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.

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_6

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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