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The average consumer, the unfair commercial practices directive, and the cognitive revolution

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Abstract This article examines the merit of the test of the average consumer as a basis for judicial and regulatory action. In the first part, we describe the origin of the test, its application in the Unfair Commercial Practices Directive and its possible developments. In the second part, we discuss the theoretical grounds of the average consumer test (i.e., information and rationality), drawing upon the studies of cognitive psychology and behavioural economics concerning consumers' behaviour. The result of our analysis is that we call into serious question the practical workability of the test of the average consumer, which requires consumers an overly demanding standard of rationality and information without dedicating much attention to the real functioning of consumer behaviour. The average consumer may be described as an interesting, anti-paternalistic and, to some extent, useful notion. It is, however, an overly simplistic concept with little correspondence with the real world of individual consumer behaviour and should be reinterpreted more flexibly, or even abandoned to mirror consumer behaviour more effectively.

Keywords Average consumer · Unfair commercial practice directive · Cognitive studies

The emergence of the "average consumer"

European law recognises and protects consumers' interests in many respects but, in some areas, limits its scope of application to the single prototypical personification of an ''average consumer,'' a figure who first emerged in the case-law of the European Court of Justice (ECJ) in relation to cases involving the free movement of goods,

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labelling, and misleading advertising cases. This simplification of the manifest complexities of human nature was further delineated in trademark infringement cases by the Court of First Instance (CFI) (Davis, 2005; Schricker & Henning-Bodewig, 2002) and is now enshrined in the Unfair Commercial Practices Directive (European Parliament and Council, 2005).

In the first part of this article, we describe the origin of the test, its application in the Unfair Commercial Practices Directive and its possible developments. In the second part, drawing upon the studies of cognitive psychology and behavioural economics on consumerist behaviour, we discuss the theoretical grounds of the average consumer test (i.e., information and rationality). We conclude that the average consumer test overlooks the real world of individual consumer behaviour and sets an overly demanding standard for consumers, though it responds to the appreciable intent of offering a useful tool to firms, their consultants, and the judicial authorities in the assessment of unfair commercial practices. The liberal approach to consumer protection adopted by the Unfair Commercial Practices Directive opens up to a less paternalistic view of European consumer law.

The ECJ and CFI case-law on the average consumer

The origins of ECJ case-law based on the average consumer can be traced in Gut Springenheide. Gut Springenheide marketed ready-packed eggs under the description ''6-grain-10 fresh eggs,'' as the feed mix used to feed the hens contained 60% of a variety of six different cereals. Each pack of eggs contained a piece of paper stating the beneficial effects of this feed on the quality of the eggs. The German authorities claimed that this misled consumers. In a reference for preliminary ruling from the Bundesverwaltungsgericht, the ECJ indicated the proper test to be applied to purchasers and discussed whether this description was misleading.

The ECJ stated that: ''In order to determine whether a statement or description designed to promote sales (...) is liable to mislead the purchaser (...) the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect.''[1]

The ECJ judgement also clarified that Community law does not preclude the possibility that, where the national court has a particular difficulty in assessing the misleading nature of a statement or description, it may resort under the conditions set forth under domestic law to a consumer research poll or an expert's report. In subsequent case-law, the ECJ and the CFI refined the definition of the average consumer and made several distinctions depending on different groups of consumers or goods at issue.

The question of which consumers a product targets is determined by factors such as advertising in one or more Member States and the requirement of a particular language. In CeWe Color AG & Co. OHG,[2] the ECJ explained that: ''The goods and services at issue are directed not only at a specialist public but also more widely at the public at large. In addition, the marks sought are made up of elements of the

[1] Gut Springenheide GmbH, Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt—Amt für Lebensmittelüberwachung, judgement of the Court of Justice (Fifth Chamber) of 16 July 1998, case C-210/96, ECR, 1998, I-4657, § 31.

[2] CeWe Color AG & Co. OHG v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court of First Instance (Fifth Chamber) of 8 September 2005, joined cases T-178/03 and T-179/03, § 28.

English language. As a consequence, the relevant public is the average English-speaking consumer, normally well informed and reasonably attentive.''

If products are specifically designed for, or advertised only in one Member State, the consumers in that country are the benchmark for the expectations of the average consumer for that particular product or service. Expectations of consumers in other Member States are irrelevant. Potentially, language can also have a restricting influence. If an advertisement is published throughout the whole EU, but in a language spoken only in a particular country, and not widely known as a foreign language, it effectively defines the group of consumers, the product, or service targets.

Once the relevant group of consumers is defined, the ECJ examines the expectations and presumptions of the average consumers comprising this group. The average consumer may, in certain situations, be especially careful and attentive, but in others may be not ''particularly well informed and attentive.''[3] In New Look Ltd v. Office for Harmonization in the Internal Market (OHIM), in relation to possible confusion of trademarks in the clothing sector, the CFI explained:

''The clothing sector (...) comprises goods which vary widely in quality and price. Whilst it is possible that the [average] consumer is more attentive to the choice of mark where he or she buys a particular item or clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector.''[4]

The level of consumer attention often depends on knowledge[5] and on whether a consumer has a prior familiarity with the particular product and not on previous experience in similar transactions. Even if individual consumers may not always be at all observant and circumspect, or may not be so in a particular situation, the average consumer is falsely deemed to be ever reasonably circumspect and attentive.

In Miles Handelsgesellschaft International GmbH v. OHIM,[6] the CFI measured the response of the average consumer as being that of the whole mass of consumers in general and not that of the precise group of motorcyclists targeted by the product. The CFI held that, since clothing for motorcyclists may also be purchased by persons other than motorcyclists, the relevant public consists of all ''average'' consumers who are considered to be reasonably well-informed and observant. The court further determined that as the goods at issue are staple consumer goods, the average consumer regards those with a normal degree of attention. Indeed, the court found that, even if the relevant public consisted only of motorcyclists, that group of consumers would be no more observant than average consumers when they purchase the clothing in question, which can be used both for riding a motorcycle and for walking in winter. If a product is aimed at all consumers, the average consumer is the average

[3] New Look Ltd v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court of First Instance of 6 October 2004, joint cases T-117/03 to T-119/03 and T-171/03, § 20.

[4] New Look Ltd v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), quoted above, § 43.

[5] The views and the knowledge of professionals (who may, for a particular contract, act like consumers) have not been considered relevant. See Vitaly Lissotschenko and Joachim Hentze v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court of First Instance of 20 July 2004, case T-311/02, § 28.

[6] Miles Handelsgesellschaft International mbH v. Office for Harmonization in the Internal Market, judgement of the Court of First Instance (Fourth Chamber) of 7 July 2005, case T-385/03.

of all consumers. The average consumer is thus not necessarily, but may be, related to the average of all consumers.[7]

The average consumer is also considered to be reasonably well-informed, or at least averagely informed.[8] In other words, the consumer has a rough idea, but not necessarily a detailed knowledge, about the product or service in question.

In cases involving labelling, the ECJ pointed out that the average consumer, whose purchasing decisions depend on the composition of a product, will first read the list of component raw materials. In Darbo, the ECJ explained that the average consumer is not misled by the term ''naturally pure'' on a label simply because the jam contains a pectin gelling agent whose presence is duly indicated on the list of ingredients.[9] In Douwe Egberts,[10] Advocate-General Geelhoed, in relation to the fact that courts refer to the presumed expectations of an average consumer, reasonably well-informed, observant, and circumspect, concluded that:

''This presupposes that, before acquiring a given product (for the first time), a consumer will always take note of the information on the label and that he is also able to assess the value of that information. It seems to me that a consumer is sufficiently protected if he is safeguarded from misleading information on products and that he does not need to be shielded from information whose usefulness with regard to the acquisition and use of a product he can himself appraise.''[11]

In cases involving trademarks confusion, it was held that the distinctiveness of a trademark must be assessed according to the reasonable expectations of the average consumer. In *Lloyd*,[12] the ECJ held, quoting the Gut Springenheide formula, that for the purposes of assessing likelihood of confusion, the inattentive purchaser cannot be taken as a basis and account must be taken of the perceptions of the

[7] See Frischpack GmbH & Co. KG v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court of First Instance (Fifth Chamber) of 23 November 2004, case T-360/03; Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) v. Erpo Möbelwerk GmbH, judgement of the ECJ of 21 October 2004, case C-64/02, ECR, 2004, I-10031; New Look Ltd, supra fn. 7; Applied Molecular Evolution Inc. v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court of First Instance of 14 September 2004, case T-183/03; Vitaly Lissotschenko and Joachim Hentze v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court of First Instance of 20 July 2004, case T-311/02; Procter & Gamble Company v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the ECJ 29 April 2004, joined cases C-473/01 and C-474/01, ECR, 2004, I-5141; El Corte Ingles, SA v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the ECJ of 11 November 2004, joined cases T-183/02 and T-184/02, ECR, 2004, II-965.

[8] August Storck KG v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court of First Instance (Fourth Chamber) of 10 November 2004, Case T-402/02; Mag Instruments Inc. v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), judgement of the Court (Second Chamber) of 7 October 2004, C-136/02, ECR, 2004, I-9165 and the opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 16 March 2004, case C-136/02.

[9] Verein gegen Unwesen in Handel und Gewerbe Köln v. Adolf Darbo AG, judgement of the Court of First Instance (First Chamber) of 4 April 2000, case C-465/98, ECR, 2000, I-2297, § 22.

[10] Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis, judgement of case C-239/02, judgement of the ECJ of 15 July 2004, ECR, 2004, I-7007.

[11] Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis, opinion of Advocate General Geelhoed of 11 December 2003 at § 54. Emphasis added.

[12] Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV., judgement of the Court of 22 June 1999, case C-342/97, ECR, 1999, I-3819. In this case, the German proprietor of the mark ''Lloyd'' for footwear sought to prevent the use of the defendant's mark ''Loint's'' also for footwear.

average consumer ''who normally perceives a mark as a whole and does not analyse its various details.''[13] The ECJ admitted that, in making this assessment, one should consider that the average consumer only rarely has the opportunity to make direct comparisons between different marks, but he or she places his or her trust ''in the imperfect picture of them that he has kept in his mind,'' and his level of attention is ''likely to vary according to the category of goods or services in question.''[14]

In assessing distinctiveness, therefore, as it relates to the capacity of the average consumer to distinguish among and between different trademarks/products, national courts might take into account a range of factors, including the characteristics of the mark, its market share, the length of use and how widespread it has been, and the proportion of the relevant public which identifies the mark as emanating from a particular enterprise or undertaking.[15] The perceptions of the average consumer are linked to the product and seem to vary with the product, its use, its presentation, and its availability.

In Philips, which involved the registration of the shape of a three-headed electric shaver, the perceptions of the average consumer were decisive in judging whether a mark which was initially devoid of distinctive character had subsequently acquired distinctive character through use.[16] According to the ECJ, using the magic-Gut-Springenheide mantra again, the distinctive character of a sign which consists of the shape of a product must be assessed in light of the presumed expectations of an average consumer of the category of goods or services in question, who is reasonably well-informed and reasonably observant and circumspect. Where a trader has been the only supplier of particular goods in the market, extensive use of a sign which consists of the shape of those goods may be sufficient to give the sign a distinctive character. It would do so in those circumstances where, as a result of that use, a substantial proportion of the relevant class of persons perceives the shape as an indication of origin of the products.

For certain products, the average consumer is deemed by the court to be inattentive to some characteristics of the product. In Procter & Gamble v. OHIM, the applicants sought to register a community trademark for various white tablets involved with washing machine and dishwasher cleaning products.[17] The OHIM refused the registration on the grounds that the marks were devoid of distinctive character. The Third Board of Appeal of OHIM and the CFI upheld the decision measuring the mark's distinctiveness against the perceptions of the average consumer. Since the relevant products were widely used consumer goods, the public concerned in determining distinctiveness was deemed to be all consumers, with the usual reference to the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect. The CFI

[13] Ib., §§ 9 and 25; see also the opinion of Mr Advocate General Jacobs of 29 October 1998, ECR, 1999, I-3819.

[14] Ib., §§ 26–27. Emphasis added.

[15] Ib., § 23. At § 24, the ECJ specified however that ''[it] is not possible to state in general terms, for example by referring to given percentages relating to the degree of recognition attained by the mark within the relevant section of the public, when a mark has a strong distinctive character.''

[16] Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd, judgement of the ECJ of 18 June 2002, ECR, 2002, I-5475.

[17] Procter & Gamble Company v. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), supra fn. 11.

concluded that the level of attention given by the average consumer to the shape and colours of washing machine and dishwasher tablets, being everyday consumer goods, would not be high. Interestingly, the applicants appealed to the ECJ, asking the court, inter alia, to ascertain whether the assessment of the consumer's level of attention was the correct test. The ECJ rejected the appeal by confirming the arguments of the CFI. While this result may have a limited significance, considering that the case concerned where a trademark was registrable and not the fairness of a commercial practice, it is curious to note that the average consumer is not required or supposed to be attentive in assessing certain characteristics of certain consumer goods, but is expected to be attentive concerning others, presumably more costly, and less widely used. Ironically enough, the Unfair Commercial Practice Directive covers primarily consumer goods practices, which are to be assessed with reference to the average consumer standard, an average consumer who is deemed to be informed, circumspect, and observant, but who is sometimes allowed (by the ECJ) to be less diligent and even inattentive to the characteristics of these goods.

In LTJ Diffusion SA v. SA Sadas Vertbaudet SA, a case relating to the issue of identity in a trademark case, the ECJ concluded that a sign is identical with a trademark where it reproduces, without any modification or addition, all the elements constituting the trademark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.[18] The ECJ recognises that the perception of identity between a sign and a trademark must be assessed globally with respect to an average consumer—reasonably well-informed, reasonably observant, and circumspect—who rarely has the chance to compare signs and trademarks side by side and whose attention varies according to the category of goods in question.[19]

It is not easy to reach a balance of understanding that makes the average consumer standard a predictable one, capable of determination in the courts. The case-law depicts the average consumer as informed, observant, and circumspect, but it also recognises that he or she may have an imperfect understanding of a product purchase and may not even pay attention to some features of the product. As Weatherill (2007, p. 1) remarks, consumers do not fall in a consistent unvarying category and thus ''choosing the identity of the benchmark consumer-as-victim is clearly of vital importance to the practical implications of a regime designed to control commercial practices which will not have a uniform impact on consumers precisely because consumers themselves do not form a homogenous group.''

The average consumer and the Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive (Howells, 2006; Poncibò & Incardona, 2005; Stuyck, Terryn & Van Dyck, 2006; Twigg-Flesner et al., 2005) gives this ambiguous average consumer standard statutory authority, standing, and permanence. The Commercial Practices Directive is intended to harmonise (Pegado Liz, 2006) fully disparate Member States measures which seek to curb unfair commercial practices harmful to the economic interests of consumers, with the twofold aim of

[18] LTJ Diffusion SA v. SA Sadas Vertbaudet SA, judgement of the ECJ of 20 March 2003, case C-291/00, ECR, 2003, I-2799.

[19] Ib., §§ 52–53.

contributing to the smooth functioning of the internal market and providing consumers with a high level of protection.[20]

The Commercial Practices Directive does not, however, protect the consumer who is distracted or uninformed about the goods or services which are the subject matter of a commercial practice. Nor does it protect those consumers who naively allow themselves to be convinced by deceptive exaggerations in advertising. The Commercial Practices Directive protects the ''average consumer,'' the benchmark consumer known in the case-law as the ''reasonably well-informed and reasonably observant and circumspect consumer, taking into account social, cultural, and linguistic factors, as interpreted by the Court of Justice (Recital 18).''[21]

The Commercial Practices Directive employs a general clause which is designed to preclude unfair commercial behaviour by traders with a few exceptions and which divides questionable practices into two categories: those which are misleading and those which are aggressive (Article 5). The prohibition of unfair commercial practices applies both to the promotional stage leading up to the sale of a product or service and to the period after the sale with reference, for example, to complaints management and to the delivery of after-sale services.

A practice is found to be unfair when it both (1) fails to respect professional standards of accuracy and disclosure required or customary in a given field and (2) influences significantly[22] the economic behaviour of the ''average consumer,'' precluding him or her from dispassionately using the pertinent information to evaluate a commercial proposal, thereby inducing the consumer to take an economic decision that he or she might not have otherwise taken.

The twin criteria of professional diligence and consumer detriment, at once rigorous and flexible, can be of use only when the commercial practice involved is neither misleading (Articles 6–7) nor aggressive (Article 8), nor among those specified in annex 1 of the Directive, which describes the commercial practices which will a priori be considered unfair, independently of any test or evidence (i.e., black list).

Both misleading and aggressive practices are defined relative to the perceptions of an average consumer. Misleading commercial practices make use of information which is false, or even if factually correct on the whole, serves to influence the average consumer to take a transactional decision which he or she would not have otherwise taken [Article 6(1)]. The Unfair Commercial Practices Directive thus restates the (average) consumer's right to correct and complete material information.[23]

[20] The benefits of the Directive will not, however, be realised at its effective date (Article 19). The Directive allows member States for an extended period of up to six years from 12 June 2007 to continue to apply national provisions which are more stringent than those it envisages, in compliance with pre-existing minimum harmonization directives. Thus the benefits to result from the harmonization, the movement toward a growing sense of economic community, and transactional confidence for businesses and consumers will all be deferred [Articles 3(5) and 18].

[21] Article 2 of the Unfair Commercial Practices Directive defines the consumer and not the average consumer. Express reference to the average consumer is, however, made in Articles 5(2)b, 6(1), 7(1) and 8 of the Unfair Commercial Practices Directive.

[22] The Directive uses and defines the expression ''to materially distort the economic behaviour of consumers,'' meaning using a commercial practice which ''appreciably impair[s] the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'' [Article 2(e) and 5(2)(b)].

[23] To make organic a piecemeal system, Annex 2 of the Directive further lists the obligations of information outlined in pre-existing directives.

Aggressive commercial practices use harassment, coercion or undue influence to significantly impair or to create a likelihood of impairment of the average consumer's freedom of choice, thereby causing him or her to take a transactional decision that he or she would not likely have taken otherwise (Article 8 and Recital 16). The Unfair Commercial Practices Directive intends to protect (average) consumers from those practices which, even when not accompanied by violence or threat, nevertheless prey on the sensitivity, emotions, circumstances, state of mind, or simply the patience of the consumer, thereby impairing considerably his or her decision-making capacity and inhibiting his or her capacity to make an informed, attentive, and judicious economic decision.

The concept of the average consumer is one of the most challenging presented by the Unfair Commercial Practices Directive to Member States and traders. The reaction of the average consumer to any particular commercial practice is not predefined, except for practices falling among those on the black list and so will be subject to evaluative judgement by national authorities, though this assessment may be biased or constrained by established case-law.

The high standard of attention to and information for consumers required by the Unfair Commercial Practices Directive is artificial, and leaves room to regulators and courts to revisit the (average) consumer standard and to make it more meaningful, realistic, precise, and unambiguous. The lack of these qualities is all too evident and might impede rather than foster commercial development, fair trade, and consumer confidence.

The vulnerable consumer and the Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive tempers the concept of the average consumer—the ''notional, typical consumer reasonably well-informed and reasonably observant and circumspect''—with the concept of the ''vulnerable consumer,'' whose vulnerability results from mental or physical infirmity, age, or credulity.[24]

It is not clear what the impetus was that moved the Commission to resort to a new variant of the prototypical consumer. Is the vulnerable consumer merely an exception to the average consumer? Is he or she thus a consumer not reasonably informed, observant, and circumspect? Or, is he or she a defined type of person representing a self-standing category of consumers, among whom one can hypothesise a particular average (vulnerable) consumer?

Even if the vulnerable consumer were to be given serious in-depth consideration by traders in the planning of their commercial practices, many problems arise in defining who is to be considered a vulnerable consumer and what level of vulnerability can be ascribed to him or her. How is credulity to be defined? How can one identify a group characterised by credulity? Is everyone who is of below average intelligence or perspicacity to be individually taken into account by the trader? Are people more vulnerable merely because of their age, educational, economic, or

[24] Article 5(3) of the Directive: ''Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are 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, shall be assessed from the perspective of the average member of that group.'' See also Recital 19 of the Directive.

minority status? We indeed agree with a recent contribution that ''it would have been—and still is—recommended to conduct sound empirical research, at EC level, about the correlation between the characteristics of certain groups of consumers and the likelihood of being specifically vulnerable for certain commercial practices'' (Stuyck et al., 2006, pp. 107–152).

The vulnerable consumer was introduced to lessen the rigidity of the average consumer test, but it lacks practical and logical foundations. It is not reasonable to require a trader to attune its commercial practices to a consumer who is particularly susceptible to a commercial practice for reasons like age, mental infirmity, or credulity. If a product targets a given group of consumers (e.g., the elderly), the average consumer will be measured in relation to this group of people, and the specific call to the vulnerable consumer does not seem to be necessary. Still, many elderly consumers would question that their judgement is so impaired as to limit their freedom to make marketplace choices for whatever reason. Who is to judge this entire category of the citizenry to be so impaired as to need the special protections accorded to the vulnerable consumer standard?

If a product (and its commercial practice) targets all consumers, the fact that a vulnerable consumer may be misled ought not to require businesses to pay more care and attention than what is reasonably required in the interests of fair marketing and fair disclosure, before launching a promotional campaign or putting a commercial practice into effect.

Viewed in this light, the vulnerable consumer concept is a superfluous, paternalistic notion which accentuates the difficulties already present in the fiction of the average consumer standard. The arbitrariness of the vulnerable consumer notion, moreover, introduces uncertainties and confusion in the assessment of commercial practices by national authorities and may refrain traders to engage in interstate commerce if they wish to avoid unpredictable and necessarily subjective regulatory entanglement.

The average consumer test and the cognitive revolution

In the case-law concerning the free movement of goods, the ECJ had initially based its construct of a consumer on the ''information model,'' which incorporates the concept of a well-informed, critical, and attentive consumer. The development of the concept commenced with the Cassis de Dijon judgement.[25] This ''model consumer'' is a responsible actor or entrant into the market who makes choices based upon information which is provided by the advertiser or obtained by the consumer himself. In its ensuing judgements (e.g., Dahlhausen, Nissan, Richer, Clinique & Mars[26]), the ECJ elaborated on this reasoning. In these decisions, the

[25] Rewe-Zentral AG v. Bundesmonopolverwaltung fuer Branntwein, judgement of the ECJ of 20 February 1979, case 120/78, ECR, 1979, 649.

[26] Respectively, Pall Corp. V P.J. Dahlhausen & Co., judgement of the ECJ of 13 December 1990, case C-238/89, ECR, 1990, I-4827; Nissan, judgement of the ECJ (Fifth Chamber) of 16 January 1992, case C-373/90, ECR, 1992, I-145; Schutzverband gegen Unwesen in der Wirtschaft e V. v. Yves Rocher GmbH, judgement of the ECJ of 18 May 1993, case C-126/91, ECR, 1993, I-102361; Verband Sozialer Wettbewerb e. V. V Clinique Laboraitoires SNC et Estée Lauder Cosmetics GmbH, judgement of the ECJ (Fifth Chamber) of 2 February 1994, case C-315/92, ECR, 1994, 1994, I-317; Mars, judgement of the Court of Justice of 6 July 1995, case C-470/93, ECR, 1995, I-1923, § 24.

Luxembourg Court held that the consumer need not be protected against advertising statements which, although carrying an abstract risk of being misunderstood, contain essentially true information. The fact that an advertising statement may potentially mislead consumers does not justify a national prohibition of that statement. Rather, in such cases, the consumer is held to be responsible for actively seeking sufficient additional information to enable him or her to make a satisfying market choice.

The concept of the average consumer is no more than the final step in an ECJ process which has developed a judicial portrayal of the consumer as sensible, attentive, and cautious, as well as able to analyse, critically and discerningly, the messages behind advertising and commercial practices in general (Dauses, 1998). Since Gut Springenheide, referring to the Community legislation and case-law on the protection of consumers from misleading information, the ECJ held that, in order to determine whether a particular promotional statement or description is liable to mislead the purchaser, the national court must take into account the presumed expectations which it evokes in an average consumer who is (1) reasonably well-informed and (2) reasonably observant and circumspect. Accordingly the A.G. Fennelly in Estée Lauder: ''The presumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices.''[27]

From the same perspective, Howells and Weatherill confirmed that ''the notion that the consumer, duly informed and thereby protected, is able to participate fairly and effectively in the market has assumed the status of a guiding principle of policy'' (Howells & Weatherill, 2005).

It seems that the ECJ relied upon the traditional law and economics analysis which suggests that consumers make decisions based on their anticipation of the expected outcomes of their decisions (Posner, 1998). In this model, consumers are viewed as rational actors able to estimate the probabilistic outcomes of uncertain decisions and to select the outcome which maximises their sense of well-being at the time the decision is made. As a consequence of their assumed rationality, consumers would largely be held responsible for their own actions, and the potential liability for the company would be greatly reduced.

In the following paragraphs, taking inspiration from the findings of cognitive psychologists (Kahneman, Slovic & Tversky, 1982; Kahneman & Tversky, 1973, 1974, 1979, 1983, 1996) and law and behavioural science (Jolls, Sunstein & Thaler, 1998; Sunstein & Thaler, 2003), we discuss the reliability of the average consumer test by analysing its two pillars: *the information* and the *rationality of the consumer*.

The ''cognitive revolution'' is primarily a consequence of the work of the Nobel laureates Khanemann and Tversky who introduced the ''Prospect Theory'' in their path-breaking article in a 1979 issue of Econometrica (Kahneman & Tversky, 1979). According to their studies, people make risky or uncertain decisions in a number of ways: For instance, people evaluate decision options relative to some reference point, generally focusing on the status quo, and they tend to make risk-averse choices when choosing among options that appear to be more favourable than the reference point (i.e., those that offer gains).

[27] Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH, opinion of Advocate General Fennelly delivered on 16 September 1999, C-220/98, ECR, 2000, I-117.

Drawing on cognitive psychology, behavioural scholars (Jolls et al., 1998) have adopted a more nuanced understanding of the rationality assumption of human behaviour, thus developing the so-called ''law and behavioural science'' (Korobkin & Ulen, 2000). According with this new scholar paradigm, human beings are not completely rational, consistent, or even aware of the various elements that enter into their decision making, and thus they often make poor choices, seizing upon irrelevant considerations to support their decisions and ignoring important ones (Jolls et al., 1998; Sunstein, 1997, 2000).[28]

Hanson and Kysar have applied the law and behavioural approach to consumers by arguing that they are likely to misperceive the risks posed by potentially dangerous products. Although they acknowledge that this research does not yield ''an overall prediction about the manner in which consumers will act,'' they conclude that consumers ''are subject to a host of cognitive biases,'' which make them susceptible to manipulation (Hanson & Kysar, 1999, p. 693). Product manufacturers take advantage of this consumer blindness and use advertising, promotions, and price setting to shape consumer perceptions and maximise their profits.

Cognitive psychology and law and behavioural studies, with their focus on consumer behaviour, may indeed offer a useful tool in evaluating the (average) consumer in relation to the Unfair Commercial Practices Directive and in the broader context of the development of EU consumer law.

The informed consumer: why information often proves ineffective

A fundamental assumption of the traditional law and economics movement is that the market works well in supplying consumers with product information. A corollary assumption is that people act rationally in their own interest when they possess information (for a critique of this traditional view: Jolls et al., 1998; Posner, 1998; Sunstein, 1997).

The Unfair Commercial Practices Directive accordingly establishes a list of the information the consumer needs before purchasing: the main characteristics of the product, the price (inclusive of taxes), delivery costs (where applicable), and the right of withdrawal. It also introduces some requirements concerning the way information is provided stating that the traders should give it in a clear, intelligible, and non-ambiguous way.

Following the approach already adopted in the misleading advertising directive 84/450/EEC,[29] the Directive provides that a practice is misleading if it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. The same applies when the practice consists in giving false information or is likely to

[28] A promising perspective for legal scholars comes from the ''Cultural Cognition Project'' at Yale Law School, http://research.yale.edu/culturalcognition (accessed 6 August 2006). See also Caterina (2004, 2005).

[29] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations, and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19 September 1984, 17–20.

deceive the average consumer, even though the information given may be factually correct.

The availability, or even the intelligibility, of information, however, does not always ensure its effective appraisal given that people may not understand, or properly evaluate, the relevant information.

First, before information can even be processed by the consumer, it must, at the very least, gain his or her attention (Reynolds & Olson, 2001). Consumers may not notice or read information and products' warnings because they have very limited resources and cannot hear and see everything that surrounds them. Marketing experts cannot hope to be successful in convincing consumers to purchase their product if they do not first get the target consumers' attention. Are regulators capable of getting consumers' attention solely through information disclosure?

Complex and numerous information requirements may even induce an ''information overload'' and lead to dysfunctions, confusion, or paralysis in consumer choices (Jacoby, 1984). EU consumer law[30] assumes the consumer will dedicate a large amount of time and attention reading instruction booklets and warnings on products and may thus cause the loss of essential information in the torrent of irrelevant data making intelligent choice difficult if not impossible. Bearing this in mind; the legislator should devote more attention and more empirical studies to the selection of the essential information to be disclosed.

As Jacoby rightly observes: ''Since consumers are selective, it is not how much information they are provided with, but just which information they access that should be the focus of both policy maker and marketing/advertising manager attention.'' (Jacoby, 1984, p. 432). Detailed product descriptions and warnings can prove counterproductive because consumers choose to read or judge only part of the information provided and ''too much'' information makes it more difficult for people to be attentive and to select the most important features for consideration (Weatherill, 1994, 1996).

Second, perception is the interpretative process by which consumers make sense of their own environment (Tellis, 2003). Contrary to what is commonly thought, perception is not passive and people do not see and hear what surrounds them objectively. Consumers see what they expect to see, and what they expect to see usually depends on their beliefs and stereotypes, so they may perceive stimuli and objects differently. Regulators should be aware of how perception works and try to tailor information requirements (i.e., packaging, pricing) to the needs of specific target consumer.

Third, memory also plays a very important role in the behaviour of consumers, who perceive, comprehend, and make decisions based on their memories. Without the information stored in their long-term memory, people would not be able to understand all the situations and objects they encounter on an everyday basis. Consumers make inferences about the product which depend heavily upon past knowledge and adopt heuristic methods or ''rules-of thumb'' to come to a decision: They buy a product that has proved adequate for them in the past, even if they are aware that there may well be something else immediately available that could be

[30] We think for example to the requirement of the Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Official Journal L 280, 29 October 1994, 83–87.

more satisfying. It would be an extraordinary human being indeed, who could absorb and fully evaluate all the possible options in the way the regulators ascribe for the average consumer.

Finally, the approach of consumers to information in purchasing may vary according to various other circumstances. The same consumer tends to behave differently when buying durable technical products with a high unit price, or food products that arouse health concerns, or a new product of which he has no prior experience, than when doing routine shopping.

It is unrealistic to expect the ordinary consumer to carry out an extensive, multidimensional advantage–disadvantage analysis each time a decision needs to be made, as is, however, assumed by the ''information model'' and the new average consumer standard.

The emotional consumer: why the consumer often acts emotionally

The Unfair Commercial Practices Directive recognises that the definition of the average consumer requires considering social, cultural, and linguistic factors, as interpreted by the Court of Justice (Recital 18). Would this slight admission allow authorities to take into consideration emotional factors in assessing the decision processes of consumers or are the emotions a priori excluded from the rigid legal construct known as the average consumer? Is there any room for analysis on an emotional level, even if only in the obscure example of the vulnerable consumer?

Far from being a function of conscious reflection, human behaviour, in the form of commercial behaviour, is controlled by unconscious factors (Gilovich, Griffin & Kahneman, 2002). Much of what consumers perceive, interpret, and respond to occur without them ever being consciously aware of their mental processes or behaviour. Consumers are, for example, influenced by their feelings in their commercial behaviour. According to the ''mood congruence'' effect (Bakamitsos & Siomkos, 2004), if the consumer is in a good mood, he or she is more likely to remember good things about the product, is more likely to make a positive judgement about a product, is quicker to make decisions, is more open to persuasion, and vice versa.

Social influence also plays an important role as consumers may purchase goods for more than just their functional value (Holbrook & Hirschman, 1982; Olshavsky & Granbois, 1979). Many acquire goods for their symbolic value (Bagozzi, Gurhan-Canli & Priester, 2002; Jacoby, 2000) and for the enhanced social status conferred by the visible ownership of certain goods. Many people, for example, feel that they would lose face if they were to drive an out-of-date car. In markets for such status goods, consumers' preferences are determined in part by the visible purchasing behaviour of certain other consumers. What each consumer deems to be fashionable is determined in significant measure by the observed purchasing behaviour of those consumers he or she admires and whose lifestyle he or she wishes to emulate. This is known as the ''like-agree'' heuristic. Marketers try to influence consumers in this way by putting famous people in their advertisements.

Consumers act, at least in part, emotionally and are often influenced by external factors, thus, they often ignore written warnings because they rely on explanations provided by human intermediaries who ostensibly possess relevant expertise

(Scott & Black, 2000). Patients normally follow their doctors' advice, irrespective of the directions printed on pharmaceutical packages and buyers often rely on the advice of salespeople. Product warnings communicated by human intermediaries may be obfuscated, incomplete, and ambiguous, yet consumers often rely on them. In addition, the impact of information can also be counteracted by the advertisement, strongly influencing consumers' choice by offsetting objective information available to consumers.

These examples show that consumers are never completely rational in making decisions. The average consumer model is thus inadequate to describe consumers' [ir]rationality (Woods, 2004).

Improving consumers' decision making processes: the case of labelling

The findings of cognitive psychology and behavioural science, together with more empirical research, may help not only to better define the average consumer in the framework of commercial practices, but also to shape EU consumer policy more effectively. European policy makers, for example, could gain some additional tools for tailoring labels and information requirements in a consumer-friendly manner that could effectively improve consumer information and understanding (Latin, 1994; Malhotra, 1982).

On February 2006, the European Commission's Directorate General for Health and Consumer Protection launched a forum to gather stakeholders' opinions on the use of labels as a way for contributing to a better regulation in the EU (European Commission, 2006). The Commission recognised that consumers are often dissatisfied with labelling, finding labels difficult to read and thus to understand and discussed how much information is required and, most relevant, how important is presentation of the information. There was a general consensus that the current labelling system, especially the nutrition labelling, functions poorly, however, there was no outcome determining how to improve the system.

We deem that eliminating the gap between the apparently informative labelling and the consumer cognitive bias outlined by the cognitive and behavioural studies may improve the labelling system. Product warnings and other disclosure mechanisms can be effective only when intended recipients are able to receive, comprehend, and act upon the information imparted.

Behavioural studies may help to make labels more comprehensible and clearer. To avoid the risk of information overload, on-product labels should carry a limited amount of essential information and might be combined with off-product information (e.g., the provision of additional information at the point of sale, in the form of monitor screens, signs, or leaflets and expanded information services on the Internet).

For both on-product labelling and off-product information, it would be essential to build consumer confidence. Consumers have virtually no opportunity to develop and test criteria for quality themselves; acceptance of information is therefore determined by the credibility of the information provider. Public and private actors, like agencies and consumers' associations, should cooperate more to achieve synergies, avoid contradictions, and promote reciprocal learning processes, which might enhance the credibility of the information sources (Bagozzi, Gurhan-Canli & Priester, 2002).

Conclusions

The average consumer test reflects the economists' idealistic paradigm of a rational consumer in an efficient marketplace. This notion may be useful for economists' calculations and projections, but departs from the unpredictable realities of individual human behaviour and is hardly an appropriate standard for legislative or judicial sanctions.

The European average consumer does not fully correspond to its legal construction. As recently underlined by Everson: ''Law proves to be too self-contained and too blunt an instrument to allow for the coherent translation of economic and political conceptions and constructions of the consumer into an integrated legal framework of regulation'' (Everson, 2006, p. 106).

Generally, consumers do not have the time and resources at their disposal to acquire and process sufficient information for rational decision-making. It is impossible for consumers to devote all their intellectual, psychological, and physical resources as well as their time to the gathering and processing of information merely so that their choices can meet an abstract economic notion. Even well-informed consumers of a high intellectual and educational level, who would, at least in theory, be ideally suited for rational market behaviour, may often base their decisions on custom and feelings rather than on an analytical process. Extensive, multi-dimensional information leads to a significant decrease in the quality of consumer choice. Different types of consumers possess different information processing and perception abilities.

The over-demanding average consumer test conflicts with the overall system of EU consumer law resulting in many forms of weak paternalism (Rachlinski, 2003). The disclosure obligations, ''cooling-off'' periods and the specific information required for certain sales, are based on the idea that, in the heat of the moment, consumers might make ill-considered or improvident decisions. The standard justification for these regulations is that they will protect consumers from unscrupulous, high-pressure and deceitful sellers and lenders whilst simultaneously fostering a more competitive marketplace and enhancing consumer confidence. Aware of information asymmetries and of the fact that consumers often act impulsively or in a way that they later regret, EU legislation does not block their choices, but ensures a period for sober reflection. This benevolent attention to consumer weakness is not present in the average consumer test.

By assuming that all participants in the market could be equally responsible, and that they are in a position to exercise equal choice in the market, the average consumer test seems to be more sympathetic to the liberal free-market principles governing the single market (Howells & Wilhelmsson, 2003) than to the rather paternalistic approach of the EU consumer law. The notion of a vulnerable consumer mirrors this paradox: it releases the underlying (and unresolved) tension between the desire of liberalising to encourage commerce and the fear that the mere use of the ''average consumer'' parameter may not protect some (vulnerable) consumers on the fringe, but it lacks precision and introduces confusions and uncertainties in the assessment of (unfair) commercial practices.

Regulators should be careful in the crafting of mandates to ensure that they are clear and unambiguous. Only when sellers can know in advance the threshold that must be met, in interactions with prospective purchasers, can they proceed with

confidence to enter the market. Those sellers who deal with their customers with integrity will flourish, while those who deceive and abuse the public trust will wither away. Those who are able to make deception pay are the small minority of purveyors and it is on rooting out these bad seed enterprises that the regulators (and the enforcing authorities) need to concentrate their efforts. The question of what is reasonable to allow an informed consumer to make intelligent choices in an ideally efficient marketplace is a question of fact that cannot effectively be addressed as a matter of law. Each situation and each decision stands on its own, and it is only the tier of fact that can determine whether a reasonable standard was met in any given instance. The traditional standard of *caveat emptor* is clearly outmoded. We would not favour a return to unregulated *laissez-faire* marketing that would transfer the burden of evidence from the seller, who has the advantage of intimate knowledge of the product, to the buyer, who of necessity must make many, often instantaneous choices in the course of a day.

We understand the urge of European courts to rely on prototypical attentive and informed average consumer, in order to foster the internal market, interpret rules uniformly, and avoid traders being blocked by the claims of too sensitive consumers or through a too paternalistic approach to consumers of some national authorities. We deem, however, that in this phase of development of the internal market and of EU consumer law, the Unfair Commercial Practices Directive should not have relied on the Gut Springenheide formula which requires consumers to enjoy a level of information and reasonable behaviour they do not have. The average consumer standard should be interpreted more flexibly or even abandoned to mirror consumer behaviour more effectively. We believe that regulators and scholars in the EU consumer law field should dedicate more attention to behavioural assessments and develop a more realistic consumer test guided by the experience of the ''cognitive revolution.'' The parameter of the unfairness of a commercial practice is the consumer (neither the *average consumer* nor the *vulnerable consumer* of the Unfair Commercial Practices Directive), who mirrors social, psychological, and cultural factors and may even represent the overwhelming majority of consumers. The consumer (like the trader, the creditor, the debtor, the seller, and any other abstract person employed in abstract norms) would serve the function of representing the whole of a category and would be deemed per se averagely reasonable, attentive, and/or even naturally vulnerable, without imposing or requiring an artificial level of attention or reasonableness. Only the ''consumer'' could offer to national courts and authorities (and even traders) a truly flexible model and could even represent the prevailing consumer. Presumptions and formulas are useful tools for regulators and judges, but they should not be adopted if they crystallise past decisions and impede the development of a more mature and aware notion of the average consumer (in the semantic meaning). The consumer does not need to be always treated as a child but neither should he or she be presumed to be Mr/Mrs I Know It All.

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