particularly vulnerable groups, although in general the protection of minorities was already covered by the benchmark of the *flüchtigen Durchschnittsverbraucher*. In general, the BGH showed a strict attitude towards potentially unfair commercial practices.

## 5.4 The Average Consumer Benchmark

### *5.4.1 Adoption of the Average Consumer Benchmark*

From the mid-1990s, the case law of the BGH began to show signs of change towards a more liberal application of the UWG.[51] This development cannot be separated from the various judgments of the CJEU that clarified that the UWG and its application did not comply with the principle of the free movement of goods.[52] One of the aspects of the necessary liberalisation of the UWG was the change of the consumer benchmark in the case law of the BGH. After a number of cases in which the BGH did not yet explicitly apply the average consumer benchmark, but which already indicated change,[53] the BGH in 1999 in *Orient-Teppichmuster* (discussed in

[49] See T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 174.

[50] See, for example, the *Betonklinker* and *Der meistgekaufte der Welt* cases above.

[51] H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 125. See on the liberalisation of the UWG also H Schulte-Nölke, C Busch and K Hawxwell, 'National report: Germany', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003).

[52] See CJEU 18 May 1993, Case C-126/91, *ECR* 1993, p. I-2361 (*Yves Rocher*), CJEU 2 February 1994, Case C-315/92, *ECR* 1994, p. I-317 (*Clinique*), CJEU 6 July 1995, Case C-470/93, *ECR* 1995, p. I-1923 (*Mars*) and CJEU 26 October 1995, Case C-51/94, *ECR* 1995, p. I-3599 (*Commission/Germany*). Some of these cases also concern the *Lebensmittel- und Bedarfsgegenständegesetzes* (German Food Law, LMBG), now replaced by the *Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuch* (LFGB). See also Chap. 3 of this book.

[53] See, for example, BGH 14 December 1995, I ZR 213/93, NJW 1996, 1135—*Umweltfreundliches Bauen*, BGH 23 May 1996, I ZR 76/94, NJW 1996, 3419—*PVC-frei*, BGH 15 February

more detail below) adopted the CJEUs average consumer benchmark. Since *Orient-Teppichmuster*, the BGH has consistently applied the average consumer benchmark in the context of the UWG.[54] The new benchmark was also explicitly mentioned in the 2004 UWG reform[55] and has been codified in the UWG in 2008 in the implementation process of the Unfair Commercial Practices Directive.[56] The benchmark of the average consumer is now applied throughout German unfair competition law, as well as in the law on pharmaceutical products, trademark law and foods law.[57]

### *5.4.2 Orient-Teppichmuster*

In *Orient-Teppichmuster* (1999) the BGH adopted the average consumer benchmark as the new benchmark applicable in German unfair competition law.[58] In its judgment, the BGH also elaborated upon the level of attention that the consumer pays to product information in advertising, providing its own interpretation of what behaviour is generally to be expected of the average consumer.

The case deals with the promotion of oriental carpets in advertising leaflets which were enclosed to several local newspapers in the Berlin area. On the first three pages of the leaflet, hand-woven carpets were promoted, while page four presented lower value machine-fabricated carpets under the slogan '*Konsequent preiswert'*

1996, I ZR 9/94, GRUR 1996, 910—*Der meistverkaufte Europas*, BGH 2 May 1996, I ZR 152/94, NJW 1996, 3153—*Preistest*, BGH 26 March 1998, I ZR 231/95, GRUR 1998, 1037—*Schmuck-Set*, BGH 26 March 1998, I ZR 222/95, WRP 1998, 857, 859–*1000 DM Umweltsbonus*. See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 715–716, A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 145–152 and S Ulbrich, *Irreführungs- und Verwechslungsgefahr im Lauterkeits- und Markenrecht: empirische oder normative Feststellung?* (Diss. Würzburg) (Berlin, Köster, 2005) 64–68.

[54] See, for example, BGH 17 February 2000, I ZR 239/97, GRUR 2000, 820, 821—*Space Fidelity Peep Show*, BGH 19 April 2001, I ZR 46/99, WRP 2002, 81—*Anwalts- und Steuerkanzlei*, BGH 3 May 2001, I ZR 318/98, GRUR 2002, 182, 183—*Das Beste jeden Morgen*, BGH 20 December 2001, I ZR 215/98, WRP 2002, 977, 978—*Scanner-Werbung* and BGH 2 October 2003, I ZR 150/01, GRUR 2004, 244—*Marktführerschaft*. The BGH itself recognised in several cases that there has been a change of the consumer benchmark. See, for example, BGH 19 September 2001, I ZR 54/96, WRP 2001, 1450, 1453—*Warsteiner III*, BGH 26 September 2002, I ZR 89/00, WRP 2003, 275, 277—*Thermal Bad* and BGH 8 March 2012, I ZR 2012/10, BeckRs 2012, 18503—*Marktführer Sport*. See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 525.

[55] See the Government proposal for the UWG reform of 2004, BT-Drucks 15/1487, p. 19, where the formula of the BGH in *Orient-Teppichmuster* is repeated.

[56] See §3(2) UWG.

[57] H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 125. See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 524–525.

[58] BGH 20 October 1999, I ZR 167/97, WRP 2000, 517—*Orient-Teppichmuster*. See on this case also R Kemper and J Rosenow, 'Der Irreführungsbegriff auf dem Weg nach Europa' (2001) *Wettbewerb in Recht und Praxis* 370.

('consistently inexpensive'). The small print underneath the products provided details of the production, amongst which the fabric that was used for manufacturing the carpets, i.e., wool or polypropylene. According to the claimant, the consumer was misled by the presentation of the different products, expecting that all carpets would be hand-woven.

The *Berufungsgericht* agreed with the claimant that the advertising was misleading, arguing that the casually observing consumer does not notice that the products on the fourth page are not hand-woven, like the carpets advertised on the previous pages. The BGH, however, dismissed the claim and explicitly rejected the approach of the *Berufungsgericht*. The BGH made clear that the benchmark to be applied is not that of the casually observing consumer, but rather that of the *averagely informed and critical consumer*, whose level of attention depends on the situation at hand:

> DE Der Grad der Aufmerksamkeit des durchschnittlich informierten und ver-ständigen Verbrauchers, auf dessen Verständnis es ankommt, ist abhängig von der jeweiligen Situation. Er wird vor allem von der Bedeutung der bewor-benen Waren oder Dienstleistungen für den angesprochenen Verbraucher ab-hängen und wird beispielsweise dort eher gering, d. h. flüchtig sein, wo es um den Erwerb geringwertiger Gegenstände des täglichen Bedarfs geht. […] Erst im Falle eines am Angebot einer bestimmten—nicht völlig gering-wertigen—Ware oder Dienst-leistung entweder von vorneherein bestehenden oder bei flüchtiger Durchsicht geweckten Interesses wird die Werbung mit größer-er Aufmerksamkeit wahrgenommen. Diese situationsadäquate Aufmerksam-keit des Durchschnittsverbrauchers ist für die Ermittlung des Verkehrs-verständnisses maßgebend. Mögliche Mißverständnisse flüchtiger oder uninteressierter Leser haben dabei zurückzutreten […].
>
> EN The degree of attention of the averagely informed and circumspect consumer, the understanding of whom is ultimately decisive, is dependent on the situation at hand. It will most of all depend on the meaning of the goods or services advertised for the targeted consumers, and will for example be limited, i.e., superficial, if it concerns advertising for every-day goods of limited value. […] Only in the case of an interest in a specific—not completely low value—good or service that was either already existing or based on the superficial observation of an offer, the advertising is observed with greater attention. This situationally dependent attention of the average consumer is decisive for determining the understanding of the public. Accordingly, possible mis-understandings of superficial or uninterested readers should not prevail […].

Hence according to the BGH, the level of attention primarily depends on the relevance or value of the products or services for the consumers to whom the statement is directed. The consumer observes only casually if the advertising concerns low-value every-day products and the same applies if the consumer glances through advertising leaflets or advertising in newspapers. In contrast, the level of attention will be higher if the advertising concerns a specific offer of a product or service of considerable value. Moreover, the BGH emphasised that—although the consumer is not always assumed to be particularly attentive—the interest of the consumer who is less attentive than the average consumer is not protected.[59]

[59] See in this sense also BGH 18 October 2001, I ZR 193/99, GRUR 2002, 550—*Elternbriefe*, BGH 26 September 2002, I ZR 89/00, WRP 2003, 275, 277—*Thermal Bad* and BGH 2 October 2003, I ZR 252/01, GRUR 2004, 162, 163—*Mindestverzinsung*. See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 525 and H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 717. This

According to the BGH, the average consumer interested in buying a carpet will not just superficially look at the products advertised, but will observe with a normal level of attention and will gather more information before buying the product. The advertising leaflet is, therefore, not misleading; the average consumer is expected to read the product information in smaller print and is thus expected to take note of the difference in the fabrics.

Although no reference is made to the CJEUs case law, it is clear that the BGH in this case adopted the CJEUs average consumer benchmark. It used the term *Durchschnittsverbraucher* (average consumer) rather than the *flüchtigen Verbraucher* (superficially observing consumer) or *flüchtigen Durchschnittsverbraucher* (superficially observing average consumer). In relation to the older case law, the judgment brought about a cautious, yet clear break with the past, ushering in a retreat from the *flüchtigen Verbraucher* and introducing the concept of the *situationsadäquate Durchschnittsverbraucher*.[60] Different from earlier case law, the level of attention was expected to be higher if the advertising concerns products of higher value and longer lifespan.[61]

Although the expectations of the average consumer's behaviour are thus higher than under the old case law of the BGH, it is questionable whether the general assumption of *situationsadäquate Aufmerksamkeit* is in line with the case law of the CJEU. Köhler argues that the reasoning of the BGH is not in conflict with the interpretation of the average consumer by the CJEU as it merely specifies how the average consumer behaves.[62] However, the European Commission in preparation of the Unfair Commercial Practices Directive mentioned *Orient-Teppichmuster* as an example in which a Member State fails to properly apply the average consumer benchmark.[63]

### *5.4.3 Application of the Average Consumer Benchmark*

If we look at the further case law of the BGH applying the average consumer benchmark, what is expected of the average consumer with its *situationsadäquate Aufmerksamkeit*? First of all, it is clear that the BGH has higher expectations of the average consumer's behaviour than under the old case law. The concept of

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also means that it is no longer sufficient of a not inconsiderable section of the public (10–15%) is misled. See BGH 2 October 2003, I ZR 252/01, GRUR 2004, 162—*Mindestverzinsung*. See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 525–526.

[60] See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 176.

[61] See also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 153 and the cases discussed below.

[62] H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 127.

[63] SEC (2003) 724, p. 8. See on this point also the conclusions of this chapter in paragraph 5.6 below.

*situationsadäquate Aufmerksamkeit* entails that the average consumer is no longer seen as generally superficially observing and naïve.[64] In general, consumers are no longer assumed to always take advertising slogans literally[65] and to be easily pressured to take wrong decisions,[66] and are required to put more thought and effort into making a purchasing decision, at least if it concerns a product of considerable value.[67]

This can be illustrated by the *Handy für 0,00 DM* judgment (1998), which was decided shortly before the formal adoption of the average consumer benchmark in *Orient-Teppichmuster*, but which already reflects the new line of thought of the BGH.[68]

The case deals with a printed advertisement for a mobile phone, displaying a picture of the phone, the name of the network provider, additional information in small print and, most prominently, the price of the phone, being 0.00 *Deutsche Mark* (DM).[69] An asterisk had been placed alongside the price referring to an information box containing small print that made clear that the phone was available only in combination with a contract with the network provider. The information box also provided the prices for the network contract.

Before the case was brought before the BGH, the *Berufungsgericht* (Court of Appeal) judged the advertisement displaying the 0.00 DM price to be misleading. It argued that while some informed consumers may know that the deal is only available in combination with a mobile phone subscription, other (less-informed) consumers are not aware of this.[70]

The BGH, however, rejected the reasoning of the *Berufungsgericht* on this point. According to the BGH, the public knows that mobile phones are of considerable

[64] See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 716.

[65] This also counts for advertising claims or slogans that are not meant to be taken seriously, see BGH 25 April 2002, I ZR 272/99, BGH GRUR 2002, 982—*Die Steinzeit ist vorbei*. See also H Helm, 'Das Verbraucherleitbild des Europäischen Gerichtshofes im Vergleich', in E Keller et al (eds), *Festschrift für Winfried Tilmann* (Köln, Heymann, 2003) 146.

[66] BGH 11 December 2003, I ZR 83/01, GRUR 2004, 343—*Playstation* and BGH 11 December 2003, I ZR 74/01, GRUR 2004, 344—*Treue-Punkte*. See also T Lettl, 'Der Schutz der Verbraucher nach der UWG-Reform' (2004) *GRUR* 459.

[67] See, for example, BGH 20 October 1999, I ZR 167/97, WRP 2000, 517—*Orient-Teppichmuster*, BGH 27 February 2003, I ZR 253/00, GRUR 2003, 538—*Gesamtpreisangebot* and BGH 3 April 2003, I ZR 222/00, WRP 2003, 1222—*Internetreservierungssystem*, BGH 13 March 2003, I ZR 212/00, GRUR 2003, 626, 627—*Umgekehrte Versteigerung II*. See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 127 and T Lettl, 'Der Schutz der Verbraucher nach der UWG-Reform' (2004) *GRUR* 459.

[68] BGH 8 October 1998, I ZR 187/97, WRP 1999, 90, 92—*Handy für 0,00 DM* and BGH 8 October 1998, I ZR 7/97, WRP 1999, 94—*Handy-Endpreis*. See on these cases also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 166.

[69] BGH 8 October 1998, I ZR 187/97, WRP 1999, 90—*Handy für 0,00 DM*.

[70] BGH 8 October 1998, I ZR 187/97, WRP 1999, 90, 91—*Handy für 0,00 DM*.

value and that sellers will thus not give them away for free and that a further commitment in the form of a subscription will be involved:

> DE Da dem Publikum geläufig ist, daß Mobiltelefone einen nicht unerheblichen Wert haben und ein Kaufmann ein solches Gerät nicht ohne weiteres verschenkt, erkennt es auch, daß der Erwerb des Mobiltelefons letztlich mit den Gegenleistungen finanziert werden muß, die im Rahmen des Netzkartenvertrags zu erbringen sind. Dabei ist zu berücksichtigen, daß der Verkehr in der Werbung seit Jahren Angeboten begegnet, mit denen für den Abschluß eines Netzkartenvertrages bei gleichzeitigem Erwerb eines Mobil-telefons zu einem besonders günstig erscheinenden Preis geworben wird. Die Fülle derartiger Angebote macht dem Publikum deutlich, daß es nicht um das Verteilen von Geschenken, sondern nur um einen Anreiz zum Abschluß eines langfristigen Netzkartenvertrags geht.
> EN Since the public is well aware that mobile phones are of not insignificant value and that a trader does not give away such a device for free, it also recognises that the acquisition of a mobile phone must ultimately be paid for with the obligations that are to be fulfilled as part of the network contract. In relation to that, it should be noted that the public of advertising is being confronted for years with offers that advertise for network contracts with the simultaneous purchase of a mobile phone at an apparently very low price. The abundance of such offers makes clear to the public that these offers are not about the distribution of gifts, but only about providing an incentive to conclude a long-term network contract.

Hence, because the public knows about these trade practices, it is assumed to be somewhat sceptical and not to take advertising slogans literally. This leads to the conclusion that as long as the prices for the phone subscription are provided in a clear manner, the advertising practice is permissible.[71] The BGH applied the same rule in the almost identical *Handy-Endpreis* case (1998).[72]

These two cases on 'free' mobile phone offers, together with *Orient-Teppichmuster*, also show that the old doctrine regarding *Blickfangwerbung* (i.e., that the main slogans in advertising should always be assessed in isolation from the other parts of the advertising and should not give an impression which is not in accordance with reality) is no longer valid, at least not for products of higher value.[73]

Another example of this is given by the *Computerwerbung I* judgment (2000), which deals with advertising for PCs in a newspaper and in advertising leaflets.[74] At the bottom of the page, the reader was informed in small print that because of the broad range of products offered, the seller could not guarantee that the products were readily available for delivery. The plaintiff in the case, a competitor, claimed that the products promoted were not available in the shop on the day on which the advertisement became public and that, therefore, it was misleading.

The BGH argued that consumers expect the products offered to be readily available and emphasised that the remark at the bottom of the page is insufficient to prevent the consumer from being misled. However, this could be overcome by pro-

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[71] In *Handy für 0,00 DM* the BGH refers the case back to the *Berufungsgericht* to judge whether this is the case for the advertisement at hand. See BGH 8 October 1998, I ZR 187/97, WRP 1999, 90, 93—*Handy für 0,00 DM*.

[72] BGH 8 October 1998, I ZR 7/97, WRP 1999, 94—*Handy-Endpreis*.

[73] See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 757.

[74] BGH 17 February 2000, I ZR 254/97, WRP 2000, 1248—*Computerwerbung I*.

viding a more clear reference, e.g., by putting an asterisk next to the slogan referring to the remark at the bottom of the page.[75] This has become the BGHs new basic rule regarding *Blickfangwerbung*; potentially misleading slogans are not necessarily prohibited and can be compensated for by a clear reference in a prominent place within the advertisement.[76]

The application of this new rule regarding *Blickfangwerbung* is, however, not always easy to predict. For example, in *Computerwerbung II* (2002), although the facts of the case were almost identical to *Computerwerbung I*, the BGH—after repeating the same new rule for *Blickfangwerbung*—decided that the practice was not misleading. In this case, the BGH argued that the text was sufficiently easily readable and sufficiently caught the attention of the consumer.[77] It is thus difficult to see where exactly the line lies between a sufficiently prominent and an insufficiently prominent disclaimer. *Computerwerbung II* does indicate that a clear reference in the main slogan is thus not always needed.

### *5.4.4 Environment-Related and Health-Related Advertising*

Whether the consumer since the introduction of the average consumer benchmark is still assumed to be particularly vulnerable with regard to certain types of claims, such as environment-related and health-related claims, is not entirely certain.
It has been suggested that these claims are still to be assessed with more scrutiny than other claims, but little case law has been reported so far.[78] Although it indeed seems likely that these claims will still be assessed more strictly, it also seems likely that the old case law on these topics is no longer applicable as such, because of the CJEUs case law and the adoption of the average consumer benchmark in German law. Hence, the average consumer is likely to still be expected to be more vulnerable to these claims than to other claims, but not as vulnerable as under the old case law.[79]

[75] See also BGH 8 October 1998, I ZR 187/97, WRP 1999, 90, 92—*Handy für 0,00 DM*.

[76] See also, for example, BGH 28 November 2002, I ZR 110/00, WRP 2003, 379—*Preis ohne Monitor*, BGH 24 October 2002, I ZR 50/00, WRP 2003, 273—*Computerwerbung II*.

[77] The BGH emphasises that the high level of attention is related to the high value of the product. See BGH 24 October 2002, I ZR 50/00, WRP 2003, 273, 275—*Computerwerbung II*.

[78] See, for example, H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 843–845 (environmental claims) and 847–850 (health claims).

[79] See in this respect in the context of environmental claims K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 1455–1457.

### 5.4.5 *Objectively False Statements*

Although the BGH adopted the average consumer benchmark, the *Scanner-Werbung* judgment (2001) displays an interesting exception to that benchmark for statements which are objectively false.[80]

The defendant advertised a scanner of the brand Mustek in an advertising leaflet, but displayed a picture of a two-and-a-half times more expensive scanner from market leader Hewlett-Packard. The defendant argued that the advertisement was not misleading because the scanner displayed was not clearly recognisable as being a Hewlett-Packard scanner so that consumers would not attach any significant meaning to it.

The BGH, rather than applying the average consumer benchmark, pointed to the risks of misunderstanding for different groups. For example, some consumers would recognise the scanner displayed to be the more expensive Hewlett-Packard model. While a section of this group would notice that the picture and the description did not correspond, others could think that the Hewlett-Packard model is for sale at the given price. Others yet could have thought that the Mustek on offer was of comparable quality to the product displayed, or may have assumed a generally low price level of the basis of the picture.

The BGH also pointed out that application of the average consumer benchmark does not prevent the core function of the prohibition of misleading statements, which is to challenge false advertising claims. Hence, even when a large part of the public is not misled, the advertisement should be prohibited if it is objectively false.[81] The same conclusion was drawn by the BGH in *Falsche Herstellerpreisempfehlung* (2000), which dealt with a falsely suggested retail price in an advertisement for a stereo set.[82]

In this way the BGH found a solution for the fact that the average consumer benchmark provides rogue traders with the possibility to make use of commercial practices that are recognised as fraudulent by most consumers, but which nevertheless mislead some. However, the European Commission addressed this issue when preparing the Unfair Commercial Practices Directive and mentioned the *Scanner-Werbung* case, together with *Orient-Teppichmuster*, as an example of failure of a Member State to properly apply the CJEUs average consumer benchmark.[83] Moreover, the CJEUs *Trento Sviluppo* case (2013) emphasises that providing false information is not misleading *per se* and that the requirements for unfairness (in-

[80] BGH 20 December 2001, I ZR 215/98, WRP 2002, 977—*Scanner-Werbung*.

[81] See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 180.

[82] BGH 24 May 2000, I ZR 222/97, GRUR 2001, 78—*Falsche Herstellerpreisempfehlung*. See also T Lettl, 'Der Schutz der Verbraucher nach der UWG-Reform' (2004) *GRUR* 457, H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 757–758 and, more generally, H Helm, 'Das Verbraucherleitbild des Europäischen Gerichtshofes im Vergleich', in E Keller et al (eds), *Festschrift für Winfried Tilmann* (Köln, Heymann, 2003) 146–147.

[83] SEC (2003) 724, p. 8.

cluding the consumer benchmarks) also have to be satisfied in this context.[84] In this sense, it remains to be seen whether this aspect of the case law of the BGH will be continued.

## 5.5 Target Groups and Vulnerable Groups

### *5.5.1 General Remarks*

The target group and vulnerable group benchmarks of Article 5(2) and 5(3) of the Unfair Commercial Practices Directive have been implemented in §3(2) UWG. Apart from these alternative benchmarks, §4 UWG offers an additional provision dealing with the exploitation of vulnerabilities. This provision was introduced in the 2004 UWG reform, but has its basis in earlier case law.[85] §4 UWG specifies a number of situations in which a trader is acting unfairly, amongst which in §4(2) UWG the exploitation of certain vulnerabilities. It determines as unfair:[86]

> DE geschäftliche Handlungen […], die geeignet sind, geistige oder körperliche Gebrechen, das Alter, die geschäftliche Unerfahrenheit, die Leichtgläubigkeit, die Angst oder die Zwangslage von Verbrauchern auszunutzen.
> EN commercial practices […] that are suited to exploitation of a consumer[']s mental or physical infirmity, age, commercial inexperience, credulity or fear, or the position of constraint to which the consumer is subject.

Note that although they closely resemble one another, this is not the implementation of the Unfair Commercial Practices Directive's vulnerable group benchmark, which has been transposed in §3(2) UWG. It is also important to note that §4(2) only specifies what is seen as unfair, rather than offering an additional benchmark. This means that in the application of §4(2) UWG, one of the benchmarks of §3(2)—i.e., the average consumer benchmark, the target group benchmark or the vulnerable group benchmark—still needs to be applied.[87]

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[84] CJEU 19 December 2013, Case C-281/12 (*Trento Sviluppo*) (not yet published in *ECR*). See on this case also paragraph 2.2 of this book.

[85] See on §4(2) UWG also I Scherer, 'Kinder als Konsumenten und Kaufmotivatoren' (2008) *WRP* 430–437, I Scherer, 'Ende der Werbung in Massenmedien?' (2008) *WRP* 563–571 and, more in general, K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 644 and onwards.

[86] English translation provided by the official translation of the UWG (2010).

[87] See also K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 863. One can question whether this provision is in line with the Unfair Commercial Practices Directive, taking into account its full harmonisation nature. However, because of the provision's general wording, it does not necessarily pose problems in this respect.

### 5.5.2 Target Groups

Also before the implementation of the Unfair Commercial Practices Directive (with its target group benchmark) in 2008, the target group of a commercial practice could determine the benchmark applied.[88] The case law of the BGH shows that in cases concerning normal consumer goods the commercial practice is judged from the point of view of the average consumer or the 'general public'.[89] However, if the commercial practice is aimed at a specific group in society, the average member of that group can be taken as a benchmark. Köhler suggests that this can apply to children, teenagers, pensioners, immigrants, unemployed people, people suffering from illness and college or university graduates, for example.[90]

Before the implementation of the Unfair Commercial Practices Directive in 2008, the BGH required that the exploited vulnerable group was *targeted* by the commercial practice in the context of §4(2) UWG.[91] By requiring that the trade practice was targeted at a particular group, the BGH prevented that advertisements reaching, for example, both adults and children, would always have to be judged from the point of view of a child.[92] The 2006 *Werbung für Klingeltöne* case shows how in this context the BGH dealt with the determination of vulnerable target groups.

The case deals with advertising for ringtones in 'Bravo Girl', a magazine aiming primarily at teenagers between the ages of twelve and fourteen. The BGH made clear that such advertising can fall within the scope of §4(2) UWG, and that this provision can form an exception to the regular benchmark of the average consumer. If commercial practices are aimed at particular groups in society, such as children or teenagers, the average member of that group serves as the benchmark, which may lead to a different assessment of the commercial practice. This, however, does not mean that the trade practice must be targeted *exclusively* at this group. In the case at hand, the fact that at least 50 % of the readers of 'Bravo Girl' magazine were teenagers, was found to be sufficient to conclude that the ringtone advertising was aimed at teenagers.[93]

As the vulnerable group benchmark of §3(2) UWG was not available at the time of the judgment, it is conceivable that nowadays it would no longer be required that the vulnerable group is targeted. However, the case does indicate how target groups are determined and, importantly, that the vulnerable group does not have

[88] See BGH 6 April 2006, I ZR 125/03, GRUR 2006, 776, 777—*Werbung für Klingeltöne*, with reference to BGH 13 June 2002, I ZR 173/01, GRUR 2002, 976—*Kopplungsangebot I* and BGH 2 October 2003, I ZR 150/01, GRUR 2004, 244, 245—*Marktführerschaft*.

[89] See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 173.

[90] H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 126.

[91] BGH 6 April 2006, I ZR 125/03, GRUR 2006, 776, 777—*Werbung für Klingeltöne*.

[92] *Ibid*. See also OLG Frankfurt a.M. 4 August 2005, 6 U 224/04, GRUR 2005, 1064, 1065—*Lion-Sammelaktion*.

[93] BGH 6 April 2006, I ZR 125/03, GRUR 2006, 776, 777—*Werbung für Klingeltöne*.

to be targeted exclusively by the commercial practice in order for the target group benchmark to apply.

### *5.5.3 Vulnerable Groups*

What groups are seen as vulnerable and for what reasons? Looking once more at *Werbung für Klingeltöne*, this case shows that children and teenagers can be regarded as particularly vulnerable towards advertising. The BGH in this case noted that in determining the misleading nature of the advertisement, it is important to take into account that minors typically lack experience as consumers and are not sufficiently able to critically assess the goods or services offered.[94] The BGH also stated that:

> DE [Das Berufungsgericht] hat ohne Rechtsfehler festgestellt, dass Minder-jährige auf Grund ihrer geringen Lebens-erfahrung in der Regel weniger in der Lage sind, die durch die Werbung ange-priesene Leistung in Bezug auf Bedarf, Preiswürdigkeit und finanzielle Folgen zu bewerten, und dass sie auch noch lernen müssen, mit dem Geld hauszuhalten.
> Im Hinblick darauf sind bei einer an Minderjährige gerichteten Werbung höhere Anforderungen an die Trans-parenz zu stellen. Den Kindern und Jugendlichen muss ausreichend deutlich gemacht werden, welche finanziellen Belastungen auf sie zukommen.
> EN [The Court of Appeal] has rightly determined that minors on the basis of their limited life experience are generally less able to evaluate the advertised performance relating to its necessity, its value for money and its financial consequences, and that they also still have to learn to deal with money.
> In this regard, advertising targeted at minors is subject to higher demands as to its transparency. It must be made clear to the children and teenagers what financial consequences are going to burden them.

On this basis, the BGH requires advertising directed at children to be more transparent, and the financial consequences of the offer to be clear. The BGH agreed, therefore, with the decision of the *Berufungsgericht* that the advertising at hand was misleading.

In this context it was important that the total costs of downloading a ringtone was unclear and depended on the skill of accessing the menus quickly. The ringtones could be downloaded by calling the ringtone company, which cost the consumer € 1.86 per minute. This rate per minute was mentioned in the advertisement, but how long it would take to download a ringtone was not made clear. In practice it took 110 s on average, if the consumer worked through the various menus smoothly, ensuring that each ringtone cost at least approximately € 3.40. The element of unknown costs was regarded as particularly relevant, because the consumer was only confronted with the costs at a later time, when receiving the phone bill.

[94] See on the topic of ringtone advertising directed at teenagers also G Zagouras, 'Werbung für Mobilfunkmehrwertdienste und die Ausnutzung der geschäftlichen Unerfahrenheit von Kindern und Jugendlichen nach § UWG §4 Nr. 2 UWG' (2006) *GRUR* 731 and P Mankowski, 'Klingeltöne auf dem wettbewerbsrechtlichen Prüfstand' (2007) *GRUR* 1013.

Also in *Zeitschrift mit Sonnenbrille* (2005) the BGH recognised that children and teenagers, due to their lack of experience, are more vulnerable to be misled.[95] However, the BGH also stressed that advertising directed at teenagers is not unfair *per se*, and that the combined offer of a magazine with free sunglasses did not distort the decision-making of the group at hand. Teenagers are thus seen as less experienced consumers, but not as generally incapable to deal with advertising and sales promotions.[96] As mentioned above, this was different under the case law before the reform of the UWG in 2004, in which children and teenagers were more generally seen as vulnerable towards advertising.[97]

There are also several examples in which particularly credulous groups have been taken as a benchmark. There seems to be room for this in particular if the commercial practice concerned is clearly misleading, e.g., in the case of misleading sweepstakes, diet products with unbelievable results and other miraculous products. It concerns the types of commercial practices of which most people agree they are unfair, but which usually do not mislead the average consumer, even if seen as the actual average of consumers.[98] For example, in *Gewinn-Zertifikat* (2001) the BGH decided that although most addressees of a sweepstake letter would understand that the sender would not just award them a prize, the practice was misleading because it could still mislead less attentive readers.[99]

Scherer, however, as already discussed in Chap. 4 in the context of the vulnerable group benchmark in European law,[100] argues for a narrow interpretation of the vulnerable group benchmark. She states that the protection of vulnerable groups and in particular of credulous groups, because of the strict average consumer benchmark, is limited to cases in which the vulnerable group is in fact *unable* to make

[95] BGH 22 September 2005, I ZR 83/03, GRUR 2006, 161, 162—*Zeitschrift mit Sonnenbrille*. In this case the combined offer of a magazine with sunglasses for teenagers was not found misleading, but the BGH does argue that teenagers are generally more vulnerable to be misled. See also BGH 17 July 2008, I ZR 160/05, GRUR 2009, 71—*Sammelaktion für Schoko-Riegel*. See on advertising directed to children also H Köhler, 'Werbung gegenüber Kindern' (2008) *Wettbewerb in Recht und Praxis* 700.

[96] See also W Gloy, M Loschelder and W Erdmann (eds), *Wettbewerbsrecht* (Munich, Beck, 2010) §59 No. 80.

[97] See K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 866–867 and, for example, LG München 30 June 1983, 6 U 3450/82, WRP 1984, 46—*Sammelschnipsel*, BGH 21 February 1975, I ZR 46/74, WRP 1976, 100, 101—*Gewinnspiel* and OLG Hamburg 10 April 2003, 6 U 6/03, WRP 2003, 1003, 1006—*Klingelton*.

[98] See also W Gloy, M Loschelder and W Erdmann (eds), *Wettbewerbsrecht* (Munich, Beck, 2010) §59 No. 80.

[99] BGH 26 April 2001, I ZR 314/98, GRUR 2001, 1178—*Gewinn-Zertifikat*. Like in many misleading sweepstake practices, the main goal of the trader was to make the addressees order products. See also OLG Düsseldorf 9 September 2008, I-20 U 123/08, WRP 2009, 98—*Macht über die Karten*, in which the advertising of a fortune teller was not assessed from the point of view of the average consumer, but from the point of view of a credulous consumer.

[100] See paragraph 4.4 of this book.

an informed decision. She thus argues that *being* credulous is not enough.[101] She argues that as a consequence, the participants of organised excursions that include sales presentations (so-called *Kaffeefahrten*), that were seen as particularly credulous under the old case law, are no longer entitled to extra protection. According to Scherer, the same applies to consumers who believe in products related to the paranormal, unless their superstition is related to an actual personal deficit, such as a mental illness.[102] It remains to be seen how the BGH will deal with these cases.

## 5.6 Conclusion

Under the old benchmark of the *flüchtigen und unkritischen Durchschnittsverbraucher* (casually observing and uncritical average consumer), consumers were expected to only casually observe advertising, and were assumed to attach meaning to advertising slogans rather easily. The old benchmark was part of a generally strict unfair competition law, in which a commercial practice could be determined misleading as soon as a 'not inconsiderable' section of the (casually observing and uncritical) public was believed to have been misled. Moreover, the public was assumed to be particularly vulnerable regarding environmental claims and health claims and there was also special attention to some vulnerable groups, such as children and teenagers.

As a consequence of the CJEUs case law, in 1999 the BGH adopted the benchmark of the average consumer in the *Orient-Teppichmuster* case. The BGH made clear, however, that the level of attention of the average consumer is expected to depend on the situation at hand (the so-called *situationsadäquate Aufmerksamkeit*). This means that the level of attention (and in practice, connected to this, also the critical attitude) is expected to be higher if the advertising concerns a product of higher value. Advertising for products of low value is expected to be observed only casually, and the same applies to advertising that does not contain a specific product offer.

In practice this means that the BGH, in comparison to the earlier case law, has higher expectations of the behaviour of the public and is less strict in its assessment of potentially unfair commercial practices. This also means that the level of protection under the UWG for consumers is now lower than under the old case law of the BGH applying the benchmark of the *flüchtigen Durchschnittsverbraucher*.[103] The average consumer is expected to read beyond potentially misleading advertis-

[101] K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 860–861 and 878–881. See in relation to the European context also paragraph 4.4 of this book.

[102] K Fezer, *Lauterkeitsrecht: UWG (Kommentar zum Gesetz gegen den unlauteren Wettbewerb)* (Munich, Beck, 2010) 880.

[103] See also H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 126.

ing slogans and is expected to assess advertising claims somewhat more critically. This also means that, although it seems likely that environment-related and health-related claims are still assessed more strictly than other advertising, the particularly strict old case law in this field no longer seems to apply.

Despite these changes, the intention in the application of the benchmark of the *situationsadäquate Durchschnittsverbraucher* still appears to be to reflect actual behaviour rather than how the court thinks consumers *could* or *should* behave. In other words, the average consumer benchmark is used as a tool to make a prognosis of the behaviour of the consumer,[104] rather than setting a model of a consumer who is particularly attentive and critical.

Due to the emphasis in the case law of the BGH that the average consumer under circumstances is also expected to observe superficially, it is doubtful whether the benchmark of the *situationsadäquate Durchschnittsverbraucher* is in line with European law. Compared to the CJEUs case law in the field of trademarks this does seem to be the case[105]; in these cases also the CJEU emphasises that the average consumer is not always attentive. Yet compared to the misleading commercial communication cases in the context of free movement and consumer protection, the BGHs expectations of the average consumer still appear be too low.[106] This is also suggested by the remark of the European Commission in preparation to the Unfair Commercial Practices Directive, i.e., that the BGHs interpretation of the average consumer in *Orient-Teppichmuster* does not comply with the CJEUs case law on the average consumer.

Similarly as under the old case law, vulnerable groups can still be protected through application of the target group or vulnerable group benchmark. It remains to be seen what groups are regarded as vulnerable and to what extent they are seen as vulnerable. Children and teenagers are still seen as vulnerable groups due to their inexperience as consumers. There also have been examples of other groups being identified as vulnerable, but there is too little case law so far to draw any conclusions on this point.

Finally, despite the adoption of the average consumer benchmark there seems to be room for additional protection if the commercial practice contains objectively false information. The *Scanner-Werbung* case illustrates that the BGH under circumstances lets the principle of prohibition of fraudulent advertising prevail over the formal application of the consumer benchmarks. Again, this may not be in line with European law, as has also been indicated by the European Commission itself and by the recent judgment of the CJEU in *Trento Sviluppo*.

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[104] See also H Omsels, 'Kritische Anmerkungen zur Bestimmung der Irreführungsgefahr' (2005) *GRUR* 555.

[105] See, for example, H Helm, 'Das Verbraucherleitbild des Europäischen Gerichtshofes im Vergleich', in E Keller et al (eds), *Festschrift für Winfried Tilmann* (Köln, Heymann, 2003) 145 and H Köhler and J Bornkamm (eds), *Gesetz gegen den unlauteren Wettbewerb* (Munich, Beck, 2012) 127.

[106] See in this sense also Micklitz in Säcker & Rixecker 2012, Vor §§13, 14, 4(b), No. 11.

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# Chapter 6
# English Law

**Abstract** Unlike Germany, English law never had a general statute governing unfair commercial practices. There were several instruments in place that regulated, in one way or another, unfair commercial practices. In the context of these instruments, English courts applied the benchmark of the ordinary person, the ordinary shopper, or similar benchmarks. Although the consumer was not expected to be particularly gullible and to treat advertising somewhat critically, the courts generally did not have particularly high expectations of the consumer. The Consumer Protection from Unfair Trading Regulations 2008 implemented the Unfair Commercial Practices Directive. The first cases confirm that the English courts still do not have particularly high expectations of the average consumer. Fraudulent practices can be challenged, also if it is not clear whether the average consumer (be it the actual average consumer or the average consumer as interpreted by the CJEU) is affected.

**Keywords** English law · Average consumer · Passing-off · Trade Descriptions Act · Control from Misleading Advertising Regulations 1988 · Consumer Protection from Unfair Trading Regulations 2008 · Office of fair trading

## 6.1 Introduction

This chapter investigates the consumer benchmarks applied in English law. In contrast to German law, which had (and to a certain extent still has) a reputation of having low expectations of the consumer in order to secure a high level of consumer protection, English law had a reputation for having more of a *laissez-faire* approach towards potentially unfair commercial practices.[1] Also in this chapter, the

[1] See e.g. G Schricker, 'Die Bekämpfung der irreführenden Werbung in dem Mitgliedstaaten der EG' (1990) *GRUR Int.* 118–119, T Lettl, 'Der lauterkreisrechtliche Schutz vor irreführender Werbung in Europa' (2004) *GRUR Int.* 90, G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 5–6 and C van Dam, 'De gemiddelde euroconsument – een pluriform fenomeen' (2009) *Tijdschrift voor Europees en economisch recht* 10. See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 136.



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question is addressed which benchmarks were, and currently are, applied in order to determine whether a commercial practice is found unfair, and what behaviour is expected of the consumer in this context.

Unlike, for example, German law, English law does not have a general act governing unfair competition.[2] Nor did English law, prior to the implementation of the Unfair Commercial Practices Directive, have a general clause prohibiting unfair commercial practices. However, that does not mean that consumers and competitors were left unprotected from fraudulent practices. Different acts, such as the Trade Descriptions Act 1968 and the Control of Misleading Advertisements Regulations 1988 were in place to protect consumers. Moreover, competitors could use economic torts, in particular the tort of passing-off, to challenge unfair competition in the form of deception of consumers. Apart from the Consumer Protection from Unfair Trading Regulations 2008, which implement the Unfair Commercial Practices Directive, these are the instruments that are investigated in this chapter. They are relevant in order to identify which benchmarks were applied before the implementation of the Unfair Commercial Practices Directive, and, as is shown in more detail below, the case law on the consumer benchmarks applied on the basis of those instruments remains relevant for the application of the consumer benchmarks according to the Consumer Protection from Unfair Trading Regulations 2008.

As different instruments are relevant in the discussion on the consumer benchmarks and since in English law there is no clear demarcation between an 'old' and a 'new' benchmark as is the case in German law, this chapter is structured differently from the previous chapter on German law. Rather than discussing the old and new benchmarks and specifying the different categories related to the benchmarks, this chapter is structured according to the different relevant instruments. Each of these instruments is introduced, followed by a discussion on the consumer benchmarks applied under those instruments. The discussion commences with the economic tort of passing-off (paragraph 6.2) prior to progressing to the more consumer oriented legislation, i.e., the Trade Description Act 1968 (paragraph 6.3), the Control of Misleading Advertisements Regulations 1988 (paragraph 6.4) and, finally, the Consumer Protection from Unfair Trading Regulations 2008 (paragraph 6.5).[3] The cases discussed have primarily been selected on the basis of the reports on the implementation of the Unfair Commercial Practices Directive, as well as on the handbooks on the relevant instruments.[4]

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[2] J. Davis, 'Unfair competition law in the United Kingdom', in M Hilty and F Henning-Bodewig (eds), *Law against unfair competition: towards a new paradigm in Europe?* (Berlin, Springer, 2007) 183, S Weatherill, 'National report: United Kingdom', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003) 1 and G Howells and S Weatherill, *Consumer protection law* (Aldershot, Ashgate, 2005) 429–430.

[3] To some extent also the tort of defamation can also be seen as relevant to the reference consumer applied under English law. The benchmark applied in that context is similar to that related to the tort of passing-off. Defamation is dealt with very briefly in footnote 20 below.

[4] See the references below.

## 6.2 The Tort of Passing-off

As mentioned above, there was (nor is) a general act on unfair competition under English law.[5] Nor is there a general tort in place to challenge unfair competition. However, the economic tort of *passing-off* addresses a specific form of unfair competition, as it grants businesses being disadvantaged by their competitors the right to bring an action due to misrepresentations aimed at their customers. Although the tort concerns deception of customers, only competitors who have been harmed can initiate proceedings.[6]

In essence the tort of passing-off offers an action to businesses to challenge a competitor who is making customers believe that the products he or she is selling are in fact those of another business. So if a customer is made to believe by seller A that he or she is buying a product from the reputable business B, while he or she is in fact buying a product from A, B can challenge this practice in court on the grounds of the tort of passing-off. While this is the classic case of passing-off, the tort has been extended over the years to also cover other types of product confusion that are more-or-less similar to this scenario.[7] For example, producers of *advocaat* (a traditional Dutch eggnog liqueur) successfully challenged producers of another type of eggnog liquor called 'egg-flip', selling their product under the name 'English Advocaat'. Although this practice could not confuse consumers regarding the producer, it did disadvantage producers of the original *advocaat*, because consumers were thought to believe that they were in fact buying genuine *advocaat* rather than egg-flip.[8] Generally speaking, the tort of passing-off was an important action in cases of brand confusion, at least until the implementation of the European instruments on trademark protection.[9]

In all these cases, it is required that the representation must be likely to deceive the claimant's customers.[10] Although the tort of passing-off cannot be regarded as part of consumer protection law in a strict sense, the fact that it deals with confusion of customers makes it interesting to examine when investigating the consumer benchmarks applied in English law. Moreover, the consumer benchmark as applied in the context of the tort of passing-off was discussed in the preparation of the implementation of the Unfair Commercial Practices Directive, making it relevant in relation to current law (see paragraph 6.5 below).

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[5] See paragraph 5.2 of this book.

[6] Claimants can request an injunction or sue for damages, see J Murphy, *Street on torts* (Oxford University Press, 2007) 348–349.

[7] T Weir, *An introduction to tort law* (Oxford University Press, 2006) 196 and see J Murphy, *Street on torts* (Oxford University Press, 2007) 339. See on the development of the tort of passing off also C Morcom, A Roughton & S Malynicz, *The modern law of trade marks* (London, LexisNexis, 2008) 363–365.

[8] *Erven Warnink BV v Townend* [1979] 2 All ER 927.

[9] T Weir, *An introduction to tort law* (Oxford University Press, 2006) 197.

[10] J Murphy, *Street on torts* (Oxford University Press, 2007) 344.

In order to determine whether customers are being deceived, the judge must establish whether a substantial number of the members of the public, i.e., an above *de minimis* level, would be misled.[11] In this context it is necessary to identify the likely purchasers of the product or service.[12]

Looking at the case law in more detail, one of the most interesting cases regarding the consumer benchmark applied in the context of the tort of passing-off is *Reckitt & Coleman Products Ltd v Borden Inc* (1990).[13] This case before the House of Lords dealt with two lemon juice manufacturers, selling their product in similar plastic squeeze containers in the shape and size of a lemon. The plaintiff in this case, who was market leader (having a market share of 75 %) and had been using lemon shaped containers for many years, argued that the containers of its competitor were causing confusion under consumers regarding the brand that they were in fact buying. Upon careful observation, consumers would be able to see the differences between the containers and could therefore not be confused. The Chancery Division of the High Court had argued that an 'ordinary average shopper' should be the benchmark to determine whether or not the similarity of the containers deceived the public:[14]

> [T]he question is not whether the judge himself would be deceived by the defendants' get up; the question is whether, in the light of all the admissible evidence, the judge is persuaded that an ordinary average shopper, shopping in the places in which the article is available for purchase, and under the usual conditions under which such a purchase is likely to be made, is likely to be deceived. I put the matter in this way because both sides are really agreed that under today's shopping conditions, under which the humblest grocer's shop takes upon itself as much of the attributes of a supermarket as it can possibly muster—virtually certainly including self-service—one is typically dealing with a shopper in a supermarket, in something of a hurry, accustomed to selecting between various brands when there is such a choice, but increasingly having to choose in relation to a wide range of items between the supermarket's 'own brand' and one other brand, and no more.

This judgment was contested by the defendant before the Court of Appeal and the House of Lords. The defendant argued that a careful shopper would easily reach the conclusion that the containers looked different, and that, 'taken as a whole, a side-by-side visual comparison would clearly dispel any possibility of confusion between the two products.'[15]

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[11] See *Neutrogena Corporation v Golden Ltd* [1996] RPC 473 and *Arsenal Football Club plc v Reed* [2001] RPC 922. See also J Murphy, *Street on torts* (Oxford University Press, 2007) 345 C Morcom, A Roughton & S Malynicz, *The modern law of trade marks* (London, LexisNexis, 2008) 381.

[12] See *Bollinger v Costa Brava Wine Co. Ltd.* [1960] Ch. 262. See also J Murphy, *Street on torts* (Oxford University Press, 2007) 345.

[13] *Reckitt & Coleman Products Ltd v Borden Inc and others* [1990] 1 WLR 491. See for the judgment of the Chancery Division of the High Court: *Reckitt & Coleman Products Ltd v Borden Inc and others* [1987] F.S.R 505, 512, and for the judgment of the Court of Appeal: *Reckitt & Coleman Products Ltd v Borden Inc and others* [1988] F.S.R. 601.

[14] *Reckitt & Coleman Products Ltd v Borden Inc and others* [1987] F.S.R. 505, 512. See also C Morcom, A Roughton & S Malynicz, *The modern law of trade marks* (London, LexisNexis, 2008) 378–379.

[15] *Reckitt & Coleman Products Ltd v Borden Inc and others* [1990] 1 WLR 491, 503.

However, Lord Goff of Chievely stressed that although upon careful consideration consumers would be able to see the difference between the products, this careful observation should not be the point of departure for deciding whether consumers are confused:[16]

> [O]f course, statements such as this are made in the context of the particular facts under consideration. They cannot be treated as establishing a principle of law that there must always be assumed a literate and careful customer. The essence of the action for passing off is a deceit practiced upon the public and it can be no answer, in a case where it is demonstrable that the public has been or will be deceived, that they would not have been if they had been more careful, more literate or more perspicacious. Customers have to be taken as they are found.

Hence, the House of Lords dismissed the appeal, holding that the defendant had not taken adequate steps to differentiate its product container from that of its competitor in order to ensure that consumers would not be deceived.

The reasoning of the House of Lords bears close resemblance with the CJEUs case law applying the average consumer benchmark in trademark cases. In several of those cases, the CJEU emphasises that the average consumer is rarely expected to have the chance to make a direct comparison between different trademarks and must place his or her trust in the imperfect picture of the trademarks that he or she has kept in his mind.[17] At the same time, the reasoning does not seem to be in accordance with the CJEUs labelling doctrine and the other stricter case law of the CJEU in the field of misleading commercial communication. These issues are dealt with in more detail at the end of the next paragraph, when dealing with the Trade Descriptions Act 1968.

In the earlier passing-off case *Consorzio del Prosciutto di Parma v Marks & Spencer plc et al* (1960), the Court of Appeal argued that in order to grant a claim under the tort of passing-off, ordinary, sensible members of the public or a section of them must be confused.[18] The fact that it concerns ordinary members of the public again seems to imply that a particularly high level of knowledge is not expected. This also follows from *Bollinger v Costa Brava Wine* (1960), where Justice Danckwerts argued that there is 'a considerable body of evidence that persons whose life or education has not taught them much about the nature and production of wine, but who from time to time want to purchase champagne, as the wine with the great reputation, are likely to be misled by the description 'Spanish Champagne'.'[19]

Hence, both as to the level of attention, as well as to the level of knowledge the courts do not seem to have particularly high expectations of the consumer. Nevertheless, it is similarly clear that the courts take the ordinary consumer as a benchmark rather than a particularly weak consumer.[20]

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[16] *Reckitt & Coleman Products Ltd v Borden Inc and others* [1990] 1 WLR 491, 508.

[17] See CJEU 22 June 1999, Case C-342/97, *ECR* 1999, p. I-3819 (*Lloyd Schuhfabrik*) and paragraph 3.3 of this book.

[18] Consorzio del Prosciutto di Parma v Marks & Spencer plc et al [1991] RPC 351.

[19] *Bollinger v Costa Brava Wine Co. Ltd. (No.2)* [1961] 1 W.L.R. 277. See also *Consorzio del Prosciutto di Parma v Marks & Spencer plc et al* [1991] RPC 351.

[20] A similar standard seems to be applied in the tort of defamation. In short, the tort of defamation deals with damage of reputation. The question that arises in this context is not so much whether

## 6.3 Trade Descriptions Act 1968

Until the implementation of the Unfair Commercial Practices Directive, the Trade Descriptions Act 1968 was the centrepiece of English trade practices law.[21] This Act could give rise to criminal proceedings against those who gave false or misleading descriptions of products or services. The main provisions of the Act were divided across two main sections, namely section 1 (false and misleading descriptions of goods) and section 2 (false and misleading descriptions of services). In the past, the Trade Descriptions Act also covered false and misleading price indications, but in 1987 this area was moved to the Consumer Protection Act.[22] As a consequence of the implementation of the Unfair Commercial Practices Directive, the Trade Descriptions Act and the Consumer Protection Act have now largely been repealed.[23] For the consumer benchmark, the case law applying the Trade Descriptions Act remains valuable. Not only because it provides an idea of the consumer benchmark as it was applied prior to the introduction of the average consumer notion, but also because it is seen as being in line with the CJEUs average consumer benchmark.[24] The case law on the consumer benchmark in the context of the Trade Descriptions Act is, therefore, likely to be continued in the context of the implementation of the Unfair Commercial Practices Directive.

The Trade Descriptions Act itself does not elaborate upon the benchmark to be applied,[25] but several cases applying the Act do address the issue. The 1972 *Doble*

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the public is deceived or confused—as is the case with passing-off, but rather whether the public takes the statements seriously. *De Beers Abrasive Products Ltd v International General Electric Co* deals with this problem and emphasises that the question whether a claim is taken seriously is to be decided from the point of view of the reasonable man. This reasonable man is used to a certain degree of exaggeration ('puffery') and therefore takes advertising 'with a large pinch of salt'. But the case emphasises that there are also limits. See *De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd* [1975] F.S.R. 323, 329–330. See also A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 344 and I Ramsay, *Advertising, culture and the law* (London, Sweet & Maxwell, 1996) 15.

[21] G Howells and S Weatherill, *Consumer protection law* (Aldershot, Ashgate, 2005) 395.

[22] G Howells and S Weatherill, *Consumer protection law* (Aldershot, Ashgate, 2005) 397. Lacking any relevant published cases regarding the consumer benchmark applied, the Consumer Protection Act 1987 is not discussed in more detail.

[23] See the Consumer Protection from Unfair Trading Practices Regulation 2008,s Regulation 30.1.

[24] See C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 30, where it is argued that, 'overall, the approach adopted by domestic courts is largely compatible with the concept of the 'average consumer' in European law.' See also R Bragg, 'Trade descriptions after the Unfair Commercial Practices Directive', in C Twigg-Flesner, D Parry and G Howells (eds), *The yearbook of consumer law 2008* (Aldershot, Ashgate, 2007) 341, who argued that the case law under the Trade Descriptions Act is in line with the case law of the CJEU, and I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 174, noting that '[t]he concept of the average consumer is not unfamiliar to UK courts faced with determining whether a misrepresentation is actionable at common law and establishing the standard of deception under the Trade Descriptions Act 1968.'

[25] See also G Howells and S Weatherill, *Consumer protection law* (Aldershot, Ashgate, 2005) 406, who note that 'the statute makes no attempt to elaborate any sophisticated notion of the level of consumer gullibility in respect of which it seeks to provide protection.'

*v David Greig Ltd* case is of particular interest in this regard.[26] The case concerns the interpretation of section 11 Trade Descriptions Act, which held the prohibition of misleading pricing. The defendant, the owner of a grocery store, offered bottles in a way in which it was unclear whether the sale price included the refund of the empty bottle. In this case, Justice Forbes took into account the interests of a potentially harmed minority, even though the majority of consumers might not be misled:

> If it is reasonably possible that some customers might interpret the label as an indication of that kind, it seems to me that an offence is committed, even though many more customers might in fact take the opposite view. In other words the Act requires a shopkeeper, and this seems to me to be important, to take pains to resolve possible ambiguities, and if they are not adequately resolved an offence is committed.

This approach clearly provides more protection than the average consumer benchmark, even if this benchmark would reflect actual behaviour of the average consumer, rather than the sometimes high expectations of the average consumer's behaviour in the case law of the CJEU.[27]

Justice Forbes' view in relation to the average consumer is discussed in the report of Twigg-Flesner *et al* for the UK Department of Trade and Industry (DTI) in preparation for the implementation of the Unfair Commercial Practices Directive:[28]

> [The view of Justice Forbes] seems to be a position which is very favourable to consumers, and it certainly goes wider than the notion of an 'average consumer'. However, if this is compared not only with the general 'average consumer' test in the UCPD, but also with the modification for 'vulnerable consumers' in Art. 5(3) UCPD, then the approach suggested by Forbes J (in the context of the specific provision of the Trade Descriptions Act 1968) would not be that far removed from the test applied in the UCPD.

So although the benchmark applied by Justice Forbes offers more protection than the European average consumer benchmark, it is still regarded as being compatible with European law by way of the vulnerable group benchmark. However, as has been shown in the discussion on the average consumer benchmark and the vulnerable group benchmark in the context of the Unfair Commercial Practices Directive, it is questionable whether the vulnerable group benchmark provides such extensive possibilities to protect minorities.[29]

Aside from this, it must be taken into account that later case law applying the Trade Descriptions Act seems to be less focused on the protection of minorities,

[26] *Doble v David Greig Ltd* [1972] 1 W.L.R. 703.

[27] See C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 28–29.

[28] C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 29.

[29] See paragraph 2.7 of this book.

applying the test of the 'reasonable members of the public',[30] 'ordinary person',[31] 'ordinary shoppers',[32] 'reasonable person'[33] or 'average person'.[34]

Still, in *Ashurst v Hayes and Benross Trading* (1974) it was explicitly stated that clearly false trade descriptions are not allowed, even if the average person would not be misled. It is emphasised that 'a defendant cannot escape responsibility merely because it is likely that the average person would not be misled by the false description he has applied to the goods.'[35]

What exactly is expected of this 'ordinary', 'reasonable' or 'average' consumer? An important case in this respect is *Burleigh v Van den Berghs and Jurgens* (1987).[36] The defendant in the case marketed imitation ice cream, which from its packaging could not easily be distinguished from genuine ice cream. Judge Gower applied as the benchmark for the application of the Trade Descriptions Act the 'average person' and emphasised that this standard does not reflect a consumer with less than average capabilities:

> It is important that we should remember that we are dealing with the average person. It is not enough that we should be sure that an unusually careless person might be misled by the packaging. It is not enough that we should be sure that a person who is dyslexic, illiterate, short-sighted or of less than average intelligence should be misled.

This seems to move away from Justice Forbes' minority protection. Nonetheless, while this may stress that it is not sufficient if a small section of the consumer population is deceived, the application of this average person benchmark in the same case suggests that it does not pose a very high standard. The Court still argued that the ice cream packaging was misleading:

> [W]e are satisfied that this packaging is likely to deceive the ordinary average customer for the very simple reason that the general appearance of the packaging and the colouring of the packaging is that associated in the mind of the shopping public with cream […]. [T]he average member of the public is not likely to read what is printed on the packaging with

[30] *R v AF Pears Ltd* [1982] unreported. See C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 29.

[31] *Clive Sweeting v Northern Upholstery Ltd* [1982] TR L 5; [1982] 79 LSG 1258. Looking at *Concentrated Foods Ltd v Champ* [1944] K.B. 342, this was also the benchmark applied in another instrument dealing with deception of consumers, the 1938 Food and Drugs Act.

[32] *Dixons Ltd v Barnett* [1998] 153 JP 268. See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2007) 299.

[33] *Clive Sweeting v Northern Upholstery Ltd* [1982] TR L 5; [1982] 79 LSG 1258.

[34] *Clive Sweeting v Northern Upholstery Ltd* [1982] TR L 5; [1982] 79 LSG 1258.

[35] *Ashurst v Hayes and Benross Trading Co Ltd* [1974] unreported. See also C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 28. Similar to the German *Scanner-Werbung* case, it is questionable whether this argument would currently hold, taking into account the CJEUs judgment in *Trento Sviluppo.*

[36] *Burleigh v Van den Berghs and Jurgens Ltd* [1987] BTLC 337. See also C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 29.

> sufficient care and attention to realise that what is being offered for sale is imitation cream and not the real product.

Hence, the average customer is assumed neither to be very attentive nor critical. He or she is assumed not to read the packaging in detail and, as a consequence, he or she will not realise that he is buying imitation rather than genuine ice cream. The average customer rather bases his purchasing decision on a quick and general observation of the product.[37] This is in line with the 'ordinary average shopper' benchmark or 'ordinary member of the public' benchmark as applied in the context of passing-off and with the application of the average consumer benchmark by the CJEU in trademark law. However, it would appear at the same time to be in contrast with the application of the average consumer benchmark in the context of the CJEUs labelling doctrine. As discussed in Chaps. 3 and 4 of this book, the European average consumer is generally assumed to read product labels and to consider the information available.

The *Lewin v Purity Soft Drinks* case (2005) seems to move more into the direction of the CJEUs labelling doctrine.[38] The case concerned two types of fruit drinks marketed by the same manufacturer. The centre of the labels of the drinks showed a picture of the fruit (blackcurrant and cranberry respectively). Under these pictures the words 'blackcurrant juice' and 'cranberry juice' were displayed, with the word 'burst' underneath. In a box on the side of the bottle the typical values per 100 ml were displayed, accompanied by the words 'a refreshing juice-based drink'. From the values it was clear that the drinks contained 13 and 25% fruit, respectively. The claimant argued that the marketing of the drinks as 'blackcurrant juice' and 'cranberry juice' was misleading in the sense of the Trade Descriptions Act, as consumers would be made to believe that the drinks would contain 100% fruit juice. The Magistrates Court dismissed the claim:[39]

> [The] descriptions [i.e., 'Blackcurrant Juice' and 'Cranberry Juice'] were not false because a reasonable consumer faced with these products would expect to read the label as a whole, including the ingredients list, and would be familiar with the idea that the ingredients list was likely to appear on the label.

This line of argumentation was upheld in appeal by the Divisional Court. The Divisional Court emphasised that the justices:[40]

> […] sitting as a jury, were entitled to approach the issue of falsity by having regard to what, in their experience, is the expectation of consumers that the label should be read as a whole.

Justices Field and Tuckey argued that this is no different from the 'ordinary shopper' test as applied by Lord Justice Bingham in *Dixons v Barnett*.[41] However, in its application the benchmark seems stricter than the earlier case law, particularly

[37] See also C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 28.

[38] *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81.

[39] *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81, p. 326.

[40] *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81, p. 327.

[41] *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81, p. 329.

when compared to *Burleigh v Van den Berghs and Jurgens*. In this respect the case may well be influenced by the CJEUs case law establishing the labelling doctrine. It is interesting to note in this context that the wording of the Divisional Court is somewhat startling; it refers to the *experience* of the justices, but at the same time to how consumers *should* behave. Is the statement meant to reflect how consumers generally behave or how consumers generally *should* behave? The latter seems to be the case, but what is then the meaning of the experience of the justices?

Leaving the labelling doctrine to one side, another interesting case for the benchmark applied under English law in the context of the Trade Descriptions Act is *Southwark LBC v Time Computer Systems Ltd*.[42] This case from 1997 deals with computer advertising and shows that the consumer is expected to be rather attentive if he or she is dealing with specific information regarding higher value products.

The defendant advertised its computers in a twenty-page brochure in a computer magazine; the brochure only contained advertisements for the defendant. Mr Osborne, a film lighting technician who was interested in buying a new computer, purchased the computer magazine in order to help him make a purchasing decision. In the end, Mr Osborne bought one of the defendant's computer systems, attracted by its low price. The advertisements of the individual computer systems contained pictures of software boxes. However, although the computer system purchased by Mr Osborne included pre-loaded software, it was not accompanied by the back-up discs, boxes and manuals. This was regular practice of the defendant in order to save money: the defendant purchased a license to pre-load the software on a large number of computers rather than offering each individual customer the entire package. Furthermore, this practice was explained in a special section in the advertising brochure under the heading 'How to order', which referred under the section 'Pre-loaded software' to small print on the same page, explaining that 'All software applications are pre-loaded. Pack shots are shown for illustration only. Printed manuals and back-up discs are available as options.'

The advertising with the image of the software packages was claimed to be a misleading trade description, making customers believe that they would receive all software in its regular form. An essential question in the procedure was whether the customer was expected to read the entire brochure and realise on the basis thereof that the PCs had pre-loaded software instead of the full software packages.

The Magistrates Court had argued that customers in this type of situation are expected to pay attention to all information supplied. Considering the type of product and its high value, Lord Justice Henry of the High Court of Justice agrees with this approach:

> [S]he rightly recognised that the question was not whether the individual purchaser was misled, but whether the reasonable customer might have been likely to be misled. She dealt with the reasonable customer in the context of someone buying a computer, and sensibly approaching the purchase of that computer through buying a specialist magazine to assist him in the choice and, in those circumstances, acquainting himself with the brochure. She

[42] Southwark LBC v Time Computer Systems Ltd [1997] WL 1104489.

> concluded that, considering the nature of the advertisement within the brochure and the nature of the magazine in which it was contained, the pictorial representation did not constitute a false trade description. […]
> It seems to me that the Magistrate was quite entitled to take into account that this was a purchase of a sophisticated and expensive item of equipment. It was a purchase through a brochure incorporated into a serious magazine produced solely or largely for those intending to purchase a computer and the question of law realistically is whether she was entitled to look at the reasonable customer in the round or whether she had to, as a matter of law, impose blinkers on what she considered would have been a reasonable customer's approach.

Hence, the reasonable consumer's level of attention is expected to be higher when it concerns high value products and the advertising is placed in a specialised magazine.

In conclusion, it can be said that the consumer benchmark in the context of the Trade Descriptions Act 1968 is an 'ordinary' or 'reasonable' person, who is not generally believed to be especially attentive, but who is at the same time not misled by mere exaggerations. Looking at the different relevant cases, it must be concluded that it is not always clear what level of 'being informed and attentive' and what level of 'critical attitude' is expected of the consumer, as this seems to differ from case to case. Especially *Lewin v Purity Soft Drinks* is stricter than the previous case law. Is this just a coincidence or is the case law moving more towards the CJEU labelling doctrine? If the latter is the case, is this development limited to the labelling doctrine or does it point towards generally higher expectations of the behaviour of the consumer? According to Bragg, the reference consumer applied in the context of the Trade Descriptions Act is identical to that of the CJEUs average consumer.[43] While this could be true, the ambiguities in the case law—both English and European—make this difficult to confirm.[44]

## 6.4 Control of Misleading Advertisements Regulations 1988

It seems that a for consumers more lenient benchmark than that of *Lewin v Purity Soft Drinks* and *Southwark LBC v Time Computer Systems Ltd* was being applied in the context of the Control of Misleading Advertisements Regulations 1988

[43] R Bragg, 'Trade descriptions after the Unfair Commercial Practices Directive', in C Twigg-Flesner, D Parry and G Howells (eds), *The yearbook of consumer law 2008* (Aldershot, Ashgate, 2007) 341. See similarly G Howells, 'The role of the acquis communautaire in consumer law for a European contract law code—a comment', in S Grundmann and M Schauer (eds), *The architecture of European codes and contract law* (Alphen aan de Rijn, Kluwer Law International, 2006) 272.

[44] As discussed in Chaps. 3 and 4 of this book, the CJEUs case law is also not always showing a clear image of the consumer benchmark, e.g. taking into account the contrast between the relatively low expectations of the consumer in trademark law and the relatively high expectations of the consumer in the context of the labelling doctrine.

(CMAR).[45] The CMAR was an almost literal implementation of the Directive on Misleading Advertising (84/450/EEC). The CMAR was repealed in 2008 due to the implementation of the Unfair Commercial Practices Directive.[46] Due to the strong role of self-regulation in the field of advertising,[47] the CMAR was not applied widely in court, but rather functioned as a backup, supporting the existing rules on self-regulation.[48] Under the regulations, the Office of Fair Trading (OFT) could, after receiving a complaint, file for a court injunction.[49]

Similarly to the Misleading Advertising Directive, the CMAR and its case law mention the advertisement's impact on 'the persons addressed', or use similar wording. An elaboration of what is expected of the public was given by the Chancery Division in 1988 in *Director General of Fair Trading v Tobyward Ltd*.[50] The case deals with advertising by the defendant for its slimming product 'Speedslim'. After the Advertising Standards Authority (the organisation heading self-regulation within the British advertising industry) complained, the Director General of Fair Trading (the head of the Office of Fair Trading) filed for an injunction.

The High Court found the advertising for Speedslim misleading on several points. Amongst others, the advertising was found to contain false and unrealistic product claims, such as claiming '100 % guarantee of success' and that the product was a 'scientific breakthrough'. With help of an expert's opinion, these claims were found to be false. Of particular interest for the discussion here is that Justice Hoffman of the High Court gave a general view on what was required under the CMAR in order for an advertisement to be misleading:[51]

> 'Misleading,' as I have said, is defined in the regulations as involving two elements: first that the advertisement deceives or is likely to deceive the persons to whom it is addressed, and secondly that it is likely to affect their economic behaviour. In my judgment in this context there is little difficulty about applying the concept of deception. An advertisement must be likely to deceive the persons to whom it is addressed if it makes false claims on behalf of the product. It is true that many people read advertisements with a certain degree

[45] S.I. 1988/915. See on the CMAR also S Weatherill, 'National report: United Kingdom', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003) 6–9.

[46] See Sect. 81, Schedule 2, Consumer Protection from Unfair Trading Regulations 2008.

[47] In the UK, unfair advertising has traditionally mostly been dealt with through self-regulation, administered by the independent Advertising Standards Authority (ASA). See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 276.

[48] See on the relationship between self-control and the CMAR also *Director General of Fair Trading v Tobyward Ltd* [1989] WLR 517, 522. See also G Woodroffe and R Lowe, *Consumer law and practice* (London, Sweet & Maxwell, 2007, 2010) 317 and G Howells and S Weatherill, *Consumer protection law* (Aldershot, Ashgate, 2005) 426. In addition, CMAR had little extra to offer because misleading advertising was already partly covered by the Trade Descriptions Act.

[49] CMAR, Regulation 5. The Office of Fair Trading is the authority responsible for enforcement of several instruments regarding competition and consumer protection law. See on the OFT also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2007) 453–513.

[50] *Director General of Fair Trading v Tobyward Ltd* [1989] WLR 517.

[51] *Director General of Fair Trading v Tobyward Ltd* [1989] WLR 517, 521.

> of scepticism. For the purposes of applying the regulations, however, it must be assumed that there may be people who will believe what the advertisers tell them, and in those circumstances the making of a false claim is likely to deceive. Having regard to the evidence of Professor Bender, which at present is the only scientific evidence before the court, there is in my judgment a strong prima facie case that these advertisements were likely to deceive in each of the six respects of which complaint is made.

Like the *Doble v Graig Ltd*-case dealing with the Trade Descriptions Act 1968 (discussed above), the emphasis in this case seems to be on minority protection rather than protection of the average member of the public. While this statement is made in a case regarding slimming products, which were recognised by the CMAR to be a particular sensitive area of advertising, it is aimed at the CMAR in general. At the same time it must be noted that, lacking other relevant cases applying the CMAR, it is difficult to draw solid conclusions based on this case for the CMAR in general.

## 6.5 Consumer Protection from Unfair Trading Regulations 2008

### *6.5.1 Introduction*

At first, the UK Government was not very enthusiastic about the idea of introducing general rules against unfair commercial practices. In fact, the UK Government was amongst the strongest opponents to the Directive in Europe,[52] although in the end the Department for Business, Enterprise and Regulatory Reform welcomed the Directive as a desirable modernisation and simplification of the law.[53] The Unfair Commercial Practices Directive in the end was implemented in 2008 by virtue of the enactment of the Consumer Protection from Unfair Trading Regulations.[54] Due to the full harmonisation character of the Directive, the implementation statute stays close to the wording of the Directive itself, as is the case in many other Member States. Moreover, the Directive has led to the repeal of a significant number of legislative instruments, including much of the Trade Descriptions Act 1968.[55] Partly for this reason, but also because the Regulations cover a significantly wider range

[52] G Howells and S Weatherill, *Consumer protection law* (Aldershot, Ashgate, 2005) 434–435 and H Collins, 'Harmonisation by example: European laws against unfair commercial practices' (2010) *Modern law review* 93.

[53] H Collins, 'Harmonisation by example: European laws against unfair commercial practices' (2010) *Modern law review* 96. See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 165. The Department for Business, Enterprise and Regulatory Reform (BERR) was the successor of the Department of Trade and Industry (DTI) and was later followed up the Department for Business, Innovation and Skills (BIS).

[54] S.I. 2008/1277.

[55] See also H Collins, 'Harmonisation by example: European laws against unfair commercial practices' (2010) *Modern law review* 92, P Cartwright, 'Unfair commercial practices and the future of criminal law' (2010) *Journal of Business Law* 618 and O Osuji, 'Business-to-consumer

of unfair trade practices than was the case under previous law, the introduction of the Regulations are generally seen as a significant or even revolutionary change in English consumer law.[56]

The regulations do not confer any right of action in court on individuals. The UK Government deliberately excluded any civil law remedies for individuals from the Regulations.[57] Only the designated enforcement authorities (i.e., the Office of Fair Trading and the local weights and measures authorities[58]) can enforce the Regulations, mostly by virtue of criminal law sanctions and injunctions.[59] Regulation 29 emphasises that agreements that are in breach of the Regulations are not to be void or unenforceable by reason of only that breach. However, the UK Government and the Law Commission are currently discussing the possibility of a private right of redress.[60]

### *6.5.2 Consultations, Observations and Guidelines*

In a consultation paper published by the UK Government's Department of Trade and Industry (DTI) in 2005, the DTI expressed the view that there had been concern in the negotiations over the Unfair Commercial Practices Directive regarding the average and vulnerable consumer benchmarks. This concern centred on whether these terms were too open and vague.[61] The consultation paper, therefore, devoted special attention to these terms, expressing the Government's understanding of them. One of the Government's observations was that the average consumer did not mark a radical departure from existing law, applying the benchmark of the

harassment, Unfair Commercial Practices Directive and the UK—a distorted picture of uniform harmonisation?' (2011) *Journal of consumer policy* 439.

[56] See P Cartwright, 'Unfair commercial practices and the future of criminal law' (2010) *Journal of Business Law* 618 and H Collins, 'Harmonisation by example: European laws against unfair commercial practices' (2010) *Modern law review* 89.

[57] See also *McGuffic v Royal Bank of Scotland plc* [2009] EWHC 2386.

[58] There has been ongoing discussion on the question of local enforcement. See I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 214–215.

[59] See Regulation 19 CPUTR 2008. See also H Collins, 'Harmonisation by example: European laws against unfair commercial practices' (2010) *Modern law review* 111–113 and I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 213 and onwards. See on the enforcement of the Directive in Scotland J Williams and C Hare, 'Early experiences of the enforcement of the Unfair Commercial Practices Directive in Scotland' (2010) *Journal of Consumer Policy* 377.

[60] H Collins, 'Harmonisation by example: European laws against unfair commercial practices' (2010) *Modern law review* 114–117.

[61] This was also expressed in the cost-benefit analysis conducted on behalf of the DTI: 'the group did not like (and arguably did not fully grasp) the concept of the 'average consumer', as this is, they felt, a vague and nebulous concept, which is open to substantial interpretation.' See G Allinson et al. *The costs and benefits to business of simplifying consumer protection legislation: the options for change in the UK following the introduction of the Unfair Commercial Practices Directive* (report on behalf of DTI Consumer and Policy Directorate) (London, DTI, 2006) 18.

'reasonable person'.[62] This seems to be the generally accepted view, and can also be found in the comparative advertising case British Airways plc v Ryanair Ltd, based on the Trade Marks Act 1994. In this case Justice Jacob applied the average consumer benchmark and argued that this test is 'no different from that which our law has traditionally applied in cases of passing-off and trademark infringement.'[63] This seems to indicate that there are no particularly high expectations of the consumer, but that at the same time, the consumer is not expected to be generally gullible. As Justice Jacobs argues:[64]

> It is of course the case that the average consumer has been exposed from birth to advertising. People get hardened by it. They expect hyperbole and puff. One can almost say no advertisement is complete without them.

In order to somewhat clarify the concepts of the average and vulnerable consumer and the relevance of target groups, the Government in the implementation of the Unfair Commercial Practices Directive chose to include the notions in the definitions section of the Regulations. Section 2 of the Regulations reads:

> (2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.
> (3) Paragraphs (4) and (5) set out the circumstances in which a reference to the average consumer shall be read as in addition referring to the average member of a particular group of consumers.
> (4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.
> (5) In determining the effect of a commercial practice on the average consumer—
> (a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and
> (b) where the practice is likely to materially distort the economic behaviour only of that group,
> a reference to the average consumer shall be read as referring to the average member of that group.

The provision clarifies that the vulnerable consumer benchmark can be applied as an alternative benchmark whenever the provisions speak of the average consumer. Although the Directive itself only speaks of the vulnerable consumer in the context of the general prohibition on unfair commercial practices, it is clear that this benchmark can also be applied in the context of the other provisions.[65]

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[62] Department of Trade and Industry 2005, p. 30. See also C Twigg-Flesner et al. 'An analysis of the application and scope of the Unfair Commercial Practices Directive' (Report for the Department of Trade and Industry, 2005) 30.

[63] *British Airways plc v Ryanair Ltd* [2001] E.T.M.R. 24, 249.

[64] *British Airways plc v Ryanair Ltd* [2001] E.T.M.R. 24, 249. See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 137.

[65] Article 5 Directive. See also paragraph 2.7 of this book.

On the whole, the Government is reluctant to provide further guidance on the implementation of the Regulations, which is understandable in the light of the full harmonisation character of the Unfair Commercial Practices Directive and the remaining uncertainty as to its application. The same applies to the guidelines provided by the Government and the Office of Fair Trading.[66] On many points the guidelines merely summarise the provisions. However, on the issue of target groups the OFT does provide more specific examples. First of all, the guidelines state that the way advertising is placed, the language of a commercial communication, the nature of the product and the context of the commercial practice are relevant factors in determining whether a practice is aimed at a particular group. As examples of targeted practices the OFT refers to:[67]

a. television advertisements during children's programmes, where the practices may be directed at the children and/or their parents;
b. advertisements for a particular type of credit product, where the practice may be directed at 'non-status' or 'sub-prime' borrowers;
c. the sale of a product related to a certain disability, where the practice may be directed at consumers who are vulnerable because of that disability.

From these examples it would appear that the OFT sees potential for a relatively broad application of the alternative benchmark for particular target groups. As has been discussed in paragraph 4.4 of this book, important questions for the practical meaning of this benchmark are, firstly, when does a commercial practice qualify as a practice 'targeting' a particular group and, secondly, how 'particular' is this group required to be. If understood broadly, it will be much easier to protect vulnerable consumers through this provision, and it seems that in such a case the vulnerable group benchmark (only applicable if the economic behaviour of *only a clearly identifiable group of vulnerable consumers* is distorted) becomes superfluous. Especially regarding the example of 'non-status' or 'sub-prime' borrowers one can question whether these groups are really specifically targeted and whether they sufficiently qualify as a particular group that is clearly identifiable as such. Often, credit companies target the consumer population in general, through for example newspaper and television advertisements. Nor are their products purchased only by 'non-status' or 'sub-prime' borrowers, even though they may be overrepresented in the clientele.

As to the vulnerable group benchmark, the OFT guidelines suffer from the same problems as the EC Guidance to the Unfair Commercial Practices Directive.[68] For example, the category of vulnerability by virtue of age refers to the example of elderly being vulnerable to certain practices regarding burglar alarm services, but to what extent are elderly consumers really more vulnerable than other groups in society towards the practices concerning this product group? It remains unclear what the meaning of the vulnerable group benchmark will be in practice, especially since this term was non-existent in English case law prior to implementation of the Directive.

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[66] Office of Fair Trading 2008.

[67] *Idem*, p. 69.

[68] SEC (2009) 1666. See also paragraph 2.7 of this book.

### 6.5.3 *Office of Fair Trading v Purely Creative Industries*

Up to now few cases on the Consumer Protection from Unfair Trading Regulations 2008 have reached the courts.[69] To a large extent this can be explained by the role of the OFT in the (public) enforcement of the regulations. Prior to court proceedings, alleged offenders of the Regulations are warned and given the possibility to improve their behaviour on the market. Court procedures are, therefore, an *ultimum remedium* in the process of enforcement.[70]

The most important case going into the substance of the Regulations is *Office of Fair Trading v Purely Creative Industries*, leading to a High Court decision in February 2011.[71] The case also led to preliminary questions to the CJEU by the Court of Appeal on the application of the Directive's black list.[72] Before going into the details of the case, it is interesting to look at a few general remarks made on the average consumer benchmark by the High Court.

Firstly, the High Court emphasised that the Unfair Commercial Practices Directive and, therefore, the Consumer Protection from Unfair Trading Regulations:[73]

> […] rely heavily upon the concept of the average consumer. […] The requirement to assume that the consumer is reasonably well informed, observant and circumspect reflects the common sense position that the UCPD exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the overhasty consumer.

Another general remark on the average consumer benchmark was made in response to the defendant's counsel, who submitted that, on the basis of the CJEUs *Adolf Darbo* case, the average consumer is assumed to read the whole of the text of any relevant promotion.[74] In other words, the defendant's counsel alleged that the assumption made in the *Adolf Darbo* case was not limited to labelling, but rather

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[69] See *McGuffic v Royal Bank of Scotland plc* [2009] BUS. L.R. 1108, dealing with the actionability or non-actionability of the Regulations for private individuals and *Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237, on gym club memberships (which is discussed in more detail below).

[70] This is in line with the recommendations of the 'Hampton Report' on reducing administrative burdens. See P Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005) and P Cartwright, 'Unfair commercial practices and the future of criminal law' (2010) *Journal of Business Law* 635. As was already the case under the regime of the Control of Misleading Advertisements Regulations 1988, there is still an important role of the enforcement through self-regulation in the field of advertising.

[71] *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106. See on this case also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 166 and 172–174.

[72] *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWCA Civ 920. See also CJEU 18 October 2012, Case C-428/11 (*Purely Creative*) (not yet published in *ECR*). Unfortunately, no questions were asked regarding the general clauses of the Directive. The case was finalised by an order of the Court of Appeal of 19 March 2013, rejecting the appeal of Purely Creative and allowing the cross-appeal by OFT. See http://www.oft.gov.uk/shared_oft/consumer-enforcement/court-of-appeal-order.pdf (last accessed 21 February 2014).

[73] *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106, paragraph 62.

[74] See on the *Adolf Darbo* case of the CJEU paragraph 3.2.10 of this book.

that consumers are generally expected to read *all* promotion texts in their entirety. Justice Briggs did not agree with this line of reasoning:[75]

> The Darbo case was about the question whether the description of a jar of jam as 'naturally pure' was misleading because of the inclusion of a pectin gelling agent, even though it appeared in the list of ingredients on the label. Basing himself on the decision of the ECJ in Case C51/94 Commission v. Germany, Advocate General Léger advised at paragraph 39 of his opinion that a consumer whose purchasing decisions are based upon the composition of the products in question will first read the list of ingredients, and thereby ascertain that pectin was included, so as to be able to form his own view about the exact scope of the description 'naturally pure'.
> In my judgment the Darbo case is no more than an example of the application of the average consumer test to particular facts, and was influenced by the fact that another Directive (79/112) specifically required the contents of foodstuffs of that type to be identified on the label. I consider that the question whether the average consumer would read the entirety of the (frequently very small) print of a particular promotion raises fact-intensive issues as to the application of Regulations 5 and 6, rather than being capable of resolution by an invariable and irrebuttable presumption of the type contended for by the defendants.

Hence, according to Justice Briggs the average consumer can in general not be assumed to read all small print of a promotion. It seems that Justice Briggs is arguing that the labelling doctrine is limited to labelling (or even to specific cases of labelling), and that the question whether the consumer reads small print of a particular promotion depends on the facts at hand.

Delving into greater detail, the case deals with a number of promotions throughout 2008 which promised—in various ways—the addressees of the promotions that they had won prizes. This was done by sending letters and distributing scratch cards. In all of these promotions the consumers addressed were indeed entitled to a prize. However, according to the OFT the way this was done and the costs that were involved for the consumers addressed constituted unfair commercial practices.

In one of their promotions (which was representative of the defendant's general approach), almost 1.5 million consumers were sent an individually addressed letter informing them that they had won a prize. They could either win a cash prize (£ 25,000), a new car, an LCD TV, a Zurich watch, or several bonds and vouchers. Each letter contained a prize allocation code. With this code the addressee could find out what prize he or she had won, either by calling a telephone number (£ 1.50 per minute, maximum call time 6 min) or by sending a letter including a stamped self-addressed envelope.

The defendants made money by charging costs exceeding the costs involved with the prize which was allocated to almost all addressees: the Zurich watch. Almost every addressee received a code with which a Zurich Watch could be claimed. Although consumers could also claim the prize by sending a letter to the defendants, people were clearly directed to call the £ 1.50 per minute telephone number, and this is what most consumers did. Before finding out what prize had been won, consumers had to stay on call for 5 min and 58 s, being charged a minimum of £ 8.95. Moreover, in order to claim the prize the consumer would still need to send a letter

[75] Paragraphs 66–67 of the judgment.

including a self-addressed and stamped envelope and on top of that they would have to pay £ 8.50 for delivery and insurance costs. This amounted to a total of approximately £ 18.00. The total costs for the defendants were £ 9.36 in total per watch sent, including the costs of acquisition of the watch, VAT, postage, packaging and handling.

The OFT argued that this constituted an unfair commercial practice, making the consumer believe that he or she had won a prize rather than buying a product, which was *de facto* what was happening. According to the OFT this constituted a breach of Paragraph 31, Schedule 1 of the Regulations (i.e., paragraph 31 of the 'black list' of Annex 1 of the Unfair Commercial Practices Directive), prohibiting the creation of the false impression that the consumer has or will win a prize, when in fact any action in relation to claiming the prize is subject to the consumer paying money or incurring a cost. Moreover, the OFT argued that the practice was also in breach of Regulations 5 and 6, i.e., the general clauses on misleading trade practices and misleading omissions.[76]

In his judgment, Justice Briggs found the promotion to be unfair for three reasons, amounting to breaches of both Regulations 5 and 6 as well as Section 31 of the black list. He emphasised that the trade practices were 'not targeted at any particular social or economic class',[77] and that the trade practices thus should be assessed applying the benchmark of the average consumer.

Firstly, consumers were deceived by being made to believe that they had won a prize while they were really being invited to purchase a product. Secondly, and in connection with the first point, the promotions were found to insufficiently make clear what the telephone costs were for the consumer. Although there was a remark in the small print—directed to through an asterisk in the main text—that the maximum time spent calling was 6 min, it should have been made clear that each call in fact took no less than 5 min and 58 s in order to find out whether a prize had been won. Hence, even though the information given was not necessarily false, and despite the fact that the consumer could find out from the information provided that the call would be expensive (£ 1.50 per minute) and that the consumer could also follow the less expensive route of sending a letter to the trader, the trade practice was still found misleading by the Court. This shows that there are clearly limits to the degree of critical attitude expected of the consumer; the consumer is not assumed to expect the worst, nor is he or she expected to take the least costly route of claiming the prize.

Thirdly, another issue contributing to the promotion being unfair was the misrepresentation of the geographical origin of the watch in the promotion letter. The watch was described as 'genuine Zurich' and a Swiss flag was displayed next to the product image, while the watch was in fact manufactured and assembled in Japan. Justice Briggs argued that the average consumer would attribute a higher value to a watch that is made, assembled or in some way supervised from within Switzerland, than elsewhere.

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[76] Corresponding to Article 5 Unfair Commercial Practices Directive.

[77] See paragraph 82 of the judgment. See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 172.

Some of the other claims of the Office of Fair Trading were, however, not accepted by the Court. For example, the OFT had argued that the description of the costs in small print on the bottom of the page of the letter, in particular the £ 8.50 delivery costs for 'electrical goods' constituted a misleading omission. Justice Briggs was, however, not persuaded:[78]

> As to the £ 8.50, while I have concluded that this was misleadingly described as a payment for delivery and insurance rather than, in truth, a payment of what was in substance a purchase price, I am not persuaded that the requirement to make that payment was misleadingly hidden merely by reason of its inclusion in the small print. The relevant part of the small print was sufficiently identified by the use of the sword sign opposite the watch (and the TV) on both pages of the promotional letter. Whereas relevant terms may be hidden by being buried in small print: see for example OFT v. Foxtons Ltd [2009] EWHC 1681 (Ch), where the relevant print is both intelligible and identified by a convenient cross-reference, it is unlikely to be found to have been hidden. I consider that it was not been hidden in promotion 5 [i.e. the promotion letter regarding the watch].

Hence, on the one hand traders are not allowed to 'bury relevant terms in small print', but on the other consumers are expected to read the promotion carefully, at least to a certain extent.

A more general remark about the average consumer was made in the context of one of the other promotions of the defendants, which concerned scratch cards. By insertion in newspapers and other publications, approximately nine million scratch cards were distributed, with which people could win cash prizes, travel vouchers or a Greek island cruise for two. Nearly everybody received a scratch card entitling them to the Greek island cruise, and again the addressees could find out about their prize by either calling the £ 1.50 per minute telephone number or sending a letter to the defendants. Once again the most commonly won prize turned out less valuable than it seemed; the cruise trip was excluding flights to and from Greece, was very limited as regards available dates for departure, and participants would only hear a few days in advance of the start of the cruise at what date their cruise would be. Rather than an actually valuable prize, the cruise trip prize was a way to earn money through the phone calls and by making consumers purchase other travel trips, which were presented to them as alternatives to the Greek island cruise. The OFT argued that the practice was unfair, as it made consumers believe that they had won a prize, rather than getting the same 'prize' as anyone else.

The defendant's counsel argued that this would be understood by the consumer, who is used to these type of promotions. The High Court, however, was not willing to follow this line of thought:[79]

> [The defendant's counsel] submitted that, in the real world, regular recipients of scratch cards of this type who took the trouble to scratch them would soon realise that they would be the 'every one a winner' species. I am not persuaded that the test for deception in Regulations 5 and 6 is to be answered by reference to the habitual consumer. Furthermore, it is not obvious how many repetitions of the process would be needed by the average consumer before the penny dropped.

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[78] See paragraph 113 of the judgment.

[79] Paragraph 143 of the judgment.

In other words: the fact that the consumer may be confronted with these types of promotional actions more often does not mean that he or she is not misled for that reason. Consumers lacking experience with these types of practices are thus protected.

Reflecting more generally on this case, it is interesting to note that the Court finds the trade practice to be misleading for the average consumer on several points, even though this seems to be a trade practice towards which many consumers would be very suspicious. Does this trade practice really deceive most consumers, or would they refrain from taking action because they would suspect a catch? Would not most people find reacting to one of these promotions naïve? Does this not mean that the average consumer—especially taking into account the CJEUs case law—should be expected not to be misled? It seems feasible to argue that in this case the High Court is protecting particularly credulous consumers rather than the average consumer. In any case, the message is clear: clearly fraudulent trade practices, i.e., practices *intended* to deceive consumers, are not allowed.

### *6.5.4 Office of Fair Trading v Ashbourne Management Services*

*Office of Fair Trading v Ashbourne Management Services* (2011) also points in the direction that the expectations as to the behaviour of the average consumer are not particularly high.[80] The case deals primarily with unfair terms and unfair terms regulation (the Unfair Terms in Consumer Contracts Regulations 1999, implementing the Unfair Terms Directive 93/13/EEC), but also applies the Consumer Protection from Unfair Trading Regulations 2008. Several interesting observations are made as regards the expected behaviour of the average consumer. These observations were made in the context of the application of the unfair terms regulations, but the same observations also led to the conclusion that the trade practices of the defendant were unfair in context of the Consumer Protection from Unfair Trading Regulations.

Ashbourne, the defendant in this case, offered services to gym and health clubs. The company recruited members for these gym and health clubs, provided standard form agreements and collected payments under those agreements. The OFT, after receiving numerous complaints from consumers, alleged that the company acted unfairly by offering unreasonably long subscriptions (up to 36 months) without possibility for the consumer to terminate the contract, and acted unfairly by threatening to register the consumer's defaults with a credit reference agency.

In determining whether the long subscriptions were unfair, Justice Kitchin made clear that:[81]

> Th[e] average consumer tends to overestimate how often he will use the gym once he has become a member and further, unforeseen circumstances may make continued use of its

[80] *Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237. See on this case also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 345–355.

[81] Paragraph 164 of the judgment.

> facilities impractical or unaffordable. Indeed, it is, as the defendants say, a notorious fact that many people join such gym clubs having resolved to exercise regularly but fail to attend at all after two or three months. Yet, having entered into the agreement, they are locked into paying monthly subscriptions for the full minimum period.

In reaction to the defendant's argument that the consumer was offered the possibility to cancel membership under certain circumstances, e.g., in case of injury or illness or in case the consumer moves to a new home, Justice Kitchin emphasises that these possibilities are insufficient to deal with the core problem, i.e., the average consumer's overconfidence to use the gym:[82]

> I accept that these amendments go some way to reduce the burden on members but they do not remove it because it is not possible to anticipate all events which may render continued use of a gym impractical or unaffordable and they provide fertile ground for dispute as to their proper interpretation, as the letters of complaint show. Further, and most importantly, they do not begin to address the tendency of the average consumer to overestimate the use he will make of the gym facilities and, indeed, that he is likely not to attend at all after two or three months.

Justice Kitchin argued that this causes an imbalance in the parties' rights and obligations, in a manner that is contrary to good faith. It is important in this context that the defendant knows about the consumer's poor decision-making and tries to make use of it:[83]

> In this regard, the defendants know that the average consumer overestimates the use he will make of the gym and that frequently unforeseen circumstances make its continued use impossible or his continued membership unaffordable. They are also well aware that the average consumer is induced to enter into one of their agreements because of the relatively low monthly subscriptions associated with them but that if he ceases to use the gym after between three and six months he would be better off joining on a pay per month basis. Yet the defendants take no steps to have these matters brought to the attention of consumers. Nor do the defendants ensure that consumers are made clearly aware of their overall liability at the outset which might alert them to the risks associated with early termination and the likely benefits of entering into an agreement for a shorter term. […]
> In all these circumstances I believe that the defendants' business model is designed and calculated to take advantage of the naivety and inexperience of the average consumer using gym clubs at the lower end of the market. As the many complaints received by the OFT show, the defendants' standard form agreements contain a trap into which the average consumer is likely to fall.

The approach taken by Justice Kitchin is far from the classical model of the rational agent and it is highly questionable whether this interpretation fits the CJEU interpretation of the average consumer, taking into account, for example, Advocate-General Trstenjak's remark that the average consumer is expected to react rationally towards trade practices.[84] Taking into account the consumer's overconfidence of using the gym, this case is a good example of a behavioural approach to unfair terms and unfair

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[82] Paragraph 167 of the judgment.

[83] Paragraphs 171 and 173 of the judgment.

[84] CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*). See also paragraph 3.2.11 of this book.

commercial practices regulation, i.e., an approach that takes into account actual flaws in consumer decision making rather than assuming the consumer to act rationally.[85]

## 6.6 Conclusions

What conclusions can be drawn regarding the consumer benchmarks applied under English law? The basis was and still is the benchmark of the average or ordinary consumer. This seems to be valid for most instruments discussed, although a few cases (applying different instruments) seem to point more into the direction of minority protection.[86] This average or ordinary consumer is not regarded as particularly gullible and is assumed to take advertising claims with a pinch of salt. As a consequence of setting the benchmark at the average consumer, particularly inattentive, unknowledgeable or uncritical consumers are generally not protected if the trade practice does not affect the average consumer. At the same time, this average or ordinary consumer is not generally expected to study all details of, for example, a sales promotion. An exception to this is *Lewin v Purity Soft Drinks plc*, which follows the CJEUs labelling doctrine by presuming that the average consumer reads product labels.[87] However, the significance of this case seems to be limited to labelling.

The first important case applying the Consumer Protection from Unfair Trading Regulations 2008 confirms the average consumer benchmark as an 'ordinary consumer', devoid of particularly high expectations. *Office of Fair Trading v Purely Creative Industries* shows the willingness of English courts to challenge fraudulent commercial practices, making sure to prohibit intentional deception, even if the average consumer is not affected. *Office of Fair Trading v Ashbourne* also shows a consumer friendly interpretation of the average consumer benchmark, recognising the consumer's overconfidence and naivety when it comes to long term gym memberships and leading to a burden of responsibility on the side of the trader not to exploit these weaknesses in the behaviour of the consumer.

Hence, there is *some* truth to the idea that English law has a *laissez-faire* approach to commercial practices, in the sense that English consumers are expected to take, for example, exaggeration in advertising slogans with a pinch of salt. Nevertheless, apart from this sub-conclusion, English law does not have particularly high expectations of the consumer.

[85] See also I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) 302.

[86] See e.g. *Director General of Fair Trading v Tobyward Ltd* [1989] WLR 517, 522, applying the Control from Misleading Advertisements Regulations 1988.

[87] See *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81.

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# Chapter 7
# Italian Law

**Abstract** In Italy, unfair commercial practices until the early 1990s could only be challenged by competitors, by means of the general tort clause and through the general provisions on unfair competition, both laid down in the Italian Civil Code. The few available cases suggest that the courts did not expect the consumer to be misled easily, expecting the consumer to be critical and suspicious towards advertisements. Since the implementation of the Misleading Advertising Directive and the establishment of the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition and Market Authority, AGCM) in the early 1990s, Italian law took a turn towards applying a more consumer-friendly benchmark. In the decisions of the AGCM and the judgments of the administrative courts, the average consumer is not seen as particularly informed, observant and circumspect. In addition, vulnerable groups are identified in order to afford them protection against fraudulent trade practices, such as those related to paranormal products. Since the vulnerability of the average consumer is also emphasised, there is no clear demarcation between the average consumer benchmark and the target group and vulnerable group benchmarks.

**Keywords** Italian law · Concorrenza sleale · Autorità Garante della Concorrenza e del Mercato · Misleading advertising · Unfair commercial practices · Target groups · vulnerable groups

## 7.1 Introduction

This chapter discusses the consumer benchmarks in Italian unfair commercial practices law. As noted in the introduction of this book, Italian law had the reputation of being particularly permissive towards traders, expecting the consumer to be critical towards advertising.[1] This chapter addresses the question, as has been done in the previous chapters on German and English law, what consumer benchmarks were

[1] G Schricker, *Italien*, (Munich, Beck, 1965) 204. See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 242–243 and A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 329–331.



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and are applied in Italian unfair commercial practices law, as well as what behaviour was and is expected of the consumer in this context.

Firstly, paragraph 7.2 will briefly deal with the 'old' consumer benchmark as applied under the provisions in the Italian Civil Code. The paragraphs that follow, deal with the consumer benchmarks as currently applied in Italian law. Before delving into the details on the consumer benchmarks and their application, the legal context will be discussed, i.e., the Italian legislation and practice related to misleading advertising and unfair commercial practices (paragraph 7.3). After that, the general application of the consumer benchmarks, including the possibility to take empirical investigations into account, will be dealt with (paragraph 7.4). This will be followed by a more detailed account of the application of the average consumer benchmark (paragraph 7.5) and the protection of target groups and vulnerable groups (paragraph 7.6).

As in the previous chapters, case law is central to the discussion on the consumer benchmarks in this chapter. In the case of Italy this concerns in particular the decisions of the AGCM and the administrative judgments following from the appeals against these decisions. Cases have been selected on the basis of literature and on running queries in the online database of the AGCM, using keywords related to the consumer benchmarks.[2]

## 7.2 Concorrenza Sleale and the Benchmark of the Sceptical Consumer

Until the early 1990s, unfair commercial practices could only be challenged through the general tort clause and through the general provisions on unfair competition, both laid down in the *Codice Civile* (Italian Civil Code, CC).[3] In 1942, along with a reform of the *Codice Civile*, a special section on *concorrenza sleale* (unfair competition) was introduced, which is still in force today. Before that time, unfair competition was governed by the general tort clause of Article 1151 of the *Codice Civile* of 1866. The provisions that came into force in 1942 (Title 10 of Book 5, Articles 2595–2601 CC), aim only at protecting competitors.[4] Affected competitors and professional associations can initiate court actions on the basis of these provisions,

[2] The AGCM database is available at www.agcm.it/consumatore/consumatore-delibere.html

[3] T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 240–241.

[4] P Auteri, 'Brief report on Italian unfair competition law', in M Hilty and F Henning-Bodewig (eds), *Law against unfair competition: towards a new paradigm in Europe?* (Berlin, Springer 2007) 151, G Alpa, 'Rules on competition and fair trading', in H. Collins (ed), *The forthcoming Directive on Unfair Commercial Practices,* (The Hague, Kluwer Law International, 2004) 94–98 and F Henning-Bodewig, 'Die Bekämpfung unlauteren Wettbewerbs in EU-Mitgliedstaaten' (2010) *GRUR Int.* 277.

but consumers and consumer associations cannot.[5] Although there had been calls for protection of consumers through these provisions on unfair competition, this possibility was expressly excluded by the Constitutional Court in 1988. The Constitutional Court stated that the rules in place were not designed to protect consumers, and that it was up to the legislature to alter this situation if it was unsatisfied with the situation.[6] Misleading advertising was covered mainly by Article 2598 CC, which contains a general clause on breaches of 'principles of professional correctness'.[7]

Which consumer benchmark was applied according to the rules on *concorrenza sleale* in the *Codice Civile*? German comparative scholars identified Italian law as the exact opposite of German law's inattentive and uncritical consumer. In his study on Italian unfair advertising in 1965, Ulmer reported that Italian law was amongst the most lenient towards advertisers in Europe, and that—in line with this—the Italian consumer was expected to be particularly critical and suspicious towards advertising.[8] In one case the *Tribunale di Torino* had to decide on the deceptiveness of a slogan of a product called *Asti* wine, which contained only 60 % *Asti* wine. The Court stated that boasting and exaggeration did not constitute unfair competition and that one cannot expect advertising to always be an exact and reliable reflection of reality.[9]

[5] P Auteri, 'Brief report on Italian unfair competition law', in M Hilty and F Henning-Bodewig (eds), *Law against unfair competition: towards a new paradigm in Europe?* (Berlin, Springer 2007) 152. Consumer associations have this possibility based on Art. 2601 CC, introduced in the Mussolini era. At the time it applied to the obligatory public law professional associations, but it remained into force since then and is still applicable now. See Hucke, A, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 321–322 and L Antoniolli and E Ioriatti, 'National report: Italy', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003) 2.

[6] T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 241. Corte Constituzionale 14/21 January 1988, Gazz. Uff. 3 February 1988, pp. 31–32.

[7] See also P Auteri, 'Brief report on Italian unfair competition law', in M Hilty and F Henning-Bodewig (eds), *Law against unfair competition: towards a new paradigm in Europe?* (Berlin, Springer 2007), P Kindler, *Italienisches Handels- und Wirtschaftsrecht* (Heidelberg, Recht und Wirtschaft, 2002) 138–139 and L Antoniolli and E Ioriatti, 'National report: Italy', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003) 2. See on comparative advertising also S Somariello, 'Vergleichende und irreführende Werbung in *Italien* nach der Umsetzung der Richtlinie 97/55/EG' (2003) *GRUR Int.* 29.

[8] G Schricker, *Italien,* (Munich, Beck, 1965) 204. See also T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 242–243 and A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 329–331.

[9] Tribunale di Torino, Riv. Dir. Comm. 1915 II, 166. See A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 330 and T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 243.

The *Corte di Cassazione* judged similarly, arguing that advertising generally is suggestive and exaggerating, and that this does not determine the choice of consumers.[10]

It must be noted, though, that the provisions in the *Codice Civile* on unfair competition were seldom applied in the context of consumer-related cases such as unfair advertising,[11] making it difficult to state exactly what was expected of the consumer. Still, the tone of the judgments pointed towards a critical and savvy consumer, who is not deceived easily.

## 7.3 Legal Context: Misleading Advertising and Unfair Commercial Practices

### *7.3.1 Implementation of the Misleading Advertising Directive*

In the early 1990s, the implementation of the Misleading Advertising Directive and the establishment of the AGCM brought about a turn-around for the way Italian law deals with unfair commercial practices in general and the consumer benchmark specifically.[12]

With the implementation of the Misleading Advertising Directive (84/450/EEC) in 1992, Italy had legislation for the first time providing protection to consumers from unfair advertising.[13] Enforcement of this Directive, as is now also the case for the Unfair Commercial Practices Directive, was in the hands of the AGCM, which had been established in 1990 by the Italian Antitrust Act.[14] As is further discussed below, the AGCM generated a considerable number of decisions against traders on

[10] Corte di Cassazione 17–04-1962, GRUR Int. 1964, 515 (*Motta Alemagna*). See A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 330 and T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 243.

[11] P Kindler, *Italienisches Handels- und Wirtschaftsrecht* (Heidelberg, Recht und Wirtschaft, 2002) 138–139.

[12] T Lettl, *Der lauterkeitsrechtliche Schutz vor irreführender Werbung in Europa* (Munich, Beck, 2004) 243, A Hucke, *Erforderlichkeit einer Harmonisierung des Wettbewerbsrecht in Europa* (Baden-Baden, Nomos, 2001) 331.

[13] Decree of 25 January 1992, Regulation No. 74. See P Auteri, 'Brief report on Italian unfair competition law', in M Hilty and F Henning-Bodewig (eds), *Law against unfair competition: towards a new paradigm in Europe?* (Berlin, Springer 2007) 156–158.

[14] See www.agcm.it. See also L Antoniolli and E Ioriatti, 'National report: Italy', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003) 7 and P Auteri, 'Brief report on Italian unfair competition law', in M Hilty and F Henning-Bodewig (eds), *Law against unfair competition: towards a new paradigm in Europe?* (Berlin, Springer 2007) 156.

misleading advertising.[15] The Misleading Advertising Directive was at first implemented as a separate decree in 1992, but was inserted into the *Codice del Consumo* (Italian Consumer Code) when it was adopted in 2005.[16]

### *7.3.2 Implementation of the Unfair Commercial Practices Directive*

The *Codice del Consumo* was amended in 2007 to implement the Unfair Commercial Practices Directive.[17] The third title of the second part (on education, information, commercial practices and advertising) now deals with unfair commercial practices.

As with misleading advertising, the enforcement of the rules on unfair commercial practices in practice is the responsibility of the AGCM, which takes an active role in this and seems to take its task rather seriously.[18]

Any individual or legal entity can file a complaint with the AGCM. The AGCM has an obligation to investigate all complaints received, but does not have to initiate proceedings in every case. It commences enforcement procedures in light of the general interest, rather than to protect individuals. It can order injunctions, as well as impose fines. As an *ultimum remedium*, the AGCM can order a repeat offender to suspend trading. In practice, the AGCM also works with so-called 'commitments' of companies before taking an official decision. The possibility of commitments provides the AGCM with the possibility to offer companies the opportunity to halt their illegal behaviour without imposing a fine, but the AGCM can also press them to publish corrective statements or even reimburse consumers. The AGCM does not have formal power to lay down these obligations, but through the commitments—with the threat of an impeding fine—it has a strong position to ensure that the companies do so.

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[15] All decisions of the AGCM are available on the Authority's website.

[16] P Auteri, 'Brief report on Italian unfair competition law', in M Hilty and F Henning-Bodewig (eds), *Law against unfair competition: towards a new paradigm in Europe?* (Berlin, Springer 2007) 157–158. Legislative decree of 6 September 2005, No. 206, pursuant to Article 7 of Law No. 299 of 29 July 2003.

[17] *Decreto legislativo* 146/2007 of 2 August 2007. On this decree in general, see A Genovese, 'La normativa sulle pratiche commerciali scorette' (2008) *Giurisprudenza commercial, 762 and onwards, M Dona, Pubblicità, pratiche commerciali e contratti nel Codice del Consumo* (Torino, UTET Giuridica, 2008) and G de Cristofaro and A Zaccaria, *Commentario breve al diritto dei consumatori* (Padova, CEDAM, 2010).

[18] See in the context of misleading advertising also L Antoniolli and E Ioriatti, 'National report: Italy', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003) 7, who state misleading advertising 'is one of the areas in which the antitrust authority has been more active, and its decisions have had a significant impact on advertising in Italy.'

The AGCMs decisions can be challenged at the *Tribunale Amministrativo Regionale Lazio* (hereafter *Tar Lazio*), which is the administrative court of first instance in the Lazio region, where the AGCM is located. Parties can appeal against the decision of the *Tar Lazio* at the *Consiglio di Stato* (Italian Council of State), which serves as the final national court for these matters. Many decisions of the AGCM have been appealed, leading to a rich case law of the *Tar Lazio* as well as the *Consiglio di Stato*.[19]

Apart from administrative enforcement, there is also the possibility for consumers to initiate civil proceedings. Although the Italian legislature in the implementation of the Unfair Commercial Practices Directive remained silent on the possibility for consumers to claim damages, most authors agree that consumers can initiate proceedings based on Article 2043 of the *Codice Civile*, namely the general tort provision.[20] Injunction proceedings can also be initiated. Civil proceedings can also be brought by consumer associations, either through a collective action or through a class action.[21] In practice, however, the enforcement is conducted by (and left to) the AGCM. Competitors can not initiate proceedings, unless the case qualifies as unfair competition in the sense of Article 2598 CC (discussed above).

The case law discussed below concerns the period from 1992 to 2013, covering both the Italian implementation of the Misleading Advertising Directive, as well as the implementation of the Unfair Commercial Practices Directive.

## 7.4 Application of the Consumer Benchmarks: General Remarks

In general terms, the AGCM makes flexible use of the average consumer benchmark and the target group and vulnerable group benchmarks; it is clearly more concerned with dealing pragmatically with problems in the market than with ascertaining the exact reaction of the *average* consumer, or discovering whether a specific target group or vulnerable group can be identified. Overall, the *Tar Lazio* and the *Consiglio di Stato* agree with this approach and grant the AGCM significant freedom in deciding on the deceptiveness of commercial practices and the assessment of what consumers should be protected.

The courts do recognise that the abstract model of the average consumer is based on the principle of proportionality in European law and that it thus functions to strike a balance between the free movement of goods and the protection of consum-

[19] The administrative judgments of the *Tar Lazio* as well as the *Consiglio di Stato,* can be found online at www.giustizia-amministrativa.it.

[20] See G de Cristofaro, 'Die zivilrechtlichen Folgen des Verstoßes gegen das Verbot unlauterer Geschäftspraktiken: eine vergleichende Analyse der Lösungen der EU-Mitgliedstaaten' (2010) *GRUR Int.* 1025.

[21] Article 140-bis of the *Codice del Consumo* explicitly states that a class action can be started based on a breach of the provisions on unfair commercial practices.

ers.[22] Despite this, the protection of smaller groups of consumers—and this was the case even before the introduction of the vulnerable group benchmark in the Unfair Commercial Practices Directive—is clearly not excluded. This is well illustrated by the following section from the *Videosystem & Areafilm* case (2009) of the *Tar Lazio*, in which the Court explicitly stated that in some cases the protection of vulnerable consumers is more important than free competition:[23]

> IT Il richiamo a sifatto modello non esclude però (ad esempio nelle ipotesi in cui la repressione della pubblicità ingannevole è funzionale alla protezione di un diverso e più rilevante bene giuridico rispetto a quello della libera concorrenza) che la stessa tutela debba essere assicurata anche ai consumatori più sprovveduti o non particolarmente vigili.
> La scelta della fascia di collettività sulla quale appuntare la tutela (perché considerata particolarmente vulnerabile) costituisce insomma, ancora oggi, determinazione di merito insindacabilmente devoluta all'Autorità.
> EN The mentioning of such a model [i.e., the average consumer], however, does not exclude that (for instance, in cases in which the repression of misleading advertising is instrumental to the protection of an interest other than and more important than that of free competition) the same protection has also to be granted to the most naïve or not particularly observant consumers.
> The choice as to which part of the community must be addressed by protection (being considered particularly vulnerable) is thus, still today, a matter that is left to the Authority's [i.e., the AGCMs] exclusive appreciation.

This line of reasoning is also evident in the *Sigarette Lights* case (2006), which is important both in terms of the scope of protection and the relationship of the average consumer with empirical research. In the *Sigarette Lights* case, the AGCM commissioned research by a market research bureau in order to ascertain how consumers perceived the producers' claims on their products.[24] This is an exception to the general practice of the AGCM to base its decision on its own impression of how the average consumer, a targeted group or a vulnerable group perceives a commercial message. The case deals with the deceptiveness as to the health consequences of 'light cigarettes', the marketing of which is now prohibited throughout Europe, but the case dates from before the overall prohibition.

In order to discover the extent to which consumers believed that smoking light cigarettes as opposed to regular cigarettes was less harmful to their health, the AGCM commissioned a consumer survey. According to this survey, just over 10% of consumers had the (false) impression that light cigarettes were indeed less harmful. On the basis of these results, the AGCM decided that the marketing of light cigarettes was deceptive and should, therefore, be forbidden. The defendants argued against this, arguing that this prohibition was in breach of EU law, which requires the average consumer (being reasonably well-informed, observant and circumspect)

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[22] See, for example, e.g. Tar Lazio, Sez. I, 25 February 2009. No. 3723 (*Videosystem & Areafilm*).

[23] Tar Lazio, Sez. I, 25 February 2009. No. 3723 (*Videosystem & Areafilm*). See also Tar Lazio, Sez. I, 13 October 2003, No. 8321 (*Peter Van Wood*) and Tar Lazio, Sez. I, 23 May 2011, No. 4532 (*Benefit-BluPill*). The translations provided in this chapter are made by the author, with the help of native speakers.

[24] See Tar Lazio, Sez. I, 11 January 2006, No. 1372 (Sigarette Lights).

rather than just 10% of consumers to be misled. One of the parties even requested filing a preliminary procedure with the CJEU on the interpretation on this matter.

The *Tar Lazio* emphasised, however, that the CJEU deliberately left the possibility to use empirical investigations to the Member States, and that the same applies for the decision as to what percentage of consumers is required to be misled. In the *Lifting* case, the CJEU had indeed argued that it is up to national courts, if they decide to use a consumer survey or an expert opinion to decide, in the light of its own national law, the percentage of consumers that is required to be misled, in order to determine whether it is it sufficiently important to justify prohibiting its use.[25] The *Tar Lazio* interpreted this in the sense that also a small percentage of consumers being misled can be sufficient to assess an advertisement as being deceptive, and that, therefore, the CJEU had left open 'a clear and definite option' for Member States to decide which consumers are worthy of protection. According to the *Tar Lazio*, this means that the case on light cigarettes—dealing with the consumer's health—should not be decided on the basis of the average consumer benchmark:

> IT Il modello astratto del consumatore medio appare poi idoneo, ai fini del giudizio di ingannevolezza, soprattutto nelle ipotesi in cui è sufficiente operare un bilanciamento, secondo il principio di proporzionalità, tra l'esigenza di libera circolazione delle merci e il diritto del consumatore a determinarsi consapevolmente in un mercato concorrenziale, ma non già in quelle in cui la repressione della pubblicità ingannevole è funzionale alla protezione di più rilevante bene giuridico, quale, in particolare, il diritto alla salute, la cui tutela deve essere ovviamente assicurata anche ai consumatori più sprovveduti o non particolarmente vigili.
> EN Furthermore, the abstract model of the average consumer seems suitable to assess the misleading nature [of a certain advertisement], especially in those situations in which it is sufficient to balance, in light of the principle of proportionality, the need for free movement of goods and the consumer's right to make autonomous decisions in a competitive market, but not in those cases in which the control of misleading advertising is instrumental to the protection of a more important interest, such as, in particular, the right to health, the protection of which obviously has to be guaranteed also to the most naïve or not particularly observant consumers.

Hence, in a similar fashion to the case quoted above, the *Tar Lazio* interprets the case law of the CJEU as giving room for Member States to diverge from the benchmark of the average consumer if deemed necessary, such as in this case for the protection of health. Although it may be true that the right to health can overrule the free movement of goods, it seems questionable whether the CJEU *generally* leaves it to Member States to decide the level of protection; the average consumer benchmark was introduced in order to limit the freedom of Member States to decide on the level of protection, in particular if the high level of protection conflicts with the free movement of goods.[26]

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[25] This was first stated by the CJEU in the *Gut Springenheide* case, CJEU 16 July 1998, Case C-210/96, ECR 1998, p. I-4657 (*Gut Springenheide*).

[26] See on this issue also paragraph 4.6 of this book.

## 7.5 Application of the Average Consumer Benchmark

In general, the AGCM does not regard the average consumer as particularly informed, observant and circumspect.[27] This view has raised complaints by traders who were accused of unfair commercial practices, but the AGCM is supported in its views by the administrative courts.[28] For example, the *Tar Lazio*, in response to a complaint as to the application of the average consumer benchmark, emphasised that the average consumer is not an ideal consumer.[29] More generally, it is often emphasised that 'advertising should be clear and comprehensible'.[30] This means that there is a strong responsibility on the side of the trader and less emphasis on requiring the (average) consumer to critically assess the trader's communication.

Especially with regard to some sectors in which the average consumer is facing a high degree of information asymmetry, the average consumer is not expected to be particularly knowledgeable, attentive and critical.[31] Despite the fact that some consumers will be aware of market developments, the *Tar Lazio* identifies as the average consumer the *novice consumer*, i.e., the consumer who has little or no experience with the product at hand. The *Tar Lazio* has recognised this for the sectors of telecommunication, consumer credit, as well as recently liberalised markets. While the Court specifically mentioned these sectors, it seems likely that this reasoning can be applied to other sectors as well (e.g., to complex products such as insurance and banking products).

For the telecom sector, the *Tar Lazio* recognised the average consumer's vulnerability in the 2010 *Wind Absolute Tariffa* case. In this case, the Court stated in general terms that the average consumer in some sectors, in this case the telecommunication sector, should be regarded as a consumer who is new to the services offered and

[27] See also C Alvisi, 'The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices', in G Bongiovanni, G Sartor and C Valentini (eds), *Reasonableness and law* (Law and philosophy library vol. 86) (Vienna, Springer 2009) 288–292. In my view, however, Alvisi is overstating the limited expectations of the average consumer, arguing that the average consumer is someone 'who believes in miracles when it comes to their health, beauty, and physical and sexual performance' and that the average consumer is 'superstitious' and 'a fearful person''. In many of these cases the AGCM is opting for protection of minorities rather than actually expecting that the average consumer is superstitious, fearful, etc. See also the discussion on target groups and vulnerable groups below.

[28] For a ground of appeal raised specifically against the application of the average consumer benchmark, e.g. Cons. Stato, Sez. VI, 27 July 2010, No. 4905 (Fastweb).

[29] Tar Lazio, Sez. I, 3 March 2004, No. 2020 (*Sanremo giovani*).

[30] See, for example, e.g. Tar Lazio, Sez. I, 9 August 2010, No. 30421 (*Mediamarket*). Tar Lazio, Sez. I, 13 December 2010, No. 36119 (*Bioscalin crescita capelli*). See similarly L Antoniolli and E Loriatti, 'National report: Italy', in R Schulze & H Schulte-Nölke (eds), *Analysis of national fairness laws aimed at protecting consumers in relation to commercial practices* (report for the Directorate-General Health and Consumer Protection of the European Commission, 2003) 7.

[31] See also R Rolli, *Codice del Consumo—Commentato per articolo con dottrina e giurispudenza* (Piacenza, La Tribuna 2012) 237.

therefore has little knowledge. The Court links this reasoning to the CJEUs formula of 'social, cultural and linguistic factors':[32]

> IT L'individuazione di siffatto modello […] non può conseguire ad una valutazione condotta in termini meramente statistici o empirici, dovendo invece essere presi in considerazione fattori di ordine sociale, culturale ed economico, fra i quali, in particolare, va analizzato il contesto economico e di mercato nell'ambito del quale il consumatore si trova ad agire.
> In tale ottica non può essere disconosciuto che il settore in esame è non solo estremamente complesso e caratterizzato da una continua evoluzione tecnologica (tanto da richiedere frequenti interventi dell'Autorità per le Garanzie nelle Comunicazioni, a salvaguardia della concorrenza tra gli operatori e dei diritti degli utenti), ma soprattutto 'impatta' su una larghissima platea di potenziali consumatori, all'interno della quale non è ragionevolmente predicabile un elevato e diffuso grado di informazione.
> Il richiamo al modello del consumatore medio, ove posto in rapporto alla peculiarità del settore in esame, non esclude perciò che adeguata tutela debba essere assicurata anche ai consumatori meno smaliziati, in quanto presumibilmente, sono proprio costoro gli utenti 'medi' dei servizi oggetto della pratica.
> EN The identification of that model [i.e., the average consumer] […] cannot be derived merely from a statistical or empirical evaluation, but rather requires the joint consideration of social, cultural and economic factors, among which, in particular, the economic and market environment in which the consumer has to act needs to be analysed.
> From this perspective, one should not ignore the fact that the sector at hand is not only extremely complex and characterised by on-going technological developments (to the point of requiring frequent interventions on the side of the Autorità per le Garanzie nelle Comunicazioni [Italian Communication Authority, AGCOM], with the aim of safeguarding competition and users' rights), but above all has an impact on a very wide audience of potential consumers, within which it is not reasonable to assume the presence of a high and widespread level of information.
> The reference to the model of the average consumer, if read in relation to the specificities of the sector concerned, does therefore not exclude that adequate protection should also be provided to the less shrewd consumers, since it is exactly these consumers who presumably are the 'average' users of the services involved in the practice.

Hence, because of the ongoing technological changes in the market, the average consumer is confronted with information asymmetry and is not expected to be up-to-date with market developments.[33]

It is interesting to note that the Court linked this idea to the CJEUs formula of 'social, cultural and linguistic factors'. As discussed in Chaps. 3 and 4, the CJEU mentioned this formula only in the context of recognising that there may be differences between consumers (and thus between the applications of the average consumer benchmark) *in different Member States*. The *Tar Lazio* utilises the formula to clarify that the reaction of the average consumer is highly context specific, and that the average consumer is sometimes rather vulnerable, depending on the economic context.

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[32] Tar Lazio, Sez. I, 29 March 2010, No. 4931 (*Wind Absolute Tariffa*). See also the case note of M. Caruso in *Diritto dell'Informazione e dell'Informatica* 2010, p. 956 *et sEq.*

[33] Similar reasoning can be found in, for example, Cons. Stato, Sez. VI, 17 February 2012, No. 853 (*Eutelia*) and AGCM 5 July 2001, No. 9747 (PI3350), Boll. 27/2001 (*Tariffa Long TIM*). In the latter case, the AGCM emphasised that the telecom provider's information on the price should be 'complete', 'clear' and 'immediately perceptible'.

Very similar reasoning to that of *Wind Absolute Tariffa* can be found in the *Accord Italia—Carta Auchan* case (2010), dealing with consumer credit cards, and the *ENEL* and *ENI* cases (2009 and 2011) dealing with the—at the time—recently liberalised energy market.

In the *Accord Italia—Carta Auchan* case the *Tar Lazio* emphasised that the average consumer should be seen as a novice as to consumer credit cards and, more generally, consumer credit, despite the fact that it recognised that consumer credit cards had become a widespread phenomenon over the past years.[34] The underlying principle seems to be that because these products are rather complex and difficult to understand for many consumers, there is a strong responsibility for traders to inform the consumer in a clear and understandable way. This also applies to the *ENEL* and *ENI* cases, in which the *Tar Lazio* applies this rule to the liberalised energy market. Again, this reasoning is placed in the framework of 'social, cultural and linguistic factors'.[35]

Other cases also illustrate the tendency of the AGCM and the administrative courts not to expect the consumer to be particularly knowledgeable. For example, the *Tar Lazio* emphasised that the consumer is clearly not an expert with regard to the workings of the internet (in a case concerning the internet speed of an internet provider)[36] and the AGCM decided that the average consumer has no particularly high level of knowledge of the recyclability of plastic shopping bags.[37] Especially in the latter case, this is perhaps no different from what the CJEU would expect of the average consumer. What is more important is that the consumer is not expected to act particularly critically upon being confronted with information he or she does not fully understand. The reasoning seems to be, once more, that the trader is responsible for providing clear information rather than the consumer being responsible to critically assess the statements and to ascertain more concerning the products or claims. The same idea also seems to underlie another principle in Italian unfair commercial practices law, which is that the average consumer's understanding of an advertisement is based on the general and immediate impression he or she obtains, rather than on a careful reading or systematic analysis of the message.[38] It must be

[34] Tar Lazio, Sez. I, 19 May 2010, No. 12364 (*Accord Italia—Carta Auchan*). For a similar judgment, see Tar Lazio Sez. I, 18 January 2011, No. 449 (Coin).

[35] Tar Lazio, Sez. I, 25 March 2009, No. 3722 (*ENEL*) and Cons. Stato. Sez. VI, 9 June 2011, No. 3511 (*Eni*).

[36] Tar Lazio, Sez. I, 1 February 2011, No. 894 (Fastweb). For the AGCM decision, see AGCM 14 December 2000, No. 9009 (PI2996), Boll. 50/2000 (*Fastweb*).

[37] AGCM 11 January 2006, No. 15104 (PI4927), Boll. 2/2006 (*Sacchetti COOP degradabili al 100%*). See also L Ubertazzi, Concorrenza sleale e pubblicità (Padova, CEDAM, 2007) 20.

[38] See, for example, Cons. Stato. Sez. VI, 9 June 2011, No. 3511 (*Eni*), Cons. Stato, Sez. VI, 20 July 2011, No. 4391 (*Mediamarket*) and Tar Lazio, Sez. I, 7 August 2002, No. 7028 (*Medestea*). This conclusion is also drawn by C Alvisi, 'The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices', in G Bongiovanni, G Sartor and C Valentini (eds), *Reasonableness and law* (Law and philosophy library vol. 86) (Vienna, Springer 2009) 288, with regard to the AGCM practice.

noted, however, that this does not mean than any exaggeration is taken literally,[39] nor that any possibly incorrect interpretation of an advertising claim is 'covered'.[40]

Also in the context of doorstep selling or similar direct sales strategies, the average consumer is seen as less critical and, therefore, more vulnerable. This is well illustrated by the *Congress* case (2012), dealing with the sale of multimedia encyclopaedias at consumers' homes. The *Consiglio di Stato* made clear in this case that the consumer lacks critical attitude as to home sales, especially when the commercial intent is at first unclear:[41]

> IT È dato di comune esperienza che ai messaggi pubblicitari si contrappongano, da parte del consumatore, istintive difese, che tendono ad abbassarsi in presenza di comunicazioni apparentemente neutre, ovvero dettate da mero intento informativo, o ancora, come nella situazione in esame, in presenza di offerte che non si è preparati ad affrontare e che possono risultare più allettanti, nella particolare atmosfera riconducibile al perseguimento di un gratuito beneficio.
> EN It is a matter of common experience that consumers who are confronted with commercial messages, raise instinctive defences, which tend to drop when it comes to apparently neutral or merely informational communication, or, as in the case under examination, when presented with offers which one is not prepared to face and that can appear more attractive in the specific atmosphere resulting from the pursuit of a free benefit.

All in all, the application of the average consumer benchmark by the AGCM and the administrative courts demonstrates that they do not apply the average consumer benchmark to express the responsibility of the consumer. There is no mention of expected rational behaviour and no statements indicating that the average consumer is expected to read carefully or to assess commercial messages critically. In fact, the cases discussed above illustrate that there is a strong responsibility for traders to provide clear and comprehensible information. This applies especially in certain circumstances, e.g., when there is significant information asymmetry or when the consumer may be surprised or put under pressure in a direct sales context. In general, the average consumer benchmark is often tailored to the specific situation or product sector, rather than being a one-size-fits-all measure.[42]

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[39] See, for example, Cons. Stato, Sez. VI, 8 March 2006, No. 1263 (*Leonardo da Vinci*). This case deals with advertising for a state diploma course, making general claims such as 'most effective and quickest way to graduate' and 'latest cognitive techniques'. The Court argued that these claims are standard ad statements to draw curiosity and that they are not deceptive.

[40] See, for example, Cons. Stato, Sez. VI, 23 February 2012, No. 1012 (*Carapelli Firenze*) and Cons. Stato, Sez. VI, 12 March 2012, No. 1385 (*Mo*). Both cases deal with the mentioning of a place name on the label of olive oil being sold, the place being the seat of the company and not the origin of the raw materials, i.e., the olives.

[41] Cons. Stato, Sez. VI, 12 March 2012, No. 1387 (*Congress*). In other cases, elderly consumers are seen as a particularly vulnerable group as to doorstep selling. See paragraph 7.6.3 below.

[42] See also L Ubertazzi, *Concorrenza sleale e pubblicità* (Padova, CEDAM, 2007) 20 and R Rolli, *Codice del Consumo—Commentato per articolo con dottrina e giurispudenza* (Piacenza, La Tribuna 2012) 232.

## 7.6 Target Groups and Vulnerable Groups

### *7.6.1 Introduction*

At the European level, the protection of particularly vulnerable consumers—aside from the *Buet* case—was introduced in the Unfair Commercial Practices Directive. In Italy, protection of vulnerable groups had already been addressed from the early 1990s in decisions of the AGCM and related court cases applying the rules on misleading advertising.[43] This trend has continued under the new legislation implementing the Unfair Commercial Practices Directive.

It is important to note that in many of the cases dealing with vulnerable consumers, there is no clear demarcation between the average consumer benchmark and the target group and vulnerable group benchmarks. In many cases, the conclusion is drawn that the average consumer is being misled *and* that there is the particular danger of a vulnerable group being misled.[44] In some of the cases the unfairness test is carried out applying the average consumer benchmark, while a vulnerable group is merely identified in order to justify the extent of the penalty (advertising affecting vulnerable groups brings with it a higher penalty).[45] Below, the main categories of vulnerable consumers as identified by the AGCM and the administrative courts are discussed.

### *7.6.2 Children and Teenagers*

Before the implementation of the Unfair Commercial Practices Directive in 2007, there was a special provision on advertising towards children and teenagers in the chapter on advertising in the *Codice del Consumo*.[46] It stated that advertising that is able to reach children or teenagers and that can, even indirectly, threaten their safety or abuse their natural credulity or lack of experience, was considered to be misleading.

One of the cases applying this rule was the *Memorizzatore Genius* case (2003), which deals with advertising for a device—basically a CD player with advanced recording and play functions—promising to be a ‘revolution in learning’, making

[43] See also R Rolli, *Codice del Consumo—Commentato per articolo con dottrina e giurispudenza* (Piacenza, La Tribuna 2008, 2012).

[44] See, for example, Tar Lazio, Sez. I, 23 May 2011, No. 4532 (*Benefit-BluPill*) and Tar Lazio, Sez. I, 21 September 2009, No. 9083 (*Soc David 2*).

[45] Tar Lazio Sez. I, 21 January 2010, No. 645 (*Telecom Italia*). The target group benchmark of Article 5(2) Directive/ Article 20(2) of the *Codice del Consumo* is therefore hardly ever applied. This also seems related to the fact that the average consumer benchmark is often already tailored to a specific product or sector, as we have seen above.

[46] Article 6 old *Codice del Consumo*. On the vulnerability of children and adolescents, see N Zorzi Galgano, ‘Il consumatore medio ed il consumatore vulnerabile nel diritto comunitario’ (2010) *Contratto e impresa, Europa* 572–583.

it possible 'to store [in memory] everything you want to remember in a pleasant and easy way'. The product was based on the idea of 'passive storage' in memory. Although the product was based on general scientific evidence on learning through passive storage, there was little evidence that the product at hand actually worked in practice. The defendant argued that the advertising was not directed at children and teenagers, but the Court agreed with the AGCM that the practice may affect children and teenagers:[47]

> IT Riguardo all'argomentazione difensiva secondo cui i messaggi non sarebbero indirizzati specificamente a bambini e adolescenti, valga rilevare che l'articolo 6 del Decreto Legislativo n. 74/92 prevede come condizione di applicabilità che la pubblicità sia 'suscettibile di raggiungere bambini e adolescenti', come nel caso specie, non anche che sia ad essi precipuamente diretta. […] [P]roprio la natura dell'apparecchio, quale strumento di apprendimento che permette di imparare senza sforzo, fa sì che esso sia particolarmente appetibile per gli adolescenti, tipicamente impegnati nei processi di formazione e apprendimento che contraddistinguono tale fascia di età.
> Ciò posto, si osserva che le modalità enfatiche di presentazione di Genius riscontrabili nei messaggi sembrano suscettibili di fare maggiore presa proprio sui minori, in quanto soggetti dotati di filtri di valutazione meno sviluppati per vagliare l'attendibilità e la verosimiglianza delle affermazioni pubblicitarie.
> EN Concerning the defence that the messages should not be considered as addressed specifically to children and teenagers, it suffices to say that Article 6 Legislative Decree 74/92 provides as a condition for its application that the advertisement should be 'capable of reaching children and teenagers', as in the case under review, and not that it be mainly directed to them. […] [T]he machine's very nature, that of a learning instrument making it possible to learn without effort, makes it particularly attractive to teenagers, typically involved in the educational and learning processes characteristic of that age.
> That said, it is observed that the emphatic mode of presentation of the Genius found in the messages seems capable of particularly affecting minors, as subjects equipped with less developed evaluation skills when it comes to scrutinising the reliability and plausibility of advertising claims.

It is interesting to note that the decision also explained *why* children and teenagers are to be regarded as vulnerable: their defences towards potentially misleading advertising are less developed.

Also after the implementation of the Unfair Commercial Practices Directive, children and adolescents have often been identified as vulnerable groups. Many of these cases deal with advertising for downloading ringtones, wallpapers and MP3 music files for mobile phones. The AGCM and the administrative courts are strict towards the advertisers of these services, arguing that it is often unclear—especially for children and teenagers—that the products offered are in fact subscription services.[48]

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[47] AGCM 8 May 2003, No. 11994 (PI3981), Boll. 19/2003 (*Memorizzatore Genius*). See also N Zorzi Galgano, 'Il consumatore medio ed il consumatore vulnerabile nel diritto comunitario' (2010) *Contratto e impresa, Europa* 572.

[48] AGCM 20 April 2005, No. 14253 (PI4702), Boll. 16/2005 (*Suonerie per cellulari '09'*), AGCM 6 February 2007, No. 16470 (PI5497), Boll. 6/2007 (*Servizi teleunit per maggiorenni su reviste per regazzi*), AGCM 21 August 2008, No. 18799 (PS457), Boll. 32/2008 (*10 SMS Gratis*), AGCM 2 October 2008, No. 18951 (PS322), Boll. 37/2008 (*Neomobile Suonerie Gratis*), Tar Lazio Sez. I, 21 January 2010, No. 645 (*Telecom Italia*). Same: Tar Lazio Sez. I, 21 January 2010, No. 646

An illustrative case of both this type of commercial practice and the reasoning of the AGCM and the courts is the *Suonerie.it* case (2010).[49] On the website *Suonerie.it*, the trader offered downloads of ringtones of popular songs. Visitors to the website were invited to download the ringtones and were given step-by-step instructions on how to download the songs, i.e., by sending a text message by mobile phone to the trader. In small print at the bottom of the website, the visitor was told to 'check compatibility with your mobile phone' and the visitor could click 'for info and costs', which differed per phone operator. Also in small print, on the top left of the website, it was mentioned that this concerned a 'subscription service'.

The *Tar Lazio* identified children and teenagers as the groups who are most interested in and most exposed to these services. The Court argued that the practice was targeted at children and teenagers, and that these groups—despite the fact that they may have most experience as to these services—are seen as a vulnerable groups as to the services offered:

> IT Quest'ultima, relativamente all'individua-zione del target di riferimento, ha infatti chiaramente spiegato (senza che, al riguardo, la ricorrente abbia potuto sviluppare contro-deduzione alcuna, anche perché si tratta di un dato di comune esperienza) che 'in considerazione della tipologia di servizio pubblicizzato, va osservato che i messaggi in esame appaiono destinati anche ad un pubblico di adolescenti, più avvezzo all'invio ed alla ricezione di contenuti per cellulare, come rilevato dall'Autorità in precedenti interventi aventi ad oggetto comunicazioni con carattere analogo ai messaggi oggetto della presente valutazione […].
> Come evidenziato in alcune precedenti decisioni dall'Autorità […], le indicazioni carenti e poco chiare contenute nei messaggi circa le caratteristiche ed i costi finali del servizio pubblicizzato possono risultare ulteriormente pregiudizievoli in considerazione della naturale mancanza di esperienza dei giovani, […] in quanto meno propensi a distaccate e specifiche valutazioni di opportunità economica, in rapporto alle nuove tecnologie e ai servizi offerti attraverso i terminali di comunicazione.
> EN Concerning the identification of the targeted group, [the Authority] has clearly explained (without any possible rebuttal from the petitioner, also due to the fact that it is common experience) that 'having regard to the kind of service advertised, it has to be observed that the messages concerned seem to be addressed also to a teenage audience, who, as noted by the Authority in previous interventions involving communications with a similar character to that of the message at hand […], are more accustomed to sending and receiving cell-phone content.
> As highlighted in some previous decisions of the Authority […], the lacking and unclear information as to the characteristics and final costs of the service advertised contained in the messages can have further harmful effects due to the natural lack of experience of young people, […] due to their lesser proneness to specific and unaffected economic evaluation when it comes to new technologies and services offered through communication channels.

(*Telecom Italia*), Tar Lazio Sez. I, 21 January 2010, No. 647 (*Zed Sms non richiesti*), Tar Lazio, Sez. I, 21 January 2010, No. 648 (*Telecom Italia*), Tar Lazio, Sez I, 2 August 2010, No. 29511 (*Suonerie.it*), Cons. Stato, Sez. VI, 24 March 2011, No. 1810 (*Telecom Italia*), Cons. Stato, Sez. VI, 24 March 2011, No. 1811 (*Telecom Italia*), Cons. Stato, Sez. VI, 24 March 2011, No. 1812 (*Telecom Italia*), Cons. Stato, Sez. VI, 24 March 2011, No. 1813 (*Telecom Italia*), Tar Lazio, Sez. I, 21 September 2009, No. 9083 (*Soc David 2*), Cons. Stato, Sez. VI, 4 April 2011, No. 2099 (*Neomobile*). See on some of these cases affecting teenagers also N Zorzi Galgano, 'Il consumatore medio ed il consumatore vulnerabile nel diritto comunitario' (2010) *Contratto e impresa, Europa* 572–573

[49] Tar Lazio, Sez I, 2 August 2010, No. 29511 (*Suonerie.it*).

The Court also emphasised that because of the protection offered by Article 20(3) *Codice del Consumo* (i.e., the vulnerable group benchmark), the trader should give clearer information to the consumer:

> IT Tenuto conto della particolare tutela che l'articolo 20, comma 3, del Decreto Legislativo n. 146/07 riserva agli adolescenti quale gruppo di consumatori particolarmente vulnerabile alla pratica commerciale in contestazione in ragione della loro età o ingenuità, è necessario […] adottare accorgimenti grafici ed espressivi idonei a rendere edotti questi ultimi dell'attivazione di un servizio a pagamento, di durata prolungata, conseguente al download della prima suoneria.
> EN Taking into account the specific protection which Article 20 paragraph 3 of the Legislative Decree No. 146/07 grants to teenagers as a group of consumers which is particularly vulnerable to the challenged commercial practice due to their age or naivety, it is necessary […] to adopt graphic and linguistic instruments capable of making them aware that, as a consequence of downloading the first ringtone, a paid and long-term service has been activated.

Hence, children and teenagers were not expected to 'find the catch', and the Court made clear that it is up to the trader to communicate more clearly about the terms and conditions of the services that are being offered.

In another case on the vulnerability of children and teenagers, the AGCM and the *Tar Lazio* emphasised that children (in the particular case children under the age of fourteen) have difficulties recognising the commercial intent of a commercial message during a children's TV show.[50] Again, the emphasis is on the trader's responsibility not to mislead rather than on consumers, in this case children and teenagers, not to be misled.

### *7.6.3 The Elderly*

Elderly consumers have often been identified in relation to commercial practices in decisions of the AGCM, but in many of these cases they are merely identified as the target of a commercial practice, for example in relation to advertising for private elderly homes.[51] In these cases the elderly consumers are not regarded as particularly vulnerable, or at least their vulnerability is not explicitly stated.[52]

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[50] Tar Lazio, Sez. I, 9 August 2010, No. 30428 (*È Domenica papa*).

[51] See, for example, AGCM 13 April 1995, No. 2951 (PI412), Boll. 15–16/1995 (*Centro Nazionale Enti Assistenza*) and AGCM 17 January 2002, No. 10347 (PI3482), Boll. 3/2002 (*Hotel Laurens*).

[52] See also AGCM 15 December 2010, No. 21916 (PS5803), Boll. 49/2010 (*Italcogim Energie—Attivazioni non richieste*) and AGCM 23 November 2011, No. 23011 (PS3764), Boll. 47/2011 (*Edison—Attivazioni non richieste*) (on energy supply), AGCM 13 March 1997, No. 4780 (PI1084C), Boll. 11/1997 (*Agil*), AGCM 13 March 1997, No. 4781 (PI1084D), Boll. 11/1997 (*Rheumasan*), AGCM 13 March 1997, No. 4784 (PI1126), Boll. 11/1997 (*Euro Bio vit.*), AGCM 13 March 1997, No. 4779 (PI1084A), Boll. 11/1997 (*Biosal*) and AGCM 13 March 1997, No. 4778 (PI1084B), Boll. 11/1997 (*Euro Bio Med*) (on a miraculous product made out of cat hairs that is supposed to provide pain relief) and AGCM 28 March 1996, No. 3753 (PI717), Boll. 13/1996 (*Meritene crema*) (on food supplements).

There are, however, some cases in which elderly consumers have been identified as being particularly vulnerable, in particular in relation to doorstep selling, or similar ways of selling in which the trader tries to sell directly at the consumer's home. In recent years there have been a number of cases involving companies selling encyclopaedias or art works by means of doorstep selling and home visits, in which elderly consumers—sometimes elderly over the age of 90 were targeted—were determined to be particularly vulnerable.[53] Similarly, elderly consumers were identified as vulnerable in other cases involving selling at the consumer's home, including home visit selling of IT-courses.[54] The idea seems to be that elderly consumers are more easily pressured to make a purchasing decision than other consumers.

### *7.6.4 Credulous Consumers: Products and Services Related to the Paranormal*

Similarly to children and teenagers, Italian law already prior to the implementation of the Unfair Commercial Practices Directive identified some groups of consumers as particularly credulous and, therefore, in need of additional protection.[55] The clearest example of this concerns the vulnerability as to products and services related to the paranormal. From early on in the enforcement of the rules on misleading advertising, the AGCM has often taken action against traders offering these kinds of products.

A clear example is the *Ditta Euromail* case of 1994.[56] This case concerns the mail-order sale of products such as aphrodisiacs, weight loss products, talismans, magic and occult books and other items promising luck, happiness, love and money. The AGCM made clear that the advertising was misleading, taking into account that:

> IT […] i messaggi, basati su promesse del tutto infondate rispetto al comune buon senso ed alle conoscenze scientifiche attuali, sono formulati in modo da sfruttare la credulità e la debolezza delle persone culturalmente meno preparate o più sprovvedute, le quali potrebbero essere indotte a credere di poter ottenere successo e fortuna in ogni campo, risolvendo con facilità ogni tipo di problema.
> EN […] the messages, based on claims that are completely groundless in terms of common sense and current scientific knowledge, are formulated in such a way as to exploit the

[53] AGCM 9 May 2012, No. 23551 (PS4791), Boll. 19/2012 (*UTET—Enciclopedia non richiesta*), AGCM 8 August 2012, No. 23816 (PS7557), Boll. 33/2012 (*Federico Motta Editore—Modalità di vendita*) and AGCM 20 February 2013, No. 24230 (IP141), Boll. 9/2013 (*FMR-ART'È—Vendita libri di pregio a domicilio*).

[54] AGCM 18 July 2012, No. 23744 (PS6576), Boll. 29/2012 (*Titel—Corso di informatica*). In this case not only elderly consumer were identified as particularly vulnerable, but also people looking for jobs. In this case, the AGCM does not specify *why* the elderly are seen as particularly vulnerable to the practice, but it seems that the fact that it concerned doorstep selling is relevant here.

[55] See also N Zorzi Galgano, 'Il consumatore medio ed il consumatore vulnerabile nel diritto comunitario' (2010) *Contratto e impresa,* Europa 591–592.

[56] AGCM 11 February 1994, No. 1784 (PI191), Boll. 6–7/1994 (*Ditta Euromail*).

> weakness and credulity of less educated or more naïve persons, who could be led to believe that they can achieve success and good fortune in any field, resolving all sorts of problems with ease.

Similarly, the AGCM found the advertising for the *Piramide della Felicità* misleading, arguing that products such those advertised aim at exploitation of the consumer's superstitious insecurities, anxieties and fears.[57] It concerned an advertisement in the form of a teleshopping broadcast, in which popular Italian singer Nilla Pizzi (at that time in her 70s, hence appealing mostly to an elderly audience) promoted a talisman in the form of a small copper pyramid, called the *Piramide della felicità e della fortuna* (the 'Pyramid of happiness and good luck') at a price of 199,000 lire (which would today amount to approximately € 100, not taking into account inflation). Amongst others, the item was claimed to be 'a powerful shield against envy, jealousy and malice of all kinds' and was also claimed 'to increase the likelihood of winning a lottery or any other game'. Despite the fact that most consumers would see that the product advertised was a hoax, particularly vulnerable consumers who would buy into the message are protected.[58]

This idea that the consumers of these products and services are particularly vulnerable has been repeated in many other decisions of the AGCM[59] and in the case law of the *Tar Lazio*.[60] The reasoning can also be traced in later case law in which this idea is translated into the credulity concept of vulnerable consumers.[61]

### *7.6.5 Credulous Consumers: Health-Related Products*

A category of cases which is difficult to place as to the consumer benchmark applied, but which is an important category in the practice of the AGCM and the courts, concerns advertising for health-related products. There is a large body of decisions of the AGCM and judgments of the administrative courts in this field. These cases are in a way much like the decisions and case law on paranormal products; the products often promise hard-to-believe results that are apparently believed by some. In some of the cases, the AGCM or the court explicitly refers to vulnerable consumers or to the exploitation of the vulnerabilities of consumers. Yet in most cases, despite the fact that most consumers are likely to be wise enough not to believe the claims, the AGCM and the courts argue that the *average consumer* is misled. It is, therefore,

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[57] AGCM 21 February 1996, No. 3640 (PI708), Boll. 8/1996 (*Piramide della Felicita'*). See similarly AGCM 23 November 1995, No. 3412 (PI611) Boll. 47/1995 (*Divino Otelma*).

[58] See on this case also N Zorzi Galgano, 'Il consumatore medio ed il consumatore vulnerabile nel diritto comunitario' (2010) *Contratto e impresa, Europa* 591.

[59] See, for example, AGCM 23 November 1995, No. 3412 (PI611) Boll. 47/1995 (*Divino Otelma*).

[60] Tar Lazio, Sez. I, 13 October 2003, No. 8321 (*Peter Van Wood*).

[61] See e.g. AGCM 23 April 2009, No. 19791 (PS2681), Boll. 16/2009 (*Sensitiva Adelia Felice*), AGCM 28 May 2009, No. 19912 (PS2860), Boll. 21/2009 (*Stufetta Miracolosa*), AGCM 26 May 2010, No. 21174 (PS717), Boll. 22/2010 (*Mago Vito Lo Cascio*) and AGCM 26 May 2010, No. 21179 (PS2300), Boll. 22/2010 (*Mago Anthony Carr*).

difficult to place this body of case law in terms of the consumer benchmark being applied, also because the AGCM and the courts seem to reason differently from case to case. What is clear, though, is that the AGCM—with support of the administrative courts—is strict towards advertising claims concerning health related products, and that it is willing to protect consumers from hard-to-believe promises regarding products in this field.[62]

In some cases, the AGCM explicitly stated that the advertisements or commercial practices at hand were relying on the credulity of 'the most naïve and sensitive'. These cases concerned products offering solutions for pain,[63] impotence[64] and haemorrhoids.[65] The AGCM also identified vulnerability due to credulity in cases concerning products against baldness[66] and skin marks.[67]

There is also a large body of decisions of the AGCM and administrative judgments on similar hard-to-believe products related to dieting and other weight loss products.[68] The cases concern products such as dieting pills, mouth sprays supressing the feeling of hunger and electro stimulation devices. In most of these cases the traders suggest miraculous results ('you can lose up to X kg in X days') without sound scientific evidence.

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[62] See also C Alvisi, 'The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices', in G Bongiovanni, G Sartor and C Valentini (eds), *Reasonableness and law* (Law and philosophy library vol. 86) (Vienna, Springer 2009) 288–289.

[63] AGCM 13 April 1995, No. 2954 (PI446), Boll. 15-16/1995 (*Argilla radiante*).

[64] AGCM 21 July 2010, No. 21379 (PS3689), Boll. 29/2010 (*Benefit-BluPill*). The case was confirmed by the Tar Lazio, Sez. I, 23 May 2011, No. 4532 (*Benefit-BluPill*). See also AGCM 25 February 1999, No. 6937 (PI2225), Boll. 8/1999 (*Up 100 compresse*), which is also about impotence but in which the deceptiveness is tested applying the benchmark of the average consumer rather than the vulnerable consumer.

[65] AGCM 13 April 1995, No. 2953 (PI445), Boll. 15–16/1995 (*IDOS*).

[66] AGCM 10 September 2009, No. 20284 (PS891), Boll. 36/2009 (*Bioscalin crescita capelli*). The judgment has been confirmed by the Tar Lazio, Sez. I, 13 December 2010, No. 36119 (*Bioscalin crescita capelli*).

[67] AGCM 13 April 1995, No. 2955 (PI447), Boll. 15–16/1995 (*Il segreto di Venere*).

[68] AGCM 30 May 1996, No. 3941 (PI650), Boll. 22/1996 (*Dieta Slimming*), AGCM 26 March 1999, No. 7024 (PI2245), Boll. 12/1999 (*Dimagrante Chitosan*), AGCM 21 December 2000, No. 9060 (PI3043), Boll. 51-52/2000 (*Adiposforte*), AGCM 16 March 2000, No. 8152 (PI2795), Boll. 11/2000 (*Greenlife*), AGCM 22 March 2001, No. 9343 (PI3103), Boll. 12/2001 (*Rekorp G-Force Metabolic*), AGCM 29 March 2001, No. 9367 (PI3128), Boll. 13/2001 (*Fat Blocker Diet*), AGCM 1 August 2001, No. 9848 (PI2620C), Boll. 31/2001 (*Elettrostimolatore Beauty Center*), AGCM 8 August 2001, No. 9867 (PI3286), Boll. 32/2001 (*Newbody*), AGCM 6 September 2001, No. 9924 (PI3323), Boll. 35–36/2001 (*Bruciakal di prodotti naturali*), AGCM 11 October 2001, No. 10026 (PI3330), Boll. 41/2001 (*Fitness Beta 3*), AGCM 13 December 2001, No. 10230 (PI3400), Boll. 50/2001 (*D-Stock di Vichy*), AGCM 13 December 2001, No. 10232 (PI3418), Boll. 50/2001 (*Pectina di frutta dimagrante*), AGCM 24 January 2002, No. 10372 (PI3465), Boll. 4/2002 (*Body Slim*), AGCM 14 April 2010, No. 21013 (PS4025), Boll. 15/2010 (*Medestea—Full fast*), AGCM 15 June 2010, No. 21260 (PS5445), Boll. 24/2010 (*Centri Dimagranti Sobrino*) and AGCM 8 September 2010, No. 21539 (PS1898), Boll. 37/2010 (*Pool Pharma—Kilocal*).

Specific vulnerable groups are not identified in these cases.[69] Rather, the benchmark of the average consumer is applied to order to assess the deceptiveness of the commercial practices. In some of these cases, 'the average consumer of these products' is identified as particularly vulnerable. An example of this line of reasoning is the *Pool Pharma–Kilocal* case (2010),[70] in which the AGCM stated that the trade practice at hand was likely to mislead 'the average consumer—made up of overweight people who are particularly susceptible to easy solutions and who are not particularly onerous'.[71]

The fact that most people know that these dieting products are too good to be true is not ignored by the AGCM:[72]

> IT Quanto alla possibilità di conseguire un calo ponderale generalizzato, si osserva che risulta ormai dalla comune esperienza che gli strumenti indispensabili per contrastare le situazioni di sovrappeso sono rappresentati da una dieta guidata e controllata e da una specifica attività fisica, elementi questi che non possono essere ritenuti sostituibili dal semplice impiego di prodotti quali quello pubblicizzato.
> EN As to the possibility of achieving an overall weight decrease, [the AGCM] observes that it is, by now, common experience that indispensable tools to oppose overweight are a controlled and guided diet regime and specific body activity, factors which cannot be replaced by the simple use of products such as the one advertised.

However, despite the fact that it is common knowledge that losing weight is not a matter of simply taking diet pills or using other products that promise the consumer quick and easy ways to lose weight, this is not held against the consumer, but instead against the trader. Accordingly, the advertising is held to be deceptive.[73] Clearly, these cases offer protection to a credulous minority believing these types of product claims, rather than setting the benchmark at the (CJEUs or actual) average consumer. Once more, the responsibility to trade fairly weighs more heavily than the responsibility of the consumer not to be misled.

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[69] There are exceptions to this, see, for example, AGCM 27 April 1994, No. 1922 (PI179), Boll. 17/1994 (*Bromelina*), in which the AGCM speaks of 'la naturale credulità delle persone che vivono una situazione di disagio', i.e., 'the natural credulity of people living in a state of distress'.

[70] AGCM 8 September 2010, No. 21539 (PS1898), Boll. 37/2010 (*Pool Pharma—Kilocal*).

[71] This fits the wordings of Article 5(2) Unfair Commercial Practices Directive, stating that 'the average consumer whom [the trade practice] reaches or to whom it is addressed' must be affected in his economic behaviour.

[72] AGCM 24 January 2002, No. 10372 (PI3465), Boll. 4/2002 (*Body Slim*).

[73] See also C Alvisi, 'The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices', in G Bongiovanni, G Sartor and C Valentini (eds), *Reasonableness and law* (Law and philosophy library vol. 86) (Vienna, Springer 2009) 289.

## 7.7 Conclusion

Italian unfair competition law was known for its lenient stance towards potentially misleading advertising; it accepted that advertising did not correspond to reality, and consumers were thus expected to recognise this and to act correspondingly.

The implementation of the Misleading Advertising Directive and the establishment of the AGCM in the early 1990s radically changed this. The AGCM has an active role in the field of misleading advertising and unfair commercial practices and is pragmatic in its approach, also in relation to the application of the consumer benchmarks.

In the decisions of the AGCM and the judgments of the administrative courts there is a general tendency to emphasise the trader's responsibility to act fairly, rather than the consumer's responsibility to act critically and circumspect and to beware of potentially unfair practices. In this light, the expectations of the behaviour of consumers are not particularly high. This applies especially if an economic context can be identified in which the consumer is generally expected to be more vulnerable, such as in relation to complex products.

Additional protection is offered to vulnerable groups. However, as much more emphasis is generally placed on the trader's responsibility to act fairly than on the consumer's responsibility to beware of potentially unfair practices, these cases on vulnerable groups or target groups are not that obvious when compared to other cases, in which the average consumer benchmark is applied. There is no clear difference between the protection of the average consumer, on the one hand, and of certain particularly vulnerable groups, on the other. This is also evident from the fact that there is no clear demarcation between the benchmarks. In this sense, protection is offered where the AGCM and the administrative courts think it is needed, without placing too much emphasis on what benchmark should be applied.

Consumer protection in Italian unfair commercial practices law is, therefore, clearly not limited to rational consumers and certain particularly vulnerable groups. It is questionable whether this is in line with European law. Taking into account the case law of the CJEU and the fact that the approach of the German *Bundesgerichtshof* in *Orient Teppichmuster* was already seen as being in breach of European law by the European Commission, this seems unlikely.

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# Chapter 8
# Comparison

**Abstract** German, English and Italian law have distinctly different backgrounds both in terms of unfair commercial practices regulations and in terms of the benchmarks that were applied prior to the introduction of the average consumer benchmark by the CJEU. Courts and enforcement authorities in all three Member States now apply the average consumer benchmark as prescribed by the CJEU. It is interesting to note, however, that in none of the three Member States does the application of the benchmark reflect the same high expectations as the CJEUs case law with regard to the behaviour of the average consumer. In this sense, EU-conform application of the benchmark has not—yet—been achieved. There are also still considerable differences in the application of the benchmarks between the three Member States, e.g., in terms of the degree to which the average consumer is to be regarded as vulnerable and in terms of the degree to which the target group and vulnerable group benchmarks are applied.

**Keywords** Comparison · Consumer benchmarks in EU Member States · Average consumer benchmark · Target group benchmark · Vulnerable group benchmark · Use of empirical evidence

## 8.1 Introduction

This chapter compares the consumer benchmarks applied in the unfair commercial practices laws of the selected Member States, including a horizontal comparison between the Member States as well as a vertical comparison with European law. Special attention is paid to the themes identified in Chap. 4 of this book. The consequences in terms of the goals of the Directive (e.g., in relation to conform or non-conform application) are discussed in the assessment of the Directive's benchmarks in Chap. 11 of this book.

Paragraph 8.2 will first compare the legal context in which the consumer benchmarks developed in the three Member States, followed by a discussion of the 'old' consumer benchmarks in paragraph 8.3. Subsequently, the application of the average consumer benchmark (paragraph 8.4) and the target group and vulnerable group



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benchmarks (paragraph 8.5) will be discussed. Paragraph 8.6 deals with the possibility for courts to use empirical evidence in determining the expected behaviour of consumers.

## 8.2 Legal Context

Germany, England and Italy have distinctly different legal backgrounds with regard to the regulation of unfair commercial practices. Germany with its *Gesetz gegen den unlauteren Wettbewerb* (UWG), a law that dates back to 1896, has a particularly strong history in this regard. The UWG is a general law on unfair competition, which aims at the protection of competitors and consumers. However, its scope was subsequently enlarged to include consumers. Although the UWG was amended in order to implement the Unfair Commercial Practices Directive, the idea of general regulations on unfair commercial practices was certainly not new for German law. Enforcement of the UWG is private, with an important role for competitors as well as competitors' interest groups and consumer interest groups.

English law is quite different in this respect. Unlike Germany, England never had a general law regulating unfair competition or unfair commercial practices. The situation in English law was somewhat obscure, with several common law actions, as well as statutory instruments addressing unfair commercial practices, with varying scopes of protection. While some only address the interests of competitors (e.g., the economic tort of passing-off), others only address (or addressed) the interests of consumers (e.g., the Trade Descriptions Act 1968 and the Control of Misleading Advertisements Regulations 1988). In this sense the Unfair Commercial Practices Directive brought about a significant change in the English legal landscape.

In Italy, there was little protection against unfair commercial practices until the Misleading Advertising Directive was implemented in 1992. From 1942, there has been a general clause on unfair competition in tort law, but it has been used little in the context of unfair commercial practices. Moreover, this general clause did not aim to protect consumers, but competitors. It was, therefore, European law, in the form of the Misleading Advertising Directive and later the Unfair Commercial Practices Directive, that introduced unfair commercial practices regulation aimed at the protection of consumers. The *Autorità Garante della Concorrenza e del Mercato* (Italian Competition and Market Authority, AGCM) has a strong role in the enforcement of these instruments.

## 8.3 The Old Consumer Benchmarks

German law had a reputation for having a very strict approach to commercial practices, protecting even the most naïve and unknowing consumers. German unfair competition law was indeed generally strict, and there was a low threshold for po-

tentially unfair commercial practices to be forbidden under the *Gesetz gegen den unlauteren Wettbewerb* (UWG). The benchmark applied was that of the *flüchtigen und unkritischen Durchschnittsverbraucher*, i.e., the casually observing and uncritical average consumer. In practice, this meant that as soon as a product name, for example, could possibly lead to confusion, this could be successfully challenged under the UWG.[1] Moreover, under the doctrine of *Blickfangwerbung*, eye-catching advertising statements were as a rule assessed on their own, i.e., regardless of further information or disclaimers in the advertisement. Sometimes even objectively true advertising slogans, such as '*Der meistgekaufte der Welt*' (the most purchased in the world, for electric shavers) were found to be misleading, because they were thought to invoke false impressions, in this case that the producer would also be market leader in Germany.[2] The *Bundesgerichtshof* expected the consumer to be especially vulnerable as to environment-related and health-related advertising, because consumers were expected to react particularly emotionally towards these types of advertising and to have difficulty assessing the truthfulness of claims as to these topics.[3] Finally, additional protection was also granted to particularly vulnerable groups, such as children.

English law, at least in comparative studies, had a reputation for having a *laissez-faire* approach to commercial practices.[4] Looking at the consumer benchmarks applied in, for example, the common law tort of *passing off* and in the Trade Descriptions Act 1968, this reputation requires nuancing. These instruments applied the benchmarks of 'the ordinary shopper', 'the ordinary person', or similar benchmarks. What was expected of the consumer in this regard differs somewhat from case to case, but in most cases the expectations of this 'ordinary shopper' or 'ordinary person' were not particularly high.[5] In some cases, a minority of consumers was protected, although this seems to be the exception rather than the rule.[6]

In Italy, there was little general protection against unfair commercial practices for consumers until the implementation of the Misleading Advertising Directive in the early 1990s. Moreover, in the application of the clause on unfair competition in the *Codice Civile*, courts had rather high expectations of consumers, expecting

[1] See, for example, BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128—*Steinhäger*.

[2] BGH 1 October 1971, I ZR 51/70, GRUR 1972, 129—*Der meistgekaufte der Welt*.

[3] See, for example, BGH 20 October 1988, I ZR 238/87, GRUR 1991, 546—*aus Altpapier*.

[4] See, for example, G Schricker, 'Die Bekämpfung der irreführenden Werbung in dem Mitgliedstaaten der EG' (1990) *GRUR Int.* 118–119 and T Lettl, 'Der lauterkreisrechtliche Schutz vor irreführender Werbung in Europa' (2004) *GRUR Int.* 90.

[5] See, for example, with respect to the tort of passing-off: *Reckitt & Coleman Products Ltd v Borden Inc and others* [1990] 1 WLR 491; and for the Trade Descriptions Act 1968: *Burleigh v Van den Berghs and Jurgens Ltd* [1987] BTLC 337.

[6] See, for example, *Doble v David Greig Ltd* [1972] 1 W.L.R. 703, applying the Trade Descriptions Act 1968, and *Director General of Fair Trading v Tobyward Ltd* [1989] WLR 517, applying the Control of Misleading Advertisements Regulations 1988. Note that there are no examples of protection of specific vulnerable groups in English law.

them to be critical and suspicious towards advertising.[7] This earned Italy the reputation of being particularly lenient towards traders and having high expectations of consumers.[8]

## 8.4 Application of the Average Consumer Benchmark

In Germany, the introduction of the average consumer benchmark by the CJEU caused a significant change in the application of the UWG. After the CJEU judgment in *Gut Springenheide,* the *Bundesgerichtshof* ceased to apply the benchmark of the *flüchtigen und unkritischen Durchschnittsverbraucher* and instead began to apply the benchmark of the average consumer, whose level of attention is expected to depend on the situation at hand (i.e., the *situationsadäquate Durchschnittsverbraucher*).[9] This means that the average consumer is no longer expected to be confused and misled as easily as under the old consumer benchmark, and that, depending on the situation, the average consumer is expected to pay more attention to the information available. This also means that the old doctrine regarding *Blickfangwerbung* is now replaced by a new one, under which the consumer is expected to look beyond the main slogan and is expected to pay attention to additional information, especially if there is a clear reference to this information (e.g., through an asterisk in a prominent place within the advertisement). At the same time, however, there does appear to be room for deviation from the average consumer benchmark in case of objectively false advertising, as was indicated by the *Bundesgerichtshof* in *Scanner-Werbung*.[10] Despite the change to comply with the case law of the CJEU, German law remains less strict than (and thus not in conformity with) the case law of the CJEU in the field of misleading commercial communication. This was also clearly indicated by the European Commission in relation to both the *Orient-Teppichtmuster* and the *Scanner-Werbung* cases in preparing the Unfair Commercial Practices Directive. Moreover, the recent *Trento Sviluppo* judgment of the CJEU also indicates that the deviation from the average consumer benchmark in *Scanner-Werbung* is not in conformity with EU law, as the CJEUs judgment confirms that providing false information is not misleading *per se*.

In English law, the introduction of the average consumer benchmark by the CJEU has caused less change. The 2005 *Lewin v Purity Soft Drinks* case on labelling could have been seen as a change towards a more strict interpretation of the average consumer benchmark, but it seems more likely that its significance is limited to the context of labelling.[11] In the preparations for the implementation of the Unfair

[7] Tribunale di Torino, Riv. Dir. Comm. 1915 II, 166 and Corte di Cassazione 17 April 1962, GRUR Int. 1964, 515 (*Motta Alemagna*).

[8] See, for example, G Schricker, *Italien*, (Munich, Beck, 1965) 204.

[9] See, in particular, BGH 20 October 1999, I ZR 167/97, WRP 2000, 517—*Orient-Teppichmuster*.

[10] BGH 20 December 2001, I ZR 215/98, WRP 2002, 977—*Scanner-Werbung*.

[11] *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81.

Commercial Practices Directive, the UK Government argued that 'the average consumer did not mark a radical departure from the existing law'.[12] Taking into account the benchmark applied in English law prior to the implementation of the Unfair Commercial Practices Directive, the remark of the UK Government already suggested that the English courts were not going to strictly interpret the CJEUs case law. This view is further supported by the cases applying the Consumer Protection from Unfair Trading Regulations so far. The first important case going into the substance of the Directive, *Office of Fair Trading v Purely Creative Industries*, indicates that the average consumer benchmark is not a significant barrier to consumer protection.[13] In fact, the practice at hand is found misleading under application of the average consumer benchmark, despite the fact that the commercial practice is likely to affect only a minority of consumers. In this way, the case clarifies that clearly fraudulent trade practices, i.e., practices *intended* to deceive consumers, are not permitted, even if the average consumer (even if regarded as the actual average) is unaffected. *Office of Fair Trading v Ashbourne Management Services* also points to the direction of a rather consumer-friendly interpretation of the average consumer benchmark. In this case, the court bore in mind the consumer's overconfidence of his future use of the gym, and emphasised that the trader, advising long-term gym contracts, was not allowed to make use of the poor decision-making of the consumer.[14] This points towards a more 'behavioural' approach to the assessment of commercial practices, rather than the classic private law principle of *caveat emptor* ('buyer beware'). English law is, therefore, also less strict towards consumers than the CJEU in its case law on misleading commercial communication.

The same conclusion can be drawn for Italian law. The decisions of the AGCM and the judgments of the administrative courts demonstrate much more of an emphasis on the responsibility of the trader to advertise clearly and comprehensibly than on the responsibility of the consumer not to be affected by potentially unfair practices. In order to be able to pragmatically deal with problems in the market, the average consumer benchmark is applied flexibly. This also means that the average consumer is assumed to be particularly vulnerable in certain contexts and that the AGCM and the courts sometimes deliberately take into account a novice consumer rather than an experienced consumer, especially as regards, for example, complex products, such as credit cards and telecom contracts.[15]

It is interesting to note that in all three Member States, the application of the average consumer benchmark seems to be intended to reflect actual behaviour of the average consumer rather than desired behaviour.[16] Consumers are not generally expected to take into account the information available and are not generally

[12] Department of Trade and Industry 2005, p. 30.

[13] *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106.

[14] *Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237.

[15] See Tar Lazio, Sez. I, 19 May 2010, No. 12364 (*Accord Italia——Carta Auchan*) and Tar Lazio, Sez. I, 29 March 2010, No. 4931 (*Wind Absolute Tariffa*).

[16] In English law there is the exception of *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81, in which the stricter case law of the CJEU in relation to labelling is followed.

expected to beware of potentially unfair practices. Hence, all three Member States, compared to European law (and in particular the CJEUs case law), place more emphasis on the responsibility of the trader to act fairly and less emphasis on the responsibility of the consumer not to be misled. As a consequence, all three Member States seem to offer a higher level of consumer protection than is indicated (and allowed for) by the CJEU.

## 8.5 Application of the Target Group and Vulnerable Group Benchmarks

The German courts have always been willing to take into account the interests of specific vulnerable groups, in particular if they were targeted by the commercial practice. It remains to be seen how the target group and vulnerable group benchmark as introduced by the Unfair Commercial Practices Directive will be applied. There have been recent examples in which children and teenagers have been qualified as vulnerable due to their lack of experience as consumers.[17] Moreover, there are some examples of cases in which clearly misleading practices have been forbidden as it was expected that they would exploit the vulnerability of particularly credulous consumers.[18]

As to English law, little can be said about the target group and vulnerable group benchmarks, considering the fact that there are no examples of these benchmarks being applied so far. However, it could be argued that *Office of Fair Trading v Purely Creative Industries* in fact protects particularly credulous consumers, rather than the average consumer, even though the Court indicated that it applied the average consumer benchmark and not the vulnerable group benchmark.[19] It must be noted that it is questionable whether the vulnerable group benchmark could have been applied, taking into account the requirements for application of the benchmark, i.e., that the vulnerable group must be clearly identifiable and that the group's vulnerability must be reasonably foreseeable. It would therefore also be uncertain whether EU law would allow for protection in such a case via the application of the vulnerable group benchmark.

Much more explicit is the protection of vulnerable groups in Italy. Although there is no clear demarcation between the average consumer benchmark, the target group benchmark and the vulnerable group benchmark, it is clear that the AGCM as well as the administrative courts take into account the interests of particularly vulnerable groups. Children and teenagers are generally seen as more vulnerable due to their lack of experience as consumers, and also elderly consumers have been

[17] See, for example, BGH 6 April 2006, I ZR 125/03, GRUR 2006, 776—*Werbung für Klingeltöne* and BGH 22 September 2005, I ZR 83/03, GRUR 2006, 161—*Zeitschrift mit Sonnenbrille*.

[18] See, for example, BGH 26 April 2001, I ZR 314/98, GRUR 2001, 1178—*Gewinn-Zertifikat* and OLG Düsseldorf 9 September 2008, I-20 U 123/08, WRP 2009, 98—*Macht über die Karten*.

[19] *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106.

identified as a vulnerable group, in particular with regard to doorstep-selling and other direct selling methods. Moreover, consumers interested in products related to the paranormal are seen as particularly credulous and thus vulnerable. Similarly, vulnerability due to credulity has been identified for consumers of health-related products, including diet products. It is questionable whether EU law allows for such extensive protection of vulnerable groups, taking into account the requirements of the target group and vulnerable group benchmarks in the Directive.

## 8.6 Use of Empirical Evidence

In the *Gut Springenheide* and *Lifting* decisions, the CJEU ruled that the use and interpretation of empirical evidence, such as consumer research polls and expert opinions, is left to national law.[20] As discussed in paragraph 4.6 of this book, it is not clear whether the idea underlying the average consumer benchmark, i.e., setting the right level of consumer protection in relation to the free movement of goods, should play any role in the use of empirical evidence, and whether Member States can interpret empirical evidence without taking this idea in consideration.

Interestingly, the German *Bundesgerichtshof* decided that, with the adoption of the European average consumer benchmark, the old practice that only 'a not inconsiderable number of consumers' should be misled, could no longer apply. It is likely that this also has consequences for the interpretation of the results of empirical evidence. In German legal literature the general idea seems to be that if, for example, consumer research polls are used, the number of consumers that is required to be misled in order to justify a prohibition should be higher than under the old law and that the old threshold of 10–15 % cannot be utilised.[21] In practice, the issue has so far not been of importance because the German courts decide cases based on how they themselves think consumers would behave, with reference to general experience.

Also in English and Italian law the enforcement authorities and the courts generally decide on the basis of their own assessment how consumers would behave. In Italy, an exception to this was the *Sigarette Lights* case, in which the AGCM commissioned research in order to ascertain the understanding of consumers as to the health-related attributes of light cigarettes.[22] In that case, the *Tar Lazio* used the CJEUs statement in relation to the Member States' freedom to use empirical evidence to also decide on its own on the appropriate level of protection in that case. This approach thus seems different to German law. At the same time, it must be noted that the low threshold for prohibition in the case at hand also seems to be

[20] CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I–4657 (*Gut Springenheide*); CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I–117 (*Lifting*).

[21] See, for example, S Leible, 'Anmerkung zu EuGH vom 16.7.1998 (Gut Springenheide)' (1998) *Europäische Zeitschrift für Wirtschaftsrecht* 529.

[22] Tar Lazio, Sez. I, 11 January 2006, No. 1372 (*Sigarette Lights*).

related to the fact that it concerned health-related advertising, and that the claims under investigation could thus endanger the consumer's health.

## 8.7 Conclusion

It must be noted that because of the different legal contexts in which the consumer benchmarks are applied, the conclusions in this comparison are drawn with some reservation. For example, different enforcement structures (e.g., cases brought by private parties in German law and by a public body in Italian law) lead to different types of cases being brought before the authorities in these Member States. Also the number of published cases varies significantly from one legal system to the other, meaning that it is often not possible to compare similar cases as to their outcomes.

Having said that, it is striking that, when comparing the application of the consumer benchmarks in the Member States to the CJEUs case law, none of the Member States researched illustrate the emphasis of the CJEUs case law on the consumer's responsibility to beware of potentially unfair commercial practices.

Of the three Member States, Italian law seems to offer the highest level of protection to consumers, emphasising the trader's duty to act fairly and to offer clear and comprehensible information. However, English law is also not afraid to intervene in the market and challenge unfair practices, despite its reputation for having a liberal approach to potentially unfair commercial practices. Finally, although German law as a consequence of the CJEUs case law has lowered its level of protection and no longer generally assumes the average consumer to be *flüchtig* and *unkritisch,* it still presumes in certain circumstances that the consumer is observing superficially, leading some commentators as well as the European Commission to conclude that the German application of the average consumer benchmark is still not in conformity with EU law. Taking into account the application of the benchmarks in English and Italian law, the same can be said for those legal systems.

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# Part III
# Consumer Behaviour

*This part investigates the relationship between the consumer benchmarks and actual consumer behaviour, on the basis of existing consumer behaviour studies. It addresses how the behaviour assumed in light of the consumer benchmarks relates to actual consumer behaviour, as understood by the behavioural sciences. Firstly, Chap. 9 discusses the average consumer benchmark from a consumer behaviour perspective. In Chap. 10 the same is done for the protection of vulnerable consumers through the target group and vulnerable group benchmarks.*

# Chapter 9
# The Average Consumer Benchmark From a Behavioural Perspective

**Abstract** There are two general assumptions underlying the average consumer benchmark as applied by the CJEU. Firstly, the CJEU has a tendency towards viewing the average consumer as a rational decision-maker. This assumption is highly problematic from a behavioural perspective, as many studies have shown that consumers often do not act rationally. People have difficulty dealing with complex or large amounts of information and consumer decision-making is often flawed because of so-called *biases*. Secondly, the average consumer benchmark has as a basis the assumption that consumers behave similarly, and that the average consumer benchmark, therefore, more-or-less accurately represents 'standard consumer behaviour'. Similar to the rationality assumption, this assumption is problematic from the point of view of consumer behaviour. Consumers in many ways differ from one another in their decision-making, making it difficult to work with the concept of an average consumer. For example, consumers significantly differ in terms of pre-existing knowledge and the degree of involvement consumers have with specific products. Also differences in personality and culture create significant differences in behaviour between consumers.

**Keywords** Average consumer benchmark · Behavioural perspective · Behavioural assumptions · Rational decision-maker · Typical behavior · Pre-existing knowledge · Consumer involvement · Personality · Culture

## 9.1 Introduction

This chapter addresses the question how the average consumer benchmark relates to actual consumer behaviour as understood by the behavioural sciences. It first identifies two general assumptions underlying the average consumer benchmark (paragraph 9.2), followed by a discussion of those assumptions from a behavioural perspective, using insights from the field of consumer behaviour and behavioural



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economics (paragraph 9.3).[1] The focus is on the benchmark as applied at the European level, as this is the legal framework that is subject to the assessment provided in Chap. 11 of this book.

## 9.2 Assumptions Underlying the Average Consumer Benchmark

According to the CJEU, the average consumer is 'reasonably well informed and reasonably observant and circumspect'.[2] This description in itself does not clarify what behaviour is or should be assumed in relation to this benchmark. As has been shown in Chaps. 3 and 4 of this book, the application of the average consumer benchmark and the guidelines for application do not always provide a consistent image of what is expected of the average consumer's behaviour.

Still, there are two prominent assumptions with regard to the behaviour of the average consumer that can be derived from European law, in particular from the CJEUs case law. The first is that the average consumer is often depicted as someone who takes well-considered purchasing decisions and who takes into account the information available.[3] In Chap. 3 of this book, several examples of this have been provided in the CJEUs application of the benchmark, as well as in the Opinions of its Advocate Generals. For example, Advocate General Fennely in *Lifting* stated that 'the assumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices'.[4] Moreover, the CJEU in the context of the labelling doctrine assumes the average consumer to read product labels and to bear in mind the information provided on those labels before making a purchasing decision.[5] The image of the average consumer as a careful decision-maker arises most explicitly in the Opinion of Advocate General Trstenjak in *Mediaprint*, in which she argued that the consumer is expected to recognise the potential

[1] Large parts of this chapter have been published earlier as a contribution to a book on private law and behaviour (in Dutch). See B Duivenvoorde, 'De gemiddelde consument als standard bij misleiding: een kritische blik vanuit de gedragswetenschappen', in W van Boom, I Giesen and A Verheij (eds), *Capita civilologie: handboek empirie en privaatrecht* (Den Haag, Boom, 2013) 147–168.

[2] CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*).

[3] See also R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* 30 and J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 19.

[4] Paragraph 25 of the Opinion of Advocate General Fennely in CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*).

[5] See also J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 9.

danger of certain trade practices and is expected to act rationally towards them.[6] Although the image of the average consumer presented in European law is not entirely consistent (see for example the EC Guidance, which may leave more room for recognition of weaknesses in consumer behaviour), the conclusion can at least be drawn that many of the statements on the average consumer lean towards the image of a rational decision-maker.[7] This is the first assumption that can be identified and that will be discussed in detail below.

Related to this first assumption is the idea underlying the Unfair Commercial Practices Directive and the case law of the CJEU that the benchmark of the average consumer, although in and of itself by definition an abstraction, is a suitable instrument to predict how consumers *typically behave*. The CJEU assumes that certain behaviour can be qualified as 'reasonably observant and circumspect' and that a certain level of 'being informed' can be qualified as being 'reasonably informed'.[8] The CJEU thus assumes that there is such a thing as 'typical' or 'standard' consumer behaviour and that, therefore, the average consumer benchmark reflects this behaviour. This is the second assumption that will be discussed below.

Please note that these assumptions may not always be views on how consumers actually behave; they may also reflect how consumers, according to European law, *should* behave.[9] Still, it is important to test these assumptions against actual consumer behaviour, in order to gain insight into their impact on consumer protection as well as the other goals of the Directive.[10]

## 9.3 Assumption I: The Average Consumer as a Rational Decision-maker

To what extent is the assumption of the consumer as rational decision-maker realistic? Important in this context is the well-known and long-standing discussion regarding the image of man as a rational agent, a discussion that has been held most notably in economics and in the behavioural sciences. This discussion points out that although the assumption of rational decision-making may provide a model of

[6] Paragraph 103 of the Opinion of Advocate General Trstenjak in CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*).

[7] See also R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* 30 and, similarly, J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 9. See also the discussion in Chap. 4 of this book.

[8] See also paragraph 4.3 of this book.

[9] See also paragraph 4.2 of this book.

[10] See also paragraphs 1.3 and 1.4.3 of this book.

decision-making, it ignores the many mistakes people often structurally and thus predictably make.[11]

Rationality in essence refers to a conscious decision-making process, in which advantages and disadvantages (i.e., costs and benefits) are carefully weighed in order to reach the optimal decision. As psychologist Jacoby states, 'rationality implies decision-making that is a function of the deliberate conscious consideration and evaluation of information.'[12]

Since the 1970s, psychologists have strongly criticised this idea of rational decision-making. As is discussed in more detail below, extensive research shows that due to our limited cognitive abilities we cannot always act rationally, and that even if we *can* act rationally we often do not do so. Accordingly, people do not always make choices as consciously and deliberately as is assumed by rational choice theory. In fact, we *often* do not make choices as consciously and deliberately as is assumed. Moreover, these are not just random individual examples; people in general predicatively behave differently from this assumedly rational human being. The actual average consumer is thus by far not always a rational decision-maker.

Where does it go wrong? An important assumption underlying the idea of the rational decision-maker is that the consumer uses available information and, on the basis of this information, makes the right decision. This assumption can also be found in the CJEUs case law related to the average consumer benchmark, as has been shown earlier.

The fact that information is available, however, does not automatically mean that consumers will actually pay attention to that information, nor that they perceive and comprehend the information accurately.[13] The competence of the consumer to collect and process information is limited. Moreover, there is the problem of information costs; is it worth to invest time and energy to gather and process information? In this sense, also motivation plays an important role in consumer behaviour. Consumers are not likely to be motivated to invest time in making a decision if it concerns a product of low value, whereas they may be more motivated to spend time making a decision for more expensive good.[14]

Many things can go wrong in the various stages of information processing, i.e., in the stages of *attention*, *encoding and comprehension*, *inference*, as well as in the *response processes*.[15] Consumers not only encounter problems processing

[11] See in the context of the average consumer also J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 17 and onwards.

[12] J Jacoby, 'Is it rational to assume consumer rationality?' (2000) *Roger Williams University Law Review* 103.

[13] See also J Jacoby, 'Is it rational to assume consumer rationality?' (2000) *Roger Williams University Law Review* 119–122. He argues that 'if one assumes that, for consumers to engage in rational decision-making and choice behavior, one only need provide them with the requisite information, one will be operating with an untenable assumption.'

[14] See for individual differences in motivation also the discussion on *involvement* below.

[15] R Wyer Jr., 'The role of knowledge accessibility in cognition and behaviour—implications for consumer information processing', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 32.

information regarding complex products such as those in the financial sector.[16] Jacoby quotes research showing that, on average, television viewers and magazine readers miscomprehend approximately 20–25 % of the material meanings they read in magazines or see on television. He adds:[17]

> Strikingly, this research shows that virtually 100 % of the population miscomprehends at least some portion of these "common denominator mass media" communications, and that this occurs regardless of the level of formal education. J.D.s, L.L.Ds and Ph.Ds miscomprehend material elements of these simple communications at nearly the same rates as do those whose formal education ended with high school diplomas or less. In similar fashion, research on product warning labels and disclaimers reveals that consumer attention to and comprehension of such information is far from optimal, often hovering in the range of 10 % to 20 %.

Exactly where it goes wrong in the processing of information is not always easy to ascertain, but consumer psychology has identified some important problems in this regard. One of these issues is the now well-known problem of *information overload*, i.e., the problem that consumers often prove to be unable to make adequate decisions when faced with a considerable amount of information. Hence, although consumers require sufficient information in order to facilitate their decision-making process, too much information distorts the same process.[18] Providing more information may thus be counterproductive.[19]

Consumers also make mistakes because of so-called *cognitive biases*, i.e., typical and predictable irrational thought processes or results of thought processes. Experiments indicate that consumers, because they have to deal with the fact that they do not always possess full information and have limited cognitive abilities in evaluating this information, use so-called mental shortcuts or *heuristics*. These mental shortcuts or heuristics are often very useful, enabling consumers to make quick and relatively reliable decisions.[20] Heuristics provide consumers with a possibility to evaluate choices and subsequently select from alternatives in a simple, flexible and easily adapted way.[21] However, heuristics also have their difficulties. In fact, extensive research shows that certain mental shortcuts are seriously flawed, causing

[16] See on the issue of financial literacy, e.g., V Mak, 'The myth of the 'empowered consumer': lessons from financial literacy studies' (2012) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/ Journal of European consumer and market law* 254.

[17] J Jacoby, 'Is it rational to assume consumer rationality?' (2000) *Roger Williams University Law Review* 120–121.

[18] See, for example, N Malhotra, 'Information load and consumer decision making' (1992) *Journal of consumer research* 419–430 and J Jacoby, 'Perspectives on information overload' (1984) *Journal of consumer research* 432–435.

[19] J Bettman, E Johnson and J Payne, 'Consumer decision making' in T Robertson and H Kassarjian (eds.), *Handbook of consumer behaviour* 57.

[20] J Conlisk, 'Why bounded rationality?' (1996) *Journal of economic literature* 671.

[21] J Peter and J Olson,*Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 170–172. See also J Conlisk, 'Why bounded rationality?' (1996) *Journal of economic literature* 671.

people to structurally incur cognitive errors in their decision-making. These cognitive errors are also known as *biases*.[22]

One of the most well-known biases is related to the so-called *framing effect*.[23] Experiments in the 1980s by psychologists Tversky and Kahneman show that differently designed but essentially identical options lead to distinctly different choices by consumers.[24] Framing can help to draw consumers' attention to important information, but the opposite can also be achieved. A good example of this is the *decoy effect*, of which Ariely has provided an example for consumer behaviour.[25] He shows that adding an option, which at first sight would appear irrelevant, can radically change the perceived value of other options. The options in his experiment concern a subscription to the *Economist*. One group of test subjects has two options: (a) an online-only subscription to the *Economist* for $ 59,- or (b) a print subscription to the *Economist* combined with an online subscription for $ 125,-. Another group has the same options (a) and (b), but with a worthless and thus seemingly irrelevant additional option of a print subscription of $ 125,-, i.e. the same price as the combined subscription (b). None of the subjects choose the extra option, but the distribution for the choice for options (a) and (b) suddenly changes dramatically; in the first group, 68 % of the respondents choose the online-only subscription, with 32 % opting for the combined subscription, whereas in the second group only 16 % opted for the online-only subscription, and 84 % the combined subscription. This shows that the way in which options are presented can strongly influence consumer choice and that this choice is less rational than one would expect, as it can be steered by seemingly irrelevant external factors.

Another problem in consumer decision-making is that consumers often have difficulties estimating the chances of future events. Lacking accurate information, people use heuristics to make estimations. As already noted, these heuristics are often useful tools, but also necessarily involve associated flaws. For example, in estimating the chance of future events, people tend to rely too much on the availability of these events in one's own memory. Accordingly, people tend to overestimate the chance of events that have happened recently or that are otherwise readily available in their own memory. People also tend to be structurally over-optimistic about their own future.[26] This overly optimistic outlook increases the chance that people overestimate their chances to repay a loan, or make them too readily believe that they will be able to save up money for retirement at a later stage in their life.

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[22] For heuristics and biases in general, see J Conlisk, 'Why bounded rationality?' (1996) *Journal of economic literature* 670.

[23] See, for example, R Korobkin and T Ulen, 'Law and behavioral science: removing the rationality assumption from law and economics' (2000) *California law review* 1104–1107.

[24] A Tversky and D Kahneman, 'The framing of decisions and the psychology of choice' (1981) *Science* 453.

[25] D Ariely, *Predictably irrational* (London, Harper, 2009) 1–6.

[26] This is also known as the *overconfidence bias*, see R Korobkin and T Ulen, 'Law and behavioral science: removing the rationality assumption from law and economics' (2000) *California law review* 1091.

These examples illustrate that the image of the average consumer as a rational decision-maker is problematic from a behavioural perspective.[27] Consumer decision-making is subject to a range of predictable problems. These flaws in the decision-making process make consumers vulnerable to deceptive marketing strategies, exactly because the flaws are predictable. This means that traders can (and do) design their marketing strategies in order to profit from these flaws.[28]

## 9.4 Assumption II: The Average Consumer as a Model for Typical Behaviour

### *9.4.1 General Remarks*

As discussed above, the second assumption related to the average consumer benchmark is that it is a model that represents 'typical' or 'standard' consumer behaviour. Yet to what extent can one really speak of 'typical' or 'standard' consumer behaviour? To what extent is consumer behaviour generally predictable and to what extent can one talk of 'average' behaviour? As is shown in more detail below, the assumption of typical consumer behaviour presents a number of problems. In practice, there are significant differences in the basis, processes and results of decision-making between consumers. This is illustrated by means of a discussion of four important factors that influence these processes. Firstly, the role of pre-existing knowledge on the decision-making between consumers will be discussed (paragraph 9.4.2). Secondly, the role of involvement on the decision-making process will be dealt with (paragraph 9.4.3), followed by a discussion of the role of personality (paragraph 9.4.4). Finally, the role of culture in consumer behaviour will be discussed (paragraph 9.4.5).

### *9.4.2 Pre-existing Knowledge*

Pre-existing knowledge, i.e., the knowledge the consumer has prior to entering the process of decision-making, has a large impact on the further decision-making process. Research on this point indicates that knowledge influences the different stages

[27] See also R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* 21 and J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013).

[28] See also O Bar-Gill, *Seduction by contract: law, economics and psychology in consumer markets* (Oxford University Press, 2012) 2. See for an extensive overview of deceptive marketing strategies also D Boush, M Friestad and P Wright, *Deception in the marketplace: the psychology of deceptive persuasion and consumer self protection* (New York/London, Routledge, 2009).

of the decision-making process in general, including the attention that is paid to certain types of information and the way consumers evaluate choice options.[29]

Consumers can acquire knowledge in various ways, such as through exposure to advertisements, information searches, interaction with sales staff and product usage. The level of these experiences is often referred to as *familiarity*. The level of familiarity (i.e., the total number of these types of experiences) generally influences what is referred to as *expertise*. This refers to cognitive structures (e.g., beliefs about product attributes) and cognitive processes (e.g., decision rules for acting on those beliefs), which are required to perform product-related tasks successfully.[30] In other words, the more product-related experiences people have, the better they are thought to be able to perform product-related tasks such as reading and understanding technical attribute descriptions and comparing products.

Several studies have been conducted on the question how *novices* (consumers having little expertise on a certain topic) and *experts* (consumers having high expertise on a certain topic) process messages. For example, an experiment on information processing of an advertisement for a personal computer shows that novices tend to disregard technical attributes if no further explanation is given regarding the benefits of those attributes, while for experts this technical information leads to more detailed processing of the advertisement.[31] Similarly, experts tend to elaborate more upon the information available, while novices tend to use shortcuts while thinking about product attributes.[32] Moreover, it has been suggested that novices struggle to process information, as they are unable to connect facts.[33]

What does this mean for the average consumer benchmark? It is important to realise that information (e.g., in advertising) is handled differently by different consumers based on what they already know, and that there are large differences in what consumers already know (irrespective of their educational background). The availability of pre-existing knowledge depends on earlier experiences of consumers and, related to that, on their interests (see also the discussion on *consumer involvement* below). This raises the question whether setting the benchmark at the average consumer means that the interests of novices will not be taken into account, because the consumer would be assumed to be averagely informed, whereas novices may

[29] For an overview, see J Hutchinson and E Eisenstein, 'Consumer learning and expertise', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 103.

[30] J Alba and J Hutchinson, 'Dimensions of consumer expertise' (1987) *Journal of consumer research* 1987 411, J Hutchinson and E Eisenstein, 'Consumer learning and expertise', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 103–104.

[31] D Maheswaran and B Sternthal, 'The effects of knowledge, motivation, and type of message on ad processing and product judgments' (1990) *Journal of consumer research* 66.

[32] J Hutchinson and E Eisenstein, 'Consumer learning and expertise', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 106–107.

[33] J Alba and J Hutchinson, 'Dimensions of consumer expertise' (1987) *Journal of consumer research* 1987 411 and D Maheswaran, B Sternthal and Z Gürhan, 'Acquisition and impact of consumer expertise' (1996) *Journal of consumer psychology* 115.

not be capable of processing the information as they may be unable to understand the relevance of the information provided. Furthermore, if this is the case, does this not give traders the opportunity to make use of (or ultimately abuse) the inexperience of consumers?[34]

### *9.4.3 Consumer Involvement*

Another important issue in the context of typical behaviour and individual differences between consumers is what is referred to as *consumer involvement*. Consumer involvement concerns consumers' perceptions of the importance of or personal relevance for an object, event or activity.[35] This so-called *motivational state* influences cognitive and affective processes and thus also choice behaviour. The more consumers are involved with a certain product, the more they will be likely to be knowledgeable about the product, pay attention to the information given, gather additional information, make a detailed comparison of products, etc.[36]

Think for example of a 'computer fanatic' looking for a new computer system. This consumer has a strong psychological relationship with the product and will most likely be willing (and will probably even enjoy) spending time and effort in order to come to the best purchasing decision. The same product can, however, also be bought by someone who has little knowledge of computer systems, but simply needs to replace his old system with one that is more up-to-date.

Again, the point is that it is not easy to determine who the average consumer is in these cases and how one should characterise the behaviour of the average consumer. Is the computer fanatic the average consumer or is it the consumer just looking for an up-to-date system?

### *9.4.4 Personality*

The assumption of the average consumer benchmark representing typical consumer behaviour may also be problematic in relation to personality differences. Although this is often ignored when drafting and designing legal instruments, differences in personality play a significant role in decision-making.[37]

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[34] Note in this context that there are no indications in the CJEUs case law—expect for generally high expectations towards the average consumer—that the average consumer is seen as particularly knowledgeable. See also paragraph 4.3 of this book.

[35] J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 84.

[36] *Ibid*. See also P Bloch, 'An exploration into the scaling of consumers' involvement with a product class' (1981) *Advances in consumer research* 61 and N Michaelidou and S Dibb, 'Consumer involvement: a new perspective' (2008) *Marketing review* 83.

[37] See, for example, K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) 116–119.

An important distinction based on personality differences in consumer decision-making, also in relation to potentially misleading practices by traders, is that of the *need for cognition*.[38] The need for cognition concerns the degree to which people tend to think and have a need for thinking.[39] This plays a role in life in general (including people's tendency to engage in thinking activities in the context of leisure, such as completing crossword puzzles) and also for consumer behaviour. People who score high on the *need for cognition scale* tend to put more thinking into their decisions. Research by Levin, Huneke and Jasper indicates that people with a higher need for cognition use more information and also come to better decisions when comparing products.[40] This is different for people with a low need for cognition, who tend to rely more on simple heuristics and on the basis of easily perceptible signals (so-called *cues*), such as the perceived reliability of the person who is trying to influence them. This makes them more open to be 'directed' towards a certain decision by traders, whereas people with a high need for cognition will more likely be influenced by detailed product information.

Also other personality traits are relevant in the context of consumer behaviour, such as the *faith in intuition*, i.e. the degree to which people tend to rely on their intuition in making decisions.[41] Also the degree to which people are risk seeking or

[38] Also other personality variables are relevant for the decision making of consumers. See K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) and C Haugtvedt, K Liu and K Sam Min, 'Individual differences, tools for theory testing and understanding in consumer psychology research', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 1161. In this chapter the discussion of personality variables is limited to the example of need for cognition.

[39] K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) 116. See also C Haugtvedt, K Liu and K Sam Min, 'Individual differences, tools for theory testing and understanding in consumer psychology research', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 1162–1163. For the original research on the topic of need for cognition, see, amongst others, J Cacioppo, R Petty and K Morris, 'Effects of need for cognition on a message evaluation, recall, and persuasion' (1983) *Journal of personality and social psychology* 805, S Epstein and R Pacini, 'Some basic issues regarding dual-process theories from the perspective of cognitive-experiential self-theory', in S Chaiken and Y Trope (eds), *Dual-process theories in social psychology* (New York, Guildford Press, 1999) 462 and C Haugtvedt, R Petty and J Cacioppo, 'Need for cognition and advertising: understanding the role of personality variables in consumer behavior' (1992) *Personality and social psychology review* 303.

[40] K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) 118 and J Levin, M. Huneke and J Jasper, 'Information processing at successive stages of decision making: Need for cognition and inclusion-exclusion-effects' (2000) *Organizational behavior and human decision processes* 171.

[41] See e.g., S Epstein et al. 'Individual differences in intuitive–experiential and analytical–rational thinking styles' (1996) *Journal of Personality and Social Psychology* 390.

risk avoiding is relevant.[42] This characteristic may also influence their behaviour as consumers, for example in relation to risky financial products. In relation to the average consumer benchmark it is once more the question what can be seen as typical or standard behaviour, and to what extent it is at all useful to speak of typical or standard behaviour. Interestingly, European law seems to expect the average consumer to have a high need for cognition. As has been discussed above, the CJEU assumes the average consumer to generally take the available information into account and to reach a well-considered and well-reasoned decision based on this information. This has important consequences for the level of consumer protection. It is important to realise that if one presumes that the consumer has a high need for cognition, this leaves people with a lower need for cognition open to exploitation of that personality variable by traders, who are aware that not everyone tends to think things through as much as is sometimes assumed by the CJEU. The same applies to other personality traits.

### *9.4.5 Culture*

The issues of pre-existing knowledge, consumer involvement and personality concern differences between individual consumers. Yet on a broader scale there are also significant differences with respect to consumer behaviour that make it difficult to continue to work with the assumption of typical or standard consumer behaviour. In particular, culture causes significant differences between groups of consumers within and between different countries.

The CJEU has to some extent recognised this fact, as the Court has repeatedly stated that national courts can take social, cultural and linguistic factors into account in their assessment of commercial practices. However, as has been discussed earlier (see in particular paragraph 4.5 of this book), the CJEU does not appear to allow for extensive differences in the assessment of commercial practices between Member States; differences between consumers in Member States due to different understandings based on different languages can be taken into account, for example, but it is unlikely that the CJEU will allow for a view for overall different behaviour (and perhaps different levels of vulnerability) as regards commercial practices. Despite the fact that enforcement authorities and courts in Member States are allowed some freedom to determine what the typical reaction would be of the consumer in that Member State, the idea underlying the average consumer benchmark still primarily appears to be directed at the fact that Pan-European advertising campaigns should not be obstructed by taking all sorts of differences between consumers in different Member States into account. The average consumer thus appears to be primarily intended as a European benchmark.

[42] See e.g., P Bromiley and S Curley, 'Individual differences in risk taking' in: F Yates (ed), *Risk Taking Behaviour* (Chichester, Wiley 1992).

The issue of culture has become an important issue in consumer behaviour studies over the past few decades. Marketers face choices such as whether to launch a global, regional or local marketing campaign, raising the question to what extent consumers around the world, within a region or within a country are the same. Is a European consumer triggered by the same aspects of an automobile advertisement as an Asian consumer? Do the same sales methods for insurance policies work for German and Italian consumers?

On the basis of these studies, Wilhelmsson in his article '*The average consumer: a legal fiction'* draws attention to the cultural obstacles to European regulation of unfair commercial practices.[43] Based on consumer behaviour studies, he argues that the average consumer benchmark, despite the CJEUs mentioning of social, cultural and linguistic factors, largely ignores the significant cultural differences between consumers in different European Member States.

Indeed, studies on the relationship between culture and consumer behaviour show that there are large differences between consumers in different cultures. Shavitt, Lee and Johnson in their 2008 literature review of cross-cultural consumer psychology note that 'cultural distinctions have been demonstrated to have important implications for advertising content, persuasiveness of appeals, consumer motivation, consumer judgment processes and consumer response styles'.[44] Cultural differences thus have an impact not only on values and preferences, but on behaviour in general.

De Mooij, one of the leading researchers on consumer behaviour and culture, emphasises that cultural values are at the root of consumer behaviour and that culture is pervasive in all aspects of consumption and consumer behaviour.[45]

This also means that advertisements may be understood and appreciated very differently depending on culture.[46] Although it has been argued that marketing is becoming increasingly global, consumer psychologists warn against global marketing strategies, emphasising that consumers across the world are not sufficiently homogeneous.[47] Companies are realising that global marketing strategies often fail

[43] T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 243.

[44] S Shavitt, A Lee and T Johnson, 'Cross-cultural consumer psychology', in C. Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York, Psychology press, 2008) 1103.

[45] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 2. The studies by De Mooij build on the famous work on cultural differences by Hofstede, using his value system. See G Hofstede, *Culture's consequences: comparing values, behaviors, institutions and organizations across nations* (Thousand Oaks, Sage, 2001).

[46] J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 280.

[47] J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 301–302.

as a consequence of cultural differences.[48] In line with this, De Mooij points out that although many multinationals had standardised their operations and brands since the 1990s, the trend is reverting to a more local approach.[49]

It should be pointed out, however, that many of the studies on cultural differences in consumer behaviour focus on differences between cultures that seem to be wide apart (in particular American *versus* Asian cultures). The question thus is: what is the impact of cultural differences within Europe?

Although differences are likely to be considerably smaller within Europe than between American and Asian cultures, for example, this does not mean that Europe can be seen as one market. In this context consumer behaviourists Peter and Olson note that despite the general trend towards globalisation, cross-cultural differences between European countries will not disappear. They argue, therefore, that the vision of a single market (in terms of common cultural meanings) may therefore be 'premature' and that 'everyone agrees that […] marketers cannot look at Europe in the same way'.[50]

Again, these differences are not limited to values and preferences; the way in which consumers in different Member States make purchasing decisions is also different. For example, consumers in different Member States take different types of information into account when purchasing a car; while German consumers tend to look for detailed product specification data, Italians are more interested in car images and in the context in which the car is used (so-called subjective editorial).[51] Cultural differences have also been found as to the tendency to read information on labels of food products.[52] There are also differences in how people acquire information; people in individualist cultures (e.g., the United Kingdom and the Netherlands) people tend to acquire more information via the media, whereas people in more collectivist cultures (e.g., Spain and Italy) tend to acquire more knowledge via interpersonal communication.[53]

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[48] In 1983, Levitt predicted that consumers were becoming more homogenised and that global marketing was on the rise, but this view has been heavily opposed by consumer behaviour studies. See T Levitt, 'The globalization of markets' (1983) *Harvard business review* 92. See also J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 301 and M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 5–6.

[49] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 17–18.

[50] J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 302.

[51] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 184.

[52] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 222.

[53] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 205. Related to this, there are differences as to the extent to which consumers rely on different sources such as friends, salespeople and experts. See M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 222.

As to the processing of advertising, an interesting example is that, depending on culture, people are used to different types of information in advertising.[54] In so-called low-context cultures (e.g., the United Kingdom and Germany), consumers are more used to explanations, persuasive copy and rhetoric, whereas in more high-context cultures (e.g., Italy, Spain and France), consumers are more familiar with symbols, signs and indirect communication, whereas consumers in.[55] While in low-context communication the information is in the words, in high-context communication the information is in the visuals, the symbols and the associations attached to them.[56] This means that the same advertisement is likely to be read differently by consumers in different cultures and that different informational elements in the advertisements are weighed differently, leading to different inferences about what a product can or cannot do.[57]

Cultural differences also have an impact on the level of knowledge of consumers in different Member States. Research shows, for example, that while in the more 'feminine' Swedish culture more than 30% of consumers did not know the engine size of their car, in the 'masculine' United Kingdom the same information was unknown to only just over 2% of consumers.[58] Differences also exist as to the tendency to postpone decisions; in cultures characterised by a stronger external locus of control (e.g., Belgium and France), people tend to postpone more than in cultures characterised by a stronger internal locus of control (e.g., Denmark and Sweden).[59]

What does this mean for the average consumer benchmark? As mentioned above, the average consumer benchmark—and, more generally, the idea of full harmonisation—appear to primarily imply a uniform European benchmark. This view ignores the cultural differences between consumers in different Member States.[60] A model

[54] See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 260–261 and, more generally, S Shavitt, A Lee and T Johnson, 'Cross-cultural consumer psychology', in C. Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York, Psychology press, 2008) 1113–1114.

[55] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 206.

[56] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 212.

[57] This also implies different needs as to regulation. See T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 261.

[58] T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 264 and M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 256.

[59] M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 221–222. Locus of control concerns the extent to which people believe that they can control events that affect them. See for the overview of the locus of control in different countries: M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 205.

[60] See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 265.

of typical or rational consumer behaviour places the consumer outside of a cultural context.[61] At a practical level, the information presented in this paragraph raises the question what consumer (i.e., what culture) is taken as a benchmark. In this context, it seems that the CJEUs case law on the average consumer benchmark favours detailed analytical processing of information, while consumers in different Member States to a different extent tend to process information in this manner.[62] This has consequences for the level of consumer protection in the Member States. Especially for Member States in which people, on the basis of their culture, focus less on this type of decision-making, consumers are faced with a gap in consumer protection. In sum, also the issue of culture presents challenges to the idea of working with a benchmark based on typical consumer behaviour.

## 9.5 Conclusion

This chapter has shown that with respect to several important issues the behaviour assumed in light of the average consumer benchmark does not correspond to actual consumer behaviour as understood by the behavioural sciences.

Firstly, it has been shown that the tendency of the CJEU to envisage the average consumer as a rational decision maker ignores typical problems in consumer decision-making.[63] The CJEU thus seems to overstate the abilities of the typical consumer.[64] It is important to note in this context that since many mistakes consumers make are structural flaws, these can easily be made use of (or even provoked) by traders. Hence, the high expectations with respect to the behaviour of the average consumer provide exploitative business models with room for manoeuvre. In and of itself the fact that the benchmark is set at the average already means that the sub-averagely informed, observant and circumspect consumer is not protected, at least not if the average consumer is not affected. The fact that the expectations of the behaviour of the average consumer are unrealistically high, further raises the threshold to challenge unfair commercial practices. This raises questions as to the relationship of these high expectations with the goals of the Directive, in particular in relation to the goal to achieve a high level of consumer protection.[65]

[61] See in relation to the rationality assumption also M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 5.

[62] See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 268.

[63] See similarly R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* 21 and J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013).

[64] See also European Consumer Consultative Group 2013, p. 8.

[65] See more elaborately Chap. 11 of this book.

Apart from the fact that the expectations of the CJEU of the average consumer's behaviour are unrealistically high, this chapter has also shown that the average consumer benchmark assumes typical or standard decision-making, and that also this assumption can in several ways be seen as problematic when examined from the point-of-view of consumer behaviour studies. Consumers are different from one another and enter decision-making processes differently in many ways, for example because of differences in pre-existing knowledge, different degrees of involvement with the product or service, but also because of different personalities and cultural backgrounds. These differences influence consumer decision-making in many ways. What is to be regarded as 'typical' consumer behaviour is difficult to determine in this context. This raises practical problems as to the determination of the expected behaviour of the average consumer in a specific case, but it also raises the question whether the idea to work with the benchmark of the average consumer is the right way to determine who deserves protection and who does not. For example, should being inexperienced with a certain good or trade practice mean that no protection is offered by the Directive, as a consequence of the average consumer benchmark? This could be problematic because traders can exploit these vulnerabilities through their marketing strategies, i.e., by means of adapting their business models to less experienced consumers. Again, this raises questions as to the Directive's goals. These questions will be addressed more elaborately in Chap. 11.

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# Chapter 10
# The Protection of Vulnerable Groups from a Behavioural Perspective

**Abstract** The target group and vulnerable group benchmarks were meant to provide additional protection to consumers, addressing the concern that vulnerable consumers were not sufficiently protected by the average consumer benchmark. Yet, to what extent do these benchmarks really address consumer vulnerability? It is important in this context to note that the Directive views vulnerability in terms of groups. From a behavioural perspective, this view of consumer vulnerability is problematic. Studies on consumer vulnerability emphasise that vulnerability is highly context-specific and that this phenomenon is difficult to capture in terms of well-delineated groups. These studies show that some groups (such as younger children) may indeed be generally more vulnerable than other groups, but for most groups this is highly dependent on the type of situation. Since vulnerability is highly context specific and difficult to capture in terms of groups, both the target group and vulnerable group benchmark are applicable only in a limited number of cases, which makes it questionable whether these benchmarks can really address vulnerability.

**Keywords** Vulnerable groups · Behavioural perspective · Consumer vulnerability · Group-based vulnerability · Children and adolescents · Elderly consumers · Mental and physical infirmity · Credulity · Social class · Education · Low income

## 10.1 Introduction

The previous chapter has shown that the average consumer benchmark raises significant questions in relation to consumer behaviour as understood from the perspective of the behavioural sciences. In particular, the expectations of the average consumer's behaviour, as well as the fact that working with an average as a benchmark, seems to disregard the interests of many consumers. This raises questions as to the level of protection of consumers and, more in general, the way the Directive regulates unfair commercial practices. The target group and vulnerable group benchmarks could provide a solution in this respect. Although the target group benchmark can also raise the threshold of protection (e.g., in case of an expert audience), these



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benchmarks were introduced mainly to offer additional protection to vulnerable consumers, and, in case of the vulnerable group benchmark, to reduce the criticism that the average consumer benchmark generally afforded consumers insufficient protection. Taking into account the problems identified in relation to the average consumer benchmark in the previous chapter, the focus of this chapter is thus on the target group and vulnerable group benchmarks in relation to their ability to take into account vulnerability.

Although much remains uncertain regarding how the protection of vulnerable consumers under the Directive will operate in practice,[1] two points can be highlighted as to how the Directive views vulnerability. First of all, a central issue in the Directive is that consumer vulnerability is understood in terms of groups of consumers. Only the presence of specific target groups or of particularly affected vulnerable groups can justify an exception to the average consumer benchmark through application of the alternative benchmarks. Secondly, the Directive has a number of specific assumptions in relation to which groups are vulnerable. The Directive assumes that, due to their age, children, adolescents and elderly are vulnerable. Similarly, it assumes that people with mental or physical infirmity are vulnerable, and the same applies to—as the Directive refers to them—'credulous consumers'.

This chapter is devoted to a discussion of how these two points of view of the Directive on vulnerability relate to actual consumer vulnerability as understood in the behavioural sciences.[2] It discusses to what extent groups of consumers can be regarded as vulnerable, whether the groups mentioned in the Directive are indeed more vulnerable than other consumers and whether protection of these groups cover the issue of consumer vulnerability.

Firstly, paragraph 10.2 introduces the different perspectives one can take on consumer vulnerability, and identifies which perspective is relied upon in the context of the Unfair Commercial Practices Directive. Secondly, paragraph 10.3 deals with the Directive's approach to address vulnerability in terms of groups. In paragraph 10.4 the different groups as identified by the Directive are discussed, i.e., children, elderly, mental and physical infirmed and, finally, credulous consumers and other groups that may be identified as vulnerable. Paragraph 10.5 draws conclusions as to how the Directive's approach to the protection of vulnerable consumers relates to what is known about vulnerability in the behavioural sciences, and provides some preliminary conclusions as to the question whether the target group and vulnerable group benchmark take away the objections raised in relation to the average consumer benchmark.

[1] See paragraphs 2.6, 2.7 and 4.4 of this book.

[2] Large parts of this chapter have been published earlier in the form of an article in *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/Journal of European consumer and Market Law*. See B Duivenvoorde, 'The protection of vulnerable consumers under the Unfair Commercial Practices Directive' (2013) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/ Journal of European consumer and market law* 69. This chapter presents the main insights from behavioural sciences on consumer vulnerability, but by no means offers an exhaustive overview.

## 10.2 Consumer Vulnerability: Different Perspectives

Before delving further into the concept of consumer vulnerability, it is important to avoid confusion by pointing out that consumer vulnerability is a broad phenomenon, and that the Unfair Commercial Practices Directive only addresses one particular perspective of vulnerability. Vulnerability can be viewed from the point of view of the *limited abilities* of consumers to deal with commercial practices, but vulnerability may also lie in the *degree of exposure* to certain commercial practices, or to the *consequences* of those practices for different consumers.

If one focuses on vulnerability due to *limited abilities*, one concentrates on the competences of consumers to deal with, in this case, unfair commercial practices. So, for example, children may be more vulnerable due to their limited cognitive development, making them less able to understand information and making them more open to the influence of traders.

However, apart from focusing on the abilities of certain groups of consumers to deal with dangers such as unfair commercial practices, one can also focus on the *degree of exposure* to those dangers. This is not necessarily linked to the abilities of the consumer. For example, unemployed people and people who stay at home (e.g., childcare providers and pensioners) may be more likely to be exposed to doorstep selling than people in full-time employment, simply because they are at home more often. This does not make them less able to deal with these practices, but the chance that they become a victim may be higher because they are exposed to the practices more often.

A third approach examines the *consequences* of unfair commercial practices. This perspective on vulnerability is often taken in the context of consumer credit and other financial services for consumers. For example, poor consumers may be more vulnerable to predatory lending than consumers with higher incomes, not only because they may more often be in need of credit (i.e., degree of exposure), but also because they will be less able to cope with the consequences of debt. In other words, regardless of their susceptibility to the commercial practices, they will be the victims who are hit hardest.

For the protection of vulnerable consumers under the Unfair Commercial Practices Directive, it is the *limited abilities* perspective that matters; the issue of the consumer benchmark (i.e., the average consumer, the target group consumer or the vulnerable consumer) addresses the question which consumer should be taken as the standard to determine whether a commercial practice influences the economic behaviour of consumers. Hence, it is about the consumer's understanding of and reaction to commercial practices, which depends on his or her ability to deal with unfair commercial practices, rather than about the degree of exposure or the consequences of those practices. It is interesting to see that the EC Guidelines to the Directive in some cases confusingly refer to examples that reflect the vulnerability as a consequence of high exposure or gravity of the consequences, rather than the abilities of the consumer.[3]

[3] SEC (2009) 1666, pp. 29–30. For example, the Guidelines state that 'consumers who need to use wheelchairs' might be a vulnerable group in relation to advertising claims about ease of access to

## 10.3 Thinking About Vulnerability in Terms of Groups

As mentioned above, the Unfair Commercial Practices Directive focuses strongly on vulnerability in terms of groups. The average consumer is generally not regarded as vulnerable, and the application of the target group benchmark and vulnerable group benchmark is dependent on a specific group of consumers being targeted or particularly affected by a commercial practice.

One of the main lessons from studies on consumer vulnerability is, however, that vulnerability is context-specific and that the vulnerability of groups is sometimes overstated, leading to stereotypes.[4] Possible indicators of consumer vulnerability, such as age, income or other characteristics may show a relationship with vulnerability, but the relationship tends to be limited. This means that thinking about vulnerability in terms of groups of consumers clearly has its restrictions.

This is supported by four recent survey studies dealing with consumers' experiences with unfair commercial practices. It concerns studies in the United Kingdom, the Netherlands, the United States of America and Canada. The consumer enforcement authorities in each of the respective countries commissioned the studies (i.e., the U.K. Office of Fair Trading, the Dutch Consumer Authority[5], the U.S. Federal Trade Commission, and the Competition Bureau Canada respectively).[6]

The studies are similar in their methods. Consumers were questioned regarding their experiences with common forms of unfair commercial practices, such as misleading lotteries, misleading health claims and pyramid schemes. So, for example, consumers in the American study were asked whether in the past year they had been told by anybody that they had won a prize or a lottery, followed by questions about whether they responded to this, whether they had been required to make payments and so on.

These studies are interesting as they investigate relationships between being a victim of unfair commercial practices and several characteristics of consumers, such as age, income, gender and social class. The studies indicate that some of these characteristics are indeed linked to consumer vulnerability. For example, the Dutch study shows that low-income consumers are more likely to be victims of unfair commercial practices than higher income groups (see also paragraph 10.4.4 below). However, the differences between the income groups are rather limited, as is also the case for the other characteristics. This indicates that one has to be careful when drawing conclusions concerning group-based vulnerability. Everyone can be

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a holiday destination or entertainment venue. Although it is clear that these claims are relevant to this group and that this group is likely to be exposed more to these types of claims, this group is not likely to be less able to deal with those claims than other consumers would be to claims that are relevant to them.

[4] S Baker, J Gentry and T Rittenburg, 'Building understanding of the domain of consumer vulnerability' (2005) *Journal of macromarketing* 128.

[5] *Consumentenautoriteit*, now *Autoriteit Consument & Markt* (Authority for Consumers & Markets).

[6] Office of Fair Trading 2006, Consumentenautoriteit/Intomart GfK 2008, Federal Trade Commission/Synovate 2007, Competition Bureau Canada/Environics Research Group 2008.

a victim of unfair commercial practices and all consumers can expect to be vulnerable at some point in their lives.[7]

Why are these differences only limited? Part of the answer lies in the fact that characteristics that are commonly linked to vulnerability (such as age, income and social class) often do not directly address the cause of vulnerability. So, for example, the mere fact that a consumer is old does not necessarily mean that he or she is inept at reaching good decisions. To better address the vulnerability of elderly consumers, attention should instead be paid to the specific reasons for vulnerability that may be connected with old age, such as diminished cognitive abilities and social isolation, as is shown in more detail below.[8]

A second reason is that within vulnerable groups, differences exist between the individuals of those groups. Once again, this makes it more difficult to characterise vulnerability in terms of groups. People have different abilities, different knowledge, different past experiences and different personalities. It does not follow that people who have a certain characteristic in common (e.g., old age) will exhibit the same consumer behaviour. Within groups differences also exist because the individuals differ as to the identifying characteristic. For example, the group of 'elderly consumers' contains very old consumers (e.g., 90+), but also 'younger' elderly consumers (e.g., 65 year-olds).[9]

Finally, it is important to point out that members of a vulnerable group are usually not vulnerable to all practices; vulnerability is highly context specific. Once more, one has to beware of stereotyping. In most cases groups are not vulnerable *per se*. Rather, one should ask whether certain consumers are vulnerable to a certain practice. For example, people with physical infirmity are unlikely to be more vulnerable than other consumers when it comes to, say, buying mortgages.

## 10.4 Vulnerable Groups

### *10.4.1 Vulnerability by Virtue of Age: Children and Adolescents*

Children and adolescents are often regarded as vulnerable consumer groups. As we have seen above, this is also the case in the Unfair Commercial Practices Directive.

[7] See also P Mansfield and M Pinto, 'Consumer vulnerability and credit card knowledge among developmentally disabled citizens' (2008) *Journal of consumer affairs* 425.

[8] This is not to say that vulnerability of elderly consumers cannot be taken into account, but it appears to be wise to think about whether they are indeed generally more vulnerable than others in relation to a particular practice. Group-based vulnerability may still be a useful concept, but situational factors in relation to vulnerability should be taken into account in order to actually address vulnerability.

[9] See on individual differences between elderly consumers also C Yoon and C Cole, 'Aging and consumer behavior', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 4 and onwards.

Common sense suggests that children and teenagers may be more vulnerable as they lack experience as consumers and are less able to resist the influence of others.

There is a considerable body of research, developed mainly in the 1970s and 1980s, on what is often referred to as *consumer socialisation,* i.e., the development of consumer knowledge, skills and values of children and adolescents.[10] Not surprisingly, studies indeed show that skills, knowledge and attitudes of children develop during their childhood, making them gradually ready to function as consumers on the marketplace. This is clear from experiments on various subjects, such as understanding of advertising and persuasion knowledge, product and product pricing knowledge and decision-making skills.[11]

For example, research on children's understanding of TV advertising indicates that especially younger children do not comprehend the persuasive intent of advertising. From age seven or eight, children begin to understand the persuasive intent of advertising and recognise that ads may lie or contain bias or deception.[12] From age 11, children develop a deeper understanding of the persuasive intent and specific tactics and appeals of advertising, and tend to be sceptical towards advertising.[13]

More in general, research suggests that young children use fewer sources and less information when comparing and selecting products than older children.[14] Children, especially if they are young, also lack product knowledge (i.e., they tend to be *novices* rather than *experts*[15]) and knowledge of product pricing.[16]

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[10] D Roedder John, 'Stages of consumer socialization, the development of consumer knowledge, skills and values from childhood to adolescence', in Haugtvedt/Herr/Kardes (Handbook of consumer psychology, 2008) 1103.

[11] D Roedder John, 'Consumer Socialization of children: a retrospective look at twenty-five years of research' (1999) *Journal of consumer affairs* 183.

[12] D Roedder John, 'Stages of consumer socialization, the development of consumer knowledge, skills and values from childhood to adolescence', in Haugtvedt/Herr/Kardes (Handbook of consumer psychology, 2008) 226. See also D Roedder John, 'Consumer Socialization of children: a retrospective look at twenty-five years of research' (1999) *Journal of consumer affairs* 183, E Rozendaal, M Buijze and P Valkenburg, 'Children's understanding of advertisers' persuasive tactics' (2011) *International journal of advertising* 329.

[13] D Boush, M Friestad and G Rose, 'Adolescent skepticism toward TV advertising and knowledge of advertiser tactics' (1994) *Journal of consumer research* 165, D Roedder John, 'Consumer Socialization of children: a retrospective look at twenty-five years of research' (1999) *Journal of consumer affairs* 183. See on the topic of adolescents' skepticism towards advertising also T Mangleburg and T Bristol, 'Socialization and adolescents' skepticism toward advertising' (1998) *Journal of advertising*, 11.

[14] N Capon and D Kuhn, 'A developmental study of consumer information-processing strategies' (1980) *Journal of consumer research* 225, D Roedder John and C Cole, 'Age differences in information processing: understanding deficits in young and elderly consumers' (1986) *Journal of consumer research* 297, D Roedder John, 'Stages of consumer socialization, the development of consumer knowledge, skills and values from childhood to adolescence', *in Haugtvedt/Herr/Kardes* (Handbook of consumer psychology, 2008) 1103.

[15] See also the discussion on consumers' knowledge in paragraph 9.4.2 of this book.

[16] D Roedder John and C Cole, 'Age differences in information processing: understanding deficits in young and elderly consumers' (1986) *Journal of consumer research* 297 and D Roedder John,

As a consequence of these limitations, children have more difficulty making good ('rational') decisions, especially if these decisions involve large quantities of information. Moreover, the mode of presentation of information is highly relevant in this context.[17]

At the same time, it is important to point out that much depends on the age of the child. While younger children may struggle making even basic decisions, adolescents may easily be able to fulfil the same tasks.[18] In fact, adolescents in many ways have similar abilities as adults.[19] Unlike younger children, who often struggle even with relatively simple decision-making processes, adolescents can often cope well with persuasion attempts.[20]

However, it should be taken into account that adolescents still have little experience as consumers. In particular, they are likely to have less product knowledge, have less experience in making complex decisions and have less knowledge about unfair commercial practices.[21] The ability to deal with persuasion attempts, therefore, continues to develop well beyond the period in which information-processing skills have stabilised.[22] In this context it is important to note that children may be particularly vulnerable with regard to online advertising, where persuasive intent is often unclear and advertising techniques change quickly.[23]

Besides of their limited experience, adolescents—even though their cognitive skills often do not differ much from adults—tend to engage more often in risky behaviour. Steinberg points out that this is not caused by adolescents' bad risk assessment, but rather by their limited impulse control. Adolescents were found to know, just as well as adults, that certain types of behaviour are risky, but in practice they do not seem to act accordingly. Steinberg attributes this to the timing of the development of self-regulation capabilities; while several drives or impulses strengthen in early adolescence, self-regulation capacities such as impulse control, emotional

'Consumer Socialization of children: a retrospective look at twenty-five years of research' (1999) *Journal of consumer affairs* 183.

[17] D Roedder John and C Cole, 'Age differences in information processing: understanding deficits in young and elderly consumers' (1986) *Journal of consumer research* 297.

[18] N Capon and D Kuhn, 'A developmental study of consumer information-processing strategies' (1980) *Journal of consumer research* 225 and D Roedder John, 'Stages of consumer socialization, the development of consumer knowledge, skills and values from childhood to adolescence', in *Haugtvedt/Herr/Kardes* (Handbook of consumer psychology, 2008) 1103.

[19] L Steinberg, 'Risk taking in adolescence. What changes, and why?' (2004) *Annals New York Academy of Sciences* 51 and L Steinberg, 'Risk taking in adolescence: new perspectives from brain and behavioral science' (2007) *Current directions in psychological science* 55.

[20] D Roedder John, 'Consumer Socialization of children: a retrospective look at twenty-five years of research' (1999) *Journal of consumer affairs* 183.

[21] *Idem*. This is also indicated by a recent study conducted by UK consumer organisation 'Which?'. This study indicates that people under 30 score considerably worse in terms of 'consumer literacy'. See Which?, *Consumer literacy: capabilities and the real consumer* (2013).

[22] M Friestad and P Wright, 'The persuasion knowledge model: how people cope with persuasion attempts' (1994) *Journal of consumer research* 7.

[23] See, for example, S Calvert, 'Children as consumers: advertising and marketing' (2008) *The future of children* 205.

regulation, delay of gratification, planning and resistance to peer influence continue to develop until late adolescence and young adulthood. Hence, adolescents are faced with a 'gap' between the strengthening of drives, on the one hand, and capacities to deal with those drives, on the other.[24] While little is known of the impact of this on adolescents' behaviour as consumers, it may suggest increased vulnerability for certain trade practices, as well as vulnerability to exploitation by traders. For example, Steinberg's theory may suggest that adolescent consumers tend to focus more on immediate gains and ignore future costs.[25]

In conclusion, it is understandable that children are seen as a vulnerable group in the Unfair Commercial Practices Directive. Especially young children are easily persuaded and have limited decision-making abilities. However, as children grow older, they may in many senses have the same abilities as adults, yet lack the experience and self-control capabilities making them vulnerable to exploitation. It is, therefore, important to examine the age of the group involved, and to determine whether this group is vulnerable to the practice at hand. A standardised approach is thus difficult to maintain from a behavioural perspective.

### *10.4.2 Vulnerability by Virtue of Age: Elderly Consumers*

In a similar fashion to children and adolescents, elderly consumers are mentioned in the Directive as a vulnerable group. Common sense indeed suggests that at least some elderly consumers will be more vulnerable to unfair commercial practices due to their age. As is discussed in more detail below, several theories and experiments in the field of consumer behaviour indeed suggest that elderly consumers may be more vulnerable than other consumers. Surprisingly though, the surveys on consumers' experiences with unfair commercial practices (already discussed in paragraph 10.3 above) suggest that elderly consumers in fact fall victim to unfair commercial practices *less* often than other age groups.

An analysis of the consumer behaviour literature reveals that the most likely reason for vulnerability of elderly consumers concerns diminishing decision-making skills due to cognitive impairment.

Some cognitive abilities, such as memory retrieval, diminish as a result of aging, causing cognitive impairment. Elderly consumers may, therefore, be less likely than younger consumers to accurately process information and make rational decisions, if they are faced with new information.[26]

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[24] L Steinberg, 'Risk taking in adolescence. What changes, and why?' (2004) *Annals New York Academy of Sciences* 51 and L Steinberg, 'Risk taking in adolescence: new perspectives from brain and behavioral science' (2007) *Current directions in psychological science* 55.

[25] This phenomenon applies to people in general, but may well be sronger for adolescents.

[26] D Roedder John and C Cole, 'Age differences in information processing: understanding deficits in young and elderly consumers' (1986) *Journal of consumer research* 297, C Cole and S Balasubramanian, 'Age differences in consumers' search for information: public policy considerations' (1993) *Journal of consumer research* 157, P Sorce, 'Cognitive competence of older consumers'

Experiments also show that elderly consumers take longer to process information and have trouble processing information if it is presented at a relatively high pace.[27] Whether they have control over the pace in which information is presented, therefore, seems relevant for their ability to make good decisions.[28] Elderly consumers also seem less able to remain attentive and alert over longer periods of time, in particular when they face many new stimuli.[29]

Moreover, experiments suggest that elderly consumers have more trouble than younger consumers in making judgments if they are faced with irrelevant information. Accordingly, elderly consumers seem to be less able to discriminate between relevant and irrelevant information.[30]

Roedder John and Cole point out that elderly consumers, compared to non-elderly adult consumers, have particular problems processing larger amounts of information, and that the way in which information is presented is particularly important for their understanding.[31] These factors are relevant for all age groups, but are especially crucial for the elderly.

These cognitive limitations suggest that elderly consumers may be more vulnerable to unfair commercial practices, as they struggle to gather and process information. This makes it more difficult to evaluate the potential advantages and disadvantages of decisions.

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(1995) *Psychology and marketing* 467, C Yoon and C Cole, 'Aging and consumer behavior', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 247–270 and G Moschis, J Mosteller and C Fatt, 'Research frontiers on older consumers' vulnerability' (2011) *Journal of consumer affairs* 467.

[27] C Cole and G Gaeth, 'Cognitive and age-related differences in the ability to use nutritional information in a complex environment' (1990) *Journal of marketing research* 175, C Yoon, C Cole and M Lee, 'Consumer decision making and aging: current knowledge and future directions' (2009) *Journal of consumer psychology* 6, L Phillips and B Sternthal, 'Age differences in information processing: a perspective on the aged consumer' (1977) *Journal of marketing research* 477, C Yoon and C Cole, 'Aging and consumer behavior', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 247–270.

[28] D Roedder John and C Cole, 'Age differences in information processing: understanding deficits in young and elderly consumers' (1986) *Journal of consumer research* 297.

[29] L Phillips and B Sternthal, 'Age differences in information processing: a perspective on the aged consumer' (1977) *Journal of marketing research* 477.

[30] C Yoon, C Cole and M Lee, 'Consumer decision making and aging: current knowledge and future directions' (2009) *Journal of consumer psychology* 6, L Phillips and B Sternthal, 'Age differences in information processing: a perspective on the aged consumer' (1977) *Journal of marketing research* 444, C Cole and G Gaeth, 'Cognitive and age-related differences in the ability to use nutritional information in a complex environment' (1990) *Journal of marketing research* 176 and C Yoon and C Cole, 'Aging and consumer behavior', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 247–270.

[31] D Roedder John and C Cole, 'Age differences in information processing: understanding deficits in young and elderly consumers' (1986) *Journal of consumer research* 297. See also C Yoon and C Cole, 'Aging and consumer behavior', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 247.

Apart from cognitive impairment, elderly consumers may also be vulnerable due to *social isolation*.[32] As people become older, they are more likely than other people in society to become socially isolated. They are likely to have fewer social interactions due to retirement and the increased chance of losing their spouse, partner or friends.[33] They may also become isolated as a consequence of physical impairments.[34] As a result of a lack of mobility, they may not have the possibility to leave their homes independently. Since elderly consumers are more likely than other consumers to become socially isolated, this may make them more vulnerable to certain unfair commercial practices.[35]

Social interaction with others makes consumers familiar with unfair commercial practices, and how to deal with them. More specifically, people who are socially isolated may be less likely to consult friends and family in the process of making decisions,[36] which may increase the chance that they fall victim to unfair commercial practices. It is also suggested that people who are socially isolated may satisfy their social needs through commercial interactions.[37] Commercial interactions may in that way provide a functional equivalent to social support. Consumers who are socially isolated may be more willing to listen to somebody coming to their door or calling them to sell something, simply because they have the need to interact with others.[38] Moreover, it is suggested that people who are socially isolated may be more vulnerable to persuasive communication as they are not as accustomed to argue and are unsure about their own opinions.[39]

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[32] G Moschis, J Mosteller and C Fatt, 'Research frontiers on older consumers' vulnerability' (2011) *Journal of consumer affairs* 470.

[33] Y Kang and N Ridgway, 'The importance of consumer market interactions as a form of social support for elderly consumers' (1996) *Journal of public policy and marketing* 110 and J Lee and H Soberon-Ferrer, 'Consumer vulnerability to fraud: influencing factors' (1997) *Journal of consumer affairs* 70.

[34] J Lee and L Geistfeld, 'Elderly consumers' receptiveness to telemarketing fraud' (1999) *Journal of public policy and marketing* 209.

[35] Y Kang and N Ridgway, 'The importance of consumer market interactions as a form of social support for elderly consumers' (1996) *Journal of public policy and marketing* 108 and J Lee and L Geistfeld, 'Elderly consumers' receptiveness to telemarketing fraud' (1999) *Journal of public policy and marketing* 208.

[36] G Moschis, J Mosteller and C Fatt, 'Research frontiers on older consumers' vulnerability' (2011) *Journal of consumer affairs* 467 and J Lee and L Geistfeld, 'Elderly consumers' receptiveness to telemarketing fraud' (1999) *Journal of public policy and marketing* 208.

[37] Y Kang and N Ridgway, 'The importance of consumer market interactions as a form of social support for elderly consumers' (1996) *Journal of public policy and marketing* 108 and Y Kim, J Kang, M Kim, 'The relationships among family and social interaction, loneliness, mall shopping motivation, and mall spending of older consumers' (2005), *Psychology and marketing* 995.

[38] J Lee and H Soberon-Ferrer, 'Consumer vulnerability to fraud: influencing factors' (1997) *Journal of consumer affairs* 70. This hypothesis is supported by an experiment by Lee and Geistfeld, which shows that elderly consumers are generally more willing to listen to telemarketers, see J Lee and L Geistfeld, 'Elderly consumers' receptiveness to telemarketing fraud' (1999) *Journal of public policy and marketing* 208.

[39] J Lee and L Geistfeld, 'Elderly consumers' receptiveness to telemarketing fraud' (1999) *Journal of public policy and marketing* 208.

Against the background of the literature on vulnerability by virtue of cognitive impairment and social isolation, one may expect that elderly consumers fall victim to unfair commercial practices more often than other consumers. Surprisingly, however, the surveys on experiences of consumers with unfair commercial practices (see also paragraph 10.3 above) paint a different picture.

All four studies contradict the general assumption that mostly elderly consumers are the victims of unfair commercial practices. In fact, three of the four studies indicate that older consumers are victims of unfair commercial practices *less* often than consumers in other age groups; compared to the number of times elderly consumers are targeted by unfair commercial practices, they fall victim to these practices less than other groups.[40]

Why is this the case? The reports do not answer this point, although the UK study does suggest (without empirical back-up) that part of the result may be caused by elderly consumers' reluctance to admit to have been a victim of unfair commercial practices.[41] However, even if this is the case, there are more issues that have to be considered. In particular, researchers on the topic of elderly consumer vulnerability have indicated that the story of cognitive decline does not reveal the whole story of vulnerability. Although it is clear that elderly consumers face problems with, for example, memory, it is questionable whether this cognitive decline really makes the elderly to decide poorly. Even if elderly consumers encounter problems in processing information, it seems likely that they adapt to the situation (e.g., by taking more time to make a decision or taking notes when confronted with larger amounts of information), or compensate for the deficit by prior knowledge and experience.[42] Hence, there is not necessarily a direct relationship between vulnerability in the sense of having limited cognitive abilities and actually being a victim of unfair commercial practices.

As a consequence, the vulnerability of elderly consumers should not be overstated, and it seems unjustified to label the elderly as generally vulnerable. Contrary to what is often assumed (and which is apparently also assumed by the European legislature, by qualifying elderly consumers as a vulnerable group), elderly consumers do not seem to be deceived more often than younger consumers. Still, there are reasons for elderly consumers to experience vulnerability, and adaptation strategies, prior

[40] These findings are supported by earlier studies in the United States, see G Moschis, J Mosteller and C Fatt, 'Research frontiers on older consumers' vulnerability' (2011) *Journal of consumer affairs* 472–473. The Dutch study did not find any relationship between age and being a victim of unfair commercial practices, see Consumentenautoriteit/Intomart GfK 2008.

[41] Office of Fair Trading 2006, p. 28.

[42] C Yoon, C Cole and M Lee, 'Consumer decision making and aging: current knowledge and future directions' (2009) *Journal of consumer psychology* 2, G Moschis, J Mosteller and C Fatt, 'Research frontiers on older consumers' vulnerability' (2011) *Journal of consumer affairs* 474–475 and C Yoon and C Cole, 'Aging and consumer behavior', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 247. Another possible factor could be differences between generations (i.e., cohort differences). See also the study by UK consumer organisation 'Which?', in relation to consumer literacy. See Which?, *Consumer literacy: capabilities and the real consumer* (2013).

knowledge and experience will not always compensate for declining decisions-making skills and social isolation. It is, however, questionable whether the target group and vulnerable group benchmarks can accurately account for these vulnerabilities.

### *10.4.3 Vulnerability by Virtue of Mental and Physical Infirmity*

Mental and physical infirmity is mentioned as a ground for vulnerability in Article 5(3) of the Unfair Commercial Practices Directive. The EC Guidance to the Directive refers in this context to 'sensory impairment, limited mobility and other disabilities'.[43] More specifically, the EC Guidance points to advertising claims concerning access for disabled people to holiday destinations or entertainment venues, and to claims about 'hearing aid compatibility' in phone advertisements.

These examples may seem to be self-evident, but they are in fact somewhat puzzling. Although it is clear that only consumers in wheelchairs and consumers with hearing impairments will be affected by the claims concerned (they are after all the consumers for whom these practices matter), it is questionable that they are less informed, observant or circumspect than other consumers. Hence, they may be seen as vulnerable in the general meaning of the word, but they do not seem to be more vulnerable in the sense that they are less able to engage in these types of transactions (i.e., not from the *limited abilities* perspective, see the discussion on perspectives in paragraph 10.2 above). This makes it unclear why a different consumer benchmark (the *vulnerable consumer*, rather than the *average consumer*) would be needed in order to protect these consumers from fraudulent claims.

This especially applies to physical infirmity. In fact, physical infirmity does not seem to cause vulnerability at all for most decision-making processes. As already remarked above: why would people facing physical infirmity be more vulnerable in the sense that they are less informed, observant and circumspect than other consumers? Perhaps in some situations they are forced to rely more on a sales person, or perhaps for some their physical infirmity causes them to be socially isolated, which may be a cause of vulnerability (see also the discussion on the vulnerability of elderly consumers above). Nonetheless, in most cases physically infirmed consumers do not seem to be less capable of making decisions.

In examining mental infirmity, it is not difficult to imagine that in some cases this indeed causes vulnerability. Mental disorders may limit the consumers' ability in making good purchasing decisions, for example as a result of limited cognitive abilities. Mental disorders come in many different forms, such as anxiety disorders, impulse-control disorders and mood disorders.[44] Discussing in detail the relationship between mental disorders and consumer vulnerability lies outside the scope of this book, and it must be noted that little research has been done in this field.

[43] SEC (2009) 1666, 30.

[44] H Gleitman, J Gross and D Reisberg, *Psychology* (New York, London, Norton 2011) 644 and onwards.

Nevertheless, it is important to stress that different mental disorders come with different problems, causing different obstacles in the decision-making process. While mental disorders may make some aspects of decision-making difficult, they may leave other aspects untouched. It is, therefore, difficult to speak of people with mental infirmity as a homogenous group of vulnerable consumers, and the problems they face are highly context specific. This also makes them less likely to qualify as a target group, while at the same time it will often not be reasonably foreseeable for the trader that these consumers will be harmed.

### *10.4.4 Credulity and Other Causes of Vulnerability*

The third cause of vulnerability mentioned in Article 5(3) of the Directive is, as we have seen above, vulnerability by virtue of *credulity*. According to the EC Guidance, the category is meant to protect groups of consumers who are, more than others, open to be influenced by certain claims.[45] Unlike vulnerability due to age or mental or physical infirmity, vulnerability due to credulity does not refer to a specific reason for vulnerability. By their definition they are indeed more vulnerable than other consumers, but it is unclear who is exactly meant here. The definition is so broad that it could essentially include any vulnerable group.

However, whether a vulnerable group—other than those vulnerable by virtue of age or mental or physical infirmity—falls within the category of credulity is not a pivotal point, as the causes mentioned in Article 5(3) are not limitative and the provision thus leaves room for the protection of other groups.[46] It is more important that in order for these groups to be protected, they must be clearly identifiable as a group and their vulnerability must be reasonably foreseeable for the trader, or, alternatively, they must be specifically targeted by the commercial practice. As remarked earlier, this may pose significant barriers for the protection of vulnerable consumers.

Which potentially vulnerable groups spring to mind? Vulnerability has been linked in literature to several characteristics, including race, income, gender and education.[47] Although some of these characteristics do seem to indicate some relationship with consumer vulnerability, the most important conclusion is that vulnerability is difficult to capture within these types of characteristics.

Despite this it is interesting to examine a few of these characteristics, one of them being *gender*. The survey studies on the experiences of consumers with unfair commercial practices (see above) offer some interesting results on this issue. Both the Dutch study and, to a lesser extent, the American study found that women fall victim to unfair commercial practices more often than men.[48] In contrast, the UK

[45] SEC (2009) 1666, 30.

[46] See also paragraph 2.7 of this book.

[47] S Baker, J Gentry and T Rittenburg, 'Building understanding of the domain of consumer vulnerability' (2005) *Journal of macromarketing* 128.

[48] Consumentenautoriteit/Intomart GfK 2008, p. 51 and Federal Trade Commission/Synovate 2007, p. 28.

study did not find a significant difference between men and women.[49] The reason for these differences seems to be that different commercial practices are included in the studies. The UK study notes that for some scams a considerable difference depending on gender was perceptible; whilst women were affected significantly more by miracle health claims, clairvoyant mailing scams and career opportunity scams, men are affected more by high-risk investment scams, property investment scams, African advance fee scams and internet-dialler scams.[50] Many of high-risk practices for men found in the UK study were not included in the Dutch study, causing the total number of victims in that study to consist of more women than men. Based on these outcomes it is difficult to say whether women are generally more prone to be the victim of unfair commercial practices, let alone whether women are less capable of dealing with unfair commercial practices than men are. Again, as remarked above regarding age, it is important to note that these results do not necessarily indicate a direct link between a group being over-represented amongst victims and actually being less capable to deal with the practices. Differences may well be explained by other factors, such as preference for the underlying products or gains. This is supported by the study by Lee and Soberon-Ferrer, who found no significant differences between men and women in their study on consumers' attitudes towards potentially unfair practices.[51]

The only general characteristics that somewhat convincingly show a relationship to vulnerability are the—most likely related—characteristics of income, education and social class. This has been repeatedly suggested in literature[52] and is supported by the Dutch and the American survey studies, which include an analysis of the relationship between income and being a victim to unfair commercial practices. Both of these studies found that consumers with a low income are slightly more vulnerable than higher income groups and that people who are less educated are—albeit only slightly—overrepresented amongst victims.[53] The same conclusion can be drawn for social class; the two studies addressing this issue (i.e., the Dutch and the UK study) show that people in a lower social class are slightly more likely to be the victim of unfair commercial practices than those in a higher social class.[54]

It must be noted that even though these variables are connected with vulnerability, the differences between the groups mentioned (i.e., consumers with low income, low education or low social class) and other consumers only tend to be slight. Once

[49] Office of Fair Trading 2006, p. 27.

[50] *Ibid*.

[51] J Lee and H Soberon-Ferrer, 'Consumer vulnerability to fraud: influencing factors' (1997) *Journal of consumer affairs* 85–86.

[52] J Lee and H Soberon-Ferrer, 'Consumer vulnerability to fraud: influencing factors' (1997) *Journal of consumer affairs* 71. See also Baker, Gentry & Rittenburg 2005, p. 129.

[53] See Consumentenautoriteit/Intomart GfK 2008, p. 49 and Federal Trade Commission/Synovate 2007, pp. 28–29.

[54] See Consumentenautoriteit/Intomart GfK 2008, p. 49 and Office of Fair Trading 2006, p. 30. For the UK study it must be pointed out that this difference is only very slight. The difference between these studies may, like for gender, be explained by the different commercial practices included in the studies.

again this raises the question whether these characteristics adequately identify the reason for vulnerability, and whether these characteristics justify the application of a different consumer benchmark for the entire groups, either by being labelled as 'credulous' or by being recognised as vulnerable groups on their own. It shows once more that vulnerability is difficult to catch in these kinds of general categories.

## 10.5 Conclusion

As has been shown in this chapter, it is difficult in practice to identify vulnerable groups. Qualifying groups as inherently vulnerable is problematic, as vulnerability is highly dependent on the individual consumer and the specific situation. As Baker, Gentry and Rittenburg point out: consumer vulnerability is 'multidimensional, context specific, and does not have to be enduring'.[55]

Both the previous and the current chapter show that consumer vulnerability is much more of a flexible concept than is assumed by the Directive, and it is important to realise that all consumers can be vulnerable depending on the situation they are in.[56] The Directive's approach, with its (non-vulnerable) average consumer and its group-based exceptions poses problems in this respect. There are strong suggestions that some groups (e.g., children) are indeed generally more vulnerable, but it is important to realise that vulnerability takes different forms and has different causes. In many cases consumers facing vulnerability are not specifically targeted, nor can they be grouped in a way that makes them 'clearly identifiable' and for whom their vulnerability can be 'reasonably foreseeable' to the trader.

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[55] S Baker, J Gentry and T Rittenburg, 'Building understanding of the domain of consumer vulnerability' (2005) *Journal of macromarketing* 128.

[56] See also J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013).

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# Part IV
# Assessment

*The final part of this book assesses the consumer benchmarks in the Unfair Commercial Practices Directive with respect to each of the Directive's goals. The assessment builds upon the previous chapters of the book, taking into account the application of the consumer benchmarks at the European and national level, as well as the relationship of the benchmarks to consumer behaviour.*

# Chapter 11
# Assessment

**Abstract** The consumer benchmarks in the Directive present significant shortcomings in terms of all of the Directive's goals. In relation to the goal of achieving a high level of consumer protection this follows from the fact that the average consumer benchmark focuses on protection of the average rather than the sub-average consumer and from the fact that that the application of the average consumer benchmark by the CJEU imposes high expectations as to the average consumer's behaviour. Although the target group and vulnerable group benchmarks were meant to provide additional protection, their potential to do so is limited. As to the objective to increase the smooth functioning of the internal market, the benchmarks so far fail to remove barriers to trade. Although Germany, England and Italy have all adopted the CJEUs average consumer benchmark, none of them follow the strict interpretation of the average consumer benchmark of the CJEU. Moreover, there are still significant differences between the application of the consumer benchmarks in the Member States investigated. This also presents problems in terms of consumer confidence, as the idea is that this should improve with uniform protection throughout Europe. Moreover, consumer confidence is not likely to benefit from the shortcomings in terms of the level of protection of the consumer benchmarks as have been identified above. In relation to improving competition, the regime of consumer benchmarks in the Directive is generally effective in preventing over-protection. However, in terms of preventing unfair practices that harm competition, the Directive's regime of consumer benchmarks is less effective.

**Keywords** Assessment · Unfair commercial practices directive · Goals · High level of consumer protection · Smooth functioning of the internal market · Removing barriers to trade · Consumer confidence · Improving competition · Over-protection · Intervention in the market

## 11.1 Introduction

The previous chapters have investigated the consumer benchmarks of the Unfair Commercial Practices Directive in European law and national law, and have discussed the benchmarks from a behavioural perspective. This chapter assesses the



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benchmarks from the perspective of the Directive's goals, using the results of the analysis presented in the previous chapters. By doing so, it addresses the main question of this book, namely:

> To what extent does the regime of consumer benchmarks in the Unfair Commercial Practices Directive meet each of the goals of the Directive?

As has been discussed in Chap. 2, the two formal goals of the Directive are achieving a high level of consumer protection and increasing the smooth functioning of the internal market.[1] Apart from these two goals that were the basis for harmonisation, the Unfair Commercial Practices Directive also aims to improve competition on the market.

The Directive's benchmarks are assessed from the point of view of each of these three goals. As mentioned in the introduction to this book, the goals of the Directive cannot logically all be met completely at the same time. For example, protection of *all* consumers in *all* cases would be optimal in terms of consumer protection, but would at the same time significantly limit the possibility for traders to compete (see also below).[2]

In the following paragraphs (11.2–11.4), each of the three goals will be discussed, followed by the assessment of the benchmarks in terms of each respective goal. The final conclusion in relation to the main research question of this book is presented in paragraph 11.5.

## 11.2 Achieving a High Level of Consumer Protection

Achieving a high level of consumer protection is one of the two main objectives mentioned in Article 1 of the Unfair Commercial Practices Directive.[3] As pointed out in the discussion on the goals of the Directive in paragraph 2.3 of this book, a clear rationale of consumer protection is absent in the Directive and consumer protection in the context of this assessment is, therefore, understood in a broad sense, i.e., as the degree of protection afforded the consumer in his position vis-à-vis the trader.[4] In the context of unfair commercial practices, the level of consumer protection corresponds to the balance between, on the one hand, the responsibility of the

[1] See Article 1 Directive and paragraph 2.3 of this book.

[2] See paragraph 1.4.4 of this book.

[3] See also Recitals 1 and 5 Preamble. See on this goal of the Directive also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 247–250.

[4] Also EU consumer law in general lacks a clear rationale of consumer protection. See for further discussion, e.g., J Stuyck, 'European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market? (2000) *Common market law review* 367, I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) (in particular Chap. 2) and H Micklitz, 'The expulsion of the concept of protection from the consumer law and the return of social elements in the civil law: a bittersweet polemic' (2012) *Journal of consumer policy* 283.

trader not to act unfairly and, on the other, the responsibility of the consumer not to be affected by the trader's potentially unfair behaviour.

What can be said about the Directive's benchmarks from the perspective of the position of the consumer vis-à-vis the trader? In the previous chapters, the consumer benchmarks have already been questioned on several occasions in relation to the goal to achieve a high level of consumer protection. This applies in particular to the average consumer benchmark. The fact that the CJEU introduced this benchmark to limit what it regarded as 'excessive' consumer protection in some Member States, in particular Germany, is already an indication of its tension with the goal of achieving a high level of consumer protection.[5]

When examining the average consumer benchmark as applied by the CJEU and as codified in the Unfair Commercial Practices Directive, the tension between the benchmark and the objective to achieve a high level of consumer protection becomes clear in three ways.

Firstly, the average consumer benchmark presents shortcomings in terms of the objective to achieve a high level of consumer protection because of the fact that less than averagely informed, observant and circumspect consumers are not protected if the average consumer is not considered to be affected by the commercial practice. This per definition means that a—possibly large—group of consumers is left unprotected. Since the benchmark functions as a requirement in the context of the general clauses of the Directive, in principle traders can act contrary to professional diligence as long as their conduct does not affect the average consumer.[6] Offering protection 'beyond' the average consumer is thought to be excessive protection, unless a particular target group or vulnerable group is affected. In this sense the average consumer benchmark leaves open the possibility for traders to earn at the expense of less well-informed, observant and circumspect consumers.[7]

In this context, it is important to indicate that many practices that are widely regarded as unfair are not likely to affect the majority of consumers, because most consumers would suspect that the deal is 'too good to be true' and would thus involve a 'catch'. Hence, these practices generally do not affect the average consumer. Some of the *per se* unfair practices on the Directive's black list, such as pyramid schemes, are examples of such practices.[8] Examples can also be found in

[5] See the case law of the CJEU discussed in Chap. 3 of this book. In the context of the CJEU free movement of goods case law, the average consumer benchmark played an important role in the liberalisation and the enhancement of open markets, which also underlies the Unfair Commercial Practices Directive. See also U Bernitz, 'The Unfair Commercial Practices Directive: its scope, ambitions and relation to the law of unfair competition', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart 2007) 37.

[6] See also J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013) 1–2.

[7] See similarly J Nehf, 'Misleading and unfair advertising', in G Howells et al (eds), *Handbook of research on international consumer law* (Cheltenham/Northampton, Edward Elgar, 2010) 110.

[8] See paragraph 14 of the Directive's black list (Annex 1 to the Directive).

the case law in Member States, such as the *Purely Creative* case in England.[9] The commercial practice in issue (i.e., the assignment of 'prizes' that required the consumer to incur considerable costs that exceeded the value of the prize) was clearly designed to mislead consumers, and was thus found to be unfair by the High Court. Yet, it seems likely that the majority of consumers would suspect that spontaneously winning a prize does not come without cost, and that there would thus be a 'catch'. Strictly seen this should lead to the conclusion that the average consumer is not misled and that this practice is thus, in principle, allowed. This is remarkable as the practice is designed to mislead consumers, making it likely that many people would find such a practice unfair. From the perspective of the aim of achieving a high level of consumer protection, it seems that consumers should at least be protected against those practices that are clearly designed to mislead them.

The second issue related to the average consumer benchmark that presents shortcomings in terms of the objective of achieving a high level of consumer protection is that the CJEU in its case law on the average consumer benchmark has unrealistically high expectations of the average consumer. It has been shown that the CJEU in its case law applying the average consumer benchmark leans towards an image of the consumer as a rational decision maker, who takes into account the available information and who has a critical attitude towards potentially unfair commercial practices.[10] Behavioural studies have clearly shown that this image of a rational decision-maker is unrealistic. People structurally make mistakes in their decision-making because of *biases* in their thinking, and particularly struggle deciding if they have to process complex or large amounts of information.[11] Hence, although on the basis of its name the benchmark's intention would appear to be to protect the average consumer, the actual average consumer is not always protected.[12] It is important to stress in this context that many traders know how consumers behave, including their flaws. Fraudulent traders design their marketing strategies in such a way to abuse these flaws.[13] In this sense, the average consumer benchmark places a strong responsibility on the side of the consumer not to be misled, rather than on the trader not to mislead.

The third way in which the average consumer benchmark presents shortcomings in relation to the objective to achieve a high level of protection follows from the fact that the average consumer benchmark assumes 'typical' consumer behaviour. As has been shown, this idea ignores many factors that influence the decision-

[9] *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106. See the discussion on this case in paragraph 6.5.3 of this book.

[10] See Chap. 3 of this book.

[11] See paragraph 9.3 of this book.

[12] See also European Consumer Consultative Group 2013, p. 8, R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* 21 and J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013).

[13] O Bar-Gill, *Seduction by contract: law, economics and psychology in consumer markets* (Oxford University Press, 2012) 2.

making process and that cause numerous differences in the behaviour of different consumers.[14] It ignores factors that concern the person of the consumer (personality traits, such as the consumer's *need for cognition*), but it also disregards other factors such as a consumer's earlier experiences, knowledge and, to a large extent, cultural backgrounds. These factors all influence the different stages of the decision-making process, resulting in the average consumer benchmark becoming a fiction that is more disconnected from reality than one might expect. This provides opportunities for traders to make use of, for example, the inexperience of *novice* consumers, or of consumers with a low *need for cognition*, who tend to focus less on 'hard information' such as technical product attributes and who, as a consequence, are less likely to make detailed product comparisons.

The average consumer benchmark thus presents significant shortcomings in relation to the objective to achieve a high level of consumer protection. This follows from the fact that it sets the benchmark at the average rather than the sub-average consumer, but also from the unrealistically high expectations of the average consumer's behaviour and from the fact that the average consumer benchmark presumes typical consumer behaviour. In line with this, the position of the consumer vis-à-vis the trader can be characterised by a rather strong responsibility of the consumer not to be affected by potentially unfair practices, regardless of how 'unfair' the practice is and whether or not the practice was intended to mislead the consumer or abuse his weaknesses. Based on these shortcomings, it is not surprising that the average consumer benchmark has been criticised in the legislative process preceding the Unfair Commercial Practices Directive.[15] This has also been reiterated in academic literature on the topic. For example, shortly after the adoption of the Unfair Commercial Practices Directive, Wilhelmsson pointed to the average consumer benchmark as the main way in which the Directive fails to contribute to the goal of achieving a high level of consumer protection.[16]

What can be said about the level of protection offered by the other benchmarks? The target group and vulnerable group benchmark have the potential, at least in theory, to offer additional protection, and thus to close the gaps in protection created by the average consumer benchmark. In particular the vulnerable group benchmark was explicitly adopted for this purpose.[17]

These benchmarks, however, are subject to significant limitations in relation to their potential to offer additional consumer protection. The target group benchmark only applies if a specific group is targeted by a practice and not if other consumers are also targeted. Many unfair practices, although they only affect some consumers,

[14] See paragraph 9.4 of this book.

[15] The view of the European Economic and Social Committee (EESC) that the average consumer benchmark will make the Directive to 'lose its protective nature' is telling in this context. See *OJ* C 108/81, par. 3.6. See also paragraph 2.4 of this book.

[16] G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 248–249.

[17] See paragraph 2.4 of this book.

are still directed at the public in general, meaning that the target group benchmark does not provide for a solution.

In theory, the vulnerable group benchmark could address this problem, because for this benchmark to be applicable, the commercial practice does not have to be targeted at the vulnerable group. However, application of this benchmark is subject to requirements that, if followed, do not offer additional protection in many cases. In particular, the vulnerable group must be 'clearly identifiable', and the affection of the group must be 'reasonably foreseeable' to the trader. Although much remains uncertain about how the benchmarks should be applied from the perspective of the Directive, these requirements—if they are taken into account[18]—significantly limit the potential of the vulnerable group benchmark to offer additional protection.[19]

In this context, it is important to note that on the basis of consumer behaviour research, it is clear that every consumer faces vulnerability and that this vulnerability is not limited to certain groups. In fact, while consumer behaviour studies indicate that everyone tends to make structural mistakes and is vulnerable depending on the situation at hand, there is little evidence that the groups indicated by the Directive (except for children and perhaps teenagers) are indeed generally more vulnerable.[20] This clarifies that the approach of the Directive of having a rather low general level of protection (i.e., the average consumer benchmark) in combination with specific additional protection for vulnerable groups (i.e., the target group and vulnerable group benchmarks) does not fully deal with the problem of consumer vulnerability. The target group and vulnerable group benchmarks do not significantly raise the level of consumer protection compared to the average consumer benchmark, and consumers still seem to be open to exploitation in many ways without being protected by the Directive.[21]

Moreover, the approach of only protecting particular groups of vulnerable consumers also raises the question whether it is desirable to protect some groups of consumers, while others facing vulnerability are denied protection. Should it, from a consumer protection perspective, really matter whether someone is vulnerable by virtue of social isolation as a result of old age, or due to social isolation for other reasons? Should having limited cognitive abilities due to young age result in extra protection, while having limited cognitive abilities for other reasons (e.g., genetic, cultural or educational reasons) does not?[22] From a consumer protection perspective, this approach is questionable.

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[18] See for a more flexible interpretation of the vulnerable group benchmark the discussion on Italian law in Chap. 7.

[19] See paragraphs 2.7 and 4.4 of this book.

[20] See the discussion in the previous chapter.

[21] See also T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law 2007* (Aldershot, Ashgate, 2007) 218.

[22] In this context, it must be noted that other vulnerable groups than those mentioned in Article 5(3) Directive can also be identified as being particularly vulnerable, but for these groups it is likely to be even more difficult to qualify as being 'clearly identifiable', and their vulnerability is less likely to be 'reasonably foreseeable' to the trader.

Taking into account the gaps in protection presented by the system of consumer benchmarks in the Directive, it is perhaps not surprising that none of the national legal systems investigated follow the strict interpretation of the average consumer benchmark as laid down by the CJEU.[23] In this sense, the national legal systems each find ways to raise the level of protection compared to the consumer benchmarks in the Directive in their own way. In Germany, the *Bundesgerichtshof* does so by arguing that the average consumer, depending on the situation at hand, only observes casually.[24] In England, the courts have created the necessary flexibility by simply arguing that the average consumer is affected if a practice is found unfair, even if it seems unlikely that the actual average consumer is affected.[25] Finally, Italian law shows a general flexibility in application of the consumer benchmarks, including the flexible use of the vulnerable group benchmark, as well as indicating that the average consumer is vulnerable to specific types of commercial practices.[26]

## 11.3 Increasing the Smooth Functioning of the Internal Market

### *11.3.1 Introduction*

The other formal goal in the Unfair Commercial Practices Directive is to increase the smooth functioning of the internal market. As pointed out in the discussion on the goals of the Directive in paragraph 2.3 of this book, this objective is two-fold. Firstly, the Directive is supposed to remove barriers to trade, so that traders can offer their products throughout the European Union without having to face different regulations in different Member States.[27] Secondly, the Directive is intended to increase the consumer's confidence in cross-border shopping.[28] Both objectives should lead to an increase in cross-border trade, leading to an increase in competition and, hence, a better functioning of the internal market. This should, in the end,

[23] See the comparative overview of the application of the consumer benchmarks in Chap. 8 of this book.

[24] See Chap. 5 of this book, and in particular BGH 20 October 1999, I ZR 167/97, WRP 2000, 517—*Orient-Teppichmuster*.

[25] See Chap. 6 of this book, and the cases *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106 and *Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237.

[26] See Chap. 7 of this book.

[27] E.g., Recitals 4 and 13 of the Preamble to the Directive. See also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 250–253.

[28] See, again, Recitals 4 and 13 of the Preamble to the Directive. See also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 244–247.

lead to greater choice and lower prices for consumers, and, as a consequence, to a rise in consumer welfare and economic growth.[29] In the following sections, the sub-goals will be discussed separately, including the assessment of the Directive's consumer benchmarks for each sub-goal.

### *11.3.2 Remove Barriers to Trade*

The Preamble to the Directive stresses that differences between the rules on unfair commercial practices in the laws of Member States act as barriers to trade on the internal market.[30] The Preamble notes in this context that:[31]

> [T]hese barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions.

Hence, if companies attempt to sell their products in different markets within the European Union in which the rules on unfair commercial practices are not harmonised, they face compliance costs as a result of having to satisfy different rules in each Member State.[32] As a result of harmonisation, businesses should thus be optimally able to offer their products throughout the European Union, without having to face different sets of regulations. This cost-reduction should lead to an increase in cross-border trade, and thus to a more competitive and efficient internal market, leading to higher consumer welfare.[33]

Since the idea is that harmonisation leads to the removal of barriers to trade, the assessment of the benchmarks in relation to this sub-goal requires an answer to the question to what extent the benchmarks are suitable to fully harmonise the national laws. In the process of adoption of the Unfair Commercial Practices Directive, the European Commission identified differences between the consumer benchmarks in different Member States as one of the main areas of divergence between the national legal systems, and thus as one of the main obstacles to cross-border trade.[34] Indeed,

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[29] The objective of achieving economic growth is mentioned in the European Parliament's First Reading, p. 45. See also the Commission in the Extended Impact Assessment preceding the Directive, SEC (2003) 724, p. 4: 'The resulting low levels of cross border transactions limit consumer choice, reduce competitive pressure for efficient pricing and represent a lost opportunity in terms of economic growth.'

[30] Recital 3 Preamble.

[31] Recital 4 Preamble.

[32] See also F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 15 and C Brömmelmeyer, 'Der Binnenmarkt als Leitstern der Richtlinie über unlautere Geschäftspraktiken' (2007) *GRUR Int.* 296–297.

[33] F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 15–16. See also H Collins, 'EC regulation of unfair commercial practices', in H Collins (ed), *The forthcoming Directive on Unfair Commercial Practices* (The Hague, Kluwer Law International, 2004) 14.

[34] See the Extended Impact Assessment, SEC (2003) 724, p. 8.

if courts in Member States apply different consumer benchmarks, this will clearly lead to different outcomes in each Member State, and from the point of view of harmonisation this should be prevented. In the context of the free movement of goods, the average consumer benchmark has clearly been used as an instrument to limit differences between the laws of Member States, trying to facilitate companies who wish to trade cross-border and use the same marketing strategies across Europe.[35] The forced liberalisation of the German *Gesetz gegen den unlauteren Wettbewerb* (Act Against Unfair Competition, UWG) as a result of the case law of the CJEU is a good example of how the introduction of the average consumer benchmark can promote conformity with European law.[36] In this sense, the consumer benchmarks could have played an important role in achieving uniform application of the general clauses of the Directive.

However, it should be noted that in order for the consumer benchmarks of the Directive to be able to actually harmonise the laws of the Member States, they must be sufficiently clear. In this respect the Directive's benchmarks fail in several ways to provide the required certainty that is needed for uniform application throughout the European Union.

Regarding the average consumer benchmark, this is first of all clear from the fact that even essential questions, such as whether the average consumer benchmark is intended to reflect actual or desired behaviour, are difficult to answer on the basis of the European law.[37] This also applies to other issues, such as the role of empirical evidence and the significance of social, cultural and linguistic factors. The case law of the CJEU does not clarify to what extent empirical evidence can still be used after the introduction of the average consumer benchmark, and how this evidence should be interpreted in relation to this benchmark.[38] Similarly, the CJEU states that social, cultural and linguistic factors can play a role in determining the expected behaviour of the average consumer, but to what extent this can be done remains rather uncertain.[39] European law in that sense fails to offer proper guidelines on the application of the average consumer benchmark, and the problem is aggravated by the contradictory application of the benchmark by the CJEU in the field of trademarks, on the one hand, and misleading commercial communication, on the other.[40]

Considerable uncertainty also exists with regard to the application of the target group and vulnerable group benchmarks. As has been pointed out earlier in this chapter, it is unclear under which circumstances these benchmarks can be applied. It is also unclear how these benchmarks relate to one another and how they relate to the average consumer benchmark. For example, if the average consumer

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[35] See, for example, CJEU 6 July 1995, Case C-470/93, *ECR* 1995, p. I-1923 (*Mars*) and the other cases discussed in Chap. 3 of this book.

[36] See Chap. 5 of this book.

[37] See the discussion in paragraph 4.2 of this book.

[38] See paragraph 4.6 of this book.

[39] See paragraph 4.5 of this book.

[40] See on the application of the average consumer benchmark in trademark law paragraph 3.3 of this book. See on the differences also Chap. 4 of this book.

benchmark reflects desired rather than actual behaviour (e.g., the consumer being expected to read product labels and to react rationally towards potentially unfair practices), should this—as has been suggested by Scherer—also be reflected somehow in the application of the target group and vulnerable group benchmarks?[41]

Taking into account the uncertainty with regard to the consumer benchmarks in the Directive, it is not surprising that the application of the benchmarks in the Member States investigated is far from uniform. As already noted in the previous paragraph in relation to the objective to achieve a high level of consumer protection, none of the three Member States follow the strict interpretation of the average consumer benchmark of the CJEU, and harmonisation in that sense fails, regardless of whether this be because of uncertainty as to the interpretation or the unwillingness of national courts and enforcement authorities to follow the CJEUs approach. Also the different degrees to which the target group and vulnerable group benchmarks are applied point to the direction of failing harmonisation. This is, however, not to say that the benchmarks have had no harmonising effect at all. As already noted, in particular German law has clearly changed as a consequence of the CJEUs case law on the average consumer benchmark, and in that sense at least German law has been brought a step closer to many other Member States. However, the application of the Directive's consumer benchmarks is still far from uniform.[42] This is particularly problematic for a legal instrument that aims to achieve full harmonisation.

In conclusion, the benchmarks in the Directive fail to support the achievement of full harmonisation in the sense that companies who market their products in other Member States face minimal regulatory differences in Member States. This follows from the uncertainties as to the application of the benchmarks in the Directive and also follows from the non-conform and non-uniform application of the benchmarks in the Member States. Perhaps more guidance from the CJEU on the interpretation of the Directive will bring the application of the consumer benchmarks in the Member States closer together over time, but the lack of clarity presented by the Directive and the CJEUs case law so far does not support effective harmonisation, and thus the reduction in barriers to trade.

### *11.3.3 Increase Consumer Confidence*

The differences between the laws regulating unfair commercial practices in the Member States before harmonisation by the Directive were not only regarded as barriers to trade, but were also thought to make consumers uncertain of their rights and thus undermine their confidence in the internal market.[43] The underlying idea is that if consumers are not protected effectively (or, more accurately, think that they

[41] See the discussion in paragraph 4.4 of this book.

[42] For example, Italian law would seem quite far removed from application of the CJEU average consumer benchmark, despite the fact that its unfair commercial practices regulation changed significantly as a result of EU law,

[43] Recital 4 Preamble.

are not protected effectively), this will prevent them from cross-border shopping.[44] Uniform rules and effective consumer protection should increase consumer confidence, thus leading to more cross-border shopping.[45] This means that consumer confidence is linked both to the full harmonisation objective and to the objective to achieve a high level of consumer protection.

From the discussion above it follows that the consumer benchmarks pose problems from both perspectives. It has been shown that the consumer benchmarks are insufficiently clear to ensure uniform interpretation throughout the European Union. As a consequence, consumers can not be sure whether and to what extent they are protected. While some Member States may follow the CJEUs strict application of the average consumer benchmark, others, such as Italy, apply the benchmarks more flexibly and provide consumers with more protection. Moreover, also the fact that the consumer benchmarks leave gaps in terms of consumer protection is not likely to increase consumer confidence. This applies in particular to the fact that even practices that have a clear intention to mislead, and, as a consequence, are likely to be seen as unfair by many, are not covered by the Directive due to the rigidity of the consumer benchmarks.[46] In that sense, it is also unlikely that more uniform application in line with the Directive will increase consumer confidence.

### *11.3.4 Conclusion*

The smooth functioning of the internal market, from the point of view of the Directive, is dependent on harmonised unfair commercial practices laws and high consumer confidence. Although the introduction of a uniform consumer benchmark is potentially beneficial from the point of view of harmonisation, the current regime of benchmarks fails to provide the certainty that is required to ensure the uniform application of the Directive. This, together with the limited level of consumer protection, also raises concerns in relation to consumer confidence.

[44] See, for example, the Commission's proposal for the Unfair Commercial Practices Directive, COM (2003) 356 final, p. 4. The idea that harmonisation (be it by minimum standards or by full harmonisation) is expected to increase cross-border shopping in this way is strongly criticised, see e.g., T Wilhelmsson, 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) *Journal of consumer policy* 317.

[45] The Commission in this context talked about 'harmonising regulation of unfair commercial practices at a level which provides a high enough level of consumer protection to justify consumer confidence'. See the Commission's Extended Impact Assessment preceding the Directive, SEC (2003) 724, p. 2.

[46] This may reduce consumer confidence in general, and may be particularly harmful in relation to cross-border shopping, taking into account that consumers can rely less on trust and reputation and the trader is more difficult to reach if anything goes wrong.

## 11.4 Improving Competition

As mentioned above, the formal objectives of the Directive do not reach beyond achieving a high level of consumer protection and increasing the smooth functioning of the internal market.[47] However, as pointed out in paragraph 2.3 of this book, the Directive also aims to improve competition on the marketplace as such.[48] This follows from the EC Guidance to the Unfair Commercial Practices Directive, in which it is made clear that the Directive, as well as providing protection to consumers, also 'aims to ensure, promote and protect fair competition'.[49] Furthermore, the Directive's Preamble emphasises that the Directive, in protecting consumers, also protects legitimate businesses against unfair competitors, thereby guaranteeing fair competition.[50] Competition is harmed by unfair commercial practices, because unfair traders that sell inferior products remove market share from fair traders.[51] This is detrimental both for competitors and for consumers.

From the point of view of improving competition, legislation dealing with unfair commercial practices should leave sufficient room for businesses to compete and not to be limited by rules that in the end do not benefit the majority of consumers, while at the same time dealing with distortions of competition.[52] As Gomez states in his economic analysis of the Directive:[53]

> The core issue […] is how to design and apply an optimal system of duties of information and behaviour that covers the gaps that market forces are unable to check, and, at the same time, does not interfere with those same driving pressures of competitive markets which, overall, are the major factors in attaining optimality in the relationship between producers and consumers.

As businesses require room to compete, it is understandable that not the credulous, inattentive and uninformed consumer is taken as the main benchmark in the Directive. If it would be, this would easily lead to a flood of prohibitions, also of advertisements that, although some consumers may misunderstand them, provide useful information to many others. For example, the name 'Danish pastry' may lead

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[47] See Article 1 Directive.

[48] See also the goals discussed by Gomez in his economic analysis of the Unfair Commercial Practices Directive. See F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 4.

[49] SEC (2009) 1666, p. 6.

[50] Recital 8 of the Preamble to the Directive. See also paragraph 2.3 of this book.

[51] H Collins, 'EC regulation of unfair commercial practices', in H Collins (ed), *The forthcoming Directive on Unfair Commercial Practices* (The Hague, Kluwer Law International, 2004) 2. See also C Gielen (ed), *Kort begrip van het intellectuele eigendomsrecht* (Deventer, Kluwer, 2011) 615.

[52] See also R van den Bergh and M Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int.* 593. See also A MacCulloch, 'The consumer and competition law', in G Howells et al (eds), *Handbook of research on international consumer law* (Cheltenham/Northampton, Edward Elgar, 2010) 90–91.

[53] F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 8.

some consumers to believe that the pastry is actually imported from Denmark, but for most consumers (at least in the English-speaking market) it is simply a useful indication of a type of pastry, that allows them to distinguish this type of pastry from others. Similarly, marketing can inform consumers of product attributes and product usages, for instance.[54] Setting the benchmark at the credulous, inattentive and uninformed consumer in that sense limits not only businesses, but also consumers. A very high level of consumer protection can thus be detrimental for competition and for consumer choice, leading to lower consumer welfare.[55]

In this sense the average consumer benchmark is effective in excluding over-protection, leaving room for businesses to compete and to provide consumers with useful information through advertising. By setting the benchmark at the average rather than the credulous, inattentive and uninformed consumer, practices are maintained that are beneficial to many consumers and are not prohibited simply because a minority misinterprets them.[56] Since the target group and vulnerable group benchmarks can only be applied in specific circumstances, over-interference (i.e., that the benchmarks from a point of view of competition offer too much protection to consumers) is limited.

The question should be raised, however, whether the benchmarks—and in particular the main benchmark of the average consumer—do not limit the possibility to intervene in the market too extensively. In order to assess whether a commercial practice harms competition, courts and enforcement authorities should be able to balance the different relevant interests at hand, i.e., on the one hand, providing businesses the freedom to compete and to provide information to consumers, whilst preventing distortions of competition as a consequence of deception, on the other.

The consumer benchmarks present two problems in this respect. The first problem is presented by the unrealistically high expectations of the CJEU of the average consumer's behaviour. Rather than taking into account actual consumer behaviour, the benchmark is set at a consumer who generally takes into account the available information and who, in the words of Advocate General Trstenjak, is expected 'to be capable of recognising the potential risk of certain commercial practices and to take rational action accordingly'.[57] In order to assess what the impact is of a practice on the market, it is not sensible to work with this fictitious image of the consumer

[54] See, for example, P Nelson, 'Advertising as information' (1974) *Journal of political economy* 729 and R Pitofsky, 'Beyond Nader: consumer protection and the regulation of advertising' (1977) *Harvard law review* 661. See also I Ramsay, *Advertising, culture and the law* (London, Sweet & Maxwell, 1996) 21–30.

[55] See also R Sack, 'Die relevante Irreführung im Wettbewerbsrecht' (2004) *Wettbewerb in Recht und Praxis* 526 and P Rubin, 'Information regulation' (5110) in X, *Encyclopedia of law and economics*, Cheltenham: Edward Elgar (1999) 271–295.

[56] See also R van den Bergh and M Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int.* 597. The authors therefore prefer that average consumer benchmark over the benchmark of the less than averagely informed, observant and circumspect consumer.

[57] CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*). See paragraph 103 of the Opinion.

that reflects desired rather than actual behaviour. Rather, in this context, the impact on actual consumers should be taken into account. As Gomez notes:[58]

> From a Law and Economics perspective, harm to consumers from a commercial practice should be evaluated, for the purposes of a determination of fairness or unfairness of the practice, against the benchmark of how consumers really are and act, not how they could or should act, based on some external normative criterion. To take people as they are, and to use empirical techniques to know how they are, seem unavoidable requirements of economic analysis in this area.

Secondly, the fact that the benchmarks serve as requirements in the unfairness test removes the flexibility to balance the interests of, on the one hand, not limiting free trade and enabling traders to provide information to consumers and, on the other, preventing deception that distorts competition. Unnecessary interventions should indeed be prevented from the point of view of ensuring, promoting and protecting competition, but from that same point of view it follows that misleading statements should be prevented.[59] The assumption underlying the Directive seems to be that competition is sufficiently safeguarded if the average consumer is protected, but it is questionable whether this is really the case. While this may well be true if, for instance, the advertisement provides information that is useful to the majority of consumers, one can seriously doubt whether this is also the case if it does not.[60] What about those practices that mislead only a minority (but still a considerable number) of consumers, but that do not benefit other consumers by providing useful information? In such cases it would appear to make sense, from the perspective of competitiveness, to intervene.

What is also relevant, however, is the extent to which the corrective force of the market is likely to tackle these practices itself. Dissatisfied consumers are not likely to repeatedly buy the same disappointing product, and unfair practices are likely to lead to a bad reputation for the trader, which will ultimately drive him out of the market.[61] However, while reputation damage and lack of repeat purchasing by disappointed consumers may drive some companies out of the market, this mechanism also has its limitations.[62] Competitors and consumers will still be harmed in the process, prior to the fraudulent trader being forced out of the market. Moreover, the market does not effectively deal with fraudulent traders who do not aim to play a long-term role as a serious competitor in the market, but who, as a business model, earn money on the basis of fraudulent practices. These ‘fly-by-night’

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[58] F Gomez, ‘The Unfair Commercial Practices Directive: a law and economics perspective’ (2006) *European review of contract law* 27.

[59] R van den Bergh and M Lehmann, ‘Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht’ (1992) *GRUR Int.* 593, 596.

[60] See also R Sack, ‘Die relevante Irreführung im Wettbewerbsrecht’ (2004) *Wettbewerb in Recht und Praxis* 526.

[61] F Gomez, ‘The Unfair Commercial Practices Directive: a law and economics perspective’ (2006) *European review of contract law* 8.

[62] *Ibid*.

or scam businesses make a profit as long as they can while impairing the market.[63] In addition, the corrective force of the market is more effective in relation to typical repeat purchase products than for non-repeat purchase goods. As noted above, businesses are driven out of the market because of a lack of repeated purchases and reputation damage. While the latter mechanism at least partly also works for non-repeat purchase goods because of the exchange of information between consumers, the first does not.[64]

Hence, despite the fact that the average consumer benchmark prevents over-protection by safeguarding the interests of the majority of consumers and despite the fact that the corrective force of the market 'solves' some practices itself without considerable harm done to the market, there are still situations in which intervention is justified, but for which the benchmarks do not present this possibility. In this sense the consumer benchmarks present shortcomings also in relation to the objective to improve competition, providing insufficient room to take into account the impact on the market.

## 11.5 Conclusion

To what extent does the regime of consumer benchmarks in the Unfair Commercial Practices Directive meet each of the goals of the Directive? On the basis of the assessment made in this chapter, the conclusion can be drawn that the consumer benchmarks present significant shortcomings in terms of all three of the Directive's goals.

It has been shown that clear tension exists between the consumer benchmarks, in particular the average consumer benchmark, on the one hand, and the aim to achieve a high level of consumer protection, on the other. The average consumer benchmark was introduced through case law of the CJEU to challenge alleged over-protection provided in some Member States, in particular Germany. The average consumer benchmark leaves significant gaps in consumer protection, both by protecting the average (and not the sub-average) consumer and having unrealistically high expectations of the average consumer's behaviour. Whilst the target group and vulnerable group benchmark were designed to address consumer vulnerability, their limited application, as well as their focus on vulnerability in terms of specific groups, significantly limits their potential to actually address consumer vulnerability.

In terms of the aim to improve the smooth functioning of the internal market, it is clear that the average consumer benchmark was expected to bring more uniformity in the unfair commercial practices laws of Member States. To some extent it

[63] *Ibid*.

[64] See on the relationship between the corrective force of the market and types of products and services also R van den Bergh and M Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int.* 588.

has succeeded, considering, for example, the liberalisation of the German *Gesetz gegen den unlauteren Wettbewerb* as a consequence of the free movement of goods case law of the CJEU. Yet, neither the average consumer benchmark nor the other benchmarks provide the certainty that is needed for uniform application. This also shows from the application of the benchmarks in the Member States investigated. Hence, the regime of consumer benchmarks fails to bring the uniformity that is thought to be necessary to increase cross-border trade, both from the perspective of the trader (i.e., in terms of removing barriers to trade) and from the perspective of the consumer (i.e., in terms of consumer confidence derived from having the same protection when shopping cross-border as when shopping domestically). Also the limitations in terms of the level of consumer protection are not likely to benefit consumer confidence.

In terms of the objective to improve competition, it is clear that the average consumer benchmark prevents over-protection of consumers, thereby safeguarding the beneficial effects of commercial practices to the majority of consumers. Nevertheless, while it is important for the efficient working of the market to prevent over-protection, it is also important that misleading practices are challenged. In that sense, the average consumer benchmark prevents the actual impact on the market to be taken into account, due to the unrealistic expectations of the average consumer's behaviour by the CJEU. Moreover, the average consumer benchmark also prevents intervention in cases in which there would appear to be ground to do so from a market perspective—in particular if a practice deceives some consumers, while at the same time providing no benefit to others.

As all of the goals cannot logically be met completely all of the time, the mere fact that shortcomings can be identified does not imply that the Directive is ineffective. However, one would expect that the chosen regime of consumer benchmarks is a logical trade-off between the goals underlying the Directive, but this does not seem to be the case. It is remarkable that the limited level of consumer protection is not clearly justified by the goal to improve competition, and that the design of the consumer benchmarks at the same time also thwarts effective harmonisation.

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# Part V
# Epilogue: Recommendations

*The assessment in the previous chapter has shown that the consumer benchmarks in the Unfair Commercial Practices Directive present shortcomings in relation to all three of the Directive's objectives, i.e., achieving a high level of consumer protection, increasing the smooth functioning of the internal market and improving competition. The following chapter provides four recommendations that build upon the results of the assessment. At the same time, these recommendations go beyond the main question of the book and are, therefore, intended to provide a basis for further discussion rather than to draw conclusions that necessarily follow from what is presented in the previous chapter. Further research on these matters is, therefore, recommended.*

# Chapter 12
# Epilogue: Recommendations

**Abstract** The four recommendations presented in this chapter are intended to provide a basis for further discussion, e.g., on possible solutions in relation to the shortcomings identified in the assessment in the previous chapter. Firstly, it is recommended to adopt an alternative framework to assess the unfairness of commercial practices. In the proposed unfairness test, all factors should be taken into account that are relevant to the Directive's goals, such as the number of consumers that is likely to be affected by the practice, but also the degree to which other consumers are likely to benefit from the same practice and the possibility and cost for traders to prevent consumers from being deceived. Secondly, it is suggested to clarify the goals of the Directive and to provide better guidance as to the Directive's application. Clarification of the goals and better guidance are required in order for the general clauses to be applied uniformly, be it under the current or under the proposed unfairness test. Thirdly, it is recommended to reconsider the degree of harmonisation. Taking into consideration the application of the consumer benchmarks at the national level, the Directive currently struggles to achieve uniform application. Moreover, full harmonisation comes at a cost and it is questionable to what extent full harmonisation can really be beneficial for cross-border trade. Fourthly and finally, this book provides a compelling argument against extending the scope of application of the consumer benchmarks to EU consumer law in general. It is questionable whether extending the scope of application of the consumer benchmarks would really improve consistent application of European consumer law. Yet most importantly, the extension of the scope of application of the Directive's consumer benchmarks to EU consumer law in general would create the same problems as identified in the assessment in relation to the Unfair Commercial Practices Directive. This in and of itself is already sufficient reason to argue against such a development.

**Keywords** Recommendations · Alternative framework · Flexibility · Balancing of interests · Clarification of goals · Degree of harmonisation · EU consumer law



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## 12.1 Adopt an Alternative Framework to Assess Unfairness

The introduction of this book (see paragraph 1.1) commenced with the issue that underlies the legal concept of the consumer benchmark, i.e., the question what type of consumer a court or enforcement authority should bear into mind when assessing whether a commercial practice is unfair. This question was the basis for the discussion on the consumer benchmarks, and for the preliminary reference to the CJEU that led to the introduction of the average consumer benchmark in *Gut Springenheide*.[1] The question is highly relevant, taking into consideration that the answer determines to a large extent the outcome of a particular case and can thus also cause significant differences in the application of the unfair commercial practices laws in the Member States. European law has addressed this question in two different ways; firstly, through the introduction of the average consumer benchmark in the case law of the CJEU, and, secondly, by the introduction of the target group and vulnerable group benchmarks in the Unfair Commercial Practices Directive.

The question has thus been addressed in European law by adopting consumer benchmarks that function as requirements in the unfairness test; in order for a practice to be unfair, one of the benchmarks in the Directive has to be satisfied. The question can be raised, however, whether this is the best way to determine which practices should be deemed as unfair. The previous chapter has concluded that the regime of consumer benchmarks poses significant limitations for each of the goals of the Directive, and that these limitations cannot be explained as being the result of a logical trade-off between the goals. In particular, the lack of consumer protection is not evidently justified by the objective to improve competition, whilst the internal market objective also does not seem to provide a satisfactory explanation.

What the regime of benchmarks seems to lack—and this in principle applies in relation to all of the goals mentioned—is flexibility. Since the benchmarks function as requirements in the Directive's unfairness test, insufficient room is granted in the unfairness test to balance the relevant factors with respect to the Directive's goals. In order to allow for more flexible balancing of the interests at hand, a more general fairness test could be adopted—either by re-interpreting the Directive or by modifying it. Accordingly, this test should take into account and balance the relevant factors related to the goals of the Directive, such as the number of consumers that is likely to be deceived, but also, for example, the number of consumers that is likely to benefit from the practice (see more details below). In this way, an unfairness test could be adopted that functions without consumer benchmarks as requirements. This test would in fact come closer to the current practice in Member States, in which flexibility is sought to intervene where and when it is thought it is needed.[2]

[1] CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*).

[2] See also the comparative overview in Chap. 8 of this book.

An argument against this solution would be that it could be detrimental to legal certainty. Legal certainty is important in relation to the goals of the Directive, in terms of consumer protection (consumers knowing whether they are protected) and in terms of the smooth functioning of the internal market. Uncertainty as to different application between Member States can function as a barrier to cross-border trade, both for traders and for consumers. Also from the point of view of competition, it is important to ascertain the boundary of what is allowed, so that infringements can be dealt with effectively and efficiently.

However, it should be noted that the current regime of consumer benchmarks does not seem apt to provide legal certainty, despite the rigid nature of the benchmarks. As has been pointed out in the previous chapter, many uncertainties exist as to the application of the benchmarks at the European level, and the application at the national level demonstrates non-conformity with European law, as well as differences between the Member States. In addition, some degree of uncertainty is inevitable in order to provide the necessary flexibility to deal with new types of unfair commercial practices. Unfair commercial practices typically evolve quickly, making rigid legislation unsuitable to effectively deal with unfair practices.[3] Rather than having rigid, but ineffective rules, a flexible test still, therefore, seems preferable. Having said that, in order to achieve sufficient legal certainty it is important for the European Commission and the CJEU to provide proper guidance on the application of the Directive, in order to make clear how the balancing of interests within the general unfairness test should take place.[4]

So how would this more flexible unfairness test work? What factors would be relevant, and what would be the role of the expected behaviour of the consumer? Based on the goals of the Directive, the following factors should be taken into account:

1. *Whether and how many consumers are likely to be deceived*
   The more people are likely to be deceived, the more reason there is to determine that a given practice is unfair. This is relevant from the point of view of achieving a high level of consumer protection and thus also from the point of view of consumer confidence,[5] but it is also relevant in the assessment of the impact of the practice on competition; the more consumers are affected, the higher the distortion of competition. As mentioned in the previous chapter, unfair commercial practices harm the competitive functioning of the market, as unfair traders remove market share from fair traders offering better products to consumers.[6]

[3] See also H Collins, 'EC regulation of unfair commercial practices', in H Collins (ed), *The forthcoming Directive on Unfair Commercial Practices* (The Hague, Kluwer Law International, 2004) 4. See also J Nehf, 'Misleading and unfair advertising', in G Howells et al (eds), *Handbook of research on international consumer law* (Cheltenham/Northampton, Edward Elgar, 2010) 108.

[4] See in this sense also the second recommendation, presented in the next paragraph.

[5] Note that in the Directive, consumer confidence is related both to harmonisation (the consumer knowing that he or she will enjoy the same protection when shopping cross-border as when shopping domestically) and a high level of consumer protection. See also paragraph 11.3.3 of this book.

[6] See paragraph 11.4 of this book.

2. *The degree to which consumers are deceived*
   The more significant the distortion of the economic behaviour of the consumers that are affected by the practice, the more reason there is to determine that a given practice is unfair. A deception may lead to a slightly different decision with very limited economic consequences for the consumer, but the deception may also lead to greater damages, e.g., if a consumer is deceptively persuaded to buy an expensive product that is in fact worthless to him. Like the previous factor, this factor is relevant for achieving a high level of consumer protection and improving consumer confidence, as well as the impact on competition.

3. *How many consumers benefit from the practice*
   The more consumers benefit from the practice (e.g., because they derive useful information from an advertisement), the less reason there is to determine that a given practice is unfair. This is not important within the context of consumer protection (if understood broadly, in the sense that the better the position of the consumer vis-à-vis the seller, the higher the level of protection), but it is certainly relevant for the competitiveness of the market, from which consumers also benefit.

4. *The degree to which consumers benefit from the practice*
   Similar to the degree to which consumers are deceived, it is relevant to what extent (other) consumers benefit from the practice. To what extent would consumers be deprived if the practice would be prohibited? This is in particular relevant for the objective to improve competition.

5. *The possibility and cost for the trader to prevent consumers from being deceived*
   This factor takes into account whether and at what cost the trader could have prevented consumers from being deceived. The easier and cheaper it is (or could have been) for the trader to prevent consumers from being deceived, the more reason there is to assess the practice as unfair. In many cases it is more efficient for a trader to change his commercial practice than for all consumers concerned to change their behaviour (e.g., by carefully reading the small-print or by gathering additional information).[7] At the same time, it is important from the point of view of the competitive functioning of the market that the costs of providing information to consumers is low, so that traders have the possibility to effectively inform consumers, leading to better competition.[8]

6. *The possibility and cost for consumers to prevent being deceived*
   To assess the impact on the market it is also relevant whether consumers could have prevented being deceived, and how difficult and costly this would have been. In this context it seems relevant whether consumers have actual difficulty

[7] F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 22.

[8] R van den Bergh and M Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int.* 593.

in making a decision (e.g., because of biases) or whether they simply do not invest time into making a purchasing decision, despite the fact that the decision concerns a high value good. Relevant in this context is thus also the likelihood and ability for consumers to learn from their mistakes. In this way also the responsibility of the consumer is emphasised and the issue of moral hazard can be dealt with (i.e., the effect that people take risks if they are not confronted with the consequences of such risks, in this case consumers not taking care of their own interests *because* they are protected).

7. *The likelihood and ease of the market to take care of the practice itself*
   Certain practices are better dealt with by the corrective forces of the market than others. If the market is likely to easily take care of deceptive practices itself, there is less need for intervention in the market.[9] The distortion of competition is more significant if the market itself does not deal with the unfair practice. The same applies to the degree to which consumers are affected. Here it can be taken into account that the market is more likely to correct deception related to repeat purchase products, and that it is, for example, less likely to effectively deal with scam operators.[10]

8. *The degree to which vulnerable consumers are affected*
   If the protection of certain vulnerable groups (such as children) is one of the objectives of the Directive, this should also be taken into account. This may, for example, lead to the conclusion that despite the fact that many consumers benefit from a practice and the costs for the trader to make the practice less deceptive are relatively high, the practice is still assessed as being unfair due to its impact on a vulnerable group. This thus gives a possibility to take into account a more socially oriented consumer protection when deemed necessary.

Depending upon the goals of the Directive (and how these goals are interpreted), other factors could also be taken into account. For example, the creation of the internal market could be taken into account, as this necessarily requires learning (and thus initially, to some extent, misunderstanding) on the side of the consumer in order to become acquainted with 'foreign' products.[11]

[9] This is also relevant in relation to the costs of enforcement; from an efficiency perspective, it may be better in some cases not to intervene. See also F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 7–8.

[10] See paragraph 11.4 of this book. See also F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 8, and, on the relationship between the type of goods and the corrective force of the market, R van den Bergh and M Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int*. 591.

[11] This factor could also be taken into account in the assessment of (long-term) benefits, see Number 4 above, and may be a reason not to take into account social, cultural and linguistic factors, depending on the circumstances.

In determining the unfairness of a practice all listed factors would appear to be relevant, but none of these factors should function as requirements in the sense that, for example, the costs of preventing deception (see number 5 above) should necessarily be low, or that the degree of deception (see number 2 above) should necessarily be high.

Balancing the various relevant factors at hand enables courts and enforcement authorities to challenge, for example, practices that are designed to mislead consumers (and that benefit very few consumers), while also allowing room for taking into account the beneficial effects of commercial practices. Hence, this test enables courts to allow a name such as 'Danish pastry' as it can benefit many consumers despite that some may misinterpret it, while at the same time provides room to challenge practices, such as those in the English *Purely Creative* case, that are clearly designed to deceive, despite the fact that they are only likely to affect a minority of consumers.[12]

In the proposed test, the presumed expectations of (actual) consumers are relevant, but also desired behaviour of consumers can play a role in the sense that unfairness may also depend on the question whether, irrespective of how consumers actually behave, the court thinks they *should* behave given the circumstances. In order to help determine whether and to what extent consumers are actually affected by a commercial practice, enforcement authorities and courts can use insights from consumer behaviour. Consumer opinion polls can also be used to help determine the expected impact on consumers in a particular case.[13] Although it must be noted that it is not always possible to determine exactly how consumers react to a commercial practice, courts and enforcement authorities could at least make an effort to make better informed decisions by using the knowledge that marketers use in order to recognise deceptive tactics.[14]

As mentioned, the way that these factors are to be balanced in the end depends on the weight that is given to the different goals of the Directive by the European Commission and the CJEU.[15] This could range from a relatively *laissez-faire* approach towards potentially unfair commercial practices in which there is a strong responsibility for consumers not to be misled (even if, for example, the cost for the trader to prevent deception is relatively low) to a protective approach in which there is a stronger responsibility for the trader not to mislead consumers (even if, for example, the costs for preventing deception are high).

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[12] *Office of Fair Trading v Purely Creative Ltd Industries* (2011) EWHC 106. See also the discussion in paragraph 6.5.3 of this book.

[13] See also J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006).

[14] The insights into consumer behaviour as presented in Chap. 9 of this book, in which the assumed behaviour of the average consumer is discussed from the point of view of the behavioural sciences, provide for a starting point in this respect. Also the overview of deceptive marketing tactics provided by in the book *Deception in the marketplace* by Boush, Friestad and Wright (2009), can prove to be very useful in this respect. See D Boush, M Friestad and P Wright, *Deception in the marketplace: the psychology of deceptive persuasion and consumer self protection* (New York/London, Routledge, 2009).

[15] This could also be (partly) done in the Directive itself.

## 12.2 Clarify the Directive's Goals and Provide Better Guidance

If the EU ultimately wishes to achieve uniform application of the Directive, be it under the current or in the situation proposed above, there would be an important role for the European Commission and the CJEU to offer clear guidance on the goals as well as on the application of the general clauses. It has been shown throughout this book that many issues related to the consumer benchmarks remain unclear. Although the European Commission has provided the EC Guidance document, this document in fact provides little clarity and contains contradictory statements in relation to the consumer benchmarks.[16] Also the Directive itself lacks clarity on many issues and guidance by the CJEU is very limited, as the CJEU in its judgments limits itself to giving general guidelines that provide little clarity on the actual application of the general clauses.

This would mean first and foremost that the goals of the Directive should be clarified. The Directive largely relies on general clauses, but the Directive lacks clear direction as to the underlying ideas that should be taken into account in their application. In order for the general clauses to be applied uniformly, the aims of the Directive should at least be clear. Without clear goals it is unclear who is protected and for what reason. Although the Directive does make clear that, for example, a high level of consumer protection is to be achieved, it is not clear what the rationale is for consumer protection.[17] To what extent is consumer protection in the Directive about economic fairness in a purely utilitarian sense, i.e., by promoting the efficient working of the market, and to what extent is it meant to provide protection that goes beyond that?[18]

The fact that these questions are left open also follows from the Directive's benchmarks. It is worrying that it is not even clear what the general idea underlying the regime of benchmarks is. The current regime of benchmarks is the result of a compromise in the adoption process of the Directive and does not seem to be well thought through.[19] The average consumer benchmark emphasises the consumer's responsibility to pay attention and to beware of potentially unfair practices, while

[16] See, for example, the discussion on the nature of the average consumer benchmark (paragraph 4.2 of this book) and on the confusing statements in relation to vulnerable groups (paragraph 4.4 of this book).

[17] Note also that the Directive's formal goals, apart from referring to a high level of consumer protection, do not go beyond the goal improve the smooth functioning of the internal market. Although in the EU context harmonisation, because of its legal basis, should necessarily be based on the internal market and/or consumer protection, that does not mean that the Directive cannot (and does not) also have other objectives. See on this issue also A Beater, 'Zum Verhaltnis von europäischem und nationalem Wettbewerbsrecht – Überlegungen am Beispiel des Schutzes vor irreführender Werbung und des Verbraucherbegriffs' (2000) *GRUR Int*. 963–974.

[18] Clarifying the rationale can also help address the question what can be seen as a 'high level' of consumer protection. Also on this issue the Directive currently does not provide any guidance.

[19] See on the legislative history of the consumer benchmarks in the Directive also paragraph 2.4 of this book.

the target group and vulnerable group benchmarks emphasise the opposite, i.e., preventing the exploitation of consumer vulnerabilities. How they relate to one another is unclear.

Secondly, uniform application of the Directive also requires more general guidance on the application of the Directive, in particular in relation to its general clauses. This could be done through the EC Guidance document, but also the CJEU could provide better guidance. Judgments that merely provide general guidelines on the application of the Directive's general clauses offer little clarity in this respect. If uniform application is to be achieved, it would be advisable for the CJEU to address preliminary references in more detail, for example by paying more attention to the facts of the case. This is already being done in relation to the interpretation of the Directive's black list.[20]

## 12.3 Reconsider the Degree of Harmonisation

One of the most debated issues in the adoption process of the Unfair Commercial Practices Directive was the choice for full harmonisation.[21] In the years following the adoption of the Unfair Commercial Practices Directive, many other fields of EU consumer law were also supposed to be fully harmonised, in particular through adoption of the Consumer Rights Directive.[22] Although the Consumer Rights Directive in the end has been adopted, important areas (in particular unfair terms and consumer sales) were excluded from its scope and left to existing minimum harmonisation Directives, because fully harmonising these areas proved to be politically infeasible. Although the Unfair Commercial Practices Directive is not the only full harmonisation instrument in European consumer law, these developments show that full harmonisation is a highly controversial topic.

Although the Unfair Commercial Practices Directive was supposed to fully harmonise national laws, the previous chapters have shown that uniform application, at least in terms of the consumer benchmarks, still seems to be far away. Many issues in relation to the consumer benchmarks remain unclear, and application of the Directive in the Member States still presents many differences. The question should therefore be raised: is full harmonisation still the way forward?

In this context it is important to point out that although full harmonisation can reduce compliance costs for traders, it also comes at a cost.[23] Firstly, full harmoni-

[20] See CJEU 18 October 2012, Case C-428/11 (*Purely Creative*) (not yet published in *ECR*).

[21] See also paragraph 2.2 of this book.

[22] See Directive 2011/83/EU.

[23] See also F Gomez, 'The Unfair Commercial Practices Directive: a law and economics perspective' (2006) *European review of contract law* 4, V Mak, 'De grenzen van maximumharmonisatie in het Europese consumentenrecht' (2011) *Nederlands tijdschrift voor burgerlijk recht* 558, M Faure, 'Towards a maximum harmonization of consumer contract law?!?' (2008) *Maastricht journal of European and comparative law* 445 and M Loos, 'Harmonisatie van het consumentencontractenrecht' (2011) *Nederlands juristenblad* 408.

sation limits opportunities for national legislatures to attempt to draft new forms of regulation, and, as a consequence, limits the possibility for legislators to learn from one another.[24] Secondly, full harmonisation limits Member States' autonomy to determine what they think is best for 'their' consumers, and to decide, for example, whether it is desirable to have a more socially-oriented consumer law (e.g., by means of protection of vulnerable consumers, even if this is at the cost of the majority of consumers).[25] As a consequence of full harmonisation, Member States were forced to abolish more protective measures, leading to a lower level of protection in some of these Member States.[26] For the level of consumer protection, it is also important that there are cultural differences between consumers in different Member States (see Chap. 9 of this book). As a consequence, a one-size-fits-all scheme results in *de facto* differences in consumer protection in different Member States.

It is also questionable whether full harmonisation is as profitable for cross-border trade as is currently assumed. Businesses still have to satisfy other national rules (or rules that have their basis in European law, yet are not fully harmonised), so legal barriers remain in place.[27] Moreover, although the Unfair Commercial Practices Directive attempts to facilitate pan-European advertising, studies on cross-cultural consumer behaviour (see Chap. 9 of this book) make clear that even in Europe this is not as effective as is currently assumed. As a consequence, marketing strategies have been invented for or adapted to different markets, in order to be able to serve consumers with different cultural backgrounds.[28] Hence, these cross-cultural studies not only clarify that uniformly applied benchmarks create gaps in consumer protection due to cultural differences, but they also stress that pan-European advertising is often ineffective. In addition, the reasons for consumers not to shop cross-border are often related to practical matters such as language, distance and after-sales services, rather than a lack of confidence that arises from differences in national unfair commercial practices laws.[29]

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[24] See M Faure, 'Towards a maximum harmonization of consumer contract law?!?' (2008) *Maastricht journal of European and comparative law* 437 and M Loos, 'Harmonisatie van het consumentencontractenrecht' (2011) *Nederlands juristenblad* 411–412.

[25] See on the relationship between full harmonisation and 'national' consumer protection also V Mak, 'De grenzen van maximumharmonisatie in het Europese consumentenrecht' (2011) *Nederlands tijdschrift voor burgerlijk recht* 559 and M Faure, 'Towards a maximum harmonization of consumer contract law?!?' (2008) *Maastricht journal of European and comparative law* 441–442.

[26] It must be noted that this was at least partly already the case as a consequence of the free movement case law of the CJEU. The forced liberalisation of the German *Gesetz gegen den unlauteren Wettbewerb* (see Chap. 5 of this book) is a good example of this.

[27] For example, tax and environmental laws, but also many consumer law measures, especially now that they have not been fully harmonised by the Consumer Rights Directive. See also M Faure, 'Towards a maximum harmonization of consumer contract law?!?' (2008) *Maastricht journal of European and comparative law* 437 and M Loos, 'Harmonisatie van het consumentencontractenrecht' (2011) *Nederlands juristenblad* 411.

[28] See paragraph 9.4.5 of this book.

[29] See, e.g., K. Cseres, *Competition law and consumer protection* (The Hague, Kluwer, 2005) 233, M Faure, 'Towards a maximum harmonization of consumer contract law?!?' 2008 *Maastricht journal of European and comparative law* 438, M Loos, 'Harmonisatie van het consumentencon-

Another problem is that one can question whether the European legal institutional framework is fit for facilitating uniform application of general clauses such as those in the Unfair Commercial Practices Directive. Relatively few preliminary references have been directed to the CJEU thus far, and the answers to those that have are formulated in general guidelines, in particular on the interpretation of the general clauses of the Directive. In order to achieve uniform application of general clauses, the CJEU would appear to have to play a stronger role—similar to that of many national courts of cassation.[30] This, however, seems to be a distant desire at this point in time.

On the basis of these arguments, it is recommendable to at least reconsider the full harmonisation character of the Directive. The current state of the Directive neither leads to uniform application, nor does it allow for the benefits of leaving room to Member States to decide what they think is best for their consumers, both in terms of the desirable level of protection and in terms of catering the specific needs of their consumers in terms of cultural differences.

## 12.4 Do Not Extend the Directive's Benchmarks to EU Consumer Law in General

It has been suggested that the scope of application of the Directive's benchmarks, or at least the benchmark of the average consumer, should be extended to EU consumer law in general.[31] In fact, although the scope of application was first limited to commercial communication cases and did not enter the realm of consumer contract law, the *Kásler* case could be seen as a signal of a trend towards a broad scope of application.[32] There are also examples of extended application of the average consumer benchmark by national courts.[33]

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tractenrecht' (2011) *Nederlands juristenblad* 412 and T Wilhelmsson, 'The abuse of the "confident consumer" as a justification for EC consumer law' (2004) *Journal of consumer policy* 317.

[30] Suggestions for changes, e.g., by introducing a civil chamber of first instance, have been made by both M Hesselink, 'An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade?', in M Hesselink, A van Hoek and M. Loos (eds), *Het Groenboek Europees contractenrecht: naar een optioneel instrument?* (The Hague, Boom, 2011) 18 and M Loos, 'Naar een optioneel instrument', in M Hesselink, A van Hoek and M Loos (eds), *Het Groenboek Europees contractenrecht: naar een optioneel instrument?* (The Hague, Boom, 2011) 173–174.

[31] See V Mak, 'Standards of protection: in search of the 'average consumer' of EU law in the proposal for the Consumer Rights Directive' 2011 *European review of private law* 25 and V Mak, 'De grenzen van maximumharmonisatie in het Europese consumentenrecht' (2011) *Nederlands tijdschrift voor burgerlijk recht* 558.

[32] CJEU 30 April 2014, Case C-26/13 (*Kásler*) (not yet published in *ECR*). See also paragraph 3.2.12 of this book.

[33] See, for example, the Dutch cases Rechtbank Utrecht (District Court Utrecht) 24 November 2004, ECLI:NL:RBUTR:2004:AT7000, in which the average consumer benchmark is applied in the context of misrepresentation (*dwaling*, Article 6:228 of the Dutch Civil Code), and Recht-

Indeed, there are many legal questions in which the presumed expectations or understanding of the consumer are relevant, and in theory the benchmarks could be applied in all of these contexts. For example, the benchmarks could be applied in the context of the Consumer Sales Directive to determine non-conformity.[34] In this context, it is relevant what the consumer reasonably expects in terms of the product's normal quality and performance.[35] Similarly, the consumer benchmarks could be applied in the context of the Product Liability Directive in determining whether a product is defective, which depends on 'the safety which a person is entitled to expect'.[36] In more general terms, the benchmarks could be used to determine what qualifies as 'plain and intelligible language' in the context of information duties for traders.[37]

Extending the Directive's consumer benchmarks to these and other legal issues in European consumer law could be defended from the point of view of improving harmonisation through the application of uniform concepts throughout European consumer law.[38] Applying the same benchmarks throughout European consumer law whenever the expected behaviour of consumers is relevant could be beneficial in terms of consistency and clarity.

However, on the basis of the conclusions drawn in the context of unfair commercial practices, this approach is not recommended by this author. With the extended scope of application of the consumer benchmarks, the problems identified in relation to these consumer benchmarks will also be extended to these fields (e.g., in terms of clarity, level of consumer protection and flexibility to take into account the impact on the market).

Moreover, it is questionable whether application of the benchmarks throughout European consumer law would really improve consistency by providing increased uniform application. Different interests underlie the different instruments, and it thus makes sense to have different expectations (in the normative sense, i.e., in terms of *desired* behaviour) of the consumer in different fields. For example, it would be likely that the expectations as to the behaviour of the average consumer are relatively low in relation to product liability, taking into account the involved health and safety interests. The logical consequence would be that the benchmarks would be applied differently. Accordingly, this would more likely increase confusion instead of providing clarity, as is already the case with respect to the difference in application between trademark cases and misleading commercial communication

bank Maastricht (District Court Maastricht) 21 March 2002, ECLI:NL:RBMAA:2002:AE0776, in which the average consumer benchmark was applied in the context of product liability.

[34] Directive 1999/44/EC. See Loos 2014 (No. 30).

[35] See Article 2(2)(d) of the Consumer Sales Directive.

[36] Article 6(1) Directive 85/374/EEC.

[37] See Article 5 of the Consumer Rights Directive.

[38] See V Mak, 'Standards of protection: in search of the 'average consumer' of EU law in the proposal for the Consumer Rights Directive' (2011) *European review of private law* 25 and V. Mak, 'De grenzen van maximumharmonisatie in het Europese consumentenrecht', *Nederlands tijdschrift voor burgerlijk recht* 2011 558.

cases.[39] Alternatively, if the benchmarks would be applied uniformly throughout consumer law, it is questionable whether this would lead to desirable results, taking into account the different interests underlying the instruments mentioned.

A related argument against extension of the scope of application of the Directive's consumer benchmarks to EU consumer law in general is that in contractual relations there is not always an evident need to take into account what is expected of the average consumer. The benchmarks are currently being applied in legal instruments that primarily address the 'collectivity' of consumers rather than dealing with individual contracts. With respect to individual contracts it is sometimes relevant to also examine the specific circumstances related to the contracting parties. Good reasons may exist to expect from a trader that he or she does not treat a consumer as an average consumer because he or she knows (or ought to know) that *this* particular consumer does not live up to those expectations. This is the case in particular in, for example, the field of financial services, where a pronounced information asymmetry is present and where the consequences for the consumer making a wrong decision may be significant.[40]

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[39] See Chap. 3 of this book.

[40] See in this sense also Loos 2014, No. 30, in the context of the presumed expectations of the consumer in relation to non-conformity in consumer sales.

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# Chapter 13
# Summary

## 13.1 Introduction

The Unfair Commercial Practices Directive (2005/29/EC) fully harmonises unfair commercial practices law in the European Union. The Directive, which was adopted in 2005, formally aims to achieve a high level of consumer protection and to increase the smooth functioning of the internal market, but also aims to improve competition in the market.

The Directive relies to a large extent on general clauses prohibiting unfair commercial practices. Consumer benchmarks are used in this context to determine the expected behaviour of consumers. The benchmark applied has important consequences for the level of protection that is offered to consumers and for the degree to which intervention in the market is possible. This is relevant in terms of the objective of achieving a high level of consumer protection, but also in terms of the other goals of the Directive. For example, the degree to which consumers are protected may affect consumer confidence in cross-border shopping, and what is regarded as unfair also affects competition, in the sense that traders acting unfairly can remove market share from other traders.

In 1998, the CJEU in the *Gut Springenheide* case held that national courts, in deciding whether commercial communication is misleading for consumers, should apply the benchmark of the average consumer, who is assumed to be 'reasonably observant and reasonably well-informed and circumspect'. This benchmark was codified in the Unfair Commercial Practices Directive, but the Directive also introduced two alternative benchmarks, namely, the target group benchmark and the vulnerable group benchmark. These benchmarks aim primarily to provide additional protection for vulnerable groups, such as children and the elderly.

Much uncertainty existed as to how the benchmarks related to one another and how they were to be applied in practice. Moreover, the average consumer benchmark has been criticised for not affording sufficient protection to consumers, also because its application by the CJEU was claimed not to be in accordance with real consumer behaviour. This raises questions in relation to the regime of consumer benchmarks in the Directive and its suitability to meet the Directive's goals.



B. B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive,* Studies in European Economic Law and Regulation 5,
DOI 10.1007/978-3-319-13924-1_13

Accordingly, this book investigates the question to what extent the regime of consumer benchmarks in the Unfair Commercial Practices Directive meets each of the goals of the Directive. This question is addressed firstly by investigating the consumer benchmarks in the Unfair Commercial Practices Directive and their application in the case law of the CJEU. Subsequently the benchmarks as applied in national law are investigated. This is primarily relevant for the degree of harmonisation that is achieved by the Directive's benchmarks, which is relevant in terms of the goal to improve the smooth functioning of the internal market. The investigation of the benchmarks at the national level is followed by an analysis of the consumer benchmarks (and the behaviour expected under those benchmarks) from the point of view of consumer behaviour. This is intended to provide insight into the question to what extent consumers are actually protected under the benchmarks of the Directive, which is relevant for the level of consumer protection, but also for the other goals of the Directive, as explained above. Finally, the regime of consumer benchmarks in the Directive is assessed in terms of each of the Directive's goals. The epilogue of this book provides recommendations that build upon the assessment, but at the same time go beyond providing an answer to the main research question of this book.

## 13.2 The Unfair Commercial Practices Directive

The two formal goals of the Unfair Commercial Practices Directive are (1) to achieve a high level of consumer protection and (2) to increase the smooth functioning of the internal market. In terms of increasing the smooth functioning of the internal market, the Directive aims to achieve two goals, both of which should lead to an increase in cross-border trade. Firstly, the Directive should remove barriers to trade through harmonisation. Secondly, both harmonisation and a high level of consumer protection should increase consumer confidence to shop across the border. Apart from achieving a high level of consumer protection and increasing the smooth functioning of the internal market, the Directive also aims to improve competition in the market. In this context it is important to note that the Directive should prevent distortions of competition through deception of consumers on the one hand, whilst leaving sufficient room for traders to compete on the other.

The main consumer benchmark in the Directive is the average consumer benchmark, as introduced by the CJEU in *Gut Springenheide* (1998). For its interpretation, the Directive refers to the guidelines given in the case law of the CJEU. Apart from the average consumer benchmark, the Directive also introduced the target group benchmark. This benchmark grants the possibility to take into account the behaviour of a particular group (such as children or teenagers) rather than that of the average consumer, as long as this group is specifically targeted by the commercial practice. Despite the introduction of the target group benchmark, concerns were expressed in the adoption process of the Directive as to the level of protection offered by the Directive. As a compromise, a third benchmark was included, namely

the vulnerable group benchmark. This benchmark applies if a particularly vulnerable group is affected by a practice, without this group having to be specifically targeted. In order for the benchmark to be applicable, however, the vulnerable group must be clearly identifiable and the vulnerability of the group must be reasonably foreseeable for the trader. Exactly under what circumstances the target group and vulnerable group benchmarks can be applied remains unclear, but the requirements for their application do emphasise that these benchmarks remain exceptions to the main benchmark in the Directive, i.e., the average consumer benchmark.

## 13.3 Case Law of the CJEU

The average consumer benchmark as introduced in *Gut Springenheide* can be traced back to earlier CJEU judgments in the context of the free movement of goods. In these cases, the average consumer benchmark was used by the CJEU to tackle what it regarded as over-protective national laws related to commercial practices. In cases such as *Cassis de Dijon* (1979), *GB-INNO-BM* (1990), *Nissan* (1992), *Clinique* (1994) and *Mars* (1995), the CJEU made clear that the consumer is not easily misled, and that national laws offering extensive protection often disproportionally infringe the free movement of goods. In *Graffione* (1996), the CJEU did clarify that social, cultural and linguistic factors can lead to different assessments of potentially misleading commercial communication in different Member States. Moreover, the *Buet* case (1989) indicated that also before the adoption of the Unfair Commercial Practices Directive additional protection could be given to particularly vulnerable groups.

When the CJEU handed down the *Gut Springenheide* judgment in 1998 and thus introduced the average consumer benchmark, the Court explicitly based this benchmark on its earlier case law in the field of the free movement of goods. The judgment also made clear that the average consumer benchmark should not be seen as a statistical test, but that courts of the Member States retain the possibility to take empirical research into account when determining the expected behaviour of the consumer. In the *Lifting* case (1999), the CJEU linked the relevance of social, cultural and linguistic factors to the average consumer benchmark, clarifying that the average consumer benchmark does not necessarily reflect the European average consumer. In general, the case law subsequent to *Gut Springenheide*, in a similar vein to the earlier free movement case law, elucidates that the average consumer is not expected to be misled easily. This is most explicit in the Opinions of Advocate Generals Geelhoed and Trstenjak in *Douwe Egberts v Westrom Pharma* (2004) and *Mediaprint* (2010) respectively. In the latter, Trstenjak emphasises that the consumer is considered ‘to be capable of recognising the potential risk of certain commercial practices and to take rational action accordingly’. The *Kásler* case is an exception in this context, pointing more towards a consumer-friendly application of the average consumer benchmark.

In comparison to the case law on misleading commercial communication, the CJEU is clearly less strict towards consumers in the field of trademarks. Also in this context the average consumer is applied to determine the expected behaviour of the consumer. However, in this context the CJEU expects that the average consumer 'only rarely has the chance to make a direct comparison between the different marks' and 'must place his trust in the imperfect picture of them that he has kept in his mind'. Moreover, it is emphasised that 'the average consumer's level of attention is likely to vary according to the category of goods or services in question.'

## 13.4 Thematic Analysis

Questions can be raised as to the main themes in relation to the consumer benchmarks in the Unfair Commercial Practices Directive.

Firstly, it appears initially that the nature of the average consumer benchmark is unclear. Although the benchmark with its reference to the 'average' seems to reflect behaviour of the actual average of consumers or an abstraction thereof, the CJEUs case law indicates that the expected behaviour of the average consumer, at least in part, also reflects *desired* behaviour. In some cases, such as those establishing the labelling doctrine, the expected behaviour of the average consumer is determined on how the consumer ought to behave under certain circumstances, rather than how the consumer actually behaves. The application of the average consumer benchmark in trademark law appears to be more realistic in this respect, but bearing in mind its isolated development, its application in this context should be regarded as separate from the case law related to misleading commercial communication.

Secondly, a question that should be addressed is what is expected of the average consumer in terms of being 'reasonably *informed*, observant and circumspect'. The characteristic of being informed can refer to prior knowledge related to the product at hand, e.g., in relation to technical product attributes. There is little case law of the CJEU in this respect, and it is thus difficult to ascertain what level of 'being informed' is expected of the consumer in this respect. Being informed can also refer to prior knowledge on commercial practices, such as on types of advertising and sales methods. In this context there is a clear overlap with the characteristic of being circumspect, as knowledge of commercial practices is strongly linked with awareness of their potential danger. The characteristic of being *observant* refers to the degree to which the consumer pays attention to the available information. In this context, the CJEU (except in trademark cases) seems to have high expectations of the consumer, generally expecting the consumer to take into account the available information. Also in the context of the characteristic of being *circumspect*, the CJEU seems to have rather high expectations. This characteristic refers to the level of critical attitude towards commercial practices. In this context, the average consumer is often expected to recognise potentially unfair commercial practices, e.g., in relation to suggestive product packaging (*Mars*) or suggestive product names (*Clinique, Lifting*).

Thirdly, as has been mentioned above, it is unclear under what circumstances the target group and vulnerable group benchmarks can be applied, and how these benchmarks relate to one another. Unlike the average consumer benchmark, these benchmarks have hardly been applied by the CJEU so far. Only the *Buet* case can be seen as an example of protecting a vulnerable group, but this case was decided before the adoption of the Directive and provides little further guidance.

Fourthly, also the relevance of social, cultural and linguistic factors raises questions. The CJEU has expressed in *Graffione* and *Lifting* that these factors can lead to different assessments of the same commercial practice in different Member States, but the degree to which this can be the case is not clear. On the basis of the case law of the CJEU, as well as the full harmonisation nature of the Directive, it seems unlikely that extensive differences between Member States are permitted. The idea is still to have a single European market in which traders can offer their products without facing barriers in terms of different legislative provisions applicable in different States.

Fifthly and finally, questions can be raised in relation to the possibility for courts and enforcement authorities to use empirical evidence in determining the expected behaviour of the consumer. The CJEU emphasises that the average consumer benchmark is not a statistical criterion, but at the same time it does allow national courts, 'under circumstances at least', to take into account empirical evidence. Moreover, the CJEU emphasised that if a national court does so, it is left to national law what percentage of consumers is required to be affected. It is unclear under what circumstances national courts can make use of empirical evidence. In addition, it is unclear how the possibility to use empirical evidence relates to the average consumer benchmark, with its—seemingly deliberatelyhigh expectations as to the behaviour of the consumer. The same applies to the freedom of the national courts to determine the percentage of consumers that is necessary to be regarded as misled in order to deem a practice unfair. On the basis of the rationale underpinning the average consumer benchmark (i.e., preventing over-protection) it would make sense that empirical evidence is to be regarded in this light, but the CJEU refrains from taking a position on this point.

## 13.5 German Law

In Germany, unfair commercial practices are regulated by the *Gesetz gegen den unlauteren Wettbewerb* (Act Against Unfair Competition), which dates back to 1896. Until the mid-1990s, the German *Bundesgerichtshof* (BGH) applied the benchmark of the *flüchtigen und unkritischen Durchschnittverbraucher* (i.e., the 'casually observing and uncritical average consumer'). This consumer was thought to be rather easily affected by commercial practices, particularly in the field of environment-related and health-related advertising. Moreover, there was additional protection for vulnerable groups such as children and the elderly.

From the mid-1990s, the case law started to show signs of change, until the *Bundesgerichtshof* formally adopted the CJEUs average consumer benchmark in 1999 in the *Orient-Teppichtmuster* decision. The level of attention of this average consumer is, however, expected to depend on the situation at hand (i.e., the *situationsadäquate Durchschnittsverbraucher*). The level of attention of consumers is expected to be lower in relation to products of lower value, or if an advertisement does not contain a specific product offer. This is a clear nuance to the average consumer as applied by the CJEU in cases related to misleading commercial communication. As a result of this, the European Commission in the process of adoption of the Unfair Commercial Practices Directive referred to *Orient-Teppichmuster* as an example of non-conform application of the average consumer benchmark. The BGH, though, has continued to apply the average consumer benchmark in this way. Lacking recent case law of the BGH in the sensitive areas of environment-related and health-related advertising, it is unclear how these issues are now dealt with under German law. Although it seems likely that these areas can still be treated with sensitivity, it is unlikely that the particularly strict assessment of commercial practices in these fields (as was the case under the old case law) can be continued. Moreover, although the level of protection for vulnerable groups is likely to be lower than in accordance with the old case law, the interests of these groups can still be taken into account. Finally, even if no specific vulnerable group can be identified, the case law of the BGH does seem to provide room for deviation from the average consumer benchmark as long as the commercial practice contains objectively false information or if the practice is clearly meant to mislead. However, considering the recent *Trento Sviluppo* judgment of the CJEU, it remains to be seen whether this aspect of the case law of the BGH will be continued in the future.

## 13.6 English Law

Unlike Germany, English law never had a general statute governing unfair commercial practices. There were several instruments in place that regulated, in one way or another, unfair commercial practices. These ranged from the competitor-oriented economic tort of passing-off, to the more consumer-oriented Trade Descriptions Act 1968 and the Control of Misleading Advertisements Regulations 1988, which implemented the Misleading Advertising Directive.

In the context of these instruments, English courts applied the benchmark of the ordinary person, the ordinary shopper, or similar benchmarks. Although the consumer was not expected to be particularly gullible and to treat advertising somewhat critically, the courts generally did not have particularly high expectations of the consumer. Except for the *Lewin v Purity Soft Drinks* case concerning labelling, the courts generally neither expected the consumer to be attentive nor necessarily take the available information into account. In fact, some cases point towards minority protection rather than protection of the average consumer. For example, in *Doble v David Greig Ltd* Justice Forbes assessed a price indication as misleading in terms of

the Trade Descriptions Act, even though only some consumers may have misinterpreted it, while many other consumers would not be misled.

The Consumer Protection from Unfair Trading Regulations 2008 implemented the Unfair Commercial Practices Directive. The first two cases, in which the substance of these regulations was addressed, confirm that the English courts do not have particularly high expectations of the average consumer. *Office of Fair Trading v Purely Creative Industries* shows that fraudulent practices can be challenged, also if it is not clear whether the average consumer (be it the actual average consumer or the average consumer as interpreted by the CJEU) is affected. Also in *Office of Fair Trading v Ashbourne* the Court interpreted the average consumer benchmark in a consumer-friendly fashion, taking into account the weaknesses of consumers in relation to long-term gym contracts and recognising that the consumer is often overconfident and somewhat naïve in relation to his future use of the gym. This interpretation of the average consumer benchmark does not seem to be in line with the case law of the CJEU in the context of misleading commercial communication.

## 13.7 Italian Law

In Italy, unfair commercial practices until the early 1990s could only be challenged by competitors, by means of the general tort clause and through the general provisions on unfair competition, both laid down in the Italian Civil Code. These provisions were rarely applied in cases concerning business-to-consumer commercial practices, but the available cases suggest that the courts did not expect the consumer to be misled easily, expecting the consumer to be critical and suspicious towards advertisements.

Since the implementation of the Misleading Advertising Directive and the establishment of the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition and Market Authority, AGCM) in the early 1990s, Italian law took a turn towards applying a more consumer-friendly benchmark. In the decisions of the AGCM and the judgments of the administrative courts, the average consumer is not seen as particularly informed, observant and circumspect. Moreover, the average consumer is seen as vulnerable with regard to certain goods and services, such as financial products and products in the telecom sector. In addition, vulnerable groups are identified in order to afford them protection against fraudulent trade practices, such as those related to paranormal products. Since the vulnerability of the average consumer is also emphasised, there is no clear demarcation between the average consumer benchmark and the target group and vulnerable group benchmarks. This is in line with a general tendency in the decisions of the AGCM and the judgments of the administrative courts to emphasise the trader's responsibility to act fairly, rather than the consumer's responsibility to be observant and critical.

## 13.8 Comparison

German, English and Italian law have distinctly different backgrounds both in terms of unfair commercial practices regulations, as well as in terms of the benchmarks that were applied prior to the introduction of the average consumer benchmark by the CJEU.

Courts and enforcement authorities in all three Member States now apply the average consumer benchmark as prescribed by the CJEU. It is interesting to note, however, that in none of the three Member States does the application of the benchmark reflect the same high expectations as the CJEUs case law with regard to the behaviour of the average consumer. In this sense, EU-conform application of the benchmark has not—yet—been achieved. This is confirmed in relation to German law by the observations of the European Commission in the adoption process of the Unfair Commercial Practices Directive that the interpretation of the average consumer benchmark by the *Bundesgerichtshof* was not in line with European law. Considering the application of the average consumer benchmark in English and Italian law, the same would appear to apply to those legal systems. Furthermore, the courts and enforcement authorities in these Member States place more emphasis than the CJEU on the trader's responsibility not to act unfairly, and less on the consumer's responsibility not to be affected by those practices. This emphasis is strongest in Italy. All in all, there are still considerable differences in the application of the benchmarks between the three Member States, e.g., in terms of the degree to which the average consumer is to be regarded as vulnerable and in terms of the degree to which the target group and vulnerable group benchmarks are applied. However, none of the jurisdictions follows the CJEUs line of reasoning.

## 13.9 The Average Consumer Benchmark from a Behavioural Perspective

There are two general assumptions underlying the average consumer benchmark as applied by the CJEU. Firstly, the CJEU has a tendency towards viewing the average consumer as a rational decision-maker. This assumption is highly problematic from a behavioural perspective. Many studies have shown that consumers often do not act rationally. People have difficulty dealing with complex or large amounts of information. Moreover, consumer decision-making is often flawed because of so-called *biases*, i.e., typical and predictable irrational thought processes or results of thought processes. These flaws make consumers vulnerable to making bad decisions. This is particularly problematic because, as a result of the predictability of these flaws, they can be exploited by traders by taking them into account in their marketing strategies.

Secondly, the average consumer benchmark has as a basis the assumption that consumers behave similarly, and that the average consumer benchmark, therefore,

more-or-less accurately represents 'standard consumer behaviour'. Similarly, this assumption is problematic from the point of view of consumer behaviour. Consumers in many ways differ from one another in their decision-making, making it difficult to work with the concept of an average consumer. For example, consumers differ greatly in how they enter a decision-making process in terms of *pre-existing knowledge*. This influences the entire decision-making process, including whether and how consumers process available information and what types of decision-making strategies they apply. Similarly, the degree of *involvement* of consumers with a specific product also influences the decision-making process. Involvement significantly influences the degree to which consumers are willing to invest time and energy in making a decision, e.g., by making detailed product comparisons. Also *personality* can play an important role in how people approach decision-making processes. For example, *need for cognition* influences whether people are willing to consider larger amounts of 'hard' information or whether they have the tendency to use simple heuristics (i.e., mental short-cuts) to come to a decision. Apart from these more individual aspects of decision-making, *culture* also plays a significant role in how consumers decide. Although the CJEU leaves open the possibility to take 'social, cultural and linguistic factors' into account, consumer behaviour studies show that these differences may be considerably more significant than one might expect.

## 13.10 The Protection of Vulnerable Groups from a Behavioural Perspective

The target group and vulnerable group benchmarks were meant to provide additional protection to consumers, addressing the concern that vulnerable consumers were not sufficiently protected by the average consumer benchmark. Yet, to what extent do these benchmarks really address consumer vulnerability?

It is important in this context to note that the Directive views vulnerability in terms of groups. The average consumer benchmark generally disregards vulnerability, while the target group and vulnerable group benchmarks can only be applied if a group is specifically targeted or affected by the commercial practice. From a behavioural perspective, this view of consumer vulnerability is problematic. Studies on consumer vulnerability emphasise that vulnerability is highly context-specific and that this phenomenon is difficult to capture in terms of well-delineated groups. These studies show that some groups (such as younger children) may indeed be generally more vulnerable than other groups, but for most groups this is highly dependent on the type of situation. For example, elderly consumers may be more vulnerable due to their cognitive impairment, or because of social isolation, making them potentially more vulnerable to doorstep selling or organised excursions that include sales presentations, but survey evidence suggests that elderly consumers on the whole fall victim to unfair commercial practices less often than consumers in other age groups.

Since vulnerability is highly context specific and difficult to capture in terms of groups, both the target group and vulnerable group benchmark are applicable only in a limited number of cases, which makes it questionable whether these benchmarks can really address vulnerability.

## 13.11 Assessment

To what extent does the regime of consumer benchmarks in the Unfair Commercial Practices Directive meet each of the goals of the Directive? On the basis of this book, the conclusion must be drawn that the consumer benchmarks in the Directive present significant shortcomings in terms of all of the Directive's goals, i.e., achieving a high level of consumer protection, increasing the smooth functioning of the internal market and improving competition.

Firstly, the regime of consumer benchmarks in the Directive presents significant shortcomings in relation to the goal of achieving a high level of consumer protection. This already follows from the fact that the average consumer benchmark, as the main benchmark in the Directive, focuses on protection of the average rather than the sub-average consumer. Moreover, application of the average consumer benchmark by the CJEU imposes high expectations as to the average consumer's behaviour. This strongly emphasises the consumer's responsibility not to be affected by potentially unfair practices, rather than the trader's responsibility not to act unfairly. Although the target group and vulnerable group benchmarks were meant to provide additional protection, their potential to do so is limited. This follows both from the conditions for application of these benchmarks, as well as the fact that, in practice, consumer vulnerability is difficult to catch in terms of groups.

Secondly, the Directive's consumer benchmarks also present shortcomings in terms of the objective to increase the smooth functioning of the internal market. In the context of this goal, the benchmarks should help to remove barriers to trade as well as increase consumer confidence. The introduction of the uniform consumer benchmarks in *Gut Springenheide* and in the Unfair Commercial Practices Directive were clearly meant to remove barriers to trade, by limiting differences in the application of general clauses in the context of unfair commercial practices regulation. Taking into consideration the forced liberalisation of the German *Gesetz gegen den unlauteren Wettbewerb* and the benchmarks applied under this Act, this goal has partly been achieved. Yet at the same time, it must also be concluded that none of the three Member States investigated follow the strict interpretation of the average consumer benchmark of the CJEU. In this sense, none of the Member States is currently adhering to European law. Moreover, there are still significant differences between the application of the consumer benchmarks in the Member States investigated. This also presents problems in terms of consumer confidence, as the idea is that this should improve with uniform protection throughout Europe. Moreover, consumer confidence is not likely to benefit from the shortcomings in terms of the level of protection of the consumer benchmarks as have been identified above.

Thirdly, the regime of consumer benchmarks also presents difficulties in terms of improving competition. As mentioned above, to achieve this goal it is important that the Directive (and thus its regime of benchmarks) prevents over-protection, in order for traders to be able to provide information that is useful to consumers. At the same time, it is important that unfair practices are challenged, because these practices seize market share from fair traders offering better products to consumers. In the context of preventing over-protection, the regime of consumer benchmarks in the Directive is generally effective. As the benchmark is set at the average rather than the credulous consumer, it is ensured that practices that benefit most consumers are not prohibited because they are misunderstood by a minority. Due to the limited applicability of the target group and vulnerable group benchmarks, these benchmarks do not pose significant difficulties in this respect. In terms of preventing unfair practices that harm competition, the Directive's regime of consumer benchmarks is less effective. In this context the unrealistically high expectations of the CJEU towards the average consumer are particularly problematic. To determine the impact of practices on the market and thus on competition, it is relevant how actual consumers behave rather than how consumers—for whatever reason—*should* behave. Moreover, the average consumer benchmark prevents intervention even if there is reason to do so from a competition perspective. This is particularly the case if the practice affects some consumers, while at the same time not benefiting others.

Bearing in mind the shortcomings in terms of all of the Directive's goals, it is remarkable that they do not seem to be the result of a logical trade-off between the goals. The approach of the Directive in terms of its consumer benchmarks would have been sensible if, for example, the shortcomings in terms of the level of consumer protection could be explained by the need to remove barriers to trade or by the objective to improve competition. It has been shown, however, that the design of the consumer benchmarks obstructs effective harmonisation, whilst at the same time also prevents the consideration of the impact on the market in terms of distortion of competition.

## 13.12 Epilogue: Recommendations

The recommendations presented are intended to provide a basis for further discussion, e.g., on possible solutions in relation to the shortcomings identified in the assessment.

Firstly, it is recommended to adopt an alternative framework to assess the unfairness of commercial practices. Taking into account the goals of the Directive, a central problem is that the consumer benchmarks lack flexibility. As the benchmarks serve as requirements in the unfairness test, there is insufficient room to balance the factors that are relevant in the light of the Directive's goals in a specific case. In order to be able to better balance these factors, a more flexible test should be adopted. This could be done either by re-interpretation or modification of the Directive. In this proposed unfairness test, all factors should be taken into account that are

relevant to the Directive's goals, such as the number of consumers that is likely to be affected by the practice, but also the degree to which other consumers are likely to benefit from the same practice and the possibility and cost for traders to prevent consumers from being deceived. Although all of the factors would be relevant in the assessment of the unfairness of a commercial practice, none of these factors would function as a requirement, as is currently the case with the consumer benchmarks. This would allow, for example, that practices that mislead some consumers but benefit none could still be challenged, even if the consumers that have suffered harm do not qualify as a target group or vulnerable group. How the factors should be balanced ultimately depends on how the Directive's goals should be balanced. The EC Guidance to the Directive, as well as guidance provided by the CJEU could play an important role in this respect.

In line with the abovementioned recommendation, an ancillary suggestion is to clarify the goals of the Directive and to provide better guidance as to the Directive's application. The Directive currently lacks clarity as to its objectives and how the objectives relate to one another. Moreover, the CJEUs own case law and the EC Guidance to the Directive provide little certainty on the interpretation of the general clauses and, more specifically, the consumer benchmarks. Clarification of the goals and better guidance are required in order for the general clauses to be applied uniformly, be it under the current or under the proposed unfairness test.

Thirdly, it is recommended to reconsider the degree of harmonisation. Taking into consideration the application of the consumer benchmarks at the national level, the Directive currently struggles to achieve uniform application. Moreover, although full harmonisation could potentially benefit trade, full harmonisation also comes at a cost. For example, it limits the possibility of finding local solutions to local problems, and limits the possibility of being able to experiment with different types of regulation. In addition, it is questionable to what extent full harmonisation can really be beneficial for cross-border trade. There are many other practical as well as legal barriers in place that prevent traders from using the same commercial practices throughout the European Union. Furthermore, cultural differences between consumers significantly limit the usefulness of pan-European marketing, making harmonised rules in this field of limited importance.

Fourthly and finally, this book provides a compelling argument against extending the scope of application of the consumer benchmarks to EU consumer law in general. In theory, the Directive's consumer benchmarks could also be applied in the context of other consumer law instruments. In fact, the *Kásler* case (applying the average consumer benchmark in the context of unfair terms) may be an indication that there is already a trend towards broader application of the consumer benchmarks.

Such a development could—at least in theory—be beneficial in terms of the consistency of European consumer law. For example, the benchmarks could be applied in the context of determining the consumer's expectations in terms of the normal quality and performance of a particular good in the context of consumer sales, or to determine the consumer's expectations in relation to a product's safety in the context of product liability. However, it is questionable whether extending the

scope of application of the consumer benchmarks would really improve consistent application of European consumer law. Taking into account the different normative underpinnings of these instruments, it is likely that the application of the consumer benchmarks would also differ in these fields. Yet most importantly, the extension of the scope of application of the Directive's consumer benchmarks to EU consumer law in general would create the same problems as identified in the assessment in relation to the Unfair Commercial Practices Directive. This in and of itself is already sufficient reason to argue against such a development.

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