

# Chapter 9

## The Average Consumer Benchmark From a Behavioural Perspective

**Abstract** There are two general assumptions underlying the average consumer benchmark as applied by the CJEU. Firstly, the CJEU has a tendency towards viewing the average consumer as a rational decision-maker. This assumption is highly problematic from a behavioural perspective, as many studies have shown that consumers often do not act rationally. People have difficulty dealing with complex or large amounts of information and consumer decision-making is often flawed because of so-called *biases*. Secondly, the average consumer benchmark has as a basis the assumption that consumers behave similarly, and that the average consumer benchmark, therefore, more-or-less accurately represents ‘standard consumer behaviour’. Similar to the rationality assumption, this assumption is problematic from the point of view of consumer behaviour. Consumers in many ways differ from one another in their decision-making, making it difficult to work with the concept of an average consumer. For example, consumers significantly differ in terms of pre-existing knowledge and the degree of involvement consumers have with specific products. Also differences in personality and culture create significant differences in behaviour between consumers.

**Keywords** Average consumer benchmark · Behavioural perspective · Behavioural assumptions · Rational decision-maker · Typical behavior · Pre-existing knowledge · Consumer involvement · Personality · Culture

### 9.1 Introduction

This chapter addresses the question how the average consumer benchmark relates to actual consumer behaviour as understood by the behavioural sciences. It first identifies two general assumptions underlying the average consumer benchmark (paragraph 9.2), followed by a discussion of those assumptions from a behavioural perspective, using insights from the field of consumer behaviour and behavioural

economics (paragraph 9.3).<sup>1</sup> The focus is on the benchmark as applied at the European level, as this is the legal framework that is subject to the assessment provided in Chap. 11 of this book.

## 9.2 Assumptions Underlying the Average Consumer Benchmark

According to the CJEU, the average consumer is ‘reasonably well informed and reasonably observant and circumspect’.<sup>2</sup> This description in itself does not clarify what behaviour is or should be assumed in relation to this benchmark. As has been shown in Chaps. 3 and 4 of this book, the application of the average consumer benchmark and the guidelines for application do not always provide a consistent image of what is expected of the average consumer’s behaviour.

Still, there are two prominent assumptions with regard to the behaviour of the average consumer that can be derived from European law, in particular from the CJEU’s case law. The first is that the average consumer is often depicted as someone who takes well-considered purchasing decisions and who takes into account the information available.<sup>3</sup> In Chap. 3 of this book, several examples of this have been provided in the CJEU’s application of the benchmark, as well as in the Opinions of its Advocate Generals. For example, Advocate General Fennelly in *Lifting* stated that ‘the assumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices’.<sup>4</sup> Moreover, the CJEU in the context of the labelling doctrine assumes the average consumer to read product labels and to bear in mind the information provided on those labels before making a purchasing decision.<sup>5</sup> The image of the average consumer as a careful decision-maker arises most explicitly in the Opinion of Advocate General Trstenjak in *Mediaprint*, in which she argued that the consumer is expected to recognise the potential

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<sup>1</sup> Large parts of this chapter have been published earlier as a contribution to a book on private law and behaviour (in Dutch). See B Duivenvoorde, ‘De gemiddelde consument als standard bij misleiding: een kritische blik vanuit de gedragswetenschappen’, in W van Boom, I Giesen and A Verheij (eds), *Capita civilologie: handboek empirie en privaatrecht* (Den Haag, Boom, 2013) 147–168.

<sup>2</sup> CJEU 16 July 1998, Case C-210/96, ECR 1998, p. I-4657 (*Gut Springenheide*).

<sup>3</sup> See also R Incardona and C Poncibò, ‘The average consumer, the unfair commercial practices directive, and the cognitive revolution’ (2007) *Journal of consumer policy* 30 and J Trzaskowski, ‘The Unfair Commercial Practices Directive and vulnerable consumers’ (Paper for the Conference of the International association of consumer law in Sydney, 2013) 19.

<sup>4</sup> Paragraph 25 of the Opinion of Advocate General Fennelly in CJEU 16 September 1999, Case C-220/98, ECR 2000, p. I-117 (*Lifting*).

<sup>5</sup> See also J Trzaskowski, ‘The Unfair Commercial Practices Directive and vulnerable consumers’ (Paper for the Conference of the International association of consumer law in Sydney, 2013) 9.

danger of certain trade practices and is expected to act rationally towards them.<sup>6</sup> Although the image of the average consumer presented in European law is not entirely consistent (see for example the EC Guidance, which may leave more room for recognition of weaknesses in consumer behaviour), the conclusion can at least be drawn that many of the statements on the average consumer lean towards the image of a rational decision-maker.<sup>7</sup> This is the first assumption that can be identified and that will be discussed in detail below.

Related to this first assumption is the idea underlying the Unfair Commercial Practices Directive and the case law of the CJEU that the benchmark of the average consumer, although in and of itself by definition an abstraction, is a suitable instrument to predict how consumers *typically behave*. The CJEU assumes that certain behaviour can be qualified as ‘reasonably observant and circumspect’ and that a certain level of ‘being informed’ can be qualified as being ‘reasonably informed’.<sup>8</sup> The CJEU thus assumes that there is such a thing as ‘typical’ or ‘standard’ consumer behaviour and that, therefore, the average consumer benchmark reflects this behaviour. This is the second assumption that will be discussed below.

Please note that these assumptions may not always be views on how consumers actually behave; they may also reflect how consumers, according to European law, *should* behave.<sup>9</sup> Still, it is important to test these assumptions against actual consumer behaviour, in order to gain insight into their impact on consumer protection as well as the other goals of the Directive.<sup>10</sup>

### 9.3 Assumption I: The Average Consumer as a Rational Decision-maker

To what extent is the assumption of the consumer as rational decision-maker realistic? Important in this context is the well-known and long-standing discussion regarding the image of man as a rational agent, a discussion that has been held most notably in economics and in the behavioural sciences. This discussion points out that although the assumption of rational decision-making may provide a model of

<sup>6</sup> Paragraph 103 of the Opinion of Advocate General Trstenjak in CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*).

<sup>7</sup> See also R Incardona and C Poncibò, ‘The average consumer, the unfair commercial practices directive, and the cognitive revolution’ (2007) *Journal of consumer policy* 30 and, similarly, J Trzaskowski, ‘The Unfair Commercial Practices Directive and vulnerable consumers’ (Paper for the Conference of the International association of consumer law in Sydney, 2013) 9. See also the discussion in Chap. 4 of this book.

<sup>8</sup> See also paragraph 4.3 of this book.

<sup>9</sup> See also paragraph 4.2 of this book.

<sup>10</sup> See also paragraphs 1.3 and 1.4.3 of this book.

decision-making, it ignores the many mistakes people often structurally and thus predictably make.<sup>11</sup>

Rationality in essence refers to a conscious decision-making process, in which advantages and disadvantages (i.e., costs and benefits) are carefully weighed in order to reach the optimal decision. As psychologist Jacoby states, ‘rationality implies decision-making that is a function of the deliberate conscious consideration and evaluation of information.’<sup>12</sup>

Since the 1970s, psychologists have strongly criticised this idea of rational decision-making. As is discussed in more detail below, extensive research shows that due to our limited cognitive abilities we cannot always act rationally, and that even if we *can* act rationally we often do not do so. Accordingly, people do not always make choices as consciously and deliberately as is assumed by rational choice theory. In fact, we *often* do not make choices as consciously and deliberately as is assumed. Moreover, these are not just random individual examples; people in general predicatively behave differently from this assumedly rational human being. The actual average consumer is thus by far not always a rational decision-maker.

Where does it go wrong? An important assumption underlying the idea of the rational decision-maker is that the consumer uses available information and, on the basis of this information, makes the right decision. This assumption can also be found in the CJEU’s case law related to the average consumer benchmark, as has been shown earlier.

The fact that information is available, however, does not automatically mean that consumers will actually pay attention to that information, nor that they perceive and comprehend the information accurately.<sup>13</sup> The competence of the consumer to collect and process information is limited. Moreover, there is the problem of information costs; is it worth to invest time and energy to gather and process information? In this sense, also motivation plays an important role in consumer behaviour. Consumers are not likely to be motivated to invest time in making a decision if it concerns a product of low value, whereas they may be more motivated to spend time making a decision for more expensive good.<sup>14</sup>

Many things can go wrong in the various stages of information processing, i.e., in the stages of *attention, encoding and comprehension, inference*, as well as in the *response processes*.<sup>15</sup> Consumers not only encounter problems processing

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<sup>11</sup> See in the context of the average consumer also J Trzaskowski, ‘The Unfair Commercial Practices Directive and vulnerable consumers’ (Paper for the Conference of the International association of consumer law in Sydney, 2013) 17 and onwards.

<sup>12</sup> J Jacoby, ‘Is it rational to assume consumer rationality?’ (2000) *Roger Williams University Law Review* 103.

<sup>13</sup> See also J Jacoby, ‘Is it rational to assume consumer rationality?’ (2000) *Roger Williams University Law Review* 119–122. He argues that ‘if one assumes that, for consumers to engage in rational decision-making and choice behavior, one only need provide them with the requisite information, one will be operating with an untenable assumption.’

<sup>14</sup> See for individual differences in motivation also the discussion on *involvement* below.

<sup>15</sup> R Wyer Jr., ‘The role of knowledge accessibility in cognition and behaviour—implications for consumer information processing’, in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 32.

information regarding complex products such as those in the financial sector.<sup>16</sup> Jacoby quotes research showing that, on average, television viewers and magazine readers miscomprehend approximately 20–25% of the material meanings they read in magazines or see on television. He adds:<sup>17</sup>

Strikingly, this research shows that virtually 100% of the population miscomprehends at least some portion of these “common denominator mass media” communications, and that this occurs regardless of the level of formal education. J.D.s, L.L.Ds and Ph.Ds miscomprehend material elements of these simple communications at nearly the same rates as do those whose formal education ended with high school diplomas or less. In similar fashion, research on product warning labels and disclaimers reveals that consumer attention to and comprehension of such information is far from optimal, often hovering in the range of 10% to 20%.

Exactly where it goes wrong in the processing of information is not always easy to ascertain, but consumer psychology has identified some important problems in this regard. One of these issues is the now well-known problem of *information overload*, i.e., the problem that consumers often prove to be unable to make adequate decisions when faced with a considerable amount of information. Hence, although consumers require sufficient information in order to facilitate their decision-making process, too much information distorts the same process.<sup>18</sup> Providing more information may thus be counterproductive.<sup>19</sup>

Consumers also make mistakes because of so-called *cognitive biases*, i.e., typical and predictable irrational thought processes or results of thought processes. Experiments indicate that consumers, because they have to deal with the fact that they do not always possess full information and have limited cognitive abilities in evaluating this information, use so-called mental shortcuts or *heuristics*. These mental shortcuts or heuristics are often very useful, enabling consumers to make quick and relatively reliable decisions.<sup>20</sup> Heuristics provide consumers with a possibility to evaluate choices and subsequently select from alternatives in a simple, flexible and easily adapted way.<sup>21</sup> However, heuristics also have their difficulties. In fact, extensive research shows that certain mental shortcuts are seriously flawed, causing

<sup>16</sup> See on the issue of financial literacy, e.g., V Mak, ‘The myth of the ‘empowered consumer’: lessons from financial literacy studies’ (2012) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/ Journal of European consumer and market law* 254.

<sup>17</sup> J Jacoby, ‘Is it rational to assume consumer rationality?’ (2000) *Roger Williams University Law Review* 120–121.

<sup>18</sup> See, for example, N Malhotra, ‘Information load and consumer decision making’ (1992) *Journal of consumer research* 419–430 and J Jacoby, ‘Perspectives on information overload’ (1984) *Journal of consumer research* 432–435.

<sup>19</sup> J Bettman, E Johnson and J Payne, ‘Consumer decision making’ in T Robertson and H Kassarian (eds.), *Handbook of consumer behaviour* 57.

<sup>20</sup> J Conlisk, ‘Why bounded rationality?’ (1996) *Journal of economic literature* 671.

<sup>21</sup> J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 170–172. See also J Conlisk, ‘Why bounded rationality?’ (1996) *Journal of economic literature* 671.

people to structurally incur cognitive errors in their decision-making. These cognitive errors are also known as *biases*.<sup>22</sup>

One of the most well-known biases is related to the so-called *framing effect*.<sup>23</sup> Experiments in the 1980s by psychologists Tversky and Kahneman show that differently designed but essentially identical options lead to distinctly different choices by consumers.<sup>24</sup> Framing can help to draw consumers' attention to important information, but the opposite can also be achieved. A good example of this is the *decoy effect*, of which Ariely has provided an example for consumer behaviour.<sup>25</sup> He shows that adding an option, which at first sight would appear irrelevant, can radically change the perceived value of other options. The options in his experiment concern a subscription to the *Economist*. One group of test subjects has two options: (a) an online-only subscription to the *Economist* for \$ 59,- or (b) a print subscription to the *Economist* combined with an online subscription for \$ 125,-. Another group has the same options (a) and (b), but with a worthless and thus seemingly irrelevant additional option of a print subscription of \$ 125,-, i.e. the same price as the combined subscription (b). None of the subjects choose the extra option, but the distribution for the choice for options (a) and (b) suddenly changes dramatically; in the first group, 68% of the respondents choose the online-only subscription, with 32% opting for the combined subscription, whereas in the second group only 16% opted for the online-only subscription, and 84% the combined subscription. This shows that the way in which options are presented can strongly influence consumer choice and that this choice is less rational than one would expect, as it can be steered by seemingly irrelevant external factors.

Another problem in consumer decision-making is that consumers often have difficulties estimating the chances of future events. Lacking accurate information, people use heuristics to make estimations. As already noted, these heuristics are often useful tools, but also necessarily involve associated flaws. For example, in estimating the chance of future events, people tend to rely too much on the availability of these events in one's own memory. Accordingly, people tend to overestimate the chance of events that have happened recently or that are otherwise readily available in their own memory. People also tend to be structurally over-optimistic about their own future.<sup>26</sup> This overly optimistic outlook increases the chance that people overestimate their chances to repay a loan, or make them too readily believe that they will be able to save up money for retirement at a later stage in their life.

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<sup>22</sup> For heuristics and biases in general, see J Conlisk, 'Why bounded rationality?' (1996) *Journal of economic literature* 670.

<sup>23</sup> See, for example, R Korobkin and T Ulen, 'Law and behavioral science: removing the rationality assumption from law and economics' (2000) *California law review* 1104–1107.

<sup>24</sup> A Tversky and D Kahneman, 'The framing of decisions and the psychology of choice' (1981) *Science* 453.

<sup>25</sup> D Ariely, *Predictably irrational* (London, Harper, 2009) 1–6.

<sup>26</sup> This is also known as the *overconfidence bias*, see R Korobkin and T Ulen, 'Law and behavioral science: removing the rationality assumption from law and economics' (2000) *California law review* 1091.

These examples illustrate that the image of the average consumer as a rational decision-maker is problematic from a behavioural perspective.<sup>27</sup> Consumer decision-making is subject to a range of predictable problems. These flaws in the decision-making process make consumers vulnerable to deceptive marketing strategies, exactly because the flaws are predictable. This means that traders can (and do) design their marketing strategies in order to profit from these flaws.<sup>28</sup>

## 9.4 Assumption II: The Average Consumer as a Model for Typical Behaviour

### 9.4.1 *General Remarks*

As discussed above, the second assumption related to the average consumer benchmark is that it is a model that represents ‘typical’ or ‘standard’ consumer behaviour. Yet to what extent can one really speak of ‘typical’ or ‘standard’ consumer behaviour? To what extent is consumer behaviour generally predictable and to what extent can one talk of ‘average’ behaviour? As is shown in more detail below, the assumption of typical consumer behaviour presents a number of problems. In practice, there are significant differences in the basis, processes and results of decision-making between consumers. This is illustrated by means of a discussion of four important factors that influence these processes. Firstly, the role of pre-existing knowledge on the decision-making between consumers will be discussed (paragraph 9.4.2). Secondly, the role of involvement on the decision-making process will be dealt with (paragraph 9.4.3), followed by a discussion of the role of personality (paragraph 9.4.4). Finally, the role of culture in consumer behaviour will be discussed (paragraph 9.4.5).

### 9.4.2 *Pre-existing Knowledge*

Pre-existing knowledge, i.e., the knowledge the consumer has prior to entering the process of decision-making, has a large impact on the further decision-making process. Research on this point indicates that knowledge influences the different stages

<sup>27</sup> See also R Incardona and C Poncibò, ‘The average consumer, the unfair commercial practices directive, and the cognitive revolution’ (2007) *Journal of consumer policy* 21 and J Trzaskowski, ‘The Unfair Commercial Practices Directive and vulnerable consumers’ (Paper for the Conference of the International association of consumer law in Sydney, 2013).

<sup>28</sup> See also O Bar-Gill, *Seduction by contract: law, economics and psychology in consumer markets* (Oxford University Press, 2012) 2. See for an extensive overview of deceptive marketing strategies also D Boush, M Friestad and P Wright, *Deception in the marketplace: the psychology of deceptive persuasion and consumer self protection* (New York/London, Routledge, 2009).

of the decision-making process in general, including the attention that is paid to certain types of information and the way consumers evaluate choice options.<sup>29</sup>

Consumers can acquire knowledge in various ways, such as through exposure to advertisements, information searches, interaction with sales staff and product usage. The level of these experiences is often referred to as *familiarity*. The level of familiarity (i.e., the total number of these types of experiences) generally influences what is referred to as *expertise*. This refers to cognitive structures (e.g., beliefs about product attributes) and cognitive processes (e.g., decision rules for acting on those beliefs), which are required to perform product-related tasks successfully.<sup>30</sup> In other words, the more product-related experiences people have, the better they are thought to be able to perform product-related tasks such as reading and understanding technical attribute descriptions and comparing products.

Several studies have been conducted on the question how *novices* (consumers having little expertise on a certain topic) and *experts* (consumers having high expertise on a certain topic) process messages. For example, an experiment on information processing of an advertisement for a personal computer shows that novices tend to disregard technical attributes if no further explanation is given regarding the benefits of those attributes, while for experts this technical information leads to more detailed processing of the advertisement.<sup>31</sup> Similarly, experts tend to elaborate more upon the information available, while novices tend to use shortcuts while thinking about product attributes.<sup>32</sup> Moreover, it has been suggested that novices struggle to process information, as they are unable to connect facts.<sup>33</sup>

What does this mean for the average consumer benchmark? It is important to realise that information (e.g., in advertising) is handled differently by different consumers based on what they already know, and that there are large differences in what consumers already know (irrespective of their educational background). The availability of pre-existing knowledge depends on earlier experiences of consumers and, related to that, on their interests (see also the discussion on *consumer involvement* below). This raises the question whether setting the benchmark at the average consumer means that the interests of novices will not be taken into account, because the consumer would be assumed to be averagely informed, whereas novices may

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<sup>29</sup> For an overview, see J Hutchinson and E Eisenstein, 'Consumer learning and expertise', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 103.

<sup>30</sup> J Alba and J Hutchinson, 'Dimensions of consumer expertise' (1987) *Journal of consumer research* 1987 411, J Hutchinson and E Eisenstein, 'Consumer learning and expertise', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 103–104.

<sup>31</sup> D Maheswaran and B Sternthal, 'The effects of knowledge, motivation, and type of message on ad processing and product judgments' (1990) *Journal of consumer research* 66.

<sup>32</sup> J Hutchinson and E Eisenstein, 'Consumer learning and expertise', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 106–107.

<sup>33</sup> J Alba and J Hutchinson, 'Dimensions of consumer expertise' (1987) *Journal of consumer research* 1987 411 and D Maheswaran, B Sternthal and Z Gürhan, 'Acquisition and impact of consumer expertise' (1996) *Journal of consumer psychology* 115.



not be capable of processing the information as they may be unable to understand the relevance of the information provided. Furthermore, if this is the case, does this not give traders the opportunity to make use of (or ultimately abuse) the inexperience of consumers?<sup>34</sup>

### 9.4.3 *Consumer Involvement*

Another important issue in the context of typical behaviour and individual differences between consumers is what is referred to as *consumer involvement*. Consumer involvement concerns consumers' perceptions of the importance of or personal relevance for an object, event or activity.<sup>35</sup> This so-called *motivational state* influences cognitive and affective processes and thus also choice behaviour. The more consumers are involved with a certain product, the more they will be likely to be knowledgeable about the product, pay attention to the information given, gather additional information, make a detailed comparison of products, etc.<sup>36</sup>

Think for example of a 'computer fanatic' looking for a new computer system. This consumer has a strong psychological relationship with the product and will most likely be willing (and will probably even enjoy) spending time and effort in order to come to the best purchasing decision. The same product can, however, also be bought by someone who has little knowledge of computer systems, but simply needs to replace his old system with one that is more up-to-date.

Again, the point is that it is not easy to determine who the average consumer is in these cases and how one should characterise the behaviour of the average consumer. Is the computer fanatic the average consumer or is it the consumer just looking for an up-to-date system?

### 9.4.4 *Personality*

The assumption of the average consumer benchmark representing typical consumer behaviour may also be problematic in relation to personality differences. Although this is often ignored when drafting and designing legal instruments, differences in personality play a significant role in decision-making.<sup>37</sup>

<sup>34</sup> Note in this context that there are no indications in the CJEU's case law—except for generally high expectations towards the average consumer—that the average consumer is seen as particularly knowledgeable. See also paragraph 4.3 of this book.

<sup>35</sup> J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 84.

<sup>36</sup> *Ibid.* See also P Bloch, 'An exploration into the scaling of consumers' involvement with a product class' (1981) *Advances in consumer research* 61 and N Michaelidou and S Dibb, 'Consumer involvement: a new perspective' (2008) *Marketing review* 83.

<sup>37</sup> See, for example, K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) 116–119.

An important distinction based on personality differences in consumer decision-making, also in relation to potentially misleading practices by traders, is that of the *need for cognition*.<sup>38</sup> The need for cognition concerns the degree to which people tend to think and have a need for thinking.<sup>39</sup> This plays a role in life in general (including people's tendency to engage in thinking activities in the context of leisure, such as completing crossword puzzles) and also for consumer behaviour. People who score high on the *need for cognition scale* tend to put more thinking into their decisions. Research by Levin, Huneke and Jasper indicates that people with a higher need for cognition use more information and also come to better decisions when comparing products.<sup>40</sup> This is different for people with a low need for cognition, who tend to rely more on simple heuristics and on the basis of easily perceptible signals (so-called *cues*), such as the perceived reliability of the person who is trying to influence them. This makes them more open to be 'directed' towards a certain decision by traders, whereas people with a high need for cognition will more likely be influenced by detailed product information.

Also other personality traits are relevant in the context of consumer behaviour, such as the *faith in intuition*, i.e. the degree to which people tend to rely on their intuition in making decisions.<sup>41</sup> Also the degree to which people are risk seeking or

<sup>38</sup> Also other personality variables are relevant for the decision making of consumers. See K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) and C Haugtvedt, K Liu and K Sam Min, 'Individual differences, tools for theory testing and understanding in consumer psychology research', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 1161. In this chapter the discussion of personality variables is limited to the example of need for cognition.

<sup>39</sup> K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) 116. See also C Haugtvedt, K Liu and K Sam Min, 'Individual differences, tools for theory testing and understanding in consumer psychology research', in C Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York/London, Routledge, 2008) 1162–1163. For the original research on the topic of need for cognition, see, amongst others, J Cacioppo, R Petty and K Morris, 'Effects of need for cognition on a message evaluation, recall, and persuasion' (1983) *Journal of personality and social psychology* 805, S Epstein and R Pacini, 'Some basic issues regarding dual-process theories from the perspective of cognitive-experiential self-theory', in S Chaiken and Y Trope (eds), *Dual-process theories in social psychology* (New York, Guilford Press, 1999) 462 and C Haugtvedt, R Petty and J Cacioppo, 'Need for cognition and advertising: understanding the role of personality variables in consumer behavior' (1992) *Personality and social psychology review* 303.

<sup>40</sup> K Faddegon, 'Psychologische verschillen in keuzegedrag', in W Tiemeijer, C Thomas and H Prast (eds), *De menselijke beslisser: over de psychologie van keuze en gedrag* (WRR Verkenningen 22) (Amsterdam University Press, 2009) 118 and J Levin, M. Huneke and J Jasper, 'Information processing at successive stages of decision making: Need for cognition and inclusion-exclusion-effects' (2000) *Organizational behavior and human decision processes* 171.

<sup>41</sup> See e.g., S Epstein et al. 'Individual differences in intuitive-experiential and analytical-rational thinking styles' (1996) *Journal of Personality and Social Psychology* 390.

risk avoiding is relevant.<sup>42</sup> This characteristic may also influence their behaviour as consumers, for example in relation to risky financial products. In relation to the average consumer benchmark it is once more the question what can be seen as typical or standard behaviour, and to what extent it is at all useful to speak of typical or standard behaviour. Interestingly, European law seems to expect the average consumer to have a high need for cognition. As has been discussed above, the CJEU assumes the average consumer to generally take the available information into account and to reach a well-considered and well-reasoned decision based on this information. This has important consequences for the level of consumer protection. It is important to realise that if one presumes that the consumer has a high need for cognition, this leaves people with a lower need for cognition open to exploitation of that personality variable by traders, who are aware that not everyone tends to think things through as much as is sometimes assumed by the CJEU. The same applies to other personality traits.

### 9.4.5 Culture

The issues of pre-existing knowledge, consumer involvement and personality concern differences between individual consumers. Yet on a broader scale there are also significant differences with respect to consumer behaviour that make it difficult to continue to work with the assumption of typical or standard consumer behaviour. In particular, culture causes significant differences between groups of consumers within and between different countries.

The CJEU has to some extent recognised this fact, as the Court has repeatedly stated that national courts can take social, cultural and linguistic factors into account in their assessment of commercial practices. However, as has been discussed earlier (see in particular paragraph 4.5 of this book), the CJEU does not appear to allow for extensive differences in the assessment of commercial practices between Member States; differences between consumers in Member States due to different understandings based on different languages can be taken into account, for example, but it is unlikely that the CJEU will allow for a view for overall different behaviour (and perhaps different levels of vulnerability) as regards commercial practices. Despite the fact that enforcement authorities and courts in Member States are allowed some freedom to determine what the typical reaction would be of the consumer in that Member State, the idea underlying the average consumer benchmark still primarily appears to be directed at the fact that Pan-European advertising campaigns should not be obstructed by taking all sorts of differences between consumers in different Member States into account. The average consumer thus appears to be primarily intended as a European benchmark.

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<sup>42</sup> See e.g., P Bromiley and S Curley, 'Individual differences in risk taking' in: F Yates (ed), *Risk Taking Behaviour* (Chichester, Wiley 1992).

The issue of culture has become an important issue in consumer behaviour studies over the past few decades. Marketers face choices such as whether to launch a global, regional or local marketing campaign, raising the question to what extent consumers around the world, within a region or within a country are the same. Is a European consumer triggered by the same aspects of an automobile advertisement as an Asian consumer? Do the same sales methods for insurance policies work for German and Italian consumers?

On the basis of these studies, Wilhelmsson in his article '*The average consumer: a legal fiction*' draws attention to the cultural obstacles to European regulation of unfair commercial practices.<sup>43</sup> Based on consumer behaviour studies, he argues that the average consumer benchmark, despite the CJEU's mentioning of social, cultural and linguistic factors, largely ignores the significant cultural differences between consumers in different European Member States.

Indeed, studies on the relationship between culture and consumer behaviour show that there are large differences between consumers in different cultures. Shavitt, Lee and Johnson in their 2008 literature review of cross-cultural consumer psychology note that 'cultural distinctions have been demonstrated to have important implications for advertising content, persuasiveness of appeals, consumer motivation, consumer judgment processes and consumer response styles'.<sup>44</sup> Cultural differences thus have an impact not only on values and preferences, but on behaviour in general.

De Mooij, one of the leading researchers on consumer behaviour and culture, emphasises that cultural values are at the root of consumer behaviour and that culture is pervasive in all aspects of consumption and consumer behaviour.<sup>45</sup>

This also means that advertisements may be understood and appreciated very differently depending on culture.<sup>46</sup> Although it has been argued that marketing is becoming increasingly global, consumer psychologists warn against global marketing strategies, emphasising that consumers across the world are not sufficiently homogeneous.<sup>47</sup> Companies are realising that global marketing strategies often fail

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<sup>43</sup> T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 243.

<sup>44</sup> S Shavitt, A Lee and T Johnson, 'Cross-cultural consumer psychology', in C. Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York, Psychology press, 2008) 1103.

<sup>45</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 2. The studies by De Mooij build on the famous work on cultural differences by Hofstede, using his value system. See G Hofstede, *Culture's consequences: comparing values, behaviors, institutions and organizations across nations* (Thousand Oaks, Sage, 2001).

<sup>46</sup> J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 280.

<sup>47</sup> J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 301–302.

as a consequence of cultural differences.<sup>48</sup> In line with this, De Mooij points out that although many multinationals had standardised their operations and brands since the 1990s, the trend is reverting to a more local approach.<sup>49</sup>

It should be pointed out, however, that many of the studies on cultural differences in consumer behaviour focus on differences between cultures that seem to be wide apart (in particular American *versus* Asian cultures). The question thus is: what is the impact of cultural differences within Europe?

Although differences are likely to be considerably smaller within Europe than between American and Asian cultures, for example, this does not mean that Europe can be seen as one market. In this context consumer behaviourists Peter and Olson note that despite the general trend towards globalisation, cross-cultural differences between European countries will not disappear. They argue, therefore, that the vision of a single market (in terms of common cultural meanings) may therefore be 'premature' and that 'everyone agrees that [...] marketers cannot look at Europe in the same way'.<sup>50</sup>

Again, these differences are not limited to values and preferences; the way in which consumers in different Member States make purchasing decisions is also different. For example, consumers in different Member States take different types of information into account when purchasing a car; while German consumers tend to look for detailed product specification data, Italians are more interested in car images and in the context in which the car is used (so-called subjective editorial).<sup>51</sup> Cultural differences have also been found as to the tendency to read information on labels of food products.<sup>52</sup> There are also differences in how people acquire information; people in individualist cultures (e.g., the United Kingdom and the Netherlands) people tend to acquire more information via the media, whereas people in more collectivist cultures (e.g., Spain and Italy) tend to acquire more knowledge via interpersonal communication.<sup>53</sup>

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<sup>48</sup> In 1983, Levitt predicted that consumers were becoming more homogenised and that global marketing was on the rise, but this view has been heavily opposed by consumer behaviour studies. See T Levitt, 'The globalization of markets' (1983) *Harvard business review* 92. See also J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 301 and M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 5–6.

<sup>49</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 17–18.

<sup>50</sup> J Peter and J Olson, *Consumer behavior & marketing strategy* (9th international edition) (Boston, McGraw-Hill, 2010) 302.

<sup>51</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 184.

<sup>52</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 222.

<sup>53</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 205. Related to this, there are differences as to the extent to which consumers rely on different sources such as friends, salespeople and experts. See M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 222.

As to the processing of advertising, an interesting example is that, depending on culture, people are used to different types of information in advertising.<sup>54</sup> In so-called low-context cultures (e.g., the United Kingdom and Germany), consumers are more used to explanations, persuasive copy and rhetoric, whereas in more high-context cultures (e.g., Italy, Spain and France), consumers are more familiar with symbols, signs and indirect communication, whereas consumers in.<sup>55</sup> While in low-context communication the information is in the words, in high-context communication the information is in the visuals, the symbols and the associations attached to them.<sup>56</sup> This means that the same advertisement is likely to be read differently by consumers in different cultures and that different informational elements in the advertisements are weighed differently, leading to different inferences about what a product can or cannot do.<sup>57</sup>

Cultural differences also have an impact on the level of knowledge of consumers in different Member States. Research shows, for example, that while in the more 'feminine' Swedish culture more than 30% of consumers did not know the engine size of their car, in the 'masculine' United Kingdom the same information was unknown to only just over 2% of consumers.<sup>58</sup> Differences also exist as to the tendency to postpone decisions; in cultures characterised by a stronger external locus of control (e.g., Belgium and France), people tend to postpone more than in cultures characterised by a stronger internal locus of control (e.g., Denmark and Sweden).<sup>59</sup>

What does this mean for the average consumer benchmark? As mentioned above, the average consumer benchmark—and, more generally, the idea of full harmonisation—appear to primarily imply a uniform European benchmark. This view ignores the cultural differences between consumers in different Member States.<sup>60</sup> A model

<sup>54</sup> See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 260–261 and, more generally, S Shavitt, A Lee and T Johnson, 'Cross-cultural consumer psychology', in C. Haugtvedt, P Herr and F Kardes (eds), *Handbook of consumer psychology* (New York, Psychology press, 2008) 1113–1114.

<sup>55</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 206.

<sup>56</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 212.

<sup>57</sup> This also implies different needs as to regulation. See T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 261.

<sup>58</sup> T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 264 and M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 256.

<sup>59</sup> M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 221–222. Locus of control concerns the extent to which people believe that they can control events that affect them. See for the overview of the locus of control in different countries: M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 205.

<sup>60</sup> See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 265.

of typical or rational consumer behaviour places the consumer outside of a cultural context.<sup>61</sup> At a practical level, the information presented in this paragraph raises the question what consumer (i.e., what culture) is taken as a benchmark. In this context, it seems that the CJEU's case law on the average consumer benchmark favours detailed analytical processing of information, while consumers in different Member States to a different extent tend to process information in this manner.<sup>62</sup> This has consequences for the level of consumer protection in the Member States. Especially for Member States in which people, on the basis of their culture, focus less on this type of decision-making, consumers are faced with a gap in consumer protection. In sum, also the issue of culture presents challenges to the idea of working with a benchmark based on typical consumer behaviour.

## 9.5 Conclusion

This chapter has shown that with respect to several important issues the behaviour assumed in light of the average consumer benchmark does not correspond to actual consumer behaviour as understood by the behavioural sciences.

Firstly, it has been shown that the tendency of the CJEU to envisage the average consumer as a rational decision maker ignores typical problems in consumer decision-making.<sup>63</sup> The CJEU thus seems to overstate the abilities of the typical consumer.<sup>64</sup> It is important to note in this context that since many mistakes consumers make are structural flaws, these can easily be made use of (or even provoked) by traders. Hence, the high expectations with respect to the behaviour of the average consumer provide exploitative business models with room for manoeuvre. In and of itself the fact that the benchmark is set at the average already means that the sub-averagely informed, observant and circumspect consumer is not protected, at least not if the average consumer is not affected. The fact that the expectations of the behaviour of the average consumer are unrealistically high, further raises the threshold to challenge unfair commercial practices. This raises questions as to the relationship of these high expectations with the goals of the Directive, in particular in relation to the goal to achieve a high level of consumer protection.<sup>65</sup>

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<sup>61</sup> See in relation to the rationality assumption also M de Mooij, *Consumer behavior and culture: consequences for global marketing and advertising* (Thousand Oaks, Sage, 2004) 5.

<sup>62</sup> See also T Wilhelmsson, 'The average European consumer: a legal fiction?', in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private law and the many cultures of Europe* (The Hague, Kluwer Law International, 2007) 268.

<sup>63</sup> See similarly R Incardona and C Poncibò, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' (2007) *Journal of consumer policy* 21 and J Trzaskowski, 'The Unfair Commercial Practices Directive and vulnerable consumers' (Paper for the Conference of the International association of consumer law in Sydney, 2013).

<sup>64</sup> See also European Consumer Consultative Group 2013, p. 8.

<sup>65</sup> See more elaborately Chap. 11 of this book.

Apart from the fact that the expectations of the CJEU of the average consumer's behaviour are unrealistically high, this chapter has also shown that the average consumer benchmark assumes typical or standard decision-making, and that also this assumption can in several ways be seen as problematic when examined from the point-of-view of consumer behaviour studies. Consumers are different from one another and enter decision-making processes differently in many ways, for example because of differences in pre-existing knowledge, different degrees of involvement with the product or service, but also because of different personalities and cultural backgrounds. These differences influence consumer decision-making in many ways. What is to be regarded as 'typical' consumer behaviour is difficult to determine in this context. This raises practical problems as to the determination of the expected behaviour of the average consumer in a specific case, but it also raises the question whether the idea to work with the benchmark of the average consumer is the right way to determine who deserves protection and who does not. For example, should being inexperienced with a certain good or trade practice mean that no protection is offered by the Directive, as a consequence of the average consumer benchmark? This could be problematic because traders can exploit these vulnerabilities through their marketing strategies, i.e., by means of adapting their business models to less experienced consumers. Again, this raises questions as to the Directive's goals. These questions will be addressed more elaborately in Chap. 11.

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