

Chapter 2

The Unfair Commercial Practices Directive

Abstract The Unfair Commercial Practices Directive was adopted in 2005 and fully harmonises unfair commercial practices law in Europe. It aims to achieve a high level of consumer protection, to smoothen the functioning of the internal market and to increase competition in the market as such. The main consumer benchmark in the Directive is that of the average consumer, introduced by the CJEU in 1998. The Unfair Commercial Practices Directive introduced two alternative benchmarks to that of the average consumer, i.e., the target group benchmark and the vulnerable group benchmark. The latter was introduced specifically to take away the criticism that the Directive offered insufficient protection to consumers. Both the target group benchmark and the vulnerable group benchmark aim to offer additional protection to more vulnerable groups. Under what circumstances the two alternative benchmarks can be applied, remains somewhat unclear on the basis of the Directive. However, the requirements for their application emphasise that they remain exceptions to the main benchmark of the Directive, i.e., the average consumer benchmark.

Keywords Unfair Commercial Practices Directive · Goals · Legislative history · Average consumer benchmark · Target group benchmark · Vulnerable group benchmark

2.1 Introduction

This chapter discusses and analyses the consumer benchmarks in the Unfair Commercial Practices Directive. It first introduces the Directive in general (paragraph 2.2) and its goals (paragraph 2.3). After that, the Directive's benchmarks are dealt with, including their legislative history (paragraph 2.4) and a more detailed discussion of the average consumer benchmark (paragraph 2.5), the target group benchmark (paragraph 2.6) and the vulnerable group benchmark (paragraph 2.7).

2.2 The Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive, adopted on 11 May 2005, is an ambitious effort to harmonise the laws of Member States on unfair commercial practices.¹ Due to the full harmonisation nature of the Directive, its scope is of particular importance; it determines not only the cases in which the Directive is to be applied (and thus those areas for which Member States have to provide implementation), but also determines the extent to which Member States can continue to regulate unfair commercial practices.² The choice for full harmonisation is perhaps the most controversial aspect of the Directive,³ and ushers in a clear break from the minimum harmonisation tradition established by previous European consumer legislation.⁴

The scope of the Directive is particularly broad, as it covers any commercial practice; a concept defined in the Directive as ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’.⁵ This basically includes any type of advertising and marketing, but also post-sale practices.⁶ Non-commercial practices, such as those concerning political or societal matters, fall outside the scope of the Directive.⁷

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’). *OJ* 2005 L 149/22. See on the legal basis of the Directive I Eriksson and U Öberg, ‘The Unfair Commercial Practices Directive in context’, in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart, 2007) 91–94 and G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 12–13.

² G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 50.

³ See similarly G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 1.

⁴ See, for example, the Consumer Sales Directive (1994/44/EC), the Misleading and Comparative Advertising Directive (2006/114/EC) and the Unfair Terms Directive (1993/13/EEC). Note that the Unfair Commercial Practices Directive is, however, not the first full harmonisation instrument. For example, the Product Liability Directive (85/374/EEC) and the E-commerce Directive (2000/31/EC) are also full harmonisation Directives.

⁵ Article 2(d). The broad scope of application is also emphasised in the case law on the Directive. See CJEU 23 April 2009, Joined cases C-261/07 and C-299/07, *ECR* 2009, p. I-2949 (*VTB-VAB v Total/ Galatea v Sonoma*) and CJEU 14 January 2010, Case C-304/08, *ECR* 2010, p. I-217 (*Plus*).

⁶ See also U Bernitz, ‘The Unfair Commercial Practices Directive: its scope, ambitions and relation to the law of unfair competition’, in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart 2007) 35 and C Gielen (ed), *Kort begrip van het intellectuele eigendomsrecht* (Deventer, Kluwer, 2011) 617–618.

⁷ G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 53.

The Directive regulates commercial practices as far as they have the potential to affect the economic behaviour of the consumer.⁸ Most notably, this means that issues of taste and decency (e.g., rules on nudity and violence in advertising) are excluded from the scope of the Directive, and that these matters are left to Member States.⁹ Apart from the issue of taste and decency, the Directive excludes a number of other issues from the Directive's scope. In particular, the Directive excludes matters of intellectual property, as well as immovable property.¹⁰ Financial services are included in the scope of the Directive, but they are excluded from full harmonisation. Member States are thus permitted to continue to adopt more restrictive measures in this field.¹¹

The Directive offers a mix of general and specific clauses prohibiting unfair commercial practices. Article 5 provides the general clause prohibiting unfair commercial practices. A commercial practice is regarded as unfair if it is contrary to the requirements of professional diligence and if it materially distorts or is likely to distort the consumer's economic behaviour.¹² Articles 6 and 7 of the Directive offer more specific (but still general) prohibitions of misleading actions and misleading omissions, whilst Articles 8 and 9 prohibit aggressive commercial practices. In the *Trento Sviluppo* case (2013), the CJEU clarified that these more specific general clauses should be applied in accordance with the general clause of Article 5.¹³ The first annex to the Directive contains a 'black list' of practices that are unfair under all circumstances, with a list of twenty-three misleading practices and eight aggressive practices.

Little has been regulated with respect to the enforcement of the Directive. Despite the full harmonisation nature of the Directive, this important issue is thus left to Member States. Article 11 of the Directive does impose an obligation on the Member States to ensure that there are adequate and effective means to combat unfair commercial practices, but the substantiation of this obligation is essentially left

⁸ This includes, for example, the decision to go or not to go to a store, see CJEU 19 December 2013, Case C-281/12 (*Trento Sviluppo*) (not yet published in *ECR*).

⁹ Preamble to the Directive, Recital 7. See also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 59–62.

¹⁰ Article 3 of the Directive.

¹¹ See Article 3(9) of the Directive. See also the Preamble to the Directive, Recital 9. See on the topic of financial services in relation to unfair commercial practices also P Rott, 'A plea for special treatment of financial services in unfair commercial practices law' (2013) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/Journal of European consumer and market law* 61.

¹² Professional diligence is defined in Article 2(h) of the Directive as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.

¹³ CJEU 19 December 2013, Case C-281/12 (*Trento Sviluppo*) (not yet published in *ECR*). This means, amongst others, that providing false information in the sense of Article 6(1) of the Directive is not misleading *per se*.

to Member States.¹⁴ Member States are not required to provide individual remedies for consumers.¹⁵ In general, the underlying idea of the Directive—although explicit reference to such a principle is absent and enforcement is left to Member States—seems to be more about protecting the collective interests of consumers than about providing individual remedies in individual cases.¹⁶

The interpretation of the Directive, in particular of the general clauses, is generally left to Member States. In order to provide further meaning to the general clauses of the Directive and to support uniform interpretation, the European Commission has produced the EC Guidance, providing guidelines to the Directive.¹⁷ The EC Guidance was first published in 2009, but is designed to be a ‘living document’ and should thus be regularly updated online.¹⁸ It has been drawn up by the services of the Directorate-General for Health and Consumers and has been drafted in co-operation with Member States and stakeholders. It has no formal legal status and it thus binds neither the European institutions nor the Member States.¹⁹

2.3 Goals of the Directive

Article 1 of the Unfair Commercial Practices Directive encapsulates the two formal goals of the Directive, i.e., increasing the smooth functioning of the internal market and achieving a high level of consumer protection:

The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests.

As the Preamble to the Directive notes, the goal to achieve a high level of consumer protection also follows from the legal basis of the Directive.²⁰ The Unfair Commercial Practices Directive has been adopted on the basis of the internal market

¹⁴ See G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 217–218.

¹⁵ On the enforcement practice in Member States, see G de Cristofaro, ‘Die zivilrechtlichen Folgen des Verstoßes gegen das Verbot unlauterer Geschäftspraktiken: eine vergleichende Analyse der Lösungen der EU-Mitgliedstaaten’ (2010) *GRUR Int.* 1017–1025. See also the EU online database on application of the Unfair Commercial Practices Directive in Member States.

¹⁶ See in this sense also, for example, J Trzaskowski, ‘The Unfair Commercial Practices Directive and vulnerable consumers’ (Paper for the Conference of the International association of consumer law in Sydney, 2013) 2. This approach is in line with, for example, the previously existing German *Gesetz gegen den unlauteren Wettbewerb* (UWG).

¹⁷ SEC (2009) 1666.

¹⁸ It must be noted, though, that no update has been published so far (last accessed 8 September 2013).

¹⁹ SEC (2009) 1666, p. 6.

²⁰ See Recital 1 of the Preamble.

clause,²¹ and the Treaty on the Functioning of the European Union (at the time the EC Treaty) requires the EU to achieve a high level of consumer protection, including in the context of internal market measures.²²

The Directive fails to elucidate upon the rationale of consumer protection and thus what can be regarded as a high level of consumer protection. To some extent consumer protection is instrumental to the internal market, in the sense that a high level of consumer protection is meant to increase consumer confidence, leading to more cross-border trade. However, the Directive also emphasises the importance of the protection of vulnerable consumers.²³ This element of consumer protection is not linked to the internal market and provides a more socially oriented perspective on consumer protection in the Directive, by taking into account the needs of the weakest members in society.²⁴

Lacking a clear rationale for consumer protection in the Directive, consumer protection in the context of this book is understood in a broad sense, i.e., as the degree of protection of the consumer with regard to his or her position vis-à-vis the trader.²⁵ More specifically within the context of unfair commercial practices, this means that the more emphasis there is on the trader not to act unfairly (rather than on the consumer being responsible not to be affected by the trader's potentially unfair behaviour), the higher the level of consumer protection is regarded to be.

The other formal goal of the Directive, i.e., increasing the smooth functioning of the internal market, is two-fold. Firstly, as seen from the perspective of traders, the Directive aspires to remove barriers to trade by harmonising national laws. As in many other areas of European consumer law, differences between national laws were seen as barriers to cross-border trade, as they increase costs for businesses who wish to engage in cross-border marketing, advertising campaigns and sales promotions.²⁶ Secondly, as seen from the perspective of consumers, the Directive aims to increase consumer confidence. It is argued that in order for consumers to have confidence in cross-border shopping, they need to be certain of their rights and should enjoy a sufficiently high level of consumer protection.²⁷

In line with the Directive's legal basis, the goal of increasing the smooth functioning of the internal market is limited to increasing cross-border trade, by enabling

²¹ Article 95 EC, currently Article 114 TFEU.

²² Article 151(1) and 151(3)(a) EC (currently Article 169(1) and 169(2)(a) TFEU).

²³ See Recital 18 of the Preamble to the Directive. See also paragraph 2.5 below.

²⁴ See on this goal also T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law* 2007 (Aldershot, Ashgate, 2007) 211.

²⁵ Also EU consumer law in general lacks a clear rationale of consumer protection. See for further discussion, e.g., J Stuyck, 'European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market?' (2000) *Common market law review* 367, I Ramsay, *Consumer law and policy* (Oxford, Hart, 2012) (in particular Chap. 2) and H Micklitz, 'The expulsion of the concept of protection from the consumer law and the return of social elements in the civil law: a bittersweet polemic' (2012) *Journal of consumer policy* 283–296.

²⁶ Preamble to the Directive, Recital 4. See for a more elaborate discussion on this sub-goal paragraph 11.3.2 of this book.

²⁷ Preamble to the Directive, Recital 4. See more elaborately paragraph 11.3.3 of this book.

businesses to sell their products in other Member States and by promoting cross-border shopping for consumers. However, although it is not one of the formal objectives enshrined in Article 1 of the Directive, the Directive also aims to improve competition in the marketplace as such.²⁸ In the EC Guidance to the Unfair Commercial Practices Directive, a clear reference is made to this broader goal of regulating the market, where it is argued that the Directive, apart from providing protection to consumers, also ‘aims to ensure, promote and protect fair competition’.²⁹ Unfair commercial practices not only harm consumers, but also competitors. They take away market share from those who do act fairly, and thus harm competition.³⁰ The broader goal of improving competition is also clear from the Directive’s Preamble, where it is stated that:³¹

This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it.

As is discussed in further detail in Chap. 11 of this book, the goal of improving competition requires intervention if competition is hindered as a consequence of unfair commercial practices.³² However, the goal of improving competition also requires that businesses are provided with room to compete and to market their products to consumers. In this sense, competition also requires that over-protection of consumers is prevented.³³

2.4 Legislative History on the Consumer Benchmarks

In preparing for the adoption of the Unfair Commercial Practices Directive, the European Commission pointed to the differences between the consumer benchmarks applied in different Member States as one of the main divergences between the national legal systems and thus as one of the main obstacles to cross-border

²⁸ See also the goals discussed by Gomez in his economic analysis of the Unfair Commercial Practices Directive: F Gomez, ‘The Unfair Commercial Practices Directive: a law and economics perspective’ (2006) *European review of contract law* 4.

²⁹ SEC (2009) 1666, p. 6.

³⁰ H Collins, ‘EC regulation of unfair commercial practices’, in H Collins (ed), *The forthcoming Directive on Unfair Commercial Practices* (The Hague, Kluwer Law International, 2004) 2. See also C Gielen (ed), *Kort begrip van het intellectuele eigendomsrecht* (Deventer, Kluwer, 2011) 615.

³¹ Recital 8 of the Preamble to the Directive.

³² See in particular paragraph 11.4 of this book.

³³ See also R van den Bergh and M Lehmann, ‘Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht’ (1992) *GRUR Int.* 593, F Gomez, ‘The Unfair Commercial Practices Directive: a law and economics perspective’ (2006) *European review of contract law* 8 and A MacCulloch, ‘The consumer and competition law’, in G Howells et al (eds), *Handbook of research on international consumer law* (Cheltenham/Northampton, Edward Elgar, 2010) 90–91.

trade.³⁴ The CJEU had already introduced the average consumer benchmark in the 1998 *Gut Springenheide* case, defining the average consumer as ‘reasonably well informed and reasonably observant and circumspect’.³⁵ The Commission pointed out that, despite the introduction of this uniform notion, some national courts were still applying other benchmarks. In particular, the Commission pointed to Belgian and German case law, in which the courts referred to an uncritical or a casually observant consumer, at least in some circumstances.³⁶

Accordingly, the Commission deemed it necessary to codify the average consumer benchmark in the Directive. It also stressed that the average consumer test is based on a consumer who is reasonably able to protect his or her own interests, and not on a particularly vulnerable or gullible consumer.³⁷

When the Directive was first proposed by the European Commission in 2003, the average consumer notion was included in the definitions section of the Directive, reiterating the definition as introduced in *Gut Springenheide*.³⁸ The Preamble to the proposed Directive noted the following on the average consumer:³⁹

[The Directive] establishes the ECJ’s average consumer, rather than the vulnerable or atypical consumer as the benchmark consumer. This test, which is an expression of the principle of proportionality, applies when the generality of consumers is addressed or reached by a commercial practice. It is modulated when a commercial practice is specifically targeted at a particular group (e.g., children), when the average member of that group will be considered. This will clarify the standard to be applied by national courts and significantly reduce the scope for divergent assessments of similar practices across the EU, while providing a means to take into account relevant social, cultural or linguistic characteristics of targeted groups as allowed for by the Court.

Hence, apart from referring to the case law of the CJEU on the average consumer, the Preamble to the proposed Directive also pointed out that if the commercial practice is specifically targeted at a particular (and possibly vulnerable) group of consumers, the average member of that group will be considered.⁴⁰

Despite the fact that this exception aimed at protecting vulnerable groups, the proposed codification of the average consumer benchmark met significant resistance in the further legislative process. In fact, it was one of the major points of debate in

³⁴ See the Extended Impact Assessment, SEC (2003) 724, p. 8.

³⁵ CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*). See also paragraph 3.2.8 below.

³⁶ See the Extended Impact Assessment, SEC (2003) 724, p. 8. The Commission refers to the Belgian case Cour de Cassation 12 October 2000 (*Saint-Brice NV/Etat Belge*) and the German cases BGH 20 December 2001, I ZR 215/98, WRP 2002, 977—*Scanner-Werbung* and BGH 20 October 1999, I ZR 167/97, WRP 2000, 517—*Orient-Teppichmuster*. The German cases are discussed in more detail in Chap. 5 of this book.

³⁷ SEC (2003) 724, p. 8. See also the Preamble to the proposed directive, COM (2003) 356 final, Recital. 21.

³⁸ COM (2003) 356 final, Article 2(b).

³⁹ Recital 30 of the Preamble to the proposed directive, COM (2003) 356 final.

⁴⁰ Although this exception to the average consumer benchmark may to some extent be supported by the *Buet* case, the CJEU had never formulated a general exception to that effect. See CJEU 16 May 1989, Case C-382/87, *ECR* 1989, p. 1235 (*Buet*) and paragraph 3.2.2 of this book.

the Directive's process of adoption.⁴¹ The criticism commenced at an early stage in the process, namely in the Opinion of the European Economic and Social Committee (EESC). In their advice on the adoption of the Directive, the Committee noted the following:⁴²

The EESC fears that the use of this interpretive criterion [i.e. the average consumer benchmark] will mean that consumer-protection policy loses its protective nature and, notwithstanding the special attention that the proposal devotes to the most vulnerable groups, fails to protect less well-informed or less well-educated consumers.

Alongside the EESC, the European Parliament was also worried that vulnerable consumers would not be protected sufficiently. It argued, therefore, that the interest of vulnerable consumers (being vulnerable due to, for example, age, infirmity, mental state or level of literacy) should be taken into account.⁴³ The European Council took this criticism into account when drafting the proposals for amendment. The Council proposed to remove the average consumer notion from the definitions section of the Directive and to move it to the Preamble.⁴⁴ Moreover, the Council proposed to pay more attention to the interests of vulnerable consumers, both in the Preamble to the Directive and in the form of an alternative benchmark aimed specifically at the protection of vulnerable groups.⁴⁵

2.5 The Average Consumer Benchmark

The proposals of the European Council were accepted by the Commission and made it into the final version of the Directive.⁴⁶ Recital 18 now deals with the average consumer benchmark, but also emphasises the importance of preventing the exploitation of vulnerable consumers:

(18) It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer.

⁴¹ G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 20.

⁴² OJ C 108/81, para. 3.6.

⁴³ A5-0188/2004, amendments 8 and 31. Bernitz notes that it was in particular the Nordic countries that called for special protection of vulnerable groups. See U Bernitz, 'The Unfair Commercial Practices Directive: its scope, ambitions and relation to the law of unfair competition', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart 2007) 39.

⁴⁴ As discussed below, this could possibly be seen as a paradigm shift in terms of the level of protection. It should be noted, however, that the official reason given by the Commission for moving the removing the notion of the average consumer notion was that there were concerns that giving a definition in the Directive would prevent the concept from evolving in line with CJEU jurisprudence. See COM (2004) 753 final, p. 3.

⁴⁵ See OJ C 38 E/1.

⁴⁶ See COM (2004) 753 final.

In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

Recital 19 specifies how vulnerable groups are offered additional protection:

(19) Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

The Directive thus still generally sets the benchmark at the average consumer, but at the same time provides for alternatives aimed at preventing the exploitation of vulnerable consumers. Micklitz has raised the question whether the removal of the average consumer benchmark from the definitions section of the Directive should be seen as a paradigm shift in terms of the level of protection offered by the Directive.⁴⁷ However, although the legislative procedure illustrates that there was resistance against the standard of protection offered by the average consumer benchmark as introduced by the CJEU, the level of protection is, in principle, still set at the average consumer. Also on the basis of the Preamble, the conclusion should be that—despite the protests—the average consumer benchmark is still the leading benchmark in the Directive. Vulnerable groups can be protected under certain circumstances, but the Directive also clearly adheres to the case law of the CJEU on the average consumer; the *Gut Springenheide* formula is repeated in the Preamble, it is made clear that the average consumer test is not a statistical test and, as in the case law of the CJEU, it is emphasised that social, cultural and linguistic factors can be of relevance in determining the expected behaviour of the average consumer.⁴⁸ Moreover, the Preamble emphasises the relationship between the average consumer benchmark and the principle of proportionality. In its case law establishing the average consumer benchmark, the CJEU argues that only a certain

⁴⁷ G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 112. See also M Broekman, 'De Richtlijn Oneerlijke Handelspraktijken' (2005) *Tijdschrift voor consumentenrecht & handelspraktijken* 178.

⁴⁸ The European Parliament in its position in the first reading of the Unfair Commercial Practices Directive meant to include *economic factors*, but this in the end did not make it into the Directive. See A5-0188/2004, Amendment 12.

amount of consumer protection is required, and that exceeding this level—i.e., protecting the less than averagely informed, observant and circumspect consumer—is disproportionate in relation to the free movement of goods.⁴⁹

In the main text of the Directive, the average consumer benchmark, together with the other benchmarks, is placed in the general clause on unfair commercial practices. Article 5 of the Directive reads as follows:

1. Unfair commercial practices shall be prohibited.
2. A commercial practice shall be unfair if:
 - (a) it is contrary to the requirements of professional diligence, and
 - (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.
3. 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. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

In a similar vein to Recitals 18 and 19 of the Preamble, Article 5 illustrates the relationship between the average consumer benchmark and the other benchmarks; the average consumer benchmark is the main rule and the target group and vulnerable group benchmarks are the exceptions.

How is the average consumer benchmark to be interpreted? The fact that the benchmark is set at the average or typical consumer implies first of all that less than averagely informed, observant and circumspect consumers are not protected—at least insofar as the average consumer is not affected. In principle, this means that it is permitted to distort the economic behaviour of consumers ‘below average’, even though the practice may be deemed to breach professional diligence.⁵⁰

Apart from the fact that the average consumer benchmark sets the benchmark at the average and not the sub-average consumer, the CJEU in its case law (discussed in more detail in the next chapter) seems to have rather high expectations of the average consumer. Several commentators have noted that the presumptions as to the behaviour of the average consumer are unrealistically high, and that these high expectations are functional for the market order as envisaged by the European Commission, emphasising the importance of free trade and limiting intervention.⁵¹ As

⁴⁹ See, e.g., CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*). See also the discussion of the case law of the CJEU in the following chapter.

⁵⁰ J Trzaskowski, ‘The Unfair Commercial Practices Directive and vulnerable consumers’ (Paper for the Conference of the International association of consumer law in Sydney, 2013) 1–2.

⁵¹ See e.g., 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 Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 13–14.



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