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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