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.

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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.