Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD

European Review of Private Law

Schebesta, H.; Purnhagen, K.

https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/28.2/ERPL2020015

European Review of Private Law 2-2020 [293–310] © 2020 Kluwer Law International BV, The Netherlands.

Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD*

Hanna Schebesta** & Kai P. Purnhagen***

Abstract: This article investigates the codification of the average consumer concept in secondary legislation and its interpretation in the Court of Justice of the European Union(CJEU)'s case law, using doctrinal and empirical methods. We first identify all secondary legislation explicitly using the 'average consumer' in its wording and respective case law. We show that only the Unfair Commercial Practices Directive (UCPD) developed significant case law and conducted a software supported systematic qualitative analysis of all UCPD average consumer case law to address five research questions: How is the average consumer test applied? How does the CJEU test the average consumer? How is the average consumer characterized? Who decides who the average consumer is (institutional dimension?) Is the 'average consumer' in the UCPD case law the same 'average consumer' as elsewhere? The results show that the 'average consumer' concept performs a distinct function in UCPD adjudication and has matured to a self-referential 'average consumer' interpretation isolated from case law rendered in other areas. We argue that when the 'average consumer' serves as a constitutive feature in order to define what constitutes a misleading practice, a stronger mandate for the CJEU to interpret the concept can be warranted.

Résumé: L'article étudie la codificationdans le droit dérivé du concept de 'consommateur moyen', ainsi que son interprétation dans la jurisprudence de la Cour de justice de l'Union européenne (CJUE), en utilisant les principes doctrinaux et des méthodes empiriques. Nous identifions tout d'abord l'ensemble du droit dérivé qu'utilise explicitement le concept de 'consommateur moyen' dans son libellé et la jurisprudence respective. Nous montrons que seul la directive relative aux pratiques commerciales déloyales des entreprises vis-à-vis des consommateurs (DPCD) a développé une jurisprudence importante. Nous avons mené une analyse qualitative

* Assistant Professor of Law, Wageningen University.

** Associate Professor of Law, Wageningen University and Distinguished International Visitor Rotterdam Institute of Law and Economics. Emails: Hanna.schebesta@wur.nl, kai.purnhagen@wur.nl.

*** The research represents the state of the art on 15 May 2019.This article is a much revised version of a an earlier version of the text, which has appeared in Lucila de Almeida, Marta Cantero, Mateja Durovic, Kai Purnhagen (eds), The Transformation of Economic Law (Oxford: Hart 2019). Small descriptive parts of this chapter were already published in the chapter Franck, J.-U. and K. Purnhagen, 2014. 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis', in K. Mathis (ed.) *Law and Economics in Europe – Foundations and Applications* (Dordrecht, Springer 2014), pp 329 et seqq. We thank Niels van der Linden for excellence research assistance.

systématique couvrant tous les décisions liées à la DPCD qu'utilisent le concept de 'consommateur moyen' à l'aide d'un logiciel. Nous répondons à cinq questions de recherche: Comment le test du consommateur moyen est-il appliqué? Comment la CJUE teste-t-elle le consommateur moyen? Comment se caractérise le consommateur moyen? Qui décide qui est le consommateur moyen (dimension institutionnelle)? Le consommateur moyen dans la DPCD est-il le même consommateur moyen qu'ailleurs? Les résultats montrent que le concept de 'consommateur moyen' remplit une fonction distincte dans les décisions relative à la DPCD, qui évolue vers une interprétation autoréférentielle du 'consommateur moyen' isolée de la jurisprudence rendue dans d'autres domaines. Nous soutenons que lorsque le 'consommateur moyen' sert d'élément constitutif pour définir ce qui constitue une pratique trompeuse, un mandat plus fort pour la CJUE d'interpréter ce concept peut être justifié.

Zusammenfassung: Dieser Beitrag untersucht die Kodifizierung des Konzepts des Durchschnittsverbrauchers im Sekundärrecht und seine Interpretation durch die Rechtsprechung des EuGH. Für diese Untersuchung machen wir von dogmatischen und empirischen Forschungsmethoden Gebrauch. Zunächst werden die einschlägigen Sekundärrechtsakte identifiziert, welche den "Durchschnittsverbraucher" explizit in ihrem Wortlaut verwenden, sowie die zugehörige Rechtsprechung. Wir zeigen, dass sich nur bei der Richtlinie über unlautere Geschäftspraktiken im binnenmarktinternen Geschäftsverkehr zwischen Unternehmen und Verbrauchern (RuG) durch einschlägiges Fallrecht eine signifikante Dogmatik entwickelt hat. Anhand einer softwareunterstützten systematischen qualitativen Analyse aller EuGH Fälle zur RuG wurden sodann fünf Forschungsfragen untersucht: Wie wird der durchschnittliche Verbrauchertest angewendet? Wie testet der EuGH den Durchschnittsverbraucher? Wie wird der Durchschnittsverbraucher charakterisiert? Wer entscheidet, wer der Durchschnittsverbraucher ist (institutionelle Dimension)? Ist der Durchschnittsverbraucher in der RuG-Rechtsprechung ein anderer Durchschnittsverbraucher im Vergleich zu anderen Rechtsgebieten im EU-Recht? Die Ergebnisse zeigen, dass das Konzept des Durchschnittsverbrauchers im Rahmen der RuG eine spezielle, von anderen Rechtsgebieten losgelöste Funktion erfüllt. Die Rechtsprechung hat isoliert von der Rechtsprechung in anderen Bereichen eine selbstreferenzielle Interpretation des Durchschnittsverbrauchers entwickelt. Wir argumentieren, dass in Fällen in denen der Durchschnittsverbraucher als konstitutives Merkmal dient indem er eine irreführende Praxis definiert, ein weitreichenderes Mandat für den EuGH zur Auslegung des Konzepts gerechtfertigt werden kann als in anderen Bereichen, in denen dieses Konzept zur Anwendung kommt.

1. Introduction

1. The interpretation of the 'average consumer' has been subject to much comment, scholarly analysis and criticism from different perspectives. Consumer protection lawyers, for example, reproach the concept for not reflecting a realistic

notion of a consumer.[1] This approach postulates that anyone acting in a private capacity should be protected as a consumer, also at EU level. Others emphasize that consumer protection is only needed in certain situations,[2] giving rise to the criticism that the average consumer benchmark as not adequately reflecting such situational consumer protection.[3] Law and economics scholars in particular have paralleled the 'average consumer' benchmark to the economic concept of homo economicus.[4] This categorization has been used as a point of departure for criticising the concept of average consumer for not taking sufficiently into account the latest developments of behavioural consumer sciences.[5] Few have tied their work on the average consumer benchmark rigorously close to the internal market rationale as developed by the Court of Justice of the European Union (CJEU).[6] Consequentially, the average consumer concept is first and foremost a tool to manage the different levels of the EU internal market order and accommodates the systematically different demands of consumers in the Member States.[7] More recent developments in both, secondary legislation and the Court's jurisprudence, however, now seem to paint a different picture: the average consumer concept is increasingly interpreted as taking into account – among other features – more structural vulnerability levels of consumers at the EU level.[8] The question arises

---

1 R. Incardona & C. Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', 30. *JCP (Journal of Consumer Policy)* 2007, pp 21–38.

2 G. Wagner, 'Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights', *ELR (Erasmus Law Review)* 2010, p (47) at 68.

3 J. Stuyck, 'Consumer Concepts in EU Secondary Law', in F. Klinck & K. Riesenhuber (eds), *Verbraucherleitbilder* (Berlin: de Gruyter 2015), pp 115 et seqq.

4 J.U. Franck & K. Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis', in K. Mathis (ed.) *Law and Economics in Europe – Foundations and Applications* (Dordrecht et al: Springer 2014), pp 329 et seqq.

5 G. Howells, 'EU Consumer Protection Through Information – The Lessons Behavioural Economics Offers', in P.C. Müller-Graff, S. Schmahl & V. Skouris (eds), *Europäisches Recht zwischen Bewährung und Wandel: Festschrift für Dieter H. Scheuing* (Baden-Baden: Nomos 2014), pp 546 et seqq.; J. Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive', 34. *JCP 2011*, pp 377 et seqq.; V. Mak, 'Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for the Consumer Rights Directive', 15. *ERPL (European Review of Private Law)* 2010, pp 27–29.

6 H. Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in N. Reich, H.-W. Micklitz, P. Rott & K. Tonner (eds), *European Consumer Law* (Cambridge: Intersentia 2014), p 98. See for a strong endorsement of the claim to connect the average consumer test to the internal market rationale S. Weatherill, 'The Evolution of European Consumer Law: From Well Informed Consumer to Confident Consumer', in H.-W. Micklitz (ed.) *Rechtseinheit oder Rechtsvielfalt in Europa* (Baden-Baden: Nomos 1996), p 423.

7 H.-W. Micklitz, in *European Consumer Law*, p 98.

8 H. Schebesta & K.P. Purnhagen, 'The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne', 41. *ELRev (European Law Review)* 2016, pp 589 et seqq.; W. Huizing Edinger, 'Promoting Educated

whether both, secondary legislation and the Court took a fundamental turn in the conceptualization of the average consumer benchmark. Therefore, it appears necessary to assess the relationship of the benchmark, the Court's jurisprudence and the resulting effects for European integration.[9] This asks for a more thorough investigation of the average consumer concept in secondary legislation and the Court's case law.[10] The present article investigates the express codification of the 'average consumer' in secondary legislation. Only Directive 2005/29/EC on unfair commercial practices (UCPD)[11] has developed significant case law on the codified average consumer notion. We acknowledge that a large bulk of jurisprudence concerns the average consumer test in primary law; additionally, the test is habitually applied to interpret secondary legislation that does not make explicit reference to the consumer benchmark (for instance, in Unfair Contract Terms). We limit our analysis to explicit codifications of the average consumer in the wording of binding provisions of secondary law and the Court's jurisprudence thereof. Consequently, we investigate only the cases where the Court has operationalized the 'average consumer' benchmark of the UCPD. Specifically, it addresses the following research questions:

- *How is the average consumer test applied?*
- *How does the CJEU test the average consumer?*
- *How is the average consumer characterized?*
- *Who decides who the average consumer is (institutional dimension?)*
- *Is the 'average consumer' in the UCPD case law the same 'average consumer' as elsewhere?*

2. In order to answer these questions, we use a mixed-method approach combining doctrinal and empirical analysis.[12] Doctrinal legal analysis was used to

---

Consumer Choices. Has EU Food Information Legislation Finally Matured?', 39. *JCP* 2016(39), pp 9–22; G. Howells & G. Straetmans, 'The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection', *PoF (Perspectives on Federalism)* 2017, pp E 180–E 215.

9 A first attempt was already provided by G. Howells & G. Straetmans, *PoF* 2017, pp E 180–E 215.

10 When referring to the Court, we refer to both, the European Court of Justice and the Court of Justice of the European Union.

11 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').

12 See for this method at generic level T. Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law', *ELR* 2015, https://www.elevenjournals.com/tijdschrift/ELR/2015/3/ELR-D-15-003_006.pdf.

determine where the 'average consumer' is used in EU law and how the respective legislative and juridical acts relate to each other. In addition, a systematic empirical (qualitative software-supported) analysis[13] was conducted to study how these legislative and juridical acts operationalize the 'average consumer' benchmark. While in the research operation we applied both methods in isolation, the findings presented here combine the respective findings.

3. The findings are presented in the following structure: First, we examine the codification of the average consumer in secondary legislation and CJEU jurisprudence (section 2). We therefore proceeded to conduct a systematic empirical legal analysis of all UCPD case law deploying the average consumer test. This comprises a global overview of the pertinent cases (section 3) and a subsequent analysis along the research questions (section 4). Lastly, we summarize and analyse our findings (section 5).

2. The Codification of the Average Consumer in Secondary Legislation and CJEU Jurisprudence

4. The average consumer is a trending topic, both in legal scholarship and in the Court's case law.[14] 156 cases list the 'average consumer' in the operative part of the judgments, testifying to the importance of the concept in the CJEU's jurisprudence. However, explicit references to the 'average consumer' in binding provisions of EU secondary legislation is sparse.

5. The Court developed the average consumer concept as an expression of the proportionality principle to interpret the free movement of goods as enshrined today in Article 34 Treaty on Functioning of the European Union (TFEU), and therefore as a standard of EU law confining domestic law that establishes obstacles to free trade. Subsequently, the Court applied this concept as a yardstick to construe which practices may be considered 'deceptive' under secondary law that harmonized domestic protective standards in order to ensure free trade in the internal market.[15] It made its way into secondary legislation first with the adoption of the UCPD in 2005, subsequently also into other provisions such as the Regulation (EC) No 1924/2006 on Nutritional and Health Claims (NHCR) [16] and the Regulation (EU) No 1169/2011 on Food Information to Consumers

13 The qualitative software supported analysis was conducted using MAXQDA in order to code the cases, See for an elaboration of this method also H. Schebesta, 'Content Analysis Software in Legal Research: A Proof of Concept Using ATLAS.ti', *TLR (Tilburg Law Review)* 2018, pp 23–33.

14 See inter alia G. Howells & G. Straetmans, *PoF* 2017, pp E 180–E 215.

15 Case C-315/92, *Verband Sozialer Wettbewerb eV* v. *Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH* ECLI:EU:C:1994:34, [1994] ERC I-317, at [16].

16 Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

(FIR).[17] In line with the approach established in *Clinique*, the Court habitually referred to the average consumer concept in cases concerning secondary legislation which did not mention the average consumer benchmark explicitly, such as the Directive 93/13/EEC on unfair contract terms[18] or the Directive 2000/13/EC on the labelling, presentation and advertising of foodstuffs.[19] In fact, even today, the secondary instruments containing rules using the 'average consumer' concept remain limited to the already mentioned FIR, UCPD, and NHCR.

6. Both the FIR and the NHCR use the average consumer only in an isolated provision. Under the FIR, a nutrition declaration may be given in other forms of expression in addition to words or numbers only if 'they are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer' (Article 35(1)(d) FIR). The FIR mentions the average consumer in the context of a specific and technical labelling rule. The NHCR, by contrast, contains a more general principle stating that 'the use of nutrition and health claims shall only be permitted if the average consumer can be expected to understand the beneficial effects as expressed in the claim' (Article 5(2) NHCR).

7. The UCPD widely deploys the 'average consumer' notion, namely in Article 5 (contrary to trader's due diligence); Article 6 (misleading actions); Article 7 (misleading omissions); and Article 8 (aggressive practices). A practice is unfair under Article 5 if it is contrary to professional requirements and cumulatively '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'. A misleading practice under Article 6 is one that 'deceives or is likely to deceive the average consumer, even if the information is factually correct' and it causes or is likely to cause him 'to take a transactional decision that he would not have taken otherwise'. Similarly, the definition of misleading omissions strongly relies on the average consumer. A practice is misleading under Article 7 if 'it omits material information that the average consumer needs, according to the context, to take an

17 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004.

18 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993, pp 29–34.

19 Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs.

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'. An aggressive practice under Article 8 is found where 'it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard'. Therefore, the general concept of unfairness; the definition of misleading actions and misleading omissions and aggressive actions; and the necessary effect on the transactional decision of a consumer are tied to the concept of the average consumer.

8. Both the FIR and the NHCR prohibit a specific misleading aspect of information. The NHCR mandates that the average consumer must understand the *beneficial effects* expressed in a claim. The FIR mandates that the *form and presentation* of nutrition declarations must be understood by the average consumer. Interestingly, the FIR requires 'scientifically valid evidence' to support the understanding by the average consumer.

9. While the NHCR (2006) and the UCPD (2005) date from the 'first legislative wave' of the average consumer. The FIR (2011) – being the most recent instrument – makes reference to scientific studies, e.g. behavioural studies. This appears to accommodate the more modern version of the behaviourally informed understanding of the average consumer that arose since about 2005.[20]

10. The UCPD widely relies on the average consumer in order to determine whether practices are unfair. The FIR (Article 7 FIR, in particular read together with Article 8 General Food Law (GFL)) also determines whether information is misleading. However, both the NHCR and the FIR legal frameworks are primarily dedicated to the formulation of positive objective information requirements, such as the size of the font on packaging, standard information to be included, and so forth.

11. The UCPD is the only legal instrument to use the concept of the 'average consumer' systemically. Additionally, while there is no case law in the context of the FIR or the NHCR, there is by now a significant body of case law for the UCPD average consumer.

3. Operationalizing the Codified UCPD 'Average Consumer' in case Law

12. The systematic way in which the average consumer concept pervades the UCPD gives rise to the question how the CJEU operationalizes the 'UCPD average consumer'. For this reason, we conducted a systematic research on the case law in order

20 G. Howells, 'The Potential and Limits of Consumer Empowerment by Information', 32. *J. L. Soc. (Journal of Law and Society)* 2005, pp 349-360.

to provide a better understanding of how the Court has used and interpreted the average consumer concept where it is tied to a legal secondary framework.

3.1. Selection of Cases

13. There are currently 28 cases by the Court including the search term 'average consumer' on the UCPD. This is explained by the fact that almost any UCPD case will cite a full UCPD article in the legal context that contains the keywords 'average consumer'.

14. Of these, 15 cases concerned strict rule interpretation, for instance a cluster of cases seeking interpretation on the exclusive nature of the grounds mentioned in Annex I; or interpretations relating to specific practices (pyramid scheme in *Nationale Lotterij*[21]); the relationship between different provisions (for instance between professional diligence and Article 6 in *CHS Tour Service*[22]); or the legality of national enforcement measures (in *Köck*[23]). In one case, the UCPD was taken into consideration, but was ultimately not interpreted (*Citroen Commerce*[24]).

15. We identified 12 cases of relevance. These are 10 cases with a clear application of the average consumer concept (*Dyson,*[25] *Canal Digital,*[26] *Carrefour*,[27] *Perenicova,*[28] *Purely Creative,*[29] *Ving Sverige,*[30] *Wind Tre,*[31] *UPC*,[32] *Trento Sviluppo,*[33] *Sony*[34]). Additionally, the Court exclusively framed

21 Case C-667/15 *Loterie Nationale – Nationale Loterij NV van publiek recht* v. *Paul Adriaensen, Werner De Kesel, The Right Frequency VZW* ECLI:EU:C:2016:958 [2016].

22 Case C-435/11, *CHS Tour Services GmbH* v. *Team4 Travel GmbH* ECLI:EU:C:2013:574 [2013].

23 Case C-206/11 *Georg Köck* v. *Schutzverband gegen unlauteren Wettbewerb* ECLI:EU:C:2013:14 [2013].

24 Case C-476/14 *Citroën Commerce GmbH* v. *Zentralvereinigung des Kraftfahrzeuggewerbes zur Aufrechterhaltung lauteren Wettbewerbs e.V. (ZLW)* ECLI:EU:C:2016:527 [2016].

25 Case C-632/16 *Dyson ltd and Dyson BV* v. *BSH Home Appliances NV* ECLI:EU:C:2018:599 [2018].

26 Case C-611/14 *Canal Digital Danmark A/S* ECLI:EU:C:2016:800 [2016].

27 Case C-562/15 *Carrefour Hypermarchés SAS* v. *ITM Alimentaire International SASU* ECLI:EU:C:2017:95 [2017].

28 Case C-453/10 *Pereničová and Perenič* v. *SOS financ spol. s r. o* ECLI:EU:C:2012:144 [2012].

29 Case C-428/11 *Purely Creative Ltd* v. *Office of Fair Trading* ECLI:EU:C:2012:651 [2012].

30 Case C-122/10 *Konsumentombudsmannen* v. *Ving Sverige AB* ECLI:EU:C:2011:299 [2011].

31 Case C-54/17 *Autorità Garante della Concorrenza e del Mercato* v. *Wind Tre SpA* ECLI:EU:C:2018:710 [2018].

32 Case C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság* v. *UPC Magyarország Kft* ECLI:EU:C:2015:225 [2015].

33 Case C-281/12 *Trento Sviluppo srl* v. *Autorità Garante della Concorrenza e del Mercato* CLI:EU:C:2013:859 [2013].

34 Case C-310/15 *Vincent Deroo-Blanquart* v. *Sony Europe Limited* ECLI:EU:C:2016:633 [2016].

a question as a pure information case in *Verband Sozialer Wettbewerb*,[35] and in *Mediaprint*[36] the court speaks about the general public instead of the average consumer.

3.2. Overview

16. The following section outlines the facts of the relevant cases, the provisions at issue, and how reference was made to the average consumer:

17. *Carrefour* launched a television advertising campaign 'garantie prix le plus bas Carrefour' (Carrefour lowest price guarantee) that compared the price of brand products in its own shops with those of competitors by including favourable prices of its own larger outlets (hypermarches) compared to regular supermarkets for the competitors. The average consumer benchmark was therefore mostly used under the advertising rules, i.e. Article 4(a) and (c) of Directive 2006/114/EC on misleading and comparative advertising,[37] only read in conjunction with Article 7(1) to (3) of the UCPD.

18. In *Canal Digital*, a subscription price was mentioned in internet and television advertisements, while an additional charge was mentioned less prominently or only upon additional clicks on a banner. The Court interpreted Articles 6 and 7 UCPD, and the notion of transactional decision, holding that it was for the national court to decide whether the communications were misleading. It provided guidance on what to take into consideration in the assessment of whether the average consumer was misled, for instance the fact that there is significant asymmetry of information that may easily give rise to confusion and consumer understanding. The Court further held that price is principally a factor affecting the transactional decision of the average consumer.

19. In *Wind Tre*,[38] the company marketed SIM cards with pre-loaded and pre-activated services that were charged to the user if they were not expressly deactivated, without that user having been informed about the existence these fee-based services. Ultimately the practice was found to be a 'per se' violation as inertia selling prohibited by Annex I, point 29. The Court's argumentation did, however, venture quite a bit into the average consumer concept in relation to Article 8 UCPD (*aggressive commercial practices*).

---

35 Case C-146/16 *Verband Sozialer Wettbewerb eV* v. *DHL Paket GmbH* ECLI:EU:C:2017:243 [2017].

36 Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* v. *'Österreich'-Zeitungsverlag GmbH* ECLI:EU:C:2010:660 [2010].

37 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version).

38 *Wind Tre*, *supra* n. 31.

20. In *Dyson*,[39] the CJEU established that the lack of reference to a vacuum cleaner's energy efficiency testing conditions is not capable of constituting a misleading omission under Article 7 of Directive 2005/29. What constitutes or not material information to the average consumer was judged exclusively on the basis of a systematic interpretation and took as reference point the information required under EU law relating to the uniform energy label. The average consumer reaction was then extrapolated and applied in the context of the Energy Directive.

21. In *Ving Sverige*[40] was a travel agency whose commercials were accused of containing a misleading omission as there was insufficient or no information on the main characteristics of the trip, such as the price. In its treatment of the violation of Article 7, the Court speaks of consumer only, and does not specifically deploy the concept of 'average consumer'.

22. *Purely Creative and Others*[41] concerned a number of practices relating to prize winning promotions. While some practices qualified as blacklisted practices, the information on the substance of the prize was examined by the Court under the average consumer under Article 5(2)(b) UCPD. It does so by identifying pieces of information that would be necessary, rather than judging the typical consumer reaction.

23. In *Perenicova,*[42] the Court held that in a credit agreement, an annual percentage rate lower than the real rate constitutes false information as to the total cost of the credit and hence the price referred to in Article 6(1)(d) of Directive 2005/29. The average consumer reaction, to be determined by the national court, would be necessary to judge whether this would influence the 'transactional decision' of a consumer.

24. The *Sony*[43] case concerned a commercial practice consisting of the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model of computer not equipped with pre-installed software. The Court tested under Article 5(2) and 5(4)(a) UCPD, using the 'average consumer' as a benchmark twice, for ascertaining the misleadingness, and for the transactional decision.

25. In *Trento Sviluppo*,[44] a supermarket chain advertised a price reduction in leaflets for a laptop, which was not actually available to the consumer. The Court

39 *Dyson*, *supra* n. 25.
40 *Ving Sverige*, *supra* n. 30.
41 *Purely Creative*, *supra* n. 29.
42 *Perenicova*, *supra* n. 31.
43 *Sony*, *supra* n. 34.
44 *Trento Sviluppo*, *supra* n. 33.

interpreted Article 2 and held that the 'transactional decision' of an average consumer would have to be interpreted widely.

26. In the *UPC* case, the erroneous information provided by a cable television service to its customer was regarded as a misleading practice under Article 6(1) UCPD even where only one consumer was concerned.

27. We examined those cases in greater detail in order to study how the 'average consumer' concept is used in the UCPD jurisprudence by the Court.

4. The Court's Use of the Average Consumer Test in the UCPD

28. On the basis of a systematic qualitative analysis of the identified cases, the following picture emerges of the 'average consumer' concept in the CJEU's UCPD jurisprudence in terms of the meta-conception of the test itself, the characterization of the average consumer, and the institutional dimension responsible for assessing the concept.

4.1. How Is the Average Consumer Conceptualized?

29. The average consumer is conceptualized as the point of reference[45] or 'benchmark to be used'.[46] Specifically, for the UCPD, the Court held that 'the constituent features of a misleading commercial practice, as set out in that provision, are in essence expressed with reference to the consumer as the person to whom unfair commercial practices are applied'.[47] In other words, the average consumer is the reference point for determining whether a commercial practice is misleading when it is not featured on the blacklist.

4.2. How Is the Average Consumer Test Applied?

30. Overall, a double layered average consumer emerges in the case law: first, in judging the unfairness strictly of the practice (read: 'misleadingness/deceptiveness'), then second on the influence on the transactional decision. Two approaches for framing the unfairness in such cases co-exist, one is the (subjective) consumer reaction to given practices (read: 'transactional decision'), the other is the (objective) adequacy of the information quality (read: 'misleadingness/deceptiveness'). Thereby, the 'transactional decision' taken by the consumer risks to become the Achilles heel of the UCPD. While it was contended for a long period that this criterion does not provide an additional threshold, this increasingly seems to be the case.

---

45 Case C-435/11 *CHS Tour Services GmbH* v. *Team4 Travel GmbH* ECLI:EU:C:2013:574 [2013], para. 43.

46 *Canal Digital Danmark A/S*, *supra* n. 26, para. 39.

47 *CHS Tour Services*, *supra* n. 41, para. 43; *Canal Digital Danmark A/S*, *supra* n. 26; *Ving Sverige*, *supra* n. 30, paras 22–23.

4.3. Who Is the Average Consumer (Characterization)?

31. 'Recital 18 UCPD specifies that the 'average consumer' test is not a statistical test' and that, 'to determine the typical reaction of that consumer in a given case, the national courts and authorities have to exercise their own faculty of judgment'. Before its insertion into recital 18, this statement was originally developed in the case law of the CJEU. After its codification in recital 18 UCPD it is also cited by the CJEU in its codified version.[48] The benchmark to be used is that of the average consumer, 'who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'. This definition is taken over in the overwhelming number of cases.[49] This does not come as a surprise, as the definition had been developed initially in case law. Probably because recital 18 had been nothing else than a codification of case law,[50] the 'typical reaction' of recital 18 did not receive specific attention in the CJEU's jurisprudence. However, the most recent cases refer to recital 18 as a source for the characterization of the average consumer.[51] What these sweeping formulations mean can be inferred on the basis of the applications of the average consumer concept in cases. In the jurisprudence, the following variables or characteristics were used by the Court in order to interpret the average consumer: cases refer to consumer perception in the abstract[52] or deploy consumer awareness as a yardstick.[53] Other features used are the technical capacity of consumers[54] and the existence of an information asymmetry.[55]

32. Empirically there is a difference between 'the consumer in a specific context' and the 'average consumer'. There is tension between 'the average consumer' (general) and 'the average consumer, according to the context' (circumstance-specific). This is apparent, for instance, in the case of *Wind Tre*,[56] in which the CJEU raised doubts whether the average consumer is sufficiently aware and

48 *Canal Digital Danmark A/S*, *supra* n. 26, para. 39; *Wind Tre*, *supra* n. 31; and *Purely Creative*, *supra* n. 29.

49 *Wind Tre*, *supra* n. 31; *Sony*, *supra* n. 34; *Dyson*, *supra* n. 25; *UPC*, *supra* n. 35; *Canal Digital Danmark A/S*, *supra* n. 26; *Ving Sverige*, *supra* n. 30; *CHS Tour Services, supra* n. 41.

50 See as to the development of recital 18 and its relationship to CJEU case law B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law,* (Oxford: Hart 2011), pp 282 ff.; B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Cham et al., Springer 2015), pp 20–23.

51 *Purely Creative*, *supra* n. 29; *Canal Digital*, *supra* n. 26; *Wind Tre*, *supra* n. 31.

52 *Ving Sverige*, *supra* n. 30; *Carrefour*, *supra* n. 27; *Canal Digital*, *supra* n. 26; *Dyson*, *supra* n. 25.

53 *Sony*, *supra* n. 34, *Wind Tre*, *supra* n. 31.

54 *Wind Tre*, *supra* n. 31.

55 *Canal Digital*: 'offers for TV channels are characterised by a wide variety of proposals and combinations that are generally highly structured, both in terms of cost and content, resulting in a significant asymmetry of information that is likely to confuse consumers' (*supra* n. 26, para. 41).

56 *Wind Tre*, *supra* n. 31.

technically capable of the pre-loaded and pre-activated mobile services for prepaid SIM cards. It then continued by stating that it is for the national court to establish the 'typical reaction of the average consumer in circumstances such as those at issue in the main proceedings'.[57]

33. Overall, there is no clear pattern on how the CJEU interprets the average consumer, despite the fact that a solidifying body of case law operationalizing this concept has emerged. As a juridical concept, the CJEU seems to be struggling with providing meaning to measurement and content of the average consumer test and is still in the process of giving it sharper contours.

34. One exception exists. With respect to the 'transactional decision', the Court seems to accept a *per se* mechanism regarding price. Price 'is, in principle, a determining factor in the mind of the average consumer, when he has to make a transactional decision'.[58] Price therefore enjoys an *a priori* presumption of influencing the average consumer's behaviour with respect to the transactional decision.

35. An important issue that emerges clearly is the tension between subjective average consumer based framing of the argumentation und objective information requirements based framing. What is the relationship between objective information requirements and the subjective consumer perception of information?

36. As we have examined in greater detail elsewhere,[59] practices and requirements relating to information can be framed in two ways – as 'objective' information requirements, and as 'subjective' requirements that relate to the understanding and processing of information by the consumer. Under the information based approach, 'although the average consumer is mentioned, the Court takes a flight into a perceived objectivity found in examining the *quality of the information*, for instance whether information was accurate, complete, and sufficient'.[60]

37. Some cases, while paying lip-service to the 'average consumer', in reality determine whether the information quality is sufficient. For instance, in *Wind Tre*, the Court held: 'It follows that for a service to be solicited the consumer must have made a free choice. That supposes, in particular, that the information provided by the trader to the consumer is clear and adequate'.[61] In this line, no reference to the consumer's perception or capacity to handle information is made in *Verband Sozialer Wettbewerb*, although the case concerned an interpretation of Article 7 UCPD: 'It is for the referring court to examine, on a case-by-case basis, first, whether the

57 *Wind Tre*, *supra* n. 31, para. 52.

58 *Canal Digital Danmark A/S*, *supra* n. 26, para. 46.

59 H. Schebesta & K. P. Purnhagen, 'Is the "Behavioural Turn" in Consumer Law Taken by Dutch Courts?', *TvC (Tijdschrift voor Consumentenrecht en handelspraktijken)* 2017, pp 272-278.

60 H. Schebesta & K. P. Purnhagen, *TvC* 2017, pp 272-278.

61 *Wind Tre*, *supra* n. 31, para. 45.

limitations of space in the advertisement warrant information on the supplier being provided only upon access to the online sales platform and, secondly, whether, so far as the online sales platform is concerned, the information required by Article 7 (4)(b) of that directive is communicated simply and quickly'.[62]

38. In terms of information quality, there is an important difference between an omission under Article 7(1) UCPD and Article 7(3) UCPD and deception under Article 6 UCPD. Misleading omissions take into consideration in particular the limitations of the communications medium (time and space) and additional measures taken to make information available to consumers by other means. Such constraints cannot be taken into account under Article 6 UCPD (authoritatively argued in *Canal Digital*[63]).

39. Overall, as we have argued earlier,[64] it is possible to frame identical disputes through the concept of information quality, or through the capacity of consumers handling that information. In the examined UCPD cases, the Court often used only one frame or a conflated framing. This is an aspect that could be explored for the sake of developing a clearer test about the average consumer.

4.3. Who Decides Who the Average Consumer Is (Institutional Dimension)?

40. Institutionally, it is clear that the national court that has the mandate to apply and fill the average consumer with meaning to be applied to concrete situations.[65] Recital 18 UCPD specifies that, 'in a given case, the national courts and authorities have to exercise their own faculty of judgment'.[66] Again, this formulation derives from the concept of average consumer developed by the Court on fundamental freedoms.[67] This principle is strongly reflected in the case law on the average consumer.[68] More specifically, the Court emphasized that it is for the national court to ascertain the average consumer's reaction to a certain practice.[69] It is also a simple consequence of the decentralized system of application of EU law: the

62 Case C-146/16 *Verband Sozialer Wettbewerb eV* v. *DHL Paket GmbH* ECLI:EU:C:2017:243 [2017].

63 *Canal Digital Danmark A/S*, *supra* n. 26.

64 H. Schebesta & K. P. Purnhagen, *TvC* 2017, pp 272-278.

65 See instructively B. Keirsbilck, *Unfair Commercial Practices*, 284 'Normative standards have to be applied to real life cases'.

66 This is usually repeated in the UCPD cases. By way of example, See *Canal Digital Danmark A/S*, *supra* n. 26, para. 39.

67 See inter alia M. Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Oxford, Hart 2016), pp 29-36.

68 *Carrefour*, *supra* n. 27, para. 31.

69 For example, *Perenicova*, *supra* n. 31.

actual application of the average consumer test to the facts is for the national courts to execute.

41. Tridimas[70] has created a typology of CJEU judgments that acknowledges the diverging degrees to which the judgments provide stronger or weaker guidance to the national courts. The surveyed case law showed the oscillating willingness of the Court to enter into an interpretation of the 'average consumer'.

42. While it is for the national courts to apply the average consumer, the degree of guidance from the Court in the examined cases varied between 'next to nothing' and providing detailed guidance that more or less solves the case's particulars: for instance, *Carrefour* held that 'it is highly likely that the advertising would (...) be misleading'.[71] In *Canal Digital* the Court, by contrast, provided guiding principles and variables to be taken into consideration. In *Wind Tre*, there was a quasi-determination, only necessitating the national court to verify the facts:

43. *In the present case, it appears that the services at issue in the main proceedings were pre-loaded and pre-activated on the SIM cards without the consumer having been sufficiently informed of this beforehand, and that, in addition, the consumer was not informed of the costs connected with using those services; this, however, is for the referring court to verify. When the consumer has been neither informed of the cost of the services in question, nor even of the fact that they were pre-loaded and pre-activated on the SIM card that he bought, it cannot be considered that he freely chose the provision of those services.*[72]

44. In terms of how, and how strongly, the Court guides the national courts, a mixed picture emerges. Sometimes the Court proceeds with straight postulates such as that the price influences consumers' transactional decisions. At other times, the facts are discussed in greater detail (e.g. *Carrefour*[73]), whereas in other cases, the answer appears genuinely subject to the national court's determination (*Sony*[74]). However, even where the Court exercises detailed guidance, any behavioural approach must necessarily be a mandate for the national courts.[75]

---

70 T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction', 9. ICON (International Journal of Constitutional Law) 2011, p 737.

71 *Carrefour*, *supra* n. 27, para. 38.

72 *Wind Tre*, *supra* n. 31, para. 48.

73 *Carrefour*, *supra* n. 27.

74 *Sony*, *supra* n. 34.

75 H. Schebesta & K. P. Purnhagen, *TvC* 2017, pp 272-278.

5. Findings

45. The empirical analysis revealed the muddy nature of the Court's legal reasoning about the average consumer benchmark. There are few general lines which we can dissect from the empirical analysis.

5.1. The Average Consumer of the UCPD Has Matured to a Self-referential 'Average Consumer' Interpretation Isolated from Case Law Rendered in Other Areas

46. The UCPD case law interpretations of the average consumer notion are mostly self-referential, in the sense that they constitute a largely isolated bubble of cases that does not frequently cite iconic average consumer case law rendered in other areas. This raises the question whether the 'average consumer' of the UCPD is not a specific kind of consumer, and test. Indeed, cases outside of the UCPD on secondary legislation which do not carry any or only an embryonic reference to the average consumer benchmark use the average consumer as it was developed in the interpretation of primary law. In the UCPD, most case law concerning the average consumer is codified, so that the UCPD itself contains the 'textual material' to define an average consumer test without reference to primary law. Also the fact that most UCPD case law refers to the average consumer definition in the recitals, and not to the one originally developed in *Gut Springenheide*[76] testifies to this.

47. Apart from these formal features, another explanation of the self-referential nature of the UCPD consumer lies in the specificity of the factual situations governed by the UCPD, as explained in the following.

5.2. The 'Average Consumer' Concept Performs a Distinct Function in UCPD Adjudication

48. The purpose of the average consumer in the UCPD is twofold: first, it is the yardstick by which to *characterize a commercial practice*; secondly it is used in reference to *whether a transactional decision was affected.* Regarding the first, the Court uses the average consumer to characterize a practice as misleading or not; in the words of the Court: 'the constituent features of a misleading commercial practice, as set out in that provision, are in essence expressed with reference to the consumer as the person to whom unfair commercial practices are applied'.[77] In

76 Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky* v. *Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* ECLI:EU:C:1998:369 [1998], para. 31.

77 *CHS Tour Services, supra* n. 41, para. 43; *Canal Digital Danmark A/S, supra* n. 26, *Ving Sverige, supra* n. 30, paras 22-23.

the UCPD, practices are constructed as a unilateral act, and the 'average consumer' is a constitutive feature to characterize such practices as misleading or not. On this basis, it makes sense to reflect on the unilateral nature of practices versus bilateral contractual relations, as they appear in the case law on the Directive 93/13/EEC on unfair contract terms.

49. It is a different question to ask whether a practice is a misleading practice towards the average consumer (generally) and therefore aims at the characterization of the practice (situation 1), or whether the question is that in a specific case constellation, given the specific circumstances, an average – in the sense of *typical* – consumer would have been misled (as suggested by the wording of recital 18, situation 2). The varying approaches on this in the case law research demonstrated that these different functions of the juridical concept are not clearly distinguished in the Court's argumentation.

5.3. Empirically, the Institutional Mandate to Fill the Average Consumer in Situation 2 with Meaning Is Placed on the National Courts

50. The case law showed that the Court regularly recognizes the strong mandate to the national courts in filling the meaning of the average consumer in situation 2, in every case at the very least paying lip-service to this delimitation.

51. One explanation for the EU approach in the case law of the Court is clearly institutional by nature. Most consumer law cases are preliminary reference procedures. In these, the national referring court is confronted with the factual situation that it sketches for the CJEU. The CJEU's mandate is exclusively to interpret EU law, and – strictly speaking – does not proceed to apply the law to the facts. The CJEU is not the final instance of a case and thereby not the element in the overall legal process that will apply the interpretation of the law on the facts of the case. These institutional constraints of the legal process place inherent limitations on the interpretation the Court can give to the average consumer. The fact that the mandate of interpretation is placed clearly on the national court is in line with recital 18, but it is not something stipulated in the Articles of the UCPD themselves.

5.4. If the 'Average Consumer' Serves as a Constitutive Feature of a Misleading Practice (Situation 1), a Stronger Mandate for the CJEU to Interpret the Concept Can Be Warranted

52. Whether the 'average consumer' case law is used in order to characterize a practice as unfair has important institutional implications. Where the 'average consumer' is a constitutive indicator about which practices are prohibited, the interpretation thereof becomes one of EU law interpretation. Only a specific

average consumer understanding, in the specific context, would then refer to the factual circumstances which are situated in the realm of the national court. On this basis, we argue that the CJEU could pay stronger attention to the function that the 'average consumer' concept serves in situation 1 cases respectively, and in case it is used to characterize a practice as unfair, to provide stronger guidance to national courts.

53. Where in UCPD litigation the average consumer is used in order to interpret (unilateral) commercial practices, there is a stronger interest in an EU wide understanding, and this interpretation ultimately serves the characterization of what is a misleading practice – it therefore makes sense to interpret such in the abstract; rather than rendering specific circumstantial interpretations of specific cases. Such an understanding could be used to justify a stronger interpretation by the CJEU in defining the contours of the 'average consumer' concept. This argument finds support in the UCPD itself. The black list in the Annex I to the UCPD circumscribes specific practices which the EU characterizes as unfair (situation 1 cases). Hence, when determining the fairness of practices outside of the black list, it is safe to assume that the Court can employ similarly a more specific approach by providing more flesh on the bones of the average consumer concept.

54. To conclude, for the UCPD, we argue that there are still remaining dimensions in which to refine and clarify the 'average consumer' test, and good reasons to develop greater guidance for the interpretation and application of the average consumer benchmark at EU level.