The "Average Consumer" in European Consumer Law

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INTRODUCTION

The European consumer is traditionally seen as a "passive market participant" who is present on the market "without any profit-making intention".[1] Indeed, consumers are usually defined as natural persons who act on the market "for purposes which are outside their trade, business or profession".[2] A particularity of European consumers that has to be emphasised is that they operate on the "internal market"[3] which is meant to enhance a competitive market economy but also simultaneously a high level of consumer protection. Indeed, the main objectives of European Union (EU) law concerning consumer protection include, among others, the protection of consumers against fraudulent misrepresentations by traders and the protection of their legitimate expectations.[4]

However, the protection of legal interests of consumers in EU law must consider an important issue: the fact that the protection of consumers and the preservation of the good functioning of the internal market are "shared competence" between the EU and Member States.[5] Thus, if finding a balance between consumer protection and the freedoms of traders (such as the free movement of goods) already seems difficult, it is complicated further by the different interpretations and national instances.

This paper attempts to explain this conflict between the economic interests of traders and consumers. The circumstances of the emergence of the "average consumer" standard, first developed by the Court of Justice of the European Union (CJEU) and then codified in the Unfair Commercial Practices Directive (UCPD) since it seems to pursue the harmonisation of a high level of consumer protection.

The questions that led to the structure of this paper are as follows: how did the desire for harmonisation of the level of consumer protection in the EU and

[1] Norbert Reich, Hans-W.Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law*, (2nd Edition, Intersentia 2014) 6.
[2] ibid [50].
[3] Treaty on the European Union (Consolidated version) OJ C 326, 26.10.2012, p. 13-390, Article 3.
[4] Norbert Reich, Hans-W.Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law*, (2nd Edition, Intersentia 2014) 6.
[5] ibid.

the conflict between the requirements of a high level of protection and a smooth functioning of the Internal Market in national laws lead to the emergence of the abstract test developed by the CJEU in order to understand the expectations of consumers facing unfair commercial practices? Did the full harmonisation of the directive that codified the "average consumer" standard solve the problems of harmonisation between Member States? Does the standard as presented by the CJEU and the UCPD really offer a high level of consumer protection?

In the first part, this paper will focus on the context of the appearance of the standard by mentioning the opposition between the desire of harmonisation of consumer protection opposed to the conflict between EU consumer protection and the free movement of goods principle (I). This part will show the legal and economic context in which the "average consumer" standard emerged in the case law of the CJEU, along with alternatives offering more protection.

In the second part, this essay attempts to delve into the effects of the codification of the "average consumer" standard in the UCPD and more particularly with regard to its "full harmonisation" character (II). This includes a discussion of the implications of a "fully harmonised" standard characterised by high expectations of consumers in Member States bearing in mind that room for interpretation is left to national courts. Although authors such as Eva Theocharidi[6] highlighted that the scope of the standard is broader than the area of unfair commercial practices, this paper deliberately focuses on the implementation of the standard through the UCPD which seems to be the most explicit legal instrument with regard to the standard.

In the third and final part, this paper will focus on the controversial empowerment of consumers through the "average consumer" standard and on the doubtful "high level" of protection of European consumers (III). This part will try to explain why the high expectations of the behaviour of consumers cannot be satisfied with regard to behavioural economics and also that this empowerment of consumers can come from broader political considerations.

[6] Eva Theocharidi, "The effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions", European Review of Private Law 1-2016, p.103-116.

I. THE APPEARANCE OF THE STANDARD: OPPOSITION BETWEEN A DESIRE FOR HARMONISATION AND A CONFLICT BETWEEN EU CONSUMER PROTECTION AND FREE MOVEMENT OF GOODS PRINCIPLE

A. The Context of The Emergence of The Standard: The Pursuit of "Consumer Confidence" Through Harmonisation

1. The Difficult Conciliation of Free Movement of Goods and Consumer Protection

It seems that initially, EU law focused on traders for the purpose of the preservation of the internal market rather than on consumers.[7] The rationale behind this was that the good functioning of the internal market leads to an increase in the quality of life of consumers. Thus, since it appeared that the promotion of the internal market first required production-related measures, it was assumed that the protection of trade in the internal market was the first step to the protection of consumers.[8]

The fact that the interests of the trader, seen as the "active market participant", prevailed over the interests of the consumer (also known as the "passive market participant" as previously mentioned) was found in the role that the CJEU had assigned itself concerning the sanction of national measures that would affect the free movement of goods[9] without further consideration of the consumer's economic interests.[10]

However, after several years, the EU turned towards policies enhancing a high level of protection for consumers in 1975 and 1981 when the European Commission developed a catalogue of "consumer rights".[11] The CJEU took a similar stand when it presented consumer protection as an independent reason of justification against barriers to trade emanating from national laws.[12]

In 1998 the notion of "confident consumer"[13] appeared, introducing the idea that the law is essential to increase confidence in the internal market and that the EU's approach in this context of reform is the "empowerment" of consumers by

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[7] Norbert Reich, Hans-W.Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law*, (2nd Edition, Intersentia 2014) 9.

[8] ibid.

[9] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art. 34 and 56.

[10] Norbert Reich, Hans-W.Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law*, (2nd Edition, Intersentia 2014) 10.

[11] Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C 92, and Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [1981] OJ C 133.

[12] Case C-120/78, *Cassis de Dijon* [1979] ECR 649.

[13] Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests [1998] OJ L 166, p. 51–55.

giving them a set of "common rights" (for example the right to information).[14] This idea of "common rights" led to a movement towards harmonisation. Indeed, a year later, in Recital 5 of the Consumer Sales Directive, a set of rules that would be "valid no matter where the goods are purchased" is mentioned.[15] The rationale behind this desire for harmonisation seems to be that a higher level of consumer protection leads to more consumer confidence which in turn leads to incentives for consumers to participate in the internal market, ultimately leading to benefits for traders and a fair share of benefits for consumers.

Christian Twigg-Flesner drew a portrait of the "confident consumer" as imagined by EU law:[16] the "confident consumer" seems to be interested in cross-border transactions, they also seem to be aware of the fact that consumer protection differs from one Member State to another and more specifically to be aware of the protection they are entitled to in their own Member State's legislation. Finally, the "confident consumer" is seen as sensible to information, in the sense that the more information they will get, the more reasoned their final purchasing decision will be. It could be argued that the EU wants to take control of consumer protection in order to exercise a safe and reliable control on the functioning of trade in the Internal Market. It seems that this keen interest of EU law for harmonisation can also be explained by the lack of coherence between positive and negative harmonisation.

2. Emphasis on Harmonisation as a Result of "Multi-level" Consumer Protection

Indeed, Vanessa Mak highlighted the divergences in terms of consumer protection arising from the high standard of protection offered by the minimum harmonisation directives on unfair terms, consumer sales, doorstep and distance selling[17] and the provisions of EU law concerning the four freedoms and more specifically, as above-mentioned, the free movement of goods principle.[18] These

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[14] Christian Twigg-Flesner, "The Importance of Law and Harmonisation for the EU's confident consumer" in Dorota Leczykiewicz and Stephen Wheatherill (eds) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, (Oxford Hart Publishing 2016), 183-202.

[15] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12 (Consumer Sales Directive), Rec 5.

[16] Christian Twigg-Flesner, "The Importance of Law and Harmonisation for the EU's confident consumer" in Dorota Leczykiewicz and Stephen Wheatherill (eds) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, (Oxford Hart Publishing 2016) 183-202.

[17] Vanessa Mak, "Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive", Tilburg University Working Paper June 2010, http://www.ssrn.com/link/Tilburg-TISCO-Banking-Financing.html.

[18] Vanessa Mak, "Two levels, one standard, The multi-level regulation of consumer protection in Europe" in James Devenney and Mel Kenny (eds) *European Consumer Protection, Theory and Practice* (Cambridge University Press 2012) 21-42.

divergences can be seen for example in the "negative harmonisation"[19] of the CJEU, sanctioning national measures prohibiting products or advertisements on the basis of consumer protection as opposed to the "positive harmonisation" of the above-mentioned directives merely trying to set a common reference point for consumer protection. After the emergence of such a standard in the case law, the standard was codified in a maximum harmonisation directive.

However, it could be argued that the EU's attempts at reform of consumer protection seem too optimistic concerning the effects of legislation, and more particularly harmonised law. This reasoning could be explained by the fact that EU law seems to base its reforms on general assumptions according to which harmonisation will inevitably lead to more legal certainty and also that an informed consumer inevitably makes the right purchasing decision without giving further justification.

However, before discussing the harmonisation of the standard through codification, it seems important to take into consideration the case law leading to the emergence of the "average consumer" standard which was mostly related to the application of the Directive on misleading advertising adopted in 1984.[20]

B. The Emergence of the "Average Consumer" Standard of the CJEU

Before codification, the "average consumer" standard appeared in the context of cases brought before the CJEU concerning national laws on misleading commercial practices that were seen as contrary to the free movement of goods principle.[21] We are now guided by the Unfair Commercial Practices Directive, ensuring less confusion in that area.

1. The Appearance of a Standard Characterised by High Expectations

Even before the appearance of the abstract benchmark of an "average consumer" as adopted in the *Gut Springenheide*[22] decision by the CJEU, the Court had already insisted on several elements that led to the standard.

The first element which the CJEU emphasised was the information of consumers that had already been mentioned in the context of the objective of the "confident consumer" in EU law.

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[19] Hannes Unberath and Angus Johnston, "The Double-Headed Approach of the ECJ concerning consumer protection", [2007] Common Market Law Review 44: 1237-1284.

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

[21] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art. 34 and 56, Article 34.

[22] Case C-210/96, *Gut Springenheide* [1998] ECR 1998, I-4657.

In the *Cassis de Dijon*[23] decision where the German government had prohibited the import of a certain type of alcohol since the denomination used by the trader was deemed to be misleading, the CJEU did not explicitly refer to a consumer standard. However, this decision is considered as the beginning of the series of rulings that would later lead to the "average consumer" benchmark since the CJEU did not ask for an expert opinion but applied instead an abstract test for the evaluation of the alleged misleading character of the product. In the context of this abstract test, the CJEU clarified its vision of the European consumer as a person who reads labels of products very carefully before making a purchasing decision. The idea is that consumers are sufficiently protected if they are given "suitable information". [24] This assumption is referred to as the "labelling doctrine"[25], which is in line with the protective attitude of the CJEU towards traders on the single market since the assumption that the doctrine conveys (the fact that consumers automatically read labels in detail) prevents Member States from prohibiting the access of products coming from other Member States to their domestic market. One cannot but notice that the labelling doctrine on which the CJEU based its decision implies that the consumer has to be sufficiently attentive in order not to be misled by foreign products. This also means that the European consumer moves away from their previously mentioned status of "passive market participant" as understood by EU law in order to become an active market player.

In the *GB-INNO-BM*[26] decision, the CJEU went even further in considering the role of information since, when analysing the prohibition by the Luxembourg government of advertising leaflets mentioning pre-sales prices (on the grounds that it was misleading since consumers could not check if the reference price was the right one),[27] it answered that only false information can be prohibited.[28] The Court specified that if the accuracy of information was important, it was even more important to provide information to the consumer.[29] More recently in the *Trento Sviluppo*[30] decision, the CJEU strengthened its position by answering that prohibition is not justified for every piece of false information and that the "misleading" requirement had in addition to be met.

The CJEU's position, which is quite revealing of the stand later taken concerning the "average consumer" standard, seems to follow the line of EU law's vision of information concerning the "confident consumer". It seems indeed, to

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[23] Case C-120/78, *Cassis de Dijon* [1979] ECR 649.
[24] ibid [13].
[25] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 29-62.
[26] Case 362/88 *GB-INNO-BM* [1990] ECR 1993.
[27] ibid [11].
[28] ibid [12].
[29] ibid [16].
[30] Case C-281/12, *Trento Sviluppo* [2014] 1 W.L.R 890.

rely on the assumption that more information always means better decisions for consumers. One cannot but notice that this reasoning focuses on the quantity of information and overlooks the question of the quality of information. In the particular situation of the *GB-INNO-BM* decision, it could be argued that a reference price could have misled consumers if it was not particularly relevant or without additional information that should be given simultaneously. It seems that in these decisions, the CJEU was already creating an image of an "autonomous" consumer[31] to whom information always seems beneficial.

The fact that the CJEU sets high expectations on the consumer can be seen in 1995 in the *Mars*[32] decision (which concerned German laws on consumer protection) where it used as a benchmark a "reasonable circumspect consumer" and considered that the "reference" consumer that should be taken as a standard in the assessment of the misleading character of commercial practices should be a consumer with observation and analytical capabilities.[33]

The first explicit reference to the "average consumer" standard was in 1998, in the *Gut Springenheide*[34] decision which involved once again German laws on consumer protection. The German court had asked the CJEU to specify which reference consumer should be used to determine the misleading character of a commercial practice. The CJEU adopted the abstract test of the "expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect".[35]

However, in light of the previous remarks concerning the high and unrealistic expectations of the consumer and the assumptions of the CJEU concerning information, it seems logical that this benchmark led to some criticism. Indeed, Bram Duivenvoorde highlighted that the "average consumer" as understood by the CJEU is not inspired by reality but rather by a "desired" consumer.[36] As this paper attempts to explain, this remained a major problem even after the codification of the standard.

However, it is important to note that the "average consumer" standard was accompanied by mitigations when it appeared in the case law of the CJEU.

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[31] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 29-62.
[32] Case C-470/93, *Mars* [1995] ECR 1995, I-1923.
[33] ibid [24].
[34] Case C-210/96, *Gut Springenheide* [1998] ECR 1998, I-4657.
[35] ibid [30]-[32].
[36] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 29-62.

2. Mitigations of The Standard: Protection of More Vulnerable Consumers and Room for Manoeuvre for Member States

In the *Clinique*[37] decision, Advocate General Gulmann argued that the level of consumer protection should first be set by Member States and that linguistic, social and cultural differences should be taken into consideration.[38] If the CJEU ignored both arguments in the *Clinique* decision, it adopted the second in *Graffione*,[39] in which it specified that a practice which is considered as misleading in a Member State A will not necessarily be seen as misleading in a Member State B because of linguistic, social and cultural differences between Member States.[40]

Another mitigation of the standard comes from the room for manoeuvre that the CJEU left to Member States concerning interpretation. Indeed, since the adoption of the standard in *Gut Springenheide*, the CJEU specified that the aim in the establishment of an abstract standard was to enable national courts to determine the misleading character of commercial practices on the basis of the same criteria.[41] This theoretically means that national courts can exercise their own judgment in the assessment of the expectations of an average consumer. The CJEU also clarified that in doing so, national courts can take into consideration the results of a quantitative test.[42] However, it has not gone unnoticed that the CJEU did not give further indications.[43] Advocate General Fenelly, in his opinion of the *Lifting*[44] decision, considered that the CJEU has to give general guidelines to Member States on the implementation of the standard.[45] Nevertheless, in the *Lifting* decision, the CJEU merely repeated the importance of taking linguistic, cultural and social factors into account.[46]

Thus, if some room for manoeuvre is obviously left to Member States in the assessment of the expectations of the average consumer for the purpose of the determination of the misleading character of a commercial practice, one could not fail to realise that the guidelines provided by the CJEU seem too broad. As will be developed, this lack of guidance, along with the differences of initial level of consumer protection in the different Member States, explains that some countries such as Germany will be reproached for their misinterpretation of the standard.

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[37] Case C-315/92, *Clinique* [1994] ECR 1994, I-317.
[38] ibid [25].
[39] Case C-313/94, *Graffione* [1996] ECR 1996, I-6039.
[40] ibid [22].
[41] Case C-210/96, *Gut Springenheide* [1998] ECR 1998, I-4657, paras 30-32.
[42] ibid [35]-[36].
[43] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 29-62.
[44] Case C-220/98, *Estée Lauder* (*Lifting)* [1999] ECR 2000.
[45] Opinion of Mr Advocate General Fennelly delivered on 16 September 1999, *Estée Lauder (Lifting)*, para 31.
[46] Case C-220/98, *Estée Lauder* (*Lifting)* [1999] ECR 2000 para 29.

A last mitigation of the standard comes from the alternative offered by a possibility of protection of more vulnerable consumers. This alternative appeared in 1989 in the *Buet*[47] decision in which the CJEU, in the context of doorstep selling of educational material recognised that some practices may target more vulnerable groups of consumers than the usual reference consumer and that in such situations, an additional protection is justified.[48]

This additional protection for more vulnerable consumers was codified at the same time as the codification of the "average consumer" standard in the UCPD. Indeed, the directive distinguishes the "average" consumer from "target groups" and more "vulnerable" consumers. However, some doubts remain on the alternative offered by these benchmarks and will be explored further.

II. THE HARMONISATION OF THE STANDARD THROUGH ITS CODIFICATION IN THE UCPD: IS THE FULL HARMONISATION EFFICIENT?

A. The "Fully Harmonised" "Average Consumer" Standard

The UCPD adopted in 2005 aims at a full harmonisation of the law on unfair commercial practices in the EU.

1. Description of the test and Alternatives for a Higher Protection

In its recitals, the UCPD draws a distinction between the test used for the protection of the "average consumer" test and that used for the protection of more vulnerable consumers.[49] The "average consumer" test is presented as an expression of the principle of proportionality (which requires consumer protection not to infringe the free movement of goods principle) and is meant to apply when all consumers are addressed by a commercial practice. However, as will be developed further in this paper, the UCPD leaves room for a higher protection in situations where vulnerable groups are targeted easily identifiable.

As for the "average consumer" standard, it is used in the context of the UCPD in order to regulate unfair commercial practices. Article 5 of the Directive explains that an "unfair" commercial practice is a practice which is "contrary to the requirements of professional diligence" and which "materially distorts or is likely to materially distort the economic behaviour (…) of the average consumer".[50] The material distortion of the economic behaviour of the average consumer has been recently interpreted very broadly by the CJEU since it can include not only

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[47] Case C-382/87, CJEU 16 May 1989, *Buet*, ECR 1989, I-1235.
[48] ibid [12]-[13].
[49] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Recitals 18 and 30.
[50] ibid Art. 5.

contractual but pre and post-contractual actions as well.[51] This test is used for the assessment of both misleading and aggressive commercial practices,[52] both of which are perceived by the Directive as influencing the average consumer to the point that they make "transactional decisions that they would not have taken otherwise".[53]

Thus, the "average consumer" test in the UCPD could be interpreted as taking into account the emotions of consumers and the circumstances that could affect their purchasing decision in order to help consumers make the optimal decision for themselves.[54] However, as will be developed in the last part of this paper, this theory has been contradicted by several authors.

As mentioned in Recital 18,[55] the average consumer test is not a "statistical test" and national courts have to exercise their own judgment to implement it (given that their decisions have to be in line with those of the CJEU on this matter). However, difficulties arise concerning the interpretation of the average consumer standard. The distinction between an average and a vulnerable consumer and the fact that the average consumer is taken as a benchmark means that the reference consumer excludes "less than averagely informed, observant and circumspect consumers".[56]

2. The Controversial Maximum Harmonisation

A main controversial point concerning this directive is its "full harmonisation" character. Indeed, the recitals specify that the UCPD is a maximum harmonisation directive which implies that Member States cannot offer any protection to consumers other than that which is offered by the European instrument.

Since the UCPD could be considered as a reaction to the above-mentioned case law, this directive is presented as an attempt at conciliation of the preservation of the free movement of goods principle for the sake of the good functioning of the internal market and a high level of consumer protection.[57] Thus, it seems that EU law is aware that the preservation of the principle of free movement of goods and a high level of protection for consumers may have seemed sometimes

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[51] Case C-281/12, *Trento Sviluppo* [2014] 1 W.L.R 890.
[52] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Art.5(4).
[53] ibid Art. 6, 7 and 8.
[54] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.
[55] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Recital 18.
[56] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 13-27.
[57] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Recital 1 and Art.1.

incompatible in their previous case law. However, the European legislator still seems convinced that only harmonisation can solve the problem by removing barriers to trade. In spite of this, Bram Duivenvoorde noticed that the Directive gives no definition of what should be seen as a high level of consumer protection.[58] Thus, it seems that the apparent inefficiency of the codification of the standard could be explained by the fact that there is no clear rationale concerning this pursued high level of protection and that EU law remains focused on the preservation of the free movement of goods principle.

It seems interesting to put this maximum harmonisation in perspective with the room for manoeuvre left to Member States when it comes to the interpretation of the "average consumer" standard. Indeed, the UCPD provides that Member States have to ensure that unfair commercial practices are sanctioned with the tools given by the Directive.[59] Nonetheless, if the interpretation of the Directive is left to Member States, they must follow the line of the decisions of the CJEU[60] and respect the principle of proportionality.[61]

However, one could not but notice that there is clearly a problem concerning the understanding of the principle of proportionality which requires Member States to limit consumer protection in order to preserve the free movement of goods. Thus, the contradiction that existed in the CJEU for several years remains in the UCPD.

3. The Impact of the Harmonised Standard on Member States

As mentioned, from the appearance of the standard at the CJEU to its codification in the UCPD, it appears that EU law has very high expectations concerning the abilities of the "average consumer". Indeed, in the Commission's Guidance, the average consumer is described as "a critical person, conscious and circumspect in his or her market behaviour".[62] However, these high expectations mean that some consumers who do not appear to be particularly observant and circumspect will not be protected.

In terms of harmonisation, this understanding of the "average consumer" standard can lead to problems given that some Member States traditionally have a very high level of consumer protection. For example, the first part of this paper

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[58] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 13-27.

[59] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Art.11.

[60] ibid Recital 18.

[61] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Recital 30.

[62] Guidance (EC) on the implementation/application of directive 2005/29/EC on unfair commercial practices, (2009) 1666, available at: https://ec.europa.eu/transparency/regdoc/rep/2/2009/EN/2-2009-1666-EN-F-0.Pdf, 25.

referred to several cases at the CJEU involving Germany which tend to prohibit commercial practices more easily than the CJEU on the basis of consumer protection.

Indeed, if some countries such as England or Italy were characterised by a "*laissez-faire*" approach or even high expectations on consumers,[63] German consumer protection was characterised by its broad scope since it did not only protect "ordinary" consumers but also more uncritical and ignorant consumers which led to a low threshold for the prohibition of unfair commercial practices.[64]

It seems then interesting to have a look at the effects of the application of the benchmark in these countries. It seems that in England and Italy, the standard was applied with some flexibility.[65] Both countries even appeared to move towards an approach that would take more emotional reactions of consumers and circumstances surrounding the purchase into consideration.[66]

This breakthrough of behavioural economics in national laws on consumer protection seem interesting in the light of the old German consumer benchmark. Indeed, it could be argued that the leniency of the German benchmark comes in part from the fact that German courts took into consideration a large variety of elements that could bias the consumers' purchasing decisions. For example, they took into account emotional reaction of consumers towards environment-related and health-related advertising.[67] Another example is German national courts emphasizing the importance of information in the understanding of a commercial practice by a consumer.[68]

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[63] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 155-162.

[64] BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128-130 – *Steinhäger* as mentioned in B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 79-102.

[65] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 155-162.

[66] England: *Office of fair trading v Ashbourne Management Services* [2011] EWHC 1237 – Italy: Tar Lazio, Sez. I, 19 May 2010, No. 12364 *Accord Italia – carta Auchan*, as mentioned in B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 155-162.

[67] BGH 20 October 1988, I ZR 238/87, GRUR 1991, 546 - *Aus Altpapier* as mentioned in B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 79-102.

[68] BGH 18 February 1982, I ZR 23/80, GRUR 1982, 563, 564 - *Betonklinker* as mentioned in B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 79-102.

This explains that the application of the benchmark as developed by the CJEU and then codified requires a lot of adaptation in Germany. Higher expectations were progressively introduced in the national law but despite the changes, German law remains more sympathetic towards consumers and is still not considered to be in conformity with the decisions of the CJEU. For example, false statements are systematically prohibited under German law[69] unlike in the context of the CJEU case law.[70]

Thus, it could be argued that if the European legislation gave a "full harmonisation" character to the UCPD in order to increase legal certainty in terms of laws on consumer protection in different Member States, this "legal certainty" still seems a long way off. Indeed, if the standard led to a heightening of the level of protection in countries that traditionally did not offer much protection to consumers facing unfair commercial practices, it also led to a lowered protection in countries that already offered good protection to consumers facing this type of commercial practices. However, it seems that the room for manoeuvre left to Member States tempering the maximum harmonisation of the UCPD is a good point for the level of consumer protection, in the sense that it allows national courts to adapt the standard to the particularities of their domestic consumers.[71]

B. "Targeted Differentiation": Doubts on the Alternative Offered for More Vulnerable Consumers

Given the high expectations of EU law concerning the economic behaviour of consumers, additional protection was needed for consumers who do not meet the requirements of the "average consumer". Thus, the Directive adapted the "average consumer" test to target groups and possibly vulnerable consumers by referring to a "clearly identifiable group of consumers who are particularly vulnerable (…) because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee".[72] When this type of consumer is targeted, the unfair and misleading character of the practice has to be assessed "from the perspective of the average member of that group".[73]

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[69] BGH 20 December 2001, I ZR 215/98, WRP 2002, 977 - *Scanner-Werbung* as mentioned in B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 79-102.

[70] Case C-281/12, *Trento Sviluppo* [2014] 1 W.L.R 890.

[71] Vanessa Mak, "Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive", Tilburg University Working Paper June 2010, http://www.ssrn.com/link/Tilburg-TISCO-Banking-Financing.html.

[72] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Art. 5(3).

[73] ibid Art.5(3).

Authors such as Bram Duivenvoorde consider that there are three consumer benchmarks in the UCPD [74]: the average, the targeted and the vulnerable consumer. However, it seems that the demarcation between the "average consumer" and "targeted groups" is not clear given that the Directive provides that the "average consumer" can be "reached" or "addressed" by the commercial practice. [75] Nevertheless, it could be argued that "targeted" groups and "vulnerable" consumers will usually receive equal treatment under the Directive in practice. A good example to justify this assumption would be that the Directive itself[76] seems to mix up both standards in Article 5(3).

When it comes to defining who the vulnerable consumer is, problems begin to arise.[77] For example: how can we identify the credulity of consumers? Does the "vulnerable consumer" standard imply that every naive person or every person of below average intelligence should be seen as a vulnerable consumer? On this point, several authors such as Rosella Incardona and Cristina Poncibo emphasised that if the "vulnerable consumer" standard was first introduced in order to temper the "average consumer" standard, it lacked "practical and logical foundations".[78] The rationale behind this idea is that there is not enough justification for this standard and that it adds even more difficulty given that, according to the directive, traders have to be able to foresee the vulnerability of consumers.

If the list of elements used to characterise the vulnerability is non-exhaustive, it still seems that the UCPD addresses only one angle under which vulnerability can be addressed.[79] Indeed, by merely taking into consideration the limited abilities of some consumers to understand and react to a commercial practice, the Directive excludes the problems of the degree of exposure to some commercial practices (for example unemployed people) and the consequences of such practices on some consumers (for example the consequences of indebtedness for poorer consumers).[80]

Moreover, the lack of justification of the "vulnerable consumer" alternative standard can be seen in the fact that it is difficult to imagine how old persons or persons with physical infirmity will necessarily be unable to fully comprehend a commercial practice and make a good purchasing decision.

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[74] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 13-17.

[75] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Art. 5(2)(b).

[76] ibid Art. 5(3).

[77] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[78] ibid.

[79] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 179-192.

[80] ibid.

This part of the paper develops on the idea that the attempts for harmonisation do not seem particularly efficient and that there is no justification concerning the assumption according to which a complete harmonisation of the standard would lead to a higher level of consumer protection. This part goes further to assert that the "average consumer" standard in itself does not seem to establish a high level of protection for all consumers and that there are doubts concerning the alternatives of protection that the "target group" and the "vulnerable consumer" standards could offer. In light of more protective national laws and more particularly German consumer law, it appears that this low level of protection might come from the fact that the standard overlooks many elements that could influence consumers' purchasing decisions.

III. A CONTROVERSIAL EMPOWERMENT OF CONSUMERS THROUGH THE "AVERAGE CONSUMER" STANDARD AND A DOUBTFUL "HIGH LEVEL" OF PROTECTION OF EUROPEAN CONSUMERS

A. From an "Average" to a "Desirable" Consumer: Does the Standard Provide European Consumers with a High Level of Protection?

Since the Guidance from the Commission [81] specifies that the "average consumer" standard interpreted in accordance with the provisions of the TFEU requires a high level of consumer protection, the high expectations of the CJEU concerning the behaviour of the "average consumer' appeared quite controversial, as mentioned earlier.

If the Guidance from the Commission[82] mentioned that the standard should not be interpreted too strictly, it seems that the standard, as understood by EU law, is based on the assumption that "the consumer is presumed to be capable to work out for him or herself".[83] Indeed, it seems that the standard transformed the European consumer from the status of passive market participant to active market participant. Inevitably, this leads to some doubts concerning the level of protection offered to this consumer.

By comparison to the case law of the CJEU, the case law of the CFI (Court of First Instance) on trademarks-related cases seems to be much more lenient with the "average consumer". Indeed, in the situation of a targeted group of consumers, the CFI stated that if the average consumer of this group can be "careful and

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[81] Guidance (EC) on the implementation/application of directive 2005/29/EC on unfair commercial practices, (2009) 1666, available at: https://ec.europa.eu/transparency/regdoc/rep/2/2009/EN/2-2009-1666-EN-F-0.Pdf, 56.

[82] ibid.

[83] Vanessa Mak, "Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive", Tilburg University Working Paper June 2010, http://www.ssrn.com/link/Tilburg-TISCO-Banking-Financing.html.

attentive", others may not be "particularly well informed and attentive".[84] The CFI also mentioned, for example, that the average consumer may sometimes not pay a high level of attention to some features of and details on a product.[85]

The results of these divergences on the understanding of the standard between consumer law and intellectual property law seem to be a lack of legal certainty but also the fact that an emphasis is put on the vagueness of the standard which could result from a too simplistic approach of the "average consumer" standard in EU law. The rationale behind this idea is that case law from Member States and at the CFI showed that some instances consider different influences on the behaviour of consumers that seem to be overlooked by the CJEU and the UCPD. Thus, it seems interesting to have a look at the criticism levelled at the theoretical grounds of the "average consumer" standard.

The standard seems to be based on the idea that consumers are assumed to take information related to products particularly seriously,[86] to be able to foresee the consequences of their purchasing decisions and thereby make optimal choices for themselves.[87] Based on this reasoning, consumers are held responsible for their bad decisions.

At this point, one could not but notice a contradiction based on the fact that EU law recognizes the differences of behaviour related to cultural social and linguistic factors but appear (in practice) to turn a blind eye to all the biases that can influence a consumer's purchasing decision. As highlighted by different authors,[88] these influences can be found in behavioural studies which can offer a useful tool for the analysis of the "average consumer" standard in the context of the UCPD but also in EU consumer law more generally. These studies show that the standard as it is understood by EU law is not realistic and adequate with regard to the real reactions of consumers.

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[84] New Look Ltd v. Office for Harmonisation 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, para 20 as mentioned in Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[85] Procter & Gamble Company v Office for Harmonisation in the Internal Market (Trade Marks and Design) (OHIM) as mentioned in Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[86] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[87] Case C-220/98, *Estée Lauder* (*Lifting)* [1999] ECR 2000.

[88] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

1. Will Informed "Average Consumers" Always Make the Right Choice?

It seems clear that information plays an important role in the understanding of consumer behaviour resulting from the standard: the more information given to consumers (intelligible information)[89], the more they will act rationally. However, authors such as Rosella Incardona and Cristina Poncibo have argued that the availability and intelligibility of information do not ensure the correct understanding and evaluation of this information by consumers.[90] Actually, some studies have shown that 100% of the population miscomprehends some elements of mass media communication, regardless of the level of education.[91]

Indeed, different influences on the perception and understanding of information have been detected. First, the treatment of information can be influenced by the level of attention of consumers.[92] Indeed, the idea according to which the consumer will systematically take time to gather information very carefully and to evaluate each element for its advantage or disadvantage seems unrealistic. For example, due to the selective character of consumers' attention,[93] emphasis should be put on the quality of the information given rather than on the quantity since too much information can discourage consumers to read it in the first place before even taking it into consideration.[94] Bram Duivenvoorde also highlighted that consumers' level of attention can be influenced by their involvement which can, for example, depend on their perception of the importance, relevance or value of a product.[95] A last example concerning the level of attention of consumers mentioned by Bram Duivenvoorde is the personality of consumers and most importantly their "need for cognition" (the level of thinking that a person needs) since it appears that consumers with a higher need for

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[89] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, Art. 6.

[90] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[91] J.Jacoby "Is it rational to assume consumer rationality?" Roger Williams University Law Review 2000, pp. 81-161 as mentioned in B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, p. 165-178.

[92] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[93] J. Jacoby, "Perspectives on information overload", Journal of Consumer Research 1984, 10, 432-435 as mentioned in Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[94] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[95] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437 p. 165-178.

cognition will tend to take more information into consideration in their decision-making.[96]

The second argument that counters the importance given to information in the standard relies on the assumption that consumers' perception is objective is unrealistic and should be abandoned.[97] In fact, it seems clear that perceptions in general are objective and that this includes the perception of information which can be biased, for example, by beliefs emanating from education, or, as will be developed later, by emotions.

The third argument could be the important role of memory in the decision-making process. Indeed, Bastian Schüller refers to the "availability heuristic" which refers to the situation in which consumers evaluate a product or service with their experience and imagination. For example, a lot of consumers will adopt a method called "rule of thumb" to make a decision, which means that they will choose a product that they were satisfied with in the past even if they know that there may be something even better for them on the market.[98] The reasoning is explained in detail by Bram Duivenvoorde who suggests that the higher the level of "familiarity" (which refers to the experience of the consumer with the product) the consumer has, the more the consumer will take technical information concerning the product into consideration.

2. Is the "Average Consumer" Always Rational?

Referring to behavioural studies, Rosella Incardona and Cristina Poncibo highlighted that human beings are not completely rational or aware of every element that could affect their decision.

On the contrary, consumers can make risky or uncertain decisions.[99] Indeed, Bastian Schüller describes the consumer as a "bounded" consumer in the sense that they are, for example, bounded in their rationality (since they have a limited capacity of evaluation of situations and consequences in the context of their decision-making process) or bounded in their willpower (since consumers are subject to emotional influences for example, they can make quick choices that go against their long-term interests).[100]

One could not but notice yet another contradiction since it seems that EU law is perfectly aware that consumers can make quick choices that appear to go against their long-term interests given that consumers are sometimes offered withdrawal

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[96] ibid.

[97] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[98] ibid.

[99] ibid.

[100] Bastian Schüller, "The definition of consumers in EU consumer Law", in James Devenney and Mel Kenny (eds) *European Consumer Protection, Theory and Practice* (Cambridge University Press 2012), 123-142.

rights that allow them to go back on their purchasing decision within a certain time limit. It is interesting to note that by offering this type of right to consumers, EU consumer law implicitly recognises the importance of behavioural economics without giving them greater prominence (or even by turning a blind eye to them).

This is not to say that the reasoning and calculation of the consumer can be faulty.[101] For example, Bastian Schüller refers to the "representativeness heuristic" and the "anchoring and adjustment" strategy. Indeed, he explains that in the context of the "representativeness heuristic", which is a reasoning based on associations that lead consumers to think for example that two products will belong to the same category, the consumer can be, for example, blinded by stereotypes and ignore prior probabilities. Bastian Schüller further explains that in the context of the "anchoring and adjustment heuristic", which is an estimation based on a reference point, the calculation of the consumer can be biased if, for example, the adjustment from the reference point is insufficient.

It is also important to keep in mind that above all, it seems that consumers are more "emotional" than "rational". Indeed, it seems clear that the behaviour of consumers is influenced by unconscious factors that can vary with their emotions. For example, Rosella Incardona and Cristina Poncibo refer to the influence of mood and feelings but also to the social influence.[102] As for the influence of the mood, this refers, for example, to the situation where a consumer's good mood can bring back good memories concerning a product. Social influence can notably be expressed by the fact that some consumers buy a product not only for its function but also for what it symbolises, and for the social status it gives. Authors even highlighted that traders are aware of this reasoning since they use the admiration of a certain type of consumers who represent a certain lifestyle to influence their consumers (for example by casting celebrities in their commercials). Bastian Schüller also mentioned that the imagination of consumers can bias their decision-making process. This can happen for example through an underestimation of risks that could arise from the purchasing decision.[103]

The use of behavioural economics has been criticised[104] since this science takes into consideration a large variety of consumer behaviour and makes it even more difficult to predict with certainty the future reactions of consumers. However, Bastian Schüller highlighted that behavioural economics can be used as a tool to understand the deviations from the expected behaviour of the "average consumer".[105]

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[101] ibid.

[102] Rosella Incardona and Cristina Poncibo, "the average consumer, the unfair commercial practices directive, and the cognitive revolution", J Consumer Policy (2007) 30:21-38.

[103] Bastian Schüller, "The definition of consumers in EU consumer Law", in James Devenney and Mel Kenny (eds) *European Consumer Protection, Theory and Practice* (Cambridge University Press 2012), 123-142.

[104] ibid.

[105] ibid.

Anyway, it seems important to wonder: can there really be a standard for a typical behaviour? The idea in itself seems quite unrealistic, more so in the context of EU consumer law, with pan-European ambitions. Indeed, Bram Duivenvoorde highlighted that even if the CJEU mentioned that social, cultural and linguistic factors had to be taken into consideration, it can only ignore the most significant differences between Member States regarding these aspects in practice since Europe cannot actually be seen as "one" market.[106] Indeed, major cultural differences have been found concerning the types of information to which consumers from certain Member States are sensible or concerning the different ways to read labels.[107]

B. Is the "Average Consumer" a "Consumer-Citizen"?

It seems that the "average consumer" standard can find its origins in broader economic or even political considerations. Indeed, if aforementioned EU law and policies tended (in the past) to be merely oriented towards the preservation of the good functioning of the Internal Market through removing barriers to trade, it seems that more recently, EU law took another turn.[108] Although it still seems focused on the idea of "harmonisation", the pursued harmonisation this time requires a redefinition of the role of citizens, who become "empowered" citizens and have a much more active role in the policy making of the EU.[109]

It appears that this desire to improve cohesion on a pan-European level impacted the role of consumers on the internal market since policy strategies started to mention the redefinition of the role of consumers who needed to be put on the "driving seat" given that they were able to "manage their own affairs".[110] The "transformation" of the consumer from a passive market participant to an active actor in the market was even explicitly mentioned in the EU consumer Policy Strategy 2007-2013 with the idea that consumers have to "fulfil their role in the modern economy".[111] In practice, this does not only take the form of

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[106] B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 165-178.

[107] M. De Mooij, "Consumer behaviour and culture: consequences for global marketing and adversiting", Thousand Oaks: Sage (2004) as mentioned B.B., Duivenvoorde, "The consumer benchmarks in the Unfair Commercial Practices Directive" (2014) University of Amsterdam Digital Academic Repository, available at: http://dare.uva.nl/search?arno.record.id=480437, 165-178.

[108] K.J.Cseres and A.Schrauwen, "Empowering Consumer-Citizens: Changing Rights or Merely Discourse?", (2012)Amsterdam Law School Legal Studies Research Paper No. 2012-03, available at: http://ssrn.com/abstract=2154869.

[109] European Commission (2010a). Communication from the Commission. *Europe 202. A Strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final.

[110] European Commission (2007d). Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions. *EU Consumer Policy Strategy 2007-2013 – Empowering Consumers, Enhancing Welfare, Effectively Protecting Them*, COM(2007) 99 final, 3, 5.

[111] ibid [2].

consultations of consumer organisations in the policy-making process, but this also leads to consumers being held more "responsible". As a result, it has been noticed that citizens and consumers were "merged into the "consumer-citizen" model" by the process.[112]

CONCLUSION

In the first part, this paper explained that if consumer protection was initially secondary to the protection of the economic interests of traders, EU law turned towards a promotion of the harmonisation of consumer protection. This harmonisation, which was progressively developed in a context of incoherence between positive and negative harmonisation, implied to offer a common set of legal rules to European consumers which was meant to empower them. However, the legislative harmonisation was not counting on the role that the CJEU gave itself concerning the free movement of goods principle. The "average consumer" standard emerged in a context of sanctions of national measures prohibiting products and advertisements that were considered misleading for consumers. The above-mentioned "empowerment" of consumers through rights such as the right to information led to high expectations of the behaviour of consumers, tempered by alternatives (the most important and relevant being the "vulnerable consumer" standard) offering a higher level of protection for certain consumers in certain circumstances.

The second part focusing on the codification of the standard in the UCPD highlighted the full harmonisation directive contains not only provisions on the "average consumer" but also on the above-mentioned alternative. This part discussed the relative efficiency of the "maximum harmonisation character" of the directive since room for interpretation of the standard is left to national courts which do not seem to have the same understanding of the proportionality principle as EU law. This explains that some countries that, traditionally, have low expectations of the behaviour of consumers and who had to lower their domestic level of consumer protection are sanctioned because of their misinterpretation of the standard. This is not to mention that since the alternative offered by the "vulnerable consumer" standard does not seem to help to cover all consumers, national courts started to interpret flexibly the standard and to take behavioural economics into consideration in their analysis.

In the final part, this paper listed different sorts of influences of the commercial behaviour of consumers introduced by behavioural economics which challenge the standard by proving that informed "average consumers" do not always make optimal choices for themselves and also that the assumption that an

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[112] K.J.Cseres and A.Schrauwen, "Empowering Consumer-Citizens: Changing Rights or Merely Discourse?", (2012) Amsterdam Law School Legal Studies Research Paper No. 2012-03, available at: http://ssrn.com/abstract=2154869.

"average consumer" would always be rational is unrealistic. Finally, the last paragraph of the third part considers that this "empowerment" of consumers could come from broader political considerations since EU policies seem to enhance the idea of responsible and autonomous EU citizens who actively take part in the work of the EU.