

Chapter 8

Comparison

Abstract German, English and Italian law have distinctly different backgrounds both in terms of unfair commercial practices regulations and in terms of the benchmarks that were applied prior to the introduction of the average consumer benchmark by the CJEU. Courts and enforcement authorities in all three Member States now apply the average consumer benchmark as prescribed by the CJEU. It is interesting to note, however, that in none of the three Member States does the application of the benchmark reflect the same high expectations as the CJEU's case law with regard to the behaviour of the average consumer. In this sense, EU-conform application of the benchmark has not—yet—been achieved. There are also still considerable differences in the application of the benchmarks between the three Member States, e.g., in terms of the degree to which the average consumer is to be regarded as vulnerable and in terms of the degree to which the target group and vulnerable group benchmarks are applied.

Keywords Comparison · Consumer benchmarks in EU Member States · Average consumer benchmark · Target group benchmark · Vulnerable group benchmark · Use of empirical evidence

8.1 Introduction

This chapter compares the consumer benchmarks applied in the unfair commercial practices laws of the selected Member States, including a horizontal comparison between the Member States as well as a vertical comparison with European law. Special attention is paid to the themes identified in Chap. 4 of this book. The consequences in terms of the goals of the Directive (e.g., in relation to conform or non-conform application) are discussed in the assessment of the Directive's benchmarks in Chap. 11 of this book.

Paragraph 8.2 will first compare the legal context in which the consumer benchmarks developed in the three Member States, followed by a discussion of the 'old' consumer benchmarks in paragraph 8.3. Subsequently, the application of the average consumer benchmark (paragraph 8.4) and the target group and vulnerable group

benchmarks (paragraph 8.5) will be discussed. Paragraph 8.6 deals with the possibility for courts to use empirical evidence in determining the expected behaviour of consumers.

8.2 Legal Context

Germany, England and Italy have distinctly different legal backgrounds with regard to the regulation of unfair commercial practices. Germany with its *Gesetz gegen den unlauteren Wettbewerb* (UWG), a law that dates back to 1896, has a particularly strong history in this regard. The UWG is a general law on unfair competition, which aims at the protection of competitors and consumers. However, its scope was subsequently enlarged to include consumers. Although the UWG was amended in order to implement the Unfair Commercial Practices Directive, the idea of general regulations on unfair commercial practices was certainly not new for German law. Enforcement of the UWG is private, with an important role for competitors as well as competitors' interest groups and consumer interest groups.

English law is quite different in this respect. Unlike Germany, England never had a general law regulating unfair competition or unfair commercial practices. The situation in English law was somewhat obscure, with several common law actions, as well as statutory instruments addressing unfair commercial practices, with varying scopes of protection. While some only address the interests of competitors (e.g., the economic tort of passing-off), others only address (or addressed) the interests of consumers (e.g., the Trade Descriptions Act 1968 and the Control of Misleading Advertisements Regulations 1988). In this sense the Unfair Commercial Practices Directive brought about a significant change in the English legal landscape.

In Italy, there was little protection against unfair commercial practices until the Misleading Advertising Directive was implemented in 1992. From 1942, there has been a general clause on unfair competition in tort law, but it has been used little in the context of unfair commercial practices. Moreover, this general clause did not aim to protect consumers, but competitors. It was, therefore, European law, in the form of the Misleading Advertising Directive and later the Unfair Commercial Practices Directive, that introduced unfair commercial practices regulation aimed at the protection of consumers. The *Autorità Garante della Concorrenza e del Mercato* (Italian Competition and Market Authority, AGCM) has a strong role in the enforcement of these instruments.

8.3 The Old Consumer Benchmarks

German law had a reputation for having a very strict approach to commercial practices, protecting even the most naïve and unknowing consumers. German unfair competition law was indeed generally strict, and there was a low threshold for po-

tentially unfair commercial practices to be forbidden under the *Gesetz gegen den unlauteren Wettbewerb* (UWG). The benchmark applied was that of the *flüchtigen und unkritischen Durchschnittsverbraucher*, i.e., the casually observing and uncritical average consumer. In practice, this meant that as soon as a product name, for example, could possibly lead to confusion, this could be successfully challenged under the UWG.¹ Moreover, under the doctrine of *Blickfangwerbung*, eye-catching advertising statements were as a rule assessed on their own, i.e., regardless of further information or disclaimers in the advertisement. Sometimes even objectively true advertising slogans, such as ‘*Der meistgekaufte der Welt*’ (the most purchased in the world, for electric shavers) were found to be misleading, because they were thought to invoke false impressions, in this case that the producer would also be market leader in Germany.² The *Bundesgerichtshof* expected the consumer to be especially vulnerable as to environment-related and health-related advertising, because consumers were expected to react particularly emotionally towards these types of advertising and to have difficulty assessing the truthfulness of claims as to these topics.³ Finally, additional protection was also granted to particularly vulnerable groups, such as children.

English law, at least in comparative studies, had a reputation for having a *laissez-faire* approach to commercial practices.⁴ Looking at the consumer benchmarks applied in, for example, the common law tort of *passing off* and in the Trade Descriptions Act 1968, this reputation requires nuancing. These instruments applied the benchmarks of ‘the ordinary shopper’, ‘the ordinary person’, or similar benchmarks. What was expected of the consumer in this regard differs somewhat from case to case, but in most cases the expectations of this ‘ordinary shopper’ or ‘ordinary person’ were not particularly high.⁵ In some cases, a minority of consumers was protected, although this seems to be the exception rather than the rule.⁶

In Italy, there was little general protection against unfair commercial practices for consumers until the implementation of the Misleading Advertising Directive in the early 1990s. Moreover, in the application of the clause on unfair competition in the *Codice Civile*, courts had rather high expectations of consumers, expecting

¹ See, for example, BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128—*Steinhäger*.

² BGH 1 October 1971, I ZR 51/70, GRUR 1972, 129—*Der meistgekaufte der Welt*.

³ See, for example, BGH 20 October 1988, I ZR 238/87, GRUR 1991, 546—*aus Altpapier*.

⁴ See, for example, G Schricker, ‘Die Bekämpfung der irreführenden Werbung in dem Mitgliedstaaten der EG’ (1990) *GRUR Int.* 118–119 and T Lettl, ‘Der lauterkreisrechtliche Schutz vor irreführender Werbung in Europa’ (2004) *GRUR Int.* 90.

⁵ See, for example, with respect to the tort of passing-off: *Reckitt & Coleman Products Ltd v Borden Inc and others* [1990] 1 W.L.R. 491; and for the Trade Descriptions Act 1968: *Burleigh v Van den Berghs and Jurgens Ltd* [1987] BTLC 337.

⁶ See, for example, *Doble v David Greig Ltd* [1972] 1 W.L.R. 703, applying the Trade Descriptions Act 1968, and *Director General of Fair Trading v Tobyward Ltd* [1989] WLR 517, applying the Control of Misleading Advertisements Regulations 1988. Note that there are no examples of protection of specific vulnerable groups in English law.

them to be critical and suspicious towards advertising.⁷ This earned Italy the reputation of being particularly lenient towards traders and having high expectations of consumers.⁸

8.4 Application of the Average Consumer Benchmark

In Germany, the introduction of the average consumer benchmark by the CJEU caused a significant change in the application of the UWG. After the CJEU judgment in *Gut Springenheide*, the *Bundesgerichtshof* ceased to apply the benchmark of the *flüchtigen und unkritischen Durchschnittsverbraucher* and instead began to apply the benchmark of the average consumer, whose level of attention is expected to depend on the situation at hand (i.e., the *situationsadäquate Durchschnittsverbraucher*).⁹ This means that the average consumer is no longer expected to be confused and misled as easily as under the old consumer benchmark, and that, depending on the situation, the average consumer is expected to pay more attention to the information available. This also means that the old doctrine regarding *Blickfangwerbung* is now replaced by a new one, under which the consumer is expected to look beyond the main slogan and is expected to pay attention to additional information, especially if there is a clear reference to this information (e.g., through an asterisk in a prominent place within the advertisement). At the same time, however, there does appear to be room for deviation from the average consumer benchmark in case of objectively false advertising, as was indicated by the *Bundesgerichtshof* in *Scanner-Werbung*.¹⁰ Despite the change to comply with the case law of the CJEU, German law remains less strict than (and thus not in conformity with) the case law of the CJEU in the field of misleading commercial communication. This was also clearly indicated by the European Commission in relation to both the *Orient-Teppichmuster* and the *Scanner-Werbung* cases in preparing the Unfair Commercial Practices Directive. Moreover, the recent *Trento Sviluppo* judgment of the CJEU also indicates that the deviation from the average consumer benchmark in *Scanner-Werbung* is not in conformity with EU law, as the CJEU's judgment confirms that providing false information is not misleading *per se*.

In English law, the introduction of the average consumer benchmark by the CJEU has caused less change. The 2005 *Lewin v Purity Soft Drinks* case on labelling could have been seen as a change towards a more strict interpretation of the average consumer benchmark, but it seems more likely that its significance is limited to the context of labelling.¹¹ In the preparations for the implementation of the Unfair

⁷ Tribunale di Torino, Riv. Dir. Comm. 1915 II, 166 and Corte di Cassazione 17 April 1962, GRUR Int. 1964, 515 (*Motta Alemagna*).

⁸ See, for example, G Schricker, *Italien*, (Munich, Beck, 1965) 204.

⁹ See, in particular, BGH 20 October 1999, I ZR 167/97, WRP 2000, 517—*Orient-Teppichmuster*.

¹⁰ BGH 20 December 2001, I ZR 215/98, WRP 2002, 977—*Scanner-Werbung*.

¹¹ *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81.

Commercial Practices Directive, the UK Government argued that ‘the average consumer did not mark a radical departure from the existing law’.¹² Taking into account the benchmark applied in English law prior to the implementation of the Unfair Commercial Practices Directive, the remark of the UK Government already suggested that the English courts were not going to strictly interpret the CJEU’s case law. This view is further supported by the cases applying the Consumer Protection from Unfair Trading Regulations so far. The first important case going into the substance of the Directive, *Office of Fair Trading v Purely Creative Industries*, indicates that the average consumer benchmark is not a significant barrier to consumer protection.¹³ In fact, the practice at hand is found misleading under application of the average consumer benchmark, despite the fact that the commercial practice is likely to affect only a minority of consumers. In this way, the case clarifies that clearly fraudulent trade practices, i.e., practices *intended* to deceive consumers, are not permitted, even if the average consumer (even if regarded as the actual average) is unaffected. *Office of Fair Trading v Ashbourne Management Services* also points to the direction of a rather consumer-friendly interpretation of the average consumer benchmark. In this case, the court bore in mind the consumer’s overconfidence of his future use of the gym, and emphasised that the trader, advising long-term gym contracts, was not allowed to make use of the poor decision-making of the consumer.¹⁴ This points towards a more ‘behavioural’ approach to the assessment of commercial practices, rather than the classic private law principle of *caveat emptor* (‘buyer beware’). English law is, therefore, also less strict towards consumers than the CJEU in its case law on misleading commercial communication.

The same conclusion can be drawn for Italian law. The decisions of the AGCM and the judgments of the administrative courts demonstrate much more of an emphasis on the responsibility of the trader to advertise clearly and comprehensibly than on the responsibility of the consumer not to be affected by potentially unfair practices. In order to be able to pragmatically deal with problems in the market, the average consumer benchmark is applied flexibly. This also means that the average consumer is assumed to be particularly vulnerable in certain contexts and that the AGCM and the courts sometimes deliberately take into account a novice consumer rather than an experienced consumer, especially as regards, for example, complex products, such as credit cards and telecom contracts.¹⁵

It is interesting to note that in all three Member States, the application of the average consumer benchmark seems to be intended to reflect actual behaviour of the average consumer rather than desired behaviour.¹⁶ Consumers are not generally expected to take into account the information available and are not generally

¹² Department of Trade and Industry 2005, p. 30.

¹³ *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106.

¹⁴ *Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237.

¹⁵ See Tar Lazio, Sez. I, 19 May 2010, No. 12364 (*Accord Italia—Carta Auchan*) and Tar Lazio, Sez. I, 29 March 2010, No. 4931 (*Wind Absolute Tariffa*).

¹⁶ In English law there is the exception of *Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81, in which the stricter case law of the CJEU in relation to labelling is followed.

expected to beware of potentially unfair practices. Hence, all three Member States, compared to European law (and in particular the CJEU's case law), place more emphasis on the responsibility of the trader to act fairly and less emphasis on the responsibility of the consumer not to be misled. As a consequence, all three Member States seem to offer a higher level of consumer protection than is indicated (and allowed for) by the CJEU.

8.5 Application of the Target Group and Vulnerable Group Benchmarks

The German courts have always been willing to take into account the interests of specific vulnerable groups, in particular if they were targeted by the commercial practice. It remains to be seen how the target group and vulnerable group benchmark as introduced by the Unfair Commercial Practices Directive will be applied. There have been recent examples in which children and teenagers have been qualified as vulnerable due to their lack of experience as consumers.¹⁷ Moreover, there are some examples of cases in which clearly misleading practices have been forbidden as it was expected that they would exploit the vulnerability of particularly credulous consumers.¹⁸

As to English law, little can be said about the target group and vulnerable group benchmarks, considering the fact that there are no examples of these benchmarks being applied so far. However, it could be argued that *Office of Fair Trading v Purely Creative Industries* in fact protects particularly credulous consumers, rather than the average consumer, even though the Court indicated that it applied the average consumer benchmark and not the vulnerable group benchmark.¹⁹ It must be noted that it is questionable whether the vulnerable group benchmark could have been applied, taking into account the requirements for application of the benchmark, i.e., that the vulnerable group must be clearly identifiable and that the group's vulnerability must be reasonably foreseeable. It would therefore also be uncertain whether EU law would allow for protection in such a case via the application of the vulnerable group benchmark.

Much more explicit is the protection of vulnerable groups in Italy. Although there is no clear demarcation between the average consumer benchmark, the target group benchmark and the vulnerable group benchmark, it is clear that the AGCM as well as the administrative courts take into account the interests of particularly vulnerable groups. Children and teenagers are generally seen as more vulnerable due to their lack of experience as consumers, and also elderly consumers have been

¹⁷ See, for example, BGH 6 April 2006, I ZR 125/03, GRUR 2006, 776—*Werbung für Klingeltöne* and BGH 22 September 2005, I ZR 83/03, GRUR 2006, 161—*Zeitschrift mit Sonnenbrille*.

¹⁸ See, for example, BGH 26 April 2001, I ZR 314/98, GRUR 2001, 1178—*Gewinn-Zertifikat* and OLG Düsseldorf 9 September 2008, I-20 U 123/08, WRP 2009, 98—*Macht über die Karten*.

¹⁹ *Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106.

identified as a vulnerable group, in particular with regard to doorstep-selling and other direct selling methods. Moreover, consumers interested in products related to the paranormal are seen as particularly credulous and thus vulnerable. Similarly, vulnerability due to credulity has been identified for consumers of health-related products, including diet products. It is questionable whether EU law allows for such extensive protection of vulnerable groups, taking into account the requirements of the target group and vulnerable group benchmarks in the Directive.

8.6 Use of Empirical Evidence

In the *Gut Springenheide* and *Lifting* decisions, the CJEU ruled that the use and interpretation of empirical evidence, such as consumer research polls and expert opinions, is left to national law.²⁰ As discussed in paragraph 4.6 of this book, it is not clear whether the idea underlying the average consumer benchmark, i.e., setting the right level of consumer protection in relation to the free movement of goods, should play any role in the use of empirical evidence, and whether Member States can interpret empirical evidence without taking this idea in consideration.

Interestingly, the German *Bundesgerichtshof* decided that, with the adoption of the European average consumer benchmark, the old practice that only ‘a not inconsiderable number of consumers’ should be misled, could no longer apply. It is likely that this also has consequences for the interpretation of the results of empirical evidence. In German legal literature the general idea seems to be that if, for example, consumer research polls are used, the number of consumers that is required to be misled in order to justify a prohibition should be higher than under the old law and that the old threshold of 10–15% cannot be utilised.²¹ In practice, the issue has so far not been of importance because the German courts decide cases based on how they themselves think consumers would behave, with reference to general experience.

Also in English and Italian law the enforcement authorities and the courts generally decide on the basis of their own assessment how consumers would behave. In Italy, an exception to this was the *Sigarette Lights* case, in which the AGCM commissioned research in order to ascertain the understanding of consumers as to the health-related attributes of light cigarettes.²² In that case, the *Tar Lazio* used the CJEU’s statement in relation to the Member States’ freedom to use empirical evidence to also decide on its own on the appropriate level of protection in that case. This approach thus seems different to German law. At the same time, it must be noted that the low threshold for prohibition in the case at hand also seems to be

²⁰ CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*); CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*).

²¹ See, for example, S Leible, ‘Anmerkung zu EuGH vom 16.7.1998 (*Gut Springenheide*)’ (1998) *Europäische Zeitschrift für Wirtschaftsrecht* 529.

²² *Tar Lazio*, Sez. I, 11 January 2006, No. 1372 (*Sigarette Lights*).

related to the fact that it concerned health-related advertising, and that the claims under investigation could thus endanger the consumer's health.

8.7 Conclusion

It must be noted that because of the different legal contexts in which the consumer benchmarks are applied, the conclusions in this comparison are drawn with some reservation. For example, different enforcement structures (e.g., cases brought by private parties in German law and by a public body in Italian law) lead to different types of cases being brought before the authorities in these Member States. Also the number of published cases varies significantly from one legal system to the other, meaning that it is often not possible to compare similar cases as to their outcomes.

Having said that, it is striking that, when comparing the application of the consumer benchmarks in the Member States to the CJEU's case law, none of the Member States researched illustrate the emphasis of the CJEU's case law on the consumer's responsibility to beware of potentially unfair commercial practices.

Of the three Member States, Italian law seems to offer the highest level of protection to consumers, emphasising the trader's duty to act fairly and to offer clear and comprehensible information. However, English law is also not afraid to intervene in the market and challenge unfair practices, despite its reputation for having a liberal approach to potentially unfair commercial practices. Finally, although German law as a consequence of the CJEU's case law has lowered its level of protection and no longer generally assumes the average consumer to be *flüchtig* and *unkritisch*, it still presumes in certain circumstances that the consumer is observing superficially, leading some commentators as well as the European Commission to conclude that the German application of the average consumer benchmark is still not in conformity with EU law. Taking into account the application of the benchmarks in English and Italian law, the same can be said for those legal systems.

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