

The Unfair Commercial Practices Directive and Vulnerable Consumers

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Table of Contents

1. The Unfair Commercial Practices Directive.....	2
1.1. Markets, Marketing, and Decisions.....	2
1.2. The Scope and Exemptions.....	4
1.2.1 . Full Harmonisation.....	4
1.2.2 . Exemptions.....	5
1.3. Unfair Commercial Practices.....	7
1.3.1 . Requirements of Professional Diligence.....	7
1.3.2 . Economic Distortion and the Average Consumer.....	8
1.3.3 . Social, Cultural, and Linguistic factors.....	10
1.3.4 . The Long Tail of Consumer Deception.....	11
1.4. Preliminary Conclusions.....	12
2. Vulnerable Consumers.....	13
2.1. Protection of Vulnerable Consumers in the Directive.....	13
2.1.1 . Undue Influence.....	15
2.1.2 . Blacklisted Commercial Practices.....	16
2.2. Human Decision-Making and Behavioural Economics.....	17
2.2.1 . Information and the Information Paradigm.....	18
2.3. Empowered and Vulnerable Consumers.....	20
2.3.1 . Cognition and Learning.....	21
2.3.2 . Vulnerable Consumers.....	22
2.3.3 . Children and Adolescents.....	24
2.4. The Right to Self-Determination.....	25
2.5. Preliminary Conclusions.....	26
3. Enhancing the Protection of Vulnerable Consumers.....	26
3.1. Improvement Through Interpretation.....	27
3.1.1 . Reconsider the Average Consumer.....	28
3.1.2 . Reconsider the Professional Diligence.....	30
3.2. Improvement Through Revision of the Directive.....	33
3.2.1 . Reconsider the Dual Legal Standards Approach.....	33
3.2.2 . Vulnerable Groups and Individual Consumers.....	33
3.2.3 . Per Se Prohibitions and a White List.....	34
3.2.4 . (Re-)Consider the Full Harmonisation Approach.....	35
3.3. Improvement Through Enforcement and Coordination.....	36
3.3.1 . Guidelines.....	37
4. Conclusions.....	37

Abstract: Consumer protection is deeply anchored in EU law, including the Treaty and the Charter of Fundamental Rights. This article discusses the concept of consumer vulnerability and how vulnerable consumers are protected in the context of commercial practices which is fully harmonised by the Unfair Commercial Practices Directive (2005/29). The dual requirement of professional diligence and economic distortion entails that traders may distort the economic behaviour of the average consumer if the commercial practice comply with requirements of professional diligence. Also, it is legitimate to distort the economic behaviour of consumers 'below

average' even though the practice does not meet the requirements of professional diligence. The Directive's adoption of the European Court of Justice's 'average consumer' entails that protection is generally provided only for those who are far from vulnerable. The Directive's Article 5(3) concerning vulnerable consumers protects only—and to a limited extent—groups who are vulnerable due to mental or physical infirmity, age or credulity. Even though consumers make many good choices, all consumers are vulnerable in certain situations—often due to time constraints, cognitive limitations, and/or bounded rationality as convincingly demonstrated in behavioural economics. Those consumers who are vulnerable in the light of the Directive are those who are at risk of having their economic behaviour distorted by lawful commercial practices. In the article, the author suggests how the directive's protection of vulnerable consumers may be improved through interpretation, revision, and new initiatives. It is not possible to protect all consumers from bad consumption, but welfare loss originating from certain commercial practices may be reduced.

*** This working paper is up to date as of March 2013**

Consumers are generally assumed to be weaker than their commercial counterpart in consumer contracts and other business-to-consumer relations.¹ The Unfair Commercial Practices Directive² ('the Directive') fully harmonises business-to-consumer commercial practices with a view to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by protecting consumers against commercial practices harming their economic interests.

1. The Unfair Commercial Practices Directive

The Directive applies to unfair business-to-consumer commercial practices³ which is a broad concept that applies to commercial activities before, during and after a commercial transaction in relation to a product. The Directive aims at the collective consumer protection, i.e. the protection of consumers as a group in contrast to the protection of individuals through e.g. a right of withdrawal and protections against unfair contract terms. Before the Directive, commercial practices in the form of advertising was regulated in the Misleading Advertising Directive.⁴ In that directive the primary focus was on 'information' whereas the scope of the Directive is broadened to include businesses' conduct ('aggressive practices'). Even though the scope is broadened, the focus is still on the influence of consumers' economic behaviour.

The Directive introduces a general ban on unfair commercial practices (Article 5(1)) and specific (more 'detailed') bans on misleading and aggressive commercial practices. However, commercial practices are only banned to the extent the practice is likely to *materially distort the economic behaviour of the average consumer*. Thus, commercial practices must be assessed on a case-by-case basis, save for 31 commercial practices that are listed in Annex I and that in all circumstances are regarded as unfair (*per se* prohibitions).

1.1. Markets, Marketing, and Decisions

Advertising and other sorts of commercial practices play an important role in a market economy as it is an important source of information that consumers base their economic decisions on. Even

1 See e.g. Verica Trstenjak & Erwin Beysen: European Consumer Protection Law: Curia Semper Dabit Remedium?, CMLRev 48: 95-124, 2011, p. 121.

2 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

3 It should be mentioned that the European Parliament has asked the Commission to, in its review, to consider whether the rules on unfair commercial practices need to apply to business-to-business relations. See European Parliament resolution of 15 November 2011 on a new strategy for consumer policy (2011/2149(INI)), paragraph 43. See also European Parliament resolution of 13 January 2009, 2008/2114(INI), paragraph 4.

4 Directive 2006/114/EC concerning misleading and comparative advertising.

though consumers have their own experience, and also may get information from editorial reviews, unbiased tests, and their friends, the businesses' commercial communication may often be the only information that decisions are based on.⁵ The important role of commercial communication in consumers' decision making is also recognised in the Directive as it focuses on whether commercial practices distort or are likely to distort consumers' economic behaviour. Distortion of economic behaviour is related to impairing the consumer's ability to make an informed decision.⁶ As an illustrative terminology, we can use 'good consumption' to denote informed purchase decisions and 'bad consumption' to denote distorted purchase decisions.⁷ Thus, a goal of consumer protection in the context of unfair commercial practices must be to minimize commercial practices that lead to bad consumption, and if possible, impose (information) requirements that will enhance the consumers' ability to make good consumption. However, the cost of compliance and enforcement must also be considered.

It is clear that good consumption relies not only on traders' commercial practices, but also on other available information in the market, the consumers' preferences, and possibly more relevant, the consumer's ability to understand his own preferences.⁸ Further, in order for markets to be efficient, consumers must be both active and competent—'empowered consumers' is the preferred term in the European Union consumer policy.⁹ This entails not only that consumers have cognitive abilities to make good consumption, but also that they take the time to make such consumption. In general, good consumption relies on consumers' ability to overcome: 1) searching costs (the cost of gathering and comparing information), 2) switching costs (the cost of changing providers and testing new brands or products), and 3) bounded rationality (biases and heuristics in consumers decisions). These issues are of course complex and it is beyond the scope and purpose of this article to account in details for these issues here.¹⁰ However, consumers' bounded rationality is, to some extent, dealt with below.

It is not possible to achieve completely efficient markets, but marketing law is intended to support efficiency by prohibiting *unfair* competition. For traders, marketing—including the use of trademarks—serves the legitimate purpose of influencing consumers preferences. It may be argued that brands lessen product homogeneity and thereby product substitution which has a negative influence on the efficiency of markets, however, the monopoly created by trademarks is justified for other reasons. The admittedly very difficult task in marketing law is to draw the distinction between the trader's *legitimate influence* of consumers and their *illegal distortion* of consumers' economic behaviour. In the following, it is attempted to deduce some guidance from knowledge of human decision making (behavioural economics) and applying it to the Directive. But firstly, a brief introduction of the central Articles of the Directive should be accounted for.

5 It has been observed that trust exists more in horizontal relationships than in vertical relationships, and that research suggests that consumers trust strangers in their social network more than they trust experts. See Philip Kotler, Hermawan Kartajaya, and Iwan Setiawan: *Marketing 3.0*, Wiley, New Jersey 2010, p. 30.

6 See Article 2(1)(e).

7 See also David A. Hoffman: *The Best Puffery Article Ever*. 91 *Iowa L. Rev.* 1395 2005-2006, p 1398.

8 Research indicates that consumers may despite truthful information have difficulties in choosing products that best fit their stated preferences. See JCP article (forthcoming).

9 See below under 2.3. See also about empowering consumers, enhancing their welfare, effectively protecting them in COM/2007/99 concerning the EU Consumer Policy strategy 2007-2013.

10 For a thorough economic analysis of the Directive see Fernando Gómez Pomar: *The Unfair Commercial Practices Directive: A Law and Economics Perspective*, *Revista Para el Análisis del Derecho*, January 2006.

1.2. The Scope and Exemptions

1.2.1 . Full Harmonisation

It is settled case law that the Directive provides full harmonisation of *business-to-consumer commercial practises*.¹¹ This entails inter alia that Member States may not ban the use of particular sales promotions (such as e.g. discounts, gifts, premiums, and promotional games) without a case-by-case assessment under the Directive's general ban as presented and discussed below. However, it is still not clear to which extent Member States are free to interpret the ban on unfair commercial practices, i.e. how detailed guidelines the European Court of Justice ('the Court') will impose. It follows from Recital 18 that national courts and authorities will have to exercise their own faculty of judgement to determine the typical reaction of the average consumer in a given case—however, they must have regard to the case-law of the Court. So far the Court has not answered this question explicitly, but in recent case law it has left the interpretation of central issues to the Member States—including the requirement of professional diligence,¹² sufficient information to consumers,¹³ and whether national law pursues consumer protection objectives.¹⁴ This seems to indicate that the Court is reluctant to give detailed guidance on which commercial practices should be considered unfair.

It thus seems that the full harmonisation in the Directive only (or primarily) deals with the 'framework' for assessing commercial practices, but leaves it to Member States to determine within this framework whether a particular commercial practice is fair. Under the Misleading Advertising Directive, the Court has settled such issues itself—rather than leaving the final decision for the national court—whenever the evidence and information before it seemed sufficient and the solution clear.¹⁵ Therefore it seems clear that full harmonisation of unfair commercial practices is not achieved as it is likely that there will be substantial differences in Member States' interpretation of the directive.¹⁶

Despite the lack of 'real' full harmonisation, the Directive may contribute to the proper functioning of the Internal Market as expressed in the purpose (Article 1). It follows from Article 4 that Member States may not restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by the Directive. This entails that Member States may not apply its national interpretation in a way that would hinder foreign traders in the Internal Market to access its market. The Internal Market provision substantially limits possible restrictions in the Internal Market compared in particular to the protection of 'mandatory requirements'/'overriding requirements of the general interest' (including consumer protection)¹⁷ and the possibility of

11 See combined cases C-261/07 and C-299/07 (VTB-VAB), paragraph 49 and case C-304/08 (Plus Warenhandelsgesellschaft), paragraph 36. See also Cases C-206/11 (Georg Köck), C-522/08 (Telekomunikacja Polska), and C-540/08 (Mediaprint), paragraph 21: 'As is evident from recital 6 in the preamble to the Directive, only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is thus excluded from that scope.'

12 Case C-540/08 (Mediaprint).

13 Cases C-122/10 (Ving Sverige) and C-428/11 (Purely Creative and Others).

14 Case C-288/10 (Wamo).

15 Case C-210/96 (Gut Springheide), paragraph 30 with references.

16 See Fernando Gómez Pomar: The Unfair Commercial Practices Directive: A Law and Economics Perspective, *Revista Para el Análisis del Derecho*, January 2006, p. 12f., Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, *CMLRev* 43: 107-152, 2006, p. 127, and Vanessa Mak: Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive, *European review of Private Law*, 1-2011, p. 25-42, p. 29. See also European Parliament: State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation, July 2010, p. 10 and chapter 2.4. See similar European Parliament: Misleading Advertising on the Internet, July 2010.

17 See e.g. cases C-313/94 (Fratelli Graffione) and C-3/99 (Cidrerie Ruwet SA).

regulating ‘certain selling arrangements’¹⁸ in the Internal Market.

The Directive’s *scope* (business-to-consumer commercial practices) in Article 3(1) differs from the scope that may be deduced from the Directive’s *purpose* which is to approximate laws on unfair commercial practices which harm consumers’ economic interests. It is settled in the case law mentioned above that the scope of the Directive is in fact business-to-consumer commercial practices which entails that the scope also comprises practices that do not necessarily harm consumers’ economic interests. National legislation that pursues other objectives than consumer protection falls within the scope of the Directive as long as the law concerns business-to-consumer commercial practices.¹⁹ However, commercial practices that do not pursue objectives related to consumer protection fall outside the Directive’s scope.²⁰ Thus, if national legislation concerning unfair commercial practices of undertakings vis-à-vis consumers also pursues other goals than consumer protection, including e.g. competition law motives²¹ and the protection of small shopkeepers,²² it still falls under the scope of the Directive—which notably only considers the economic interests of consumers (and not other interests). Only if other community legislation is available, it will prevail according to Article 3(4).

For good measure, it should be mentioned that Recital 14 provides that the full harmonisation approach does not preclude that Member States specify main characteristics of particular products that are important, and of which the omission would be material in the context of an ‘invitation to purchase’. This seems to indicate that some levy is left to Member States to specify what constitutes an unfair commercial practice.

1.2.2 . Exemptions

There is a number of exemptions from the scope of the Directive. Some are given explicitly in the articles and others are mentioned in the recitals. Since recitals, at least in theory, are not intended to contain normative provisions or political exhortations²³—recognising that the Court increasingly looks to recitals for guidance²⁴—those exemptions should only apply if they are consequential to the scope or may be inferred from provisions in the Directive.

The Directive does not apply to: 1) rules on the validity, formation or effect of a contract, 2) rules relating to the health and safety aspects of products, 3) rules determining the jurisdiction of the courts, or 4) rules on the certification and indication of the standard of fineness of articles of precious metal.²⁵ These exemptions must be interpreted so that the Directive’s scope of application still comprises commercial practices which e.g.: 1) use undue influence to conclude a contract with a consumer (but not whether the contract consequently should be unenforceable), 2) use claims relating to health aspects of a product (without determining whether the product can be legally sold), 3) falsely give the consumer the impression that he can only sue the trader in the trader’s home court (without ruling out the possibility of the consumer being bound to that jurisdiction by

18 See in particular joined cases C-267/91 and C-268/91 (Keck and Mithouard).

19 Case C-540/08 (Mediaprint), paragraphs 28 and 41.

20 See cases C-559/11 (Pelckmans Turnhout) and C-288/10 (Wamo). See also Case C-323/12 (Euronics Belgium) [pending].

21 Georgios Anagnostaras: The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?, CMLRev 47, p. 147-171, 2010, p. 162.

22 Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 110f.

23 See also Joint Practical Guide of the European Parliament, the Council, and the Commission for persons involved in the drafting of legislation within the Community institutions, paragraphs 1.1 and 10.

24 Cathrine Barnard: Unravelling the Service Directive, CMLRev 45: 323-394, 2008, p. 324f. See to that extent e.g. Case C-428/11 (Purely Creative and Others) paragraph 53 making reference to Recital 18 of the Directive.

25 Articles 3(2), 3(3), 3(7), and 3(10), respectively.

appearance),²⁶ and 4) use false claims concerning certification of or fineness of articles in precious metals. It is clear from case law that in the context of unfair terms in consumer contracts, the Directive has no direct effect on the validity of such a contract—even though a commercial practice is found to be unfair.²⁷

In relation to *financial services*, as defined in Directive 2002/65/EC, and *immovable property*, Member States may impose requirements which are more restrictive or prescriptive. This is also possible until 12 June 2013 for *other national provisions* which implement directives containing minimum harmonisation clauses to the extent these measures are essential and proportionate to ensure that consumers are adequately protected.²⁸

Two other important exceptions that are not explicitly stated in the Directive's articles should also be mentioned here. The first concerns commercial practices that are not *directly* connected to a product, which seems to fall outside the scope of the directive, as the scope of application is concerned '... commercial practices ... in relation to a product'. This should be read in conjunction with the definition of 'business-to-consumer commercial practices' that requires a *direct* connection with the promotion, sale or supply of a product to consumers.²⁹ This 'exemption' that seems to exclude general *branding* activities from the scope seems neither logical nor intended. Even though 'product' must be understood broadly as to include in particular goods and services,³⁰ it seems difficult from a literal interpretation to include the general promotion of a brand. Of course, business brands may be closely linked to their products, but it remains questionable whether there is a *direct* connection between a business brand and the product.

It follows from Recital 7—which concerns the Directive's scope of application—that the Directive 'does not address legal requirements related to *taste and decency* ...'.³¹ As a rather confusing example it is mentioned that the commercial practice of 'commercial solicitation in the streets' may be undesirable for *cultural reasons*. If a ban on such practice could be said *only* to pursue that goal, the exemption could be deduced from the Directive's scope of application. However, cultural reasons are unlikely to be the sole (or even main) reason for imposing a ban on commercial solicitation in the streets—consumer protection seems to be a more likely reason.³² Therefore commercial solicitation in the streets is covered by the broad scope of the Directive, but it remains unclear whether the recital provides a proper exemption. However, a narrow interpretation seems likely, and it must be assumed that it only extends to national rules whose *only* purpose is to protect taste and decency. This could e.g. be issues relating to alcohol and nudity in advertising. It is unclear whether it could possibly extend to the use of fear and superstition; as such factors are likely to fall under the ban on aggressive commercial practices as dealt with below.

In a resolution, the European Parliament has called for initiatives to ensure that marketing and advertising guarantee respect for human dignity, without any discrimination based on gender, religion, convictions, disability, age or sexual orientation.³³ Such issues seem to fall under the scope

26 See Section 4 and Article 24 of Council Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

27 Case C-453/10 (Pereničová and Perenič), paragraphs 45 and 46.

28 Article 3(9) and 3(5), respectively.

29 Articles 3(1) and 2(1)(d), respectively.

30 Product is defined in Article 2(1)(c) as 'any goods or service including immovable property, rights and obligations'.

31 See also Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 122f and Christian Handig: The Unfair Commercial Practices Directive – A Milestone in the European unfair Competition Law?, EBLR Vol. 16, No. 5, 2005, pp. 1117-1132, p. 1118.

32 By means of comparison the Court found in the Buet case that a prohibition on 'canvassing' is a matter of consumer protection. Case C-382/87 (R. Buet and Educational Business Services SARL).

33 European Parliament resolution of 15 December 2010 on the impact of advertising on consumer behaviour (2010/2052(INI)), paragraph 32. The European Parliament further takes the view (Paragraph 33) that advertising can

of taste and decency, as long as these issues are addressed in a way that only disturbs people in their capacity of citizens and not as consumers—i.e. that it does not affect their transactional decisions—save for e.g. a consumer not wanting to buy products from a trader that appears to be sexist or blasphemous.

1.3. Unfair Commercial Practices

The Directive's aim of protecting consumers' economic interests is achieved with a general ban on unfair commercial practices, under which a commercial practice is unlawful if it is both: 1) contrary to the requirements of professional diligence and 2) likely to materially distort the economic behaviour of the average consumer as elaborated on below. Two more detailed bans concern misleading commercial practices (both misrepresentation and non-disclosure) and aggressive commercial practices that as such are considered to be contrary to the requirements of professional diligence. But the practice must still be likely to materially distort the economic behaviour of the average consumer in order to be unfair under the Directive.³⁴ Further, the Directive contains 31 specific *per se* bans that are found in Annex I, and which do not require an assessment of professional diligence or the likelihood of distorting the economic behaviour of consumers. Other commercial practices may be found unfair, however, only on a case-by-case basis, and provided that they satisfy the two-legged test of *professional diligence* and *economic distortion*.

1.3.1 . Requirements of Professional Diligence

Professional diligence is defined in article 2(1)(h) as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers'. Further, this must 'commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'—the latter sentence seems to subtract from the first. The concept is comparable to notions of good business conduct found in most legal systems of the Member States. In the transposition laws of some Member States, the requirements of professional diligence are to be assessed empirically rather than by means of a normative assessment as assumed in the Directive.³⁵ The standard of professional diligence resembles the exercise to be carried out under the negligence rule in tort law.³⁶ However, both preparatory works and case law regarding this requirement is very sparse.

According to the proposal for the Directive, the concept of professional diligence is necessary to ensure that normal business practices, which are in conformity with custom and usage, such as advertising based on *brand recognition* or *product placement*, will not be caught by the Directive, even if they are capable of influencing consumers' economic behaviour.³⁷ It follows from Article 5(3) that the advertising practice of making exaggerated statements or statements which are not meant to be taken literally ('puffery') is legitimate. However, product placement, for instance, which is also regulated in the Audiovisual Media Services Directive,³⁸ may not necessarily be an

be an efficient tool in challenging and confronting stereotypes and a lever against racism, sexism and discrimination, and thus calls on the Commission, Member States and advertising professionals to strengthen training and education activities as a way to overcome stereotypes, combat discrimination and promote gender equality, especially at a young age.

34 See also Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 127.

35 European Parliament study on Transposition and Enforcement of the Directive on unfair commercial practices (2005/29/EC) and the Directive concerning misleading and comparative advertising (2006/114/EC), p. 11.

36 Fernando Gómez Pomar: The Unfair Commercial Practices Directive: A Law and Economics Perspective, Revista Para el Análisis del Derecho, January 2006, p. 17.

37 Proposal for a Directive concerning unfair business-to-consumer commercial practices in the Internal Market, paragraph 53.

38 See Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative

accepted practice in all Member States.³⁹ Until recently the use of e.g. premiums, coupons, and promotional lotteries was not an accepted commercial practice in all Member States.

It follows from the definition of the standard that the focus is on the care, traders should exercise towards consumers. As discussed above, the Directive is likely to cover a number of commercial practices that in addition to the protection of consumer's economic interests also serve other purposes. In the *Mediaprint* case,⁴⁰ the ban on sales with bonuses was designed not only to protect consumers, but it also pursued other objectives, including the safeguarding of pluralism of the press and protection of the weakest competitors.⁴¹ The Court recognised that the nationally banned practice could distort the economic behaviour of consumers, but left it to the national court to decide whether the commercial practice is also contrary to professional diligence. It is thus still unclear whether e.g. the safeguarding of pluralism of the press and protection of the weakest competitors could constitute part of the professional diligence assessment. The definition seem to confirm this possibility as the standard also takes into account the *general* principle of good faith in the trader's field of activity. In the *Familiapress* case, which concerned free movement of goods, it was found that the maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods.⁴² But it is still unclear whether such purposes may form part of the professional diligence standard.⁴³ However, a national court may not relax on the requirement that the commercial practice should also be able to distort the economic behaviour of consumers in order to be deemed unfair.

1.3.2 . Economic Distortion and the Average Consumer

As mentioned above, the blacklisted commercial practices in the Annex are the only commercial practices that are prohibited without the need to assess whether the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer. This makes 'economic distortion' the single most important concept of the Directive—and admittedly also the most difficult to determine. The importance of economic distortion is in line with the purpose in Article 1 of achieving a high level of consumer protection by harmonising the area of unfair commercial practices harming consumers' *economic* interests.

Material distortion of the economic behaviour of consumers is defined in Article 2(1)(e). It entails that a commercial practice is used to appreciably impair the consumer's ability to make an informed decision, and that it should cause the consumer to take a *transactional decision*⁴⁴ that he would not have taken otherwise. What makes this equation difficult is both that we need to know: 1) what an informed decision is and 2) what the consumer would have done, if the commercial practice was not deployed by the trader. In the prohibition of unfair commercial practices, this test should be made in some kind of aggregate, as it must assess *an average consumer's behaviour*—i.e. the average consumer whom the commercial practice reaches or to whom it is addressed *or* the average member of the group when a commercial practice is directed to a particular group of consumers. It is not settled in the Directive when and how these three particular groups should be used.

action in Member States concerning the provision of audiovisual media services (codified version).

39 Article 11(2-3) prohibits product placement, save for product placement that comply with a number of requirements, and only to the extent Member States do not decide otherwise.

40 Case C-540/08 (*Mediaprint*).

41 Paragraph 15.

42 Case C-368/95 (*Familiapress*), paragraph 18.

43 Answered in the negative in Georgios Anagnostaras: *The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?*, CMLRev 47, p. 147-171, 2010, p. 159.

44 'Transactional decision' is defined in Article 2(1)(k) as 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting'.

Taken literally, the analysis would require an identification of the group(s) of consumers whom the commercial practice reaches, is addressed and/or directed to. Then it should be assessed whether the average consumer in this/these group(s) will change their behaviour due to the commercial practice. In order to do so, one would have to consider what decisions the average consumer would have taken, if the commercial practices were not deployed. However, every step of such a test would be cumbersome and in most cases right out impossible. It is mentioned in Recital 18 that national courts and authorities will have to exercise their own faculty of judgement to determine the typical reaction of the average consumer in a given case. In mathematical terms this sounds more like a *median* than the *mean* which is also an average—however; this does not make the above-mentioned exercise easier.

The assessment must, according to Recital 18, also be carried out with regard to the case-law of the Court. There is a substantial body of case-law on the average-consumer-test which focuses on an average consumer who is reasonably *well informed and reasonably observant and circumspect*. So if the actual, average consumer is not well informed and reasonably observant and circumspect, one will in his assessment have to lift the benchmark to represent one who is, and thereby raise the standard above the ‘real’ average consumer. In the light of research in human decision making, a consumer who is *reasonably well informed and reasonably observant and circumspect* should more correctly be referred to as some kind of ‘expert consumer’—described by the European Commission as a critical person, conscious and circumspect in his market behaviour.⁴⁵ It has been argued that the average-consumer-test, as applied by the Court, is a *normative abstraction* derived from economic fiction and that it has little in common with the behaviour of the real average consumer (i.e. human beings).⁴⁶ The idea of clever consumers falls well in line with the proposed consumer policy agenda⁴⁷ which focus on *the empowered consumer* which is further dealt with below. From preparatory works it appears to be a conscious choice to adopt the average consumer—as established by the Court—as the Directive’s benchmark rather than the vulnerable or atypical consumer as the benchmark consumer.⁴⁸

It appears to be an oxymoron, when it follows from recital 18 that the average-consumer-test is *not* a statistical test. And it would be more helpful, if the Recital instead would reveal what the test is intended to be. Firstly, it should be recognised that the Court has, with what appears as ease, given opinions on how the average consumer is expected to behave in various situations. For instance, in a case concerning food labelling, the Advocate General assumed that the average consumer will always take note of the information on the label (before acquiring it for the first time) and that he is also able to assess the value of that information.⁴⁹ In a similar case the average consumer was not found to be misled by the term ‘naturally pure’ (‘naturrein’) on the label on a strawberry jam which contained pectin gelling agent, the presence of which was duly indicated on the ingredient list.⁵⁰ In another case, where the marking of ‘+ 10%’ on the wrapping of ice-cream bars occupied approximately 30% of the total surface area of the wrapping,⁵¹ the average consumer was expected

45 Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009, p. 25.

46 See Rossella Incardona and Cristina Poncibò: The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution, *Journal of Consumer Policy* Issue, Vol. 30, No. 1, pp. 21-38, March 2007, and Jan Trzaskowski: Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive, *Journal of Consumer Policy*, number 3, September 2011, p. 381.

47 Proposal of 9 November 2011 for a regulation on a consumer programme 2014-2020, COM(2011) 707 final, 2011/0340 (COD).

48 Proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market, COM (2003) 356, 2003/0134 (COD), p. 8.

49 Case C-239/02 (Douwe Egberts NV), paragraph 54.

50 Case C-465/98 (Adolf Darbo AG).

51 David Kraft: Advertising restriction and the Free Movement of Goods – The Case Law of the ECJ, *EBLR* 2007, p 517ff, p. 521.

to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase.⁵²

The Court has decided these cases without any discussions of a psychological, economic or mathematical nature. This illustrates that the average consumer is in fact merely a 'normative abstraction' setting a standard for; not how consumers *do* behave, but how they *should* behave. This resembles the notion of the *Bonus Pater Familias* in tort law, and which represent how a(n average) citizen should behave in order not to be met with civil liability. In the light of traditional economic models—which the Court seems to support—the consumers' 'right to self-determination' entails that if consumers do not show enough care in their decision-making, they should not be protected against bad consumption. The equation refers to the ability to make an *informed decision* rather than the informed decision itself. The consumer, in other words, is still free to ignore all information and make a stupid decision, on the condition that his ability to make an informed decision was not appreciably impaired.⁵³ To the extent this model disregards limitations that the consumers do not have influence on, such as cognitive limitations, the model does not seem to protect such (vulnerable) consumers. In that vein the average-consumer-test, as applied by the Court in the context of trademarks and labelling, has been criticised for overlooking the real world of individual consumer behaviour and for setting an overly demanding standard for consumers.⁵⁴

In the *Mediaprint* case the Court notes that the fact that, for at least part of the public concerned, the possibility of participating in a competition represents the factor which determines the purchase of a newspaper constitutes one of the factors which the national court may take into account when making such an assessment, and that that fact may lead the national court to consider that the commercial practice in question materially distorts or is likely to materially distort the economic behaviour of the consumer, within the meaning of Article 5(2)(b) of the Directive.⁵⁵ This seems to indicate substantial levy on the national courts to determine whether the average consumer's economic behaviour is distorted.

The actual or potential distortion must be 'material' which entails that there must be a real risk of distortion of economic behaviour.⁵⁶ This must be understood in relation to how much the practice 'influences' the average consumer and not necessarily the loss on individual consumers. The collective economic injury must be substantial, whereas the loss on single consumer does not need to be substantial; so a practice that inflicts small economic injuries to many consumers is likely to be material.⁵⁷

1.3.3 . Social, Cultural, and Linguistic factors

It follows from recital 18—with reference to the Court's case law—that in applying the benchmark

52 Case C-470/93 (*Mars*), paragraph 24.

53 Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market, *CMLRev* 43: 107-152, 2006, p. 125.

54 Rossella Incardona and Cristina Poncibò: The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution, *Journal of Consumer Policy* Issue, Vol. 30, No. 1, pp. 21-38, March 2007, p. 39: 'The average consumer test reflects the economists' idealistic paradigm of a rational consumer in an efficient marketplace. This notion may be useful for economists' calculations and projections, but departs from the unpredictable realities of individual human behaviour and is hardly an appropriate standard for legislative or judicial sanctions'.

55 Case C-540/08 (*Mediaprint*), paragraphs 44 and 45.

56 See Cases 303/97 (*Kessler*), paragraph 33, C-456/93 (*Langguth*), paragraph 29, and C-465/98 (*Darbo*), paragraph 28.

57 Compare to US law where false claims are assessed with regard of the likely interpretation by a 'reasonable' consumer, and the effect of misleading one single consumer is not sufficient ground for liability. See Richard Craswell: Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere, *Virginia Law Review*, Vol. 92, June 2006, No. 4, pp. 565-632, p. 595f.

of the average consumer, social, cultural, and linguistic factors should be taken into account.⁵⁸ There is not a similar, explicit reference to these factors in the context of the professional diligence standard, but of course these factors could (/are likely to) be implicit factors of relevance in determining professional diligence. The Court's decision in the Mediaprint case to leave it to the Member State to determine whether the commercial practice in question was contrary to professional diligence may indicate that this concept should not be understood as one common EU concept; but rather an issue to be determined by national courts under national law—without assuming that the Court will refrain from providing guidelines for its interpretation.

In practice, this entails that if a trader (Trader A) in State A addresses consumers in State B, one would have to assess: 1) the professional diligence that Trader A is required to comply with, and 2) the average consumer behaviour in state B. Due to the internal market clause in Article 4, one would expect to apply the standard for professional diligence of State A (*lex causae*)⁵⁹—which of course *could* (but not necessarily *should*) take into account e.g. social, cultural and linguistic factors relevant in State B. In the assessment of the average consumer, however, account must be taken of these factors in State B as the addressed consumers are there. So if a commercial practice would be found to distort the economic behaviour of the average consumer in State B for e.g. cultural reasons, it is possible that the practice would not render it contrary to professional diligence for the same cultural reasons. Due to the cumulative nature of the two legs, such practice would not be unfair.

Cultural differences may lead to consumers perceiving information differently. This may concern the general tendency to believe statements in advertisements, but also how consumers interpret certain words or statements. Some consumers may, for instance, have a tradition of understanding the term 'free' as something that is given without consideration of any sort—as it seems to appear from the wording of Item 20 of the Annex,⁶⁰ but not from the Commission's non-binding interpretation.⁶¹ In the Clinique case,⁶² concerning the use of the name 'Clinique' for the marketing of cosmetic products in Germany, it was argued that the name could mislead consumers into believing that the products in question had medicinal properties. However, the Court found that *inter alia* due to the fact that the products in question were marketed in other countries under the same name apparently without misleading the consumers,⁶³ the German prohibition could not be justified by the objective of protecting consumers or the health of humans. This case illustrates that the Court previously has been reluctant to admit arguments of a linguistic nature, but maybe this will change in the context of commercial practices due to the explicit reference hereto.

1.3.4 . The Long Tail of Consumer Deception

Even though a commercial practice is found not to distort the economic behaviour, the focus on *an average consumer* may—all other things being equal—leave a number of consumers below the threshold of necessary care, and thus lead to lawful distortion of these people's economic behaviour. This will unavoidably be the result regardless whether one would consider the average-consumer-test to be a negligence standard or an attempt to reveal the expected reactions of real human beings.

58 See e.g. Case C-313/94 (Fratelli Graffione), paragraph 22.

59 See also Case C-509/09 (eDate Advertising) concerning choice of law and the country of origin principle in the E-Commerce Directive (2000/31).

60 It is prohibited to describe a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

61 See Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009, p. 56ff. as dealt with below.

62 Case C-315/92 (Verband Sozialer Wettbewerb).

63 Paragraph 21.

The ‘long tail’ refers to the statistical property that a larger share of population rests within the tail of a probability distribution which has been used to explain profitable niche strategies in retailing with focus on selling a large number of unique items in relatively small quantities (‘niches’)—in contrast to traditional ‘hit strategies’ with the sole focus on fewer, but very popular (and profitable) items.⁶⁴ The driving force in making niches profitable is primarily found in the diminishing cost of shelf space in electronic commerce. In contrast to traditional brick and mortar shops, the cost of adding an extra item on the virtual shelf is close to zero. The long tail theory has been applied to a number of other areas than retail, and in this context it is applied to diminishing costs of advertising on the Internet.

Marketing has also become cheaper in the wake of the diminishing cost of advertising space and communication in general through e.g. social media. If the long tail theory is applied in this context, it suggests that it will become profitable to target niches. It also means that the marketing campaign needs to influence fewer people in order to be profitable. The low cost of communication makes it economically viable to target more specific groups—or in other words—marketing need not speak to or attract the crowds. This mechanism is utilised in ‘Nigerian letters’ (advance-fee fraud scheme) and other online scams, in which e-mails are sent at virtually no cost to millions of users in the hope that just a few people can be tricked into sending money or disclosing account information.⁶⁵

The reality of consumer protection in the context of commercial practices is that it is unavoidable that some consumers are likely to be misled by commercial practices that is not deemed unfair. This will be the case no matter where the threshold is set—save for the situation in which a general ban on commercial practices is enacted. However, such a general band would harm the efficiency of markets and thus eventually leave all consumers worse off. The long tail of consumer deception entails that it may be profitable for businesses to rely on responses from those people who are not able to meet the requirements of the average consumer. Even if such a campaign was found to target only the group of such vulnerable consumers, it would still have to be assessed in light of the average consumer in that group. This is true even though such exploitation would be found contrary to professional diligence (e.g. aggressive).

1.4. Preliminary Conclusions

The Directive introduces a general ban on unfair commercial practices. However, due to the cumulative requirement of professional diligence and economic distortion, it is lawful to distort the economic behaviour of consumers to the extent the commercial practice is not found to be contrary to professional diligence.⁶⁶ If a commercial practice distorts the economic behaviour in a non-material way, it will also be lawful even though the practice may be found to be contrary to the requirements of professional diligence.⁶⁷ Even though a commercial practice is found not to distort the economic behaviour, the focus on *an average consumer* may—all other things being equal—leave a number of consumers below the threshold of necessary care, and thus lead to lawful distortion of these people’s economic behaviour. This leads to the conclusion that it is not always an unfair commercial practice to distort consumers’ economic behaviour.

As the average-consumer-test is a standard for how consumers should behave; it also entails that all consumers, who do not comply with this standard of care, are at risk of having their economic behaviour distorted by lawful commercial practices. Failure to comply with the required care may be due to in particular time constraints and cognitive limitations. Time constraints may be the result

64 See Chris Anderson, *The (Longer) Long Tail*, Hyperion, New York 2008.

65 Jan Trzaskowski: *User-Generated Marketing – Legal Implications when Word-of-Mouth Goes Viral*, *International Journal of Law and Information Technology*, Volume 19, Issue 4, 2011, p. 30 ff.

66 See to that extent the mentioned *Mediaprint* case.

67 The Directive only prohibits commercial practices that *materially* distort the economic behaviour of consumers, i.e. *appreciably* impair the consumer’s ability to make an informed decision.

of conscious decision (cost/benefit) or a consequence of the situation, however recognising that the time we may avail for commercial decisions are always limited. Cognitive limitations are not the result of a conscious decision; but limitations due to in particular experience and credulity.

2. Vulnerable Consumers

As it is established above that it to some extent is legal to distort the economic behaviour of certain consumers and in certain situations, the title of this article requires an examination of whether this group of misled consumers include vulnerable consumers. However, it also raises the question whether those consumers—whose economic behaviour it is legal to distort—are vulnerable already because it is legitimate to mislead them. That question incites a discussion on the whole concept of vulnerable consumers, which by no means is a clearly identifiable group of people.

2.1. Protection of Vulnerable Consumers in the Directive

In the context of the average-consumer-test, it is provided in recital 18 of the Directive that the Directive ‘also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices’.⁶⁸ It follows that ‘where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group’. This policy statement is followed up by Article 5(3) which provides that: ‘Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.’

In order for this specific provision to kick in, 1) the trader should reasonably be expected to foresee the material distortion of economic behaviour; 2) of a clearly identifiable group; 3) which is particularly vulnerable due to the reasons listed above. It follows that when the provision takes effect, the average consumer to be used is that of the vulnerable group—leaving those weaker than the average of the vulnerable group unprotected. Apparently it is not a requirement that the vulnerable group is particularly targeted by the commercial practices,⁶⁹ which entails that *all* commercial practices that may distort members of the vulnerable group of people, must be assessed in the light of this provision. However, a possibly significant limitation lies in the requirement that the trader should ‘reasonably’ be expected to foresee the distortion of the vulnerable group. That is of course more likely if the vulnerable group in question is targeted by the trader in order to exploit their particular vulnerability.

In terms of negligence standards, the expectations to the ‘quality’ of the average consumer’s behaviour are lowered. Regarding the trader, the requirement of professional diligence is supplemented by a requirement—or a defence available to the trader—to foresee certain distortions of the economic behaviour of these vulnerable groups. Both from a literal and a logical reasoning it is clear that this is indeed a negligence standard. A logical reasoning leads to the conclusion that traders may distort the economic behaviour of vulnerable consumers to the extent the trader should not reasonably have foreseen this distortion. This entails that uncertainties as to the possible distortion of the vulnerable consumers benefits the trader. As this is a negligence standard, an absurd consequence seems to be that a trader will be free to distort the economic behaviour of

68 See Peter Shears: *Overviewing the EU Unfair Commercial Practices Directive: Concentric Circles*, EBLR, 2007, p. 781ff., p. 784.

69 See Georgios Anagnostaras: *The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?*, CMLRev 47, p. 147-171, 2010, p. 168f.

vulnerable consumers even when he has actual knowledge of this—as long as he by this standard is not expected to have knowledge about this. It cannot be ruled out that the case-by-case approach of determining unfairness could be influenced by the trader’s actual knowledge. However, this would lead to another—and equally absurd—situation in which different traders could apply different commercial practices depending on their actual knowledge—which again would incite to blissful ignorance on the side of the trader.

The protection seems to be exhaustively limited to groups that are vulnerable due to mental infirmity, physical infirmity, age, or credulity.⁷⁰ So the provision does not protect other groups or ‘normal’ people who may be vulnerable due to lack of experience in the particular situation, time constraints, or cognitive limitations—unless the cognitive constrain is severe enough to be categorised as ‘mental infirmity’. Thus, if a particular group of consumers responds economically irrational to certain commercial practices, they are not protected as a vulnerable group—and they are not protected if they behave more irrational than the average consumer. The groups in question seems to revolve around age, i.e. young people who suffer from credulity and older people who are likely to be infirm. However, it has been suggested that the words ‘such as’ in Recital 19 could be read as an intention to make a merely indicative enumeration of the vulnerability criteria.⁷¹

In the Buet case⁷² it was found—in the context of free movement of goods—that *canvassing at private dwellings* exposes the potential customer to the risk of making an ill-considered purchase, but that a *right to cancel* would normally be sufficient to guard against this risk.⁷³ However, in the case of enrolment for a course of instruction or the sale of educational material, the court found a ban on canvassing justified due to a greater risk of ill-considered purchases in the targeted group of consumers. The Court emphasised that the potential purchaser often would belong to a category of people who—for one reason or another—are behind with their education and who are seeking to catch up, and that that makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects. The Court further stressed that because teaching is not a consumer product in daily use, an ill-considered purchase could cause the purchaser harm other than mere financial loss and which could be longer lasting.⁷⁴ It is unclear whether such a situation would fall under ‘credulity’ and thus be covered by Article 5(3). However, it seems clear that a Member State would not be able to uphold such a general (per se) ban after the introduction of the Directive—depending of course on the interpretation of taste and decency as discussed above.

It is important to note that the protection of vulnerable consumers only relates to the second leg of the unfairness-test (economic distortion), and that the requirement of professional diligence is not modified. This is emphasised in the last sentence of Article 5(3) that provides that this protection of vulnerable consumers is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally. Such statements are likely to distort the economic behaviour of consumers,⁷⁵ but seems to be immunised by that statement.

The possibility to take into account social, cultural and linguistic factors may also be perceived as a

70 See also Georgios Anagnostaras: The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?, CMLRev 47, p. 147-171, 2010, p. 169.

71 Georgios Anagnostaras: The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?, CMLRev 47, p. 147-171, 2010, p. 169.

72 Case C-382/87 (Buet).

73 Paragraph 12.

74 Paragraphs 13 to 15.

75 See about similar treatment of puffery under American law: David A. Hoffman: The Best Puffery Article Ever, 91 Iowa L. Rev. 1395, 2006, p 1396: ‘This speech is often intentionally misleading, is usually vivid and memorable, and induces many of us to rely on it. But the law, which normally punishes lies for profit, encourages this speech by immunizing it as “mere puffery”.’

protection of certain vulnerable consumers. This would comprise vulnerabilities deriving from national differences that may lead consumers in a particular state to e.g. be inexperienced with certain commercial practices or having a particular understanding of certain terms. The above-mentioned exemption of taste and decency may be derived from this possibility to take into account in particular cultural reason. In the same vein, one could argue that certain Member States do not have experience with e.g. coupons and product placement—as there have had been bans on such commercial practices—possibly also due to cultural reasons. As mentioned above, these factors may according to Article 4 not be used to prohibit commercial practices from other Member States, provided the practice is found lawful in these Member States.

As the focus of this article is on vulnerable consumers in the context of unfair commercial practices and the protection of consumers' economic interests, the situations of possible vulnerabilities are vast. In principle, the Directive covers all situations in which consumers make inferior choices relative to their preference *due to* a commercial practice. Because we are all potentially vulnerable whenever we have to make a *transactional decision*—as defined in the Directive—the limited focus on particular groups as dealt with in Article 3(5) does not protect all vulnerable consumers. Admittedly, children constitute a particular group of consumers that should be protected, but children are not vulnerable in all situations, and may in certain situations be far less vulnerable than their peers. The Commission has suggested that consumers who need to use wheelchairs might be a vulnerable group in relation to advertising claims about ease of access to a holiday destination or entertainment venue,⁷⁶ but this can not be seen as a vulnerability relating to their ability to make rational decisions, in the context of Article 5(3).

2.1.1 . Undue Influence

Undue influence is defined in the Directive as ‘exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision’,⁷⁷ and it follows from Article 8 that a commercial practice is aggressive if it inter alia by the use of undue influence significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise. As an example in the preparatory works is mentioned the situation where a consumer is already in debt to a trader and behind with payments, the trader would be using undue influence if he said that he would reschedule the debt on condition that the consumer bought another product.⁷⁸ Of course, one could argue the intentional or grave exploitation of vulnerable consumers in itself would be the exercise of ‘undue influence’.

In determining whether a commercial practice uses undue influence, it follows from Article 9 that account shall be taken of, inter alia, its timing, location, nature or persistence, and the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgement, of which the trader is aware, to influence the consumer’s decision with regard to the product. It is, however, noted in the preparatory works that the Directive focuses primarily on vulnerability from the perspective of consumers’ economic interests.⁷⁹ This aggressive practice still

⁷⁶ Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009, p. 30.

⁷⁷ Article 2(1)(j).

⁷⁸ Proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market, 18 June 2003, COM (2003) 356 final, 2003/0134 (COD), paragraph 71. The offering of an incentive to a consumer, such as a free bus to an out-of-town store, or refreshments while shopping, might influence a consumer but would not constitute undue influence because, as it would not impair the consumer’s ability to make an informed transactional decision.

⁷⁹ European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, paragraph 7.

require economic distortion. In Article 5(3), it is required that the trader could reasonably be expected to foresee the consequences, whereas in the context of undue influence it seems that the trader should have *actual awareness*.

2.1.2 . Blacklisted Commercial Practices

Annex I contains the list of 31 commercial practices which in all circumstances are to be regarded as unfair ('per se bans'). According to Article 5(5), the list applies in all Member States and may only be modified by revision of this Directive. The per se bans protect all consumers, including vulnerable consumers, with regard to the particular commercial practice regardless of how irrational the consumer behaves. The Annex effectively protects vulnerable consumers, but the items do to a large extent, only restate what would be prohibited under the general principles of unfair commercial practices.⁸⁰

The blacklist has been criticised for not being sufficiently precise, because of its use of vague notions which together with per se prohibition is likely to pose important problems in practice.⁸¹ There are a number of concepts that are open for interpretation—in particular in the light of the discussion on information mentioned below. Some items on the list requires that the trader claims something.⁸² It is not clear whether an explicit statement is required or just creating an impression of the claim. Other practices on the list point towards the former as these require the trader to 'claim or create the impression'⁸³ or 'state or otherwise create the impression'.⁸⁴ On the other hand, one item regards 'explicitly informing a consumer',⁸⁵ which may exclude impressions inferred implicitly. The need to consult an 'average consumer' is not completely eliminated by the blacklist, as some of them focus on the impression created on consumers⁸⁶ or on acts performed by the consumer.⁸⁷ There may also be a need to consider some sort of professional diligence, e.g. when determining reasonable grounds that the trader may have for believing that he will not be able to offer advertised products (Item 5), if the trader promotes a product 'deliberately to mislead' the consumer⁸⁸ (Item 13), or when failing to respond to correspondence is done systematically 'in order to dissuade a consumer from exercising his contractual rights' (Item 27).

Further prohibited practices may be difficult to deal with in the context of proof. This includes proving that a false statement of limited availability is actually given in order to elicit an immediate decision and to deprive consumers of sufficient opportunity or time to make an informed choice (Item 7) or the intention of promoting a different product in bait and switch marketing (Item 6). Finally, there is a number of concepts that needs to be interpreted, including 'pyramid promotional scheme'⁸⁹ (Item 14) and when information on market conditions is 'materially inaccurate' (Items 12

80 Cf. Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 132.

81 Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 131.

82 To be signatory to a code of conduct (Item 1), that a code of conduct or his product has been endorsed (Items 3 and 4), the trader is about to cease trading (Item 15) or that products are able to facilitate winning in games of chance (Item 16), or that a product is able to cure illnesses (Item 17).

83 That the trader is not acting for purposes relating to his trade, business, craft or profession (Item 22).

84 That a product can legally be sold (Item 9).

85 That if he does not buy the product or service, the trader's job or livelihood will be in jeopardy (Item 30).

86 Creating a false impression concerning after-sales service and winning a prize (Items 23 and 31) or creating the impression that the consumer cannot leave the premises until a contract is formed (Item 24). Also in advertorials it is required that paid promotion must be 'identifiable by the consumer' (Item 11), and the consumer's 'impression' must be considered when a trader sends e.g. an invoice for products not ordered by the consumer (Item 21). See also C-428/11 (Purely Creative and Others) paragraph 25.

87 Requesting the trader to leave or not to return (Item 25).

88 Into believing that the product is made by that same manufacturer when it is not.

89 Schemes in which 'a consumer gives consideration for the opportunity to receive compensation that is derived

and 18). Clarification is also needed to determine what ‘unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item’ is in the context of describing a product as ‘free’ (Item 20), the Commission’s staff working document suggests that a sportsbag is ‘free’ even though it would require the payment of a membership fee in a gym.⁹⁰ In the context of won prizes, the consumer may be required to pay money or incur a cost for taking action in relation to claiming the prize (Item 31). According to the Court, this also includes a *de minimis* costs compared to the value of the prize (e.g. stamps or a simple telephone call),⁹¹ which could indicate a literal interpretation⁹²—contrary to the interpretation of ‘free’ in the staff working document. There is also a need to determine when an advertisement contains ‘a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them’ (Item 28).

It falls outside the scope of this article to discuss the blacklisted commercial practices in detail, but the intention is to demonstrate that even though Annex I seems relatively clear, there is still room left for interpretation. However, in most situations the assessment does not require consumers to comply with a certain standard of behaviour in order to be protected, which entails that vulnerable consumers are equally protected. One could argue that not all blacklisted prohibitions are suitable as *per se* ban, as it e.g. may be contrary to standards of freedom of expression to be too restrictive on the use of certain words such as ‘free’ without taking the circumstances into account.

2.2. Human Decision-Making and Behavioural Economics

Consumers must make a massive amount of decisions every day. Basically, consumers are expected to make good purchase decisions, i.e. decisions that match their preferences. In an ideal world, marketing consists of information and conducts that assist consumers in those purchase decisions. The trader’s influence of consumers’ preferences should be fair which entails that information should not be misleading and conducts should not be aggressive. Transactional decisions—the term used in the Directive—are generally based on goals, experience, and available information. The Directive focuses on those decisions that concern products, i.e. decisions whether to buy it or complain about it.

As the economic behaviour of consumers is basically a matter of human decision making, it makes sense to turn to the fast-growing body of research in behavioural economics which combines economics with psychology.⁹³ Already in 1935 it was established that practically everything that people want is wanted for some unconscious reason that the average person does not understand, and that apparent reasons are excuses rather than reasons (‘rationalization’).⁹⁴ Research in behavioural economics attempts to obtain a map of consumers’ bounded rationality by exploring the systematic biases that separate the beliefs that people have and the choices they make from the optimal beliefs and choices assumed in rational-agent models.⁹⁵ First of all, this body of research

primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products’. See Case C-515/12 (4finance) [pending].

90 Provided that the sports bag was offered to all new members, who could choose whether or not to take it, and new members paid the same price whether or not they took the bag. Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009, p. 56ff.

91 C-428/11 (Purely Creative and Others) paragraphs 34, 39, 42, and 47.

92 Ibid, paragraphs 42, 43, 46, and 48.

93 See in general the discussions in in Richard A. Posner: Rational Choice, Behavioral Economics, and the Law, 50 Stan. L. Rev. 1551 1997-1998, and Christine Jolls, Cass R. Sunstein, and Richard Thaler: Theories and Tropes: A Reply to Posner and Kelman, 50 Stan. L. Rev. 1593, 1997-1998

94 Donald A. Laird: What makes People Buy, Mcraw-Hill 1935, p. 22f. See also Daniel Kahneman: Thinking, Fast and Slow, Farrar, Straus and Giroux, 2011.

95 Daniel Kahneman: Maps of Bounded Rationality: Psychology for Behavioral Economics, The American Economic

may help to answer the question of what transactional decision the consumer would be likely to *have taken otherwise*, i.e. without the commercial practice in question. This is a fundamental part of the definition of material distortion as dealt with above. Secondly, behavioural economics (and other similar research) may give guidance on how consumers in general are likely to respond to particular commercial practices.

In order for consumers to make decisions that match their preferences, they process available information and respond to conducts based on both a cognitive and emotional response that to a large extent rests on the consumer's experience. In traditional economic expected-utility-theory emphasis is laid on the rational inference from the situation. A rational decision relies on both time and cognition—the consumer's 'processing power'—both factors are available in limited amount for all purchase decisions, and the availability will depend on both the consumer (cognition) and the circumstances (time and complexity). Research in behavioural economics (psychology) has shown that our feelings (pragmatic inferences) play an important role in human decision-making. We are biased towards certain options and apply a number of heuristics that deviate from rational behaviour in the economic sense—this allows us to make faster decisions. A fully rational person in economic terms has been connoted an *Econ* (aka '*Homo economicus*'), whereas *Humans* denote a person who responds like a real human being.⁹⁶

The central characteristic of consumers is not that they reason poorly but that they often act intuitively, and that the behaviour is not guided by what they are able to compute, but by what they happen to see at a given moment. Generally, theories in behavioural economics have retained the basic architecture of models dealing with rational agents, however adding assumptions about cognitive limitations designed to account for specific anomalies. One particularly unrealistic assumption of the rational-agent model is that agents make their choices in a comprehensively inclusive context, which incorporates all the relevant details of the present situation, as well as expectations about all future opportunities and risks.⁹⁷

2.2.1 . Information and the Information Paradigm

The less experience and knowledge we have, the more information we may need in order to make good decisions. The information provided by the trader is regulated in Article 6 (misleading actions) and 7 (misleading omissions) of the Directive. Article 6 basically qualifies which types of information may be misleading and thus contrary to the requirement of professional diligence.⁹⁸ The commercial practice in question will still only be unlawful if it is able to distort the economic behaviour of consumers. Article 7 requires (positively) the trader to provide 'material information that the average consumer needs, according to the context, to take an informed transactional decision'. Account should be taken of all features and circumstances concerning the commercial practices, including limitations of the communication medium. In order to be prohibited, the omission should still be capable of distorting the economic behaviour of consumers.

In addition to that information that may be material in the situation, it is further provided in Article 7(5) that information requirements established by Community law in relation to commercial communication including advertising or marketing shall be regarded as material. In addition, new

Review, Vol. 93, No. 5 (Dec., 2003), pp. 1449-1475, p. 1449.

96 Richard H. Thaler and Cass R. Sunstein: *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Penguin Books 2009.

97 Daniel Kahneman: *Maps of Bounded Rationality: Psychology for Behavioral Economics*, *The American Economic Review*, Vol. 93, No. 5 (December 2003), pp. 1449-1475, pp. 1469 and 1459. See also Richard A. Posner: *Rational Choice, Behavioral Economics, and the Law*, 50 *Stan. L. Rev.* 1551, 1997-1998, p. 1559 and Daniel Kahneman: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011.

98 See also Case C-281/12 (*Trento Sviluppo and Centrale Adriatica*) [pending].

information requirements are introduced in connection to an ‘invitation to purchase’.⁹⁹ The required information resembles the information requirements in the Consumer Rights Directive,¹⁰⁰ but the application is broader and it kicks in earlier than the information requirements in the Consumer Rights Directive which is required only *before* the consumer is bound by a contract. The information requirement in the Directive may be required in advertising and thus before the situation in which the consumer is about to enter into a contract.

By these articles in the Directive, information is treated by prohibiting misleading information and by requiring the trader to reveal information which is material to the consumers’ decision. This is a sound and convincing approach, but the text does not help the trader or the law enforcer to identify what information is likely to deceive the average consumer or what information is needed for him to take an informed transactional decision. In economic theory, consumers are expected to read and understand available information in order to make rational (‘efficient’) choices. This approach has been adopted by the Court,¹⁰¹ and clearly expressed by Advocate General Fennelly: ‘Community law ... has preferred to emphasise the desirability of disseminating information, whether by advertising, labelling or otherwise, as the best means of promoting free trade in openly competitive markets. The presumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices.’¹⁰² The Directive reflects the same market-oriented approach and shares the belief in *the information paradigm*, which underlines transparency as the main method of consumer protection.¹⁰³

Information is a very complex matter to understand and evaluate, and consumers do not have much time on their hands. Consumers are expected—based on their experience—to make inferences from the information they are given—this allow few words in e.g. advertising to carry many bits of information. Deception appears when the consumer forms a belief about some proposition of fact. However, it is not easy to determine which inferences are drawn by consumers because even a single phrase within an ad may affect consumer beliefs in several different ways.¹⁰⁴ Issues of ‘information overload’ have also been recognised by the Commission in particular in relation to the ‘small print’ of contract terms and conditions.¹⁰⁵ It may indeed be relevant to note that the effectiveness of information is not a function of type size or amount of information alone, as any given disclosure also may be affected by e.g. whatever else is said, and whatever pictures are used.¹⁰⁶

99 Defined in Article 2(1)(i) as ‘commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase’.

100 Directive 2011/83/EU on consumer rights. Article 5 for contracts other than distance or off-premises contracts and Article 6 concerning for distance and off-premises contracts. See also Stephen Weatherill: The Consumer Rights Directive: How and why a quest for ‘coherence’ has (largely) failed, CMLRev, Issue 4, volume 49 (2012), p. 1279.

101 See in particular Case C-120/78 (Rewe-Zentral AG), paragraph 12.

102 Case C-220/98 (Estée Lauder Cosmetics), paragraph 25.

103 Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 108.

104 Richard Craswell: Interpreting Deceptive Advertising, 65 B.U. L. Rev. 657, 1985, p. 659ff. and 671f.

105 Commission Staff Working Paper on Consumer Empowerment in the EU, 7 April 2011, (SEC(2011)0469), paragraph 24 and European Commission: Communication on a European Consumer Agenda – Boosting confidence and growth, COM(2012) 225, chapter 3.3. See also Jacob Jacoby: Perspectives on Information Overload, Journal of Consumer Research, Vol. 10, No. 4 (Mar., 1984), pp. 432-435 and Fernando Gómez Pomar: The Unfair Commercial Practices Directive: A Law and Economics Perspective, Revista Para el Análisis del Derecho, January 2006, p. 24.

106 Richard Craswell: Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere, Virginia Law Review, Vol. 92, June 2006, No. 4, pp. 565-632, p. 582.

2.3. Empowered and Vulnerable Consumers

Consumer empowerment is the mantra of the European Commission's proposed consumer strategy which inter alia aim to protect the economic interests of consumers, as well as promoting their right to information and education.¹⁰⁷ Empowered consumers are considered to make optimal decisions by understanding their own preferences and the choices available to them, but this depends also on willingness and time to play an active consumer role. Empowered consumers maximise their own welfare, and are found to be significant drivers of growth, as they intensify competition and innovation inter alia by rewarding the businesses which are most efficient and best at innovating to respond to consumer demand. Empowered consumers should be both confident and knowledgeable and feel protected and they should have knowledge of their protection.¹⁰⁸ However, the feeling of protection and knowledge of rights, such as a right of withdrawal, are admittedly important in order to realise the Internal Market.

Under the title 'empowerment: consumers' responsibility in their own protection' the European Parliament has recognised that the reinforcement of vulnerable consumers' rights also include a strengthening of their capacity to make optimum decisions by themselves, for instance, through the provision of easily accessible and understandable information and consumer education.¹⁰⁹ However, the European Parliament expresses concern that this focus may be 'insufficient to protect vulnerable consumers, since their vulnerability may originate from their difficulty in accessing or assessing the information given to them'.¹¹⁰ In a previous resolution the European Parliament has stressed the need to educate consumers (from as early an age as possible)¹¹¹ the crucial importance of transparency and consumer information in the advertising field, and the need for consumers to develop a critical attitude to the quality of media content.¹¹² The European Commission emphasises that a key part of the solution to improving consumer empowerment rests with consumer media, journalism, and personal networks where consumers talk about both their positive and negative purchase experiences.¹¹³

A 'consumer empowerment index' has been constructed from data on consumer skills, knowledge of consumer rights and consumer engagement. It shows that consumer empowerment appears to be strongly linked to age, profession, education level and Internet use. Non-native speakers do not, however, appear to be less empowered than native speakers.¹¹⁴ However, consumer protection is apparently difficult to understand for the average consumer—according to the consumer empowerment survey only 2 per cent could correctly answer questions on their rights of withdrawal, guarantees and protection from unfair commercial practices.¹¹⁵

107Proposal for a Regulation on a consumer programme 2014-2020, COM(2011)707, Article 2.

108Commission Staff Working Paper on Consumer Empowerment in the EU, 7 April 2011,(SEC(2011)0469), in particular paragraphs 12, 18, and 23.

109See also Antonina Bakardjieva Engelbrekt: Empowering the European Consumer in Old and New Markets: What Place for EU Law?, *Europarättslig Tidskrift*, No 3/2011, p. 403.

110European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, paragraph 9.

111European Parliament resolution of 15 November 2011 on a new strategy for consumer policy (2011/2149(INI)), paragraph 23.

112European Parliament resolution of 15 December 2010 on the impact of advertising on consumer behaviour (2010/2052(INI)), paragraph 38.

113Commission Staff Working Paper on Consumer Empowerment in the EU, 7 April 2011,(SEC(2011)0469), paragraphs 26 and 27.

114Commission Staff Working Paper on Consumer Empowerment in the EU, 7 April 2011,(SEC(2011)0469), paragraphs 28 and 29.

115Eurobarometer 342 on consumer empowerment, April 2011.

2.3.1 . Cognition and Learning

As mentioned above, purchase decisions are a learning experience which relies on skills, experience and time.¹¹⁶ *Human* decision making relies to a large extent on the prefrontal cortices of the brain, and emotions are closely related to (and important for) effective learning and thus for effective decision-making.¹¹⁷ In that vein, it is valid to assume that consumers build experience through their transactional decisions, and thus that consumers who are making particular decisions for the first time will be more vulnerable than consumers that are experienced with that type of decisions. This will eventually lead to the fact that younger people in general are more vulnerable than older—assuming that consumers build experience with transactional decisions over the course of their lives. This also entails that decisions that are generally rare constitute a greater risk for consumers as they cannot build the necessary experience. Buying a car or a house is, for instance, less common to most consumers than buying milk and bread. However, one should also recognise that the consumer who is about to make a rare decision may be likely to hire professional assistance and/or spend more time on the issue—even though this may not help if the complexity of the decision challenges the consumer’s cognitive skills. This supports particular protection of younger people (and not necessarily elderly), situations of rare decisions, and decisions regarding complex products.

It has been noted that *Humans* have limited computational skills and seriously flawed memories.¹¹⁸ Research in behavioural economics does demonstrate that we are not necessarily as good at learning as we tend to believe.¹¹⁹ Experiments suggest that when people believe a conclusion is true, they are also very likely to believe arguments that appear to support it, even when these arguments are unsound, and many people are overconfident, prone to place too much faith in their intuitions.¹²⁰ Nobel laureate, *Daniel Kahneman*, notes on issues relating to *cognitive ease* that ‘a reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth.’ Similarly, people are more likely to believe statements in bold or blue (compared to red) even though there may be no ‘rational’ reason to believe the statement.¹²¹ Also the ‘halo effect’ refers to the tendency to like (or dislike) everything about a person, including things that are not observed.¹²² These and other biases of judgement and choice are fundamental to behavioural economics, and included issues of overconfidence, framing effects, and base-rate neglect.¹²³ Human memories does fade away, and it is reconstructed—in light of present values—every time we consult it.

Pain is educational, and we may learn from our mistakes and our regret. However, learning to choose is not free, and by relying on a particular level of experience by the average consumer we also acknowledge that it is acceptable to distort the economic behaviour of consumers who are unfamiliar with the particular transactional decision. It is also important to bear in mind that reputation and repeat sales does not deter scam operators who will be happy only to benefit from consumers’ first experience with the scam.¹²⁴

116See on this issue Sumit Agarwal, John C. Driscoll, Xavier Gabaix, and David Laibson: *The Age of Reason: Financial Decisions over the Life-Cycle with Implications for Regulation*, working paper prepared for the Brookings Papers on Economic Activity, 19 October 2009.

117See in particular Antonio Damasio: *Descartes’ Error: Emotion, Reason, and the Human Brain*, Penguin Books 2005.

118Christine Jolls, Cass R. Sunstein, and Richard Thaler: *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1997-1998, p. 1477.

119See about learning in Daniel Kahneman: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011, chapter 35.

120Daniel Kahneman: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011, p. 45.

121Daniel Kahneman: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011, p. 62.

122Daniel Kahneman: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011, p. 82.

123Daniel Kahneman: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011, p. 87f.

124See also Fernando Gómez Pomar: *The Unfair Commercial Practices Directive: A Law and Economics Perspective*, *Revista Para el Análisis del Derecho*, January 2006, p. 5.

2.3.2 . Vulnerable Consumers

There are many approaches to protect vulnerable consumers, but not really any clear definition of this group of people. It is most likely due to the fact that consumers are vulnerable for many reasons and in many different contexts.¹²⁵ In this context, the focus is on consumers who are vulnerable to commercial practices with regard to their ‘transactional decisions’ as defined in Article 2(1)(k).¹²⁶ Transactional decision is an important element of the definition of material distortion of economic behaviour of consumers,¹²⁷ and is broadly related to decisions whether or not to buy products and on which terms. The use of e.g. skinny models in advertising may inflict harm on vulnerable persons who are prone to eating disorders,¹²⁸ but as long as this harm is not related to their economic interests—in a stricter sense than their ability to live a normal life when being sick—it must be considered a matter of taste and decency falling outside the scope of the Directive. However, if the same advertising utilizes skinny models in order to sell products to this group, it must be considered as a group that is *potentially* vulnerable with regard to their economic interests.

In the context of commercial practices and in the light of the focus on empowered consumers, one could suggest to define vulnerable consumers as those that are not empowered. It is given that empowered consumers are better able to identify the best prices, selling conditions and quality. This is well in line with the requirements to the average consumers which seem to resemble an empowered consumer. In the ongoing work on adopting a consumer programme for the years 2014 to 2020. The Programme—with its four priorities of 1) safety, 2) information and education, 3) rights and redress, and 4) enforcement—intends to take into account new societal challenges which inter alia include the number of vulnerable consumers and an ageing population.¹²⁹ The work programme mentions vulnerable consumers a couple of times including in the context of social inclusion and as victims of the financial crisis, but the proposed regulation does not comprise details on what is meant by vulnerability.

The European Parliament has on 22 May 2012 adopted a strategy for strengthening the rights of vulnerable consumers.¹³⁰ It follows from the preceding report that the ambition for EU consumer policy should be a high level of empowerment and protection for *every* consumer,¹³¹ but the adopted resolution focuses only on *vulnerable* consumers.¹³² In Paragraph 34, the European Parliament ‘calls on the Commission and the Member States to collaborate on the adoption of a broad and coherent

125See examples of the protection of vulnerable consumers in Denmark, Estonia, Germany, Spain and the United Kingdom in the European Commission’s Compilation of Briefing Papers on Consumer Vulnerability, February 2012.

126“transactional decision” means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.’

127Article 2(1)(e): “to materially distort the economic behaviour of consumers” means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.’

128See also European Parliament resolution of 3 September 2008 on how marketing and advertising affect equality between women and men (2008/2038(INI)), paragraph 18: ‘[the European Parliament] notes that marketing and advertising portrayals of the ideal body image can adversely affect the self-esteem of women and men, particularly teenagers and those susceptible to eating disorders such as anorexia nervosa and bulimia nervosa; calls on advertisers to consider carefully their use of extremely thin women to advertise products.’

129Proposal for a Regulation on a consumer programme 2014-2020, COM(2011)707, p. 3.

130European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, p. 6. See also Committee on the Internal Market and Consumer Protection, Report of 8 May 2012 on a strategy for strengthening the rights of vulnerable consumers, 2011/2272(INI), Rapporteur: María Irigoyen Pérez.

131Committee on the Internal Market and Consumer Protection, Report of 8 May 2012 on a strategy for strengthening the rights of vulnerable consumers, 2011/2272(INI), Rapporteur: María Irigoyen Pérez, p. 6.

132European Parliament (Committee on the Internal Market and Consumer Protection): Draft report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)).

political and legislative strategy to tackle vulnerability, taking into account the diversity and complexity of all the situations involved' which is an admirable ambition, but also easier said than done. In its response to the consumer programme, the European Parliament has mentioned that also people that are made vulnerable by their social and financial situation (such as those with excessive debts) need special protection.¹³³ The European Parliament has noted that the Directive focuses insufficiently on the problem of vulnerability, limiting itself to consumers' economic interest.¹³⁴

The complexity of these issues are recognised by noting that the concept of vulnerable consumers usually is based on the notion of vulnerability as *endogenous* (~ 'proceeding from within'), and thus assuming a heterogeneous group comprised of persons who—on a permanent basis—are considered as such because of their mental, physical or psychological disability, age, credulity or gender. The resolution suggests that the concept of vulnerable consumers also should include consumers in a situation of vulnerability, meaning consumers who are placed in a state of temporary powerlessness resulting from a gap between their individual state and characteristics on the one hand, and their external environment on the other hand, taking into account criteria such as education, social and financial situation (for example over-indebtedness), access to the Internet, etc.¹³⁵ The Resolution recognises that all consumers are susceptible to becoming vulnerable consumers over the course of their lives due to external factors and their interactions with the market or because they have difficulties in accessing and comprehending relevant consumer information and therefore need special protection. The European Parliament has noted that the diversity of vulnerable situations hinders a uniform approach and the adoption of a comprehensive legislative instrument.¹³⁶

According to the Resolution, consumers may be vulnerable: 1) due to temporary or permanent causes that are inherent to the consumer or his physical or mental situation ('endogenous causes') and/or 2) due to lack of knowledge of the language, lack of education, including about the use of (new) technologies ('exogenous causes' (~ 'proceeding from outside')). It is provided that many consumers' vulnerability results from their lack of assertiveness (children or seniors, for example), from their lack of comprehension of the information they receive or of the options available or from their lack of awareness of the existing complaint and redress schemes.¹³⁷ The resolution identifies financial markets as a particularly problematic sector, and notes that advertisements for financial investment products often fail to sufficiently explain their underlying risks and overemphasise possible benefits that often fail to materialise.¹³⁸ It is also noted that the digitalisation of services may mean that consumers who, for various reasons, cannot access or use the Internet could find themselves in a situation of vulnerability, as they cannot take full advantage of the benefits of online commerce and are therefore excluded from a substantial part of the internal market, paying more for the same products or being dependent on assistance from others.¹³⁹ The resolution also addresses unemployment as vulnerability.

Members of these groups may be vulnerable in a number of situations, but it seems impossible to identify particular homogeneous groups which are always vulnerable with regard to their economic

133European Parliament resolution of 15 November 2011 on a new strategy for consumer policy (2011/2149(INI)), point I.

134European Parliament (Committee on the Internal Market and Consumer Protection): Draft report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)), paragraph 4.

135European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, under D.

136European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)).

137European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, p. 12f (explanatory statement).

138European Parliament (Committee on the Internal Market and Consumer Protection): Draft report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)), paragraphs 21 and 27.

139Paragraph 31.

interests in the context of commercial practices. However, it is possible to identify a number of factors that may make consumers vulnerable. These may in particular include age, education and actual skills (e.g. mathematical and linguistic), income (e.g. due to unemployment), health, and disabilities. In the context of the Directive and the consumers' efficient choice, the vulnerabilities mainly relates to their ability to gather and comprehend information and that they may be more credulous—i.e., for instance, the unemployed may be more susceptible to be influenced by a hope of future income, and the ill more prone to believe in possible cures—in particular if the person is terminally ill.¹⁴⁰ This issue is addressed in Article 9(1)(c) which include in the assessment of aggressive commercial practices 'the exploitation by the trader of any specific misfortune ... as to impair the consumer's judgement ... to influence the consumer's decision'. It is, however, a requirement that the trader is aware of the misfortune or particular circumstances. However, these consumers do not fall within the definition of groups of vulnerable consumers in Article 5(3), and therefore such practices are only prohibited if they are capable of distorting the average consumer's economic behaviour.

Certain products pose a larger risk than others. If, for instance, one is to refinance one's mortgage, wrongful information will impose a larger risk on the consumer than if he were tricked into buying a smaller product by offering a cheap pencil as a premium. However, as the Directive's focus is on human decision, one could argue that the significance of the risks should not bear on the vulnerability. Similarly, if a consumer were misled to buy a medicinal product that would be harmful to that particular consumer, one could argue that this is not a matter of the consumer's economic interests—recognising that harm to one's health is likely to influence a consumer's economy in a longer perspective. This may be an issue for more specialised regulation imposing restrictions, information requirements, and standardisation to relevant fields.

2.3.3 . Children and Adolescents

The European Parliament mentions children, teenagers and the elderly as groups of people who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity.¹⁴¹ In another context, the European Parliament's focus is on vulnerable consumers (in general), however, in particular children and adolescents. In this context, the European Parliament draws attention to the vulnerability of consumers to mimetism, which can lead to inappropriate behavioural attitudes, violence, tensions, disappointment, anxiety, harmful addictions (smoking, drugs), eating disorders, such as *anorexia nervosa* and *bulimia*, and disturbance of mental equilibrium.¹⁴² However, the focus of these issues of vulnerability do not relate directly to the consumers' economic behaviour and are thus not relevant in the context of the Directive.

Children and young people seem to be at least one clearly identifiable group of consumers who may be particularly vulnerable in many situations,¹⁴³ in particular due to their natural credulity and lack of experience. This group of people consumes a lot of products, but may to a large extent not be able to make purchases (or other transactional decisions) themselves. To the extent children and young people are not able to buy a particular product; it is hard to find it possible that their

¹⁴⁰This situation could be included by the reference to mental and physical infirmity in Article 5(3).

¹⁴¹European Parliament resolution of 15 November 2011 on a new strategy for consumer policy (2011/2149(INI)), point I.

¹⁴²European Parliament resolution of 15 December 2010 on the impact of advertising on consumer behaviour (2010/2052(INI)), paragraphs 26 and 31. The European Parliament encourages all advertising agencies and media professionals to reconsider the promotion of extremely skinny models (men or women) in order to avoid harmful messages about appearance, body imperfections, age and weight, taking into account the influence and impact of advertising on children and young people.

¹⁴³See e.g. European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, paragraph 28.

economic behaviour is being distorted within the meaning of the Directive. This does, however, not subtract from the fact that children and young people influence transactional decisions made by their parents. This is recognised in Item 28 in Annex I which prohibits advertisements (and apparently not other commercial practices) that include a *direct* exhortation to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them (utilizing ‘pester power’). If read literally, the provision will have far-reaching implications on advertising copy.

It seems reasonable to include commercial practices directed at children and young people in the Directive’s scope of application, as such commercial practices may in fact influence consumers’ economic behaviour. However, it is not clear whether one should consider the distortion of the child or young person or the distortion of the adult who will eventually be at risk of making bad consumption due to the commercial practice. It seems clear from Article 5(3) that the commercial practice is to be assessed from the vulnerable group only to the extent the practice is likely to materially distort the economic behaviour of that group. Recognising that children and young people influence the transactional decisions of their parents, it seems reasonable, firstly, to consider how the commercial practice will influence children and young people, and secondly assess how this is likely to influence the behaviour of the parents (or other adults). Parents will of course like all good *Econs* gather all relevant information and use their adult experience, whereas *Humans* are more likely to get carried away with their offspring’s wishes. Provided the list of vulnerable groups is exhaustive, parents are not likely to fall under the improved protection of Article 5(3). So this assessment has to be carried out in accordance with the general clauses—and taking into account Item 28 as mentioned above.

2.4. The Right to Self-Determination

As decision-quality to a large extent relies on both cognition and time spent to make the decision, it is obvious to assume that consumers influence the decision-quality by the time devoted to the decision. The average consumer negligence standard can be said to settle a reasonable level of cognitive ability and a reasonable time that the consumer is expected to spend on gathering and understanding information. This is e.g. clear from the Advocate General assumption in the above-mentioned Douve Egberts Case, in which the average consumer is expected to spend the time to take note of the information on a food label (before acquiring the product for the first time) and that he has the cognitive ability to assess the value of that information.¹⁴⁴ Actual consumers who do not have the cognitive power to assess the information fall prey of *the long tail of consumer deception*, whereas the consumers who may have that power, but decide not to read the information or fail to avail enough time for comprehension suffer bad consumption under the principle of *the right to self-determination*.¹⁴⁵

Available time may be limited due to the nature of a commercial practice. This is recognised in the general clause on aggressive commercial practices which prohibits the use of *undue influence*, including by non-physical pressure in a way which significantly limits the consumer’s ability to make an informed decision. Similarly, Item 7 in Annex I prohibits false statements concerning an offer’s availability *in order to elicit an immediate decision* and deprive consumers of sufficient opportunity or time to make an informed choice. Several of the aggressive practices mentioned in Annex I address situations in which the commercial practice limits the consumers ability to consider information.

In this vein it should be mentioned that longer time for consideration does not necessarily lead to

¹⁴⁴Case C-239/02 (Douwe Egberts), paragraph 54.

¹⁴⁵See also Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, note 7.

better decisions as emotions in certain situations are a better apparatus for decision-making than our rational minds. This is of course valuable information when considering how much time the consumer should spend under the average-consumer-test. But also information about how much time real consumers actually spend on their decisions should be considered when setting the standard for how much time *the average consumer* is expected to use¹⁴⁶—many choices in stores are based on brand names alone¹⁴⁷ and often consumers do not look at the back of product packages.¹⁴⁸ The amount of time used by the average consumer could be weighed in on the standard of professional diligence. If the trader knows (or should know) that consumers only spend a little amount of time, professional diligence would require that only highly relevant information should be displayed. The question could be; who should bear the burden of the consumers' laziness?

The consumer's right to self-determination is closely linked to an ideology in which it is unnecessary and even immoral to protect people against their choices.¹⁴⁹ The presumption that individual choices should be respected is usually based on the claim that people do an excellent job of making choices.¹⁵⁰ But most *Humans* often need help to make more accurate judgments and better decisions. Another aspect of the right to self-determination that must necessarily be disregarded is the consumer's preferences. Several products may help the consumer equally well, but he may desire a product of a particular brand at a higher price. This is not distortion of economic behaviour, but a choice to meet one's preferences. In that vein it should be mentioned that brands actually adds to the consumer's experience and utility of a product,¹⁵¹ i.e. the consumer may enjoy more utility from a product with a brand he likes than from an identical generic product.

2.5. Preliminary Conclusions

The Directive does contain particular protection of vulnerable consumers. However, the protection is apparently exhaustively limited to particular groups of consumers, and it seems to be overly focused on age (young and old). Further, the specific provision on vulnerable consumers requires that the trader could reasonably be expected to foresee the economic distortion of this particular, vulnerable group. The provision only protects groups of consumers, and even when the provision kicks in, it suffers from a long tail fallacy because the provision only seems to lower the standard for the requirements to the average consumer—consumers who do not meet this standard are not protected. Also, vulnerable consumers may also suffer economic distortion from commercial practices that do meet the requirement of professional diligence such as product placement and puffery. Based on the analysis above, it seems reasonable to protect younger people as a group, and protect all consumers in situations of rare and complex decisions as well as in situations with limited time available.

3. Enhancing the Protection of Vulnerable Consumers

With a population in the European Union (EU-27) of more than 500 million people (some 16 per

146See e.g. What is it to Materially Distort Economic Behaviour? Unfair Commercial Practices Directive versus Everyday Decision Quality, *Journal of Consumer Policy* 2013 (forthcoming)...

147Jacoby, J. Chestnut, R. I., and Fisher, W. A.: Information Acquisition in Nondurable Purchase, *Journal of Marketing Research*, 15 (4), 1978, 532-44.

148Jesper Clement: Visual influence on in-store buying decisions: An eye-track experiment on the visual influence on packaging design. *Journal of Marketing Management* 23, 2007, 917-928.

149Daniel Kahneman: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011, p. 411.

150Cass R. Sunstein and Richard H. Thaler: Libertarian Paternalism Is Not an Oxymoron, 70 *U. Chi. L. Rev.* 1159, 2003, p. 1167

151See Jan Trzaskowski: Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive, *Journal of Consumer Policy*, number 3, September 2011, p. 381, p. 390.

cent below 15 years of age),¹⁵² misleading just one per cent of consumers will in absolute figures lead to bad consumption for millions of citizen. Advertising will never be 100 per cent reliable and it is not possible to save all consumers from bad consumption. However, more could probably be done in the context of commercial practises in order to protect (and empower) the consumers of the Internal Market.¹⁵³ In this part, vulnerable consumers include those individuals who are vulnerable with regard to their economic behaviour due to the nature of human decision-making—as exposed through e.g. behavioural economics—but not protected by the Directive.

The Directive provides, despite its ambiguities,¹⁵⁴ a well thought out framework for addressing issues relevant to protecting the economic behaviour of consumers—i.e. in particular addressing both information and conducts and combining flexible rules with firm prohibitions in the Annex. However, the flexibility also entails vast *and costly* uncertainty for both traders and law enforcers. The current amount of clarification from the case law of the Court is depressingly low. Therefore, the main priority must be to enhance predictability in the interpretation of the directive and thus lowering the cost of regulation. In doing so, the flexible nature of the Directive allow for improvement of the protection of vulnerable consumers.

3.1. Improvement Through Interpretation

Consumer protection is an important and fundamental part of EU policies. It follows from the Charter of Fundamental Rights of the European Union, as incorporated into the Treaties by Article 6 TEU,¹⁵⁵ Article 38 that ‘Union policies shall ensure a high level of consumer protection’.¹⁵⁶ Further, it follows from article 12 TFEU that ‘Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’.¹⁵⁷ So even though the Directive’s legal basis is Article 114 TFEU concerning the Internal Market, consumer protection issues cannot be ignored in its application.¹⁵⁸ In addition, Article 9 of the Treaty on the Functioning of the European Union, which stipulates that ‘in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’. After all, Community law must be placed in its context and interpreted in the light of Community law as a whole—having also regard to the objectives thereof.¹⁵⁹

The protection against unfair commercial practices builds upon three legal standards, i.e. 1) how the trader should behave (professional diligence), 2) how the (average) consumer is expected to react (economic distortion), and 3) what the trader should foresee (vulnerable groups and undue influence). Both items 1 and 3 relate to the behaviour of the trader and are treated together in this context. How the trader and the consumer should behave may also be perceived as two sides of the same matter, and could be considered to interplay in order to distribute the risk of bad consumption

152EUROSTAT: Consumers in Europe, 2009 edition, ISSN 1831-4023.

153See also Cass R. Sunstein and Richard H. Thaler: *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159, 2003, p. 1165.

154See also European Parliament: *State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation*, July 2010, p. 10 and chapter 2.2.

155The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

156See also Articles 7 (respect for private and family life), 21 (non-discrimination), 24 (the rights of the child), 25 (the rights of the elderly), and 26 (integration of persons with disabilities).

157Article 12 (ex Article 153(2) TEC).

158See also Verica Trstenjak & Erwin Beysen: *European Consumer Protection Law: Curia Semper Dabit Remedium?*, CMLRev 48: 95-124, 2011, p. 95.

159Case 283/81 (Srl CILFIT and Lanificio di Gavardo SpA), paragraph 20.

between those parties. As legal standards *per se* are flexible, interpretation of these standards can be flexed to accommodate the EU consumer policy and the Directive's purpose of achieving a high level of consumer protection.

3.1.1 . Reconsider the Average Consumer

Only in the *Mediaprint* case, the Court has reflected on the average consumer in the context of the Directive. However, not much can be deduced from that case. Generally, the average consumer has been applied as a legal standard for what care the consumer should show and what he should be able to understand. In the light of the foregoing discussions, the question to be dealt with is whether this normative interpretation could benefit from findings in other sciences, including in particular behavioural economics. Other sciences such as neuroscience, and more specific methods such as eye-tracking and A/B-testing may also be applied to determine how real consumers behave or respond to commercial practices.

In the 2012 resolution on vulnerable consumers, the European Parliament notes that the notion of an 'average consumer' lacks the flexibility needed to adapt to specific cases and sometimes does not correspond to real-life situations.¹⁶⁰ The use of a benchmark average consumer makes it reasonable to draw upon research which seeks to identify common features in human decision-making. The Commission has acknowledged that the understanding of consumers' skills, knowledge and assertiveness is essential if consumer policy measures are to correspond to their actual daily behaviour, as opposed to textbook models of what they do.¹⁶¹ Studies show that not only the content of the information provided, but also the way in which the information is presented can have a serious impact on how consumers respond to it. According to the staff working document concerning the Directive, such knowledge should be taken into consideration, and national courts and administrative authorities are encouraged to assess commercial practises by reference, among other considerations, to the current state of scientific knowledge, *including the most recent findings of behavioural economics*.¹⁶² The Court has not (yet) adopted behavioural economics in its case law, but it has in the context of aggressive practices in the Directive's Annex recognised that traders may exploit 'psychological effects' in order to induce the consumer to make a choice which is not always rational.¹⁶³ The European Parliament has suggested targeted funding to be allocated to consumer research projects, *especially in the field of consumer behaviour* and data collection, to help design policies that meet the needs of consumers.¹⁶⁴

In the *Gut Springenheide* case, the Court allowed—in the context of the Misleading Advertising Directive—that national courts could order an expert's opinion or commission a consumer research poll for the purpose of clarifying whether a promotional description or statement is misleading or not. It was left for the national court to determine the percentage of consumers misled by the promotional description or statement that would be sufficiently significant.¹⁶⁵ Recital 18 of the Directive emphasizes that the average-consumer-test is not a statistical test, which could be understood as to abolish the use of statistical (empirical) evidence as a means of proof.¹⁶⁶ With

¹⁶⁰European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, under 3.

¹⁶¹Commission Staff Working Paper on Consumer Empowerment in the EU, 7 April 2011,(SEC(2011)0469), paragraph 4.

¹⁶²Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009. See p. 32.

¹⁶³C-428/11 (*Purely Creative and Others*) paragraphs 38 and 49.

¹⁶⁴European Parliament resolution of 15 November 2011 on a new strategy for consumer policy (2011/2149(INI)), paragraphs 10 and 41.

¹⁶⁵Case C-210/96 (*Gut Springenheide*), paragraphs 32, 35 and 36. See also Case C-220/98 (*Estée Lauder Cosmetics*).

¹⁶⁶Geraint G. Howells, Hans-W. Micklitz, and Thomas Wilhelmsson: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006, p. 116.

reference to the Gut Springenheide case, national courts and law enforcers can, until the Court decides otherwise, choose to use behavioural economics and other sciences in determining the expected behaviour of ‘the average consumer’.

Research on consumer behaviour may be applied either: 1) by testing the actual commercial practice or 2) by extracting general trends in human decision making.¹⁶⁷ There are costs involved in both methods, but the former will usually be more cumbersome and expensive—but also more precise even though it may often be difficult to evaluate the preferences of individual consumers.¹⁶⁸ When testing a particular commercial practice, one will still have to convert the result into what behaviour that can reasonably be expected from the average consumer. If one was to determine whether the statement ‘buy two identical items and get the 2nd item 50 percent off’ is misleading, it could be compared by observing the behaviour of a control group offered the same discount stated as ‘buy two identical items and get 25 percent off’. Let’s say that the former copy sells to 30 per cent more people than the latter. This precise number does not help the judges when they must determine whether *the average consumer* should be expected to understand this. It should also be noted that consumer polls may not be reliable when consumers reflect on how they *believe* they are affected by marketing. Therefore experts’ opinions on the matter could be equally helpful. In this case references could be made to *framing effects* and *anchoring* which will make it likely that a substantial number of consumers will have their economic behaviour distorted.

Decisions are function of a number of decision rules, including human limitations (motivation, knowledge or ability), circumstances (opportunity, time pressure, distraction or presentation) and the nature of the decision (importance or frequency), and that Commercial practices—fair or not—aim at manipulating these elements in order to influence the consumer decision.¹⁶⁹ One could also argue that it should be weighed in whether the practice is common to the group that is exposed to the commercial practice—in that case, the consumers would have more experience with that practice and are thus less likely to have the economic behaviour distorted. Other issues could be concerned whether the product or circumstances would induce the consumer to spend more or less time reacting to the commercial practice. The average consumer may e.g. be likely to be more careful when the transactional decision has great impact on his economy. When information is provided in a restaurant, it may also be considered that some consumers, e.g. those on a date, may be likely not to spend sufficiently time on evaluating prices—and may be reluctant to ask the waiter questions concerning prices and the final bill. A situation-based approach would allow policy makers etc. to address more general vulnerabilities in human decision-making, including in particular those biases and heuristics identified in behavioural economics.

In principle Article 5(3) provides a good protection of certain vulnerable consumers, but its scope may be too limited. If we were to apply the provision to promotional lotteries, behavioural economics may suggest that some consumers are particularly vulnerable to such commercial practices. In general, consumers are likely to be influenced by such commercial practices because humans suffer from overconfidence and are really bad at calculating the expected value of a lottery—even if they had essential information about the number of participants and had proper information about the prizes to be won.¹⁷⁰ Some consumers who suffer from gambling mania may be particularly vulnerable to such practices, but it remains unclear whether Article 5(3) can be used in such situations. Under the full harmonisation of unfair commercial practices, it is not possible for

167See also Jan Trzaskowski: Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive, *Journal of Consumer Policy*, number 3, September 2011.

168See also Richard Craswell: Interpreting Deceptive Advertising, 65 *B.U. L. Rev.* 657, 1985, p. 684.

169Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market, *CMLRev* 43: 107-152, 2006, p. 126

170See Jan Trzaskowski: Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive, *Journal of Consumer Policy*, number 3, September 2011

Member States to ban promotional lotteries.¹⁷¹ If gambling mania would be considered ‘mental infirmity’, all use of promotional lotteries should be assessed from the perspective of an average consumer suffering from gambling mania. Under the information paradigm, the Court would probably find that the average consumer is aware of the purpose and effects of advertising and sales promotions and is thus able to rationally decide whether to purchase a product¹⁷²—provided the average consumer is able to identify the promotional offer and the terms. The two-legged test further entails that the risk of economic distortion is not in itself sufficient to prohibit a commercial practice.¹⁷³

Introducing behavioural economics and other sciences may complicate matters and will require lawyers and judges to understand at least the fundamentals of biases and heuristics. This may increase the costs of enforcement, but judges and lawyers are already used to applying traditional economic models. On the other side, the use of behavioural economics may increase predictability and subsequently lessen the general costs on traders. Further, using evidence of actual consumer behaviour will be likely to relax the requirements to the behaviour of the average consumer—and thus improve protection of vulnerable consumers. This would be likely to lead to the conclusion that even though consumers understand that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase, *Humans* will by way of emotions be more likely to buy a product which has a marking that occupies 30 per cent than one that reflects the 10 per cent increase in size.

A more practical matter is the question of who should provide evidence of human behaviour. All parties in a case may already now provide evidence on actual human behaviour, but it is not settled in the Directive or in case law with whom the burden of proof lies—i.e. whether the commercial practice is unfair if the trader fails to prove that there is no distortion or whether the commercial practice is fair if the plaintiff fails to prove that there is in fact a risk of distortion. The same issue comes up in relation to professional diligence. The Court may in its interpretation be able to provide guidance on this issue, and enhance consumer protection by imposing the burden of proof on the trader. A strict rule on this would probably require amendments to the Directive.

3.1.2 . Reconsider the Professional Diligence

The violation of professional diligence is fundamental in the Directive’s unfairness test, and it resembles the negligence rule in tort law, that sets standards for due care against which the actual behaviour of tortfeasors is evaluated.¹⁷⁴ The legal standard is supplemented by a similar standard in the context of vulnerable consumers where it should be assessed what the trader could reasonably be expected to foresee—or have done.¹⁷⁵ It follows from the Directive that puffery is both common and legitimate, and that legitimate product placement, brand differentiation or the offering of incentives are accepted advertising and marketing practices. It is, however, not clear from the context why these practices are legitimate and how the trader should obtain knowledge of this. In the latter example (incentives), there is a risk that e.g. sales promotion actually utilizes flaws in human decision making and thereby imposes a risk of distorting the economic behaviour of the average consumer—according to the Court probably only of consumers who are ‘below average’.

171 See to that effect Case C-304/08 (Plus Warenhandelsgesellschaft).

172 Case C-540/08 (Mediaprint), Opinion of Advocate General Trstenjak, paragraph 104.

173 Case C-540/08 (Mediaprint), paragraph 47.

174 Fernando Gómez Pomar: The Unfair Commercial Practices Directive: A Law and Economics Perspective, *Revista Para el Análisis del Derecho*, January 2006, p. 17. ‘In Law and Economics terms, the Hand formula – a shortcut for cost-benefit analysis of care and total accident costs – nicely explains how the negligence rule is to be understood from an economic perspective.’

175 See to that end Peter Shears: *Overviewing the EU Unfair Commercial Practices Directive: Concentric Circles*, EBLR 2007, p 784.

As a legal standard comparable to that of neglect, it may make sense to consider the difference between neglect and intention. In criminal law, ‘fraud’—which may also be a commercial practice—requires in general terms knowledge of (possible) deception and the intention to deceive. Misrepresentation in marketing law is usually less severe than fraud. However, the Directive does not distinguish between business-to-consumer commercial practices that under national law may be considered fraud or misrepresentation. Also, the Directive does not focus on the trader’s intention, save possibly for the focus on ‘exploitation’ in the context of undue influence where exploitation may be considered an intentional act. A number of advertisements appear, for instance, to be disguised as editorial content by adding a by-line and using layout normally seen in editorial articles. The display of the text ‘advertisement’ should help the consumer recognise the commercial intent, but often fails to do so.¹⁷⁶ Of course eye-tracking can be deployed to understand whether the average consumer will recognise the commercial intent. However, one could also argue that it will be contrary to professional diligence to what seems like intentional disguising the commercial content.¹⁷⁷

As discussed above, it is unclear whether the professional diligence is an objective standard or whether the trader’s knowledge should be weighed in. It will, however, make sense to not only include the trader’s knowledge but also his intention. With intention should be understood what it seems like the trader wanted to achieve—so it is a legal construction that of course may be documented by witness statements etc. The statement ‘save up to 70%’ gives little or no information about what savings the consumer may expect. Even though the text ‘in the entire store’ does not detract from the truthfulness of the former statement, it could be perceived as an intention to make even more consumers infer that there is a 70% store-wide discount. Intention and knowledge is closely related. Knowledge relates both to information and circumstances concerning the product and the expected behaviour of consumers. Concerning the latter issue, the trader’s intention may be induced from his knowledge of how consumers may reasonably be expected to react.

Another and probably easier test of commercial practices would be to consider possible improvements in the commercial practice.¹⁷⁸ In the context of commercial practices the trader is the professional party that should have knowledge of how consumers in general—average or not—are likely to react to particular commercial practices. Such knowledge could be included in the legal standard of professional diligence—as it is expressly mentioned in the context of vulnerable consumers. As commercial practices should be elaborated in a way that do not distort the economic behaviour of consumers, it does not seem unreasonable to review commercial practices as something that should help consumers make informed transactional decisions. At the extreme point, one could expect (which would be desirable from a consumer protection point of view) commercial practices as actions that are intended to help consumers make efficient choices. To be ‘fair’ to the trader one could suggest that a commercial practice should not only be viewed in the light of how it could be improved, but also of how difficult or expensive this would be for the trader. The burden of proof could e.g. lie with the plaintiff who would have to specify alternatives for the courts to consider.¹⁷⁹

To some extent this reversed standard is introduced in the context of misleading omissions where the trader is required to reveal information that is material for the consumer to take an informed transactional decision. In general there is no economic reason not to require traders to increase the

¹⁷⁶See case C-391/12 (RivS) [pending].

¹⁷⁷It should be noted that Item 11 in Annex I prohibits (per se) the use of editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (‘advertorial’).

¹⁷⁸See also Richard Craswell: *Interpreting Deceptive Advertising*, 65 B.U. L. Rev. 657, 1985, p. 660.

¹⁷⁹See similar in the context of contract law Richard Craswell: *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, Virginia Law Review, Vol. 92, June 2006, No. 4, pp. 565-632, p. 625.

information useful for consumers so they can make more informed choices—i.e. if they in a cost-effective way can correct inadequate levels of information on the part of consumers, their practices should be deemed unfair if they do not engage in these educational or corrective actions.¹⁸⁰ According to the *availability heuristic* in behavioural economics, we are likely to base our decisions on available information, and thus failing to identify which information is relevant for us. Some important information may also be given in a way that the consumer is not likely to perceive it—in particular when it is considered how much time the average consumer is likely to use. An advertisement for wine containing a price of €10 while showing a picture of one bottle would under the information paradigm not be misleading if the important information that the offer required a purchase of 12 bottles was given in small letters. In this example the trader could easily display both the price for one bottle (as displayed) and 12 bottles and thereby minimize the risk of economic distortion.

As mentioned above, information always entail a risk of disappointment, and saying more is not always the solution, and it also impacts the effectiveness of information whether the consumer is able to comprehend the information. In the assessment of information, it could be considered whether some of the information actually detracts from the information that the consumer should base his decision on. This principle is e.g. found in the food information regulation where *voluntary* food information may not be displayed to the detriment of the space available for *mandatory* food information.¹⁸¹ This could be relevant when a trader provides information that is provided in a way that may distract consumers. This could e.g. be in the case where irrelevant information is presented in a way that distorts the consumer's focus—wasting precious time dedicated to understanding the details. Thus it may seem reasonable that the trader's commercial practice reflects the situation in question, including in particular how much time the consumer is likely to spend on evaluating the information.

In particular the requirement of disclosing information may be greater when the commercial practices are likely to take advantage of biases and heuristics identified in behavioural economics. In that case the business can be said to have the intention to exercise undue influence, and thus should do more to guide the consumers. If e.g. a restaurant markets milkshakes as 'Small milkshake: €4,95, large milkshake: €6,95.' it could be expected that a number of consumers would be likely to choose the large from a general perception that *buying more is usually a better deal*. For a start it would be necessary to have information about size in order for the consumer to make an informed decision. If the sizes appear to be 355 ml (12 oz) and 473 ml (16 oz), respectively, the average consumer would probably still need a calculator to determine the better deal—disregarding preferences as to size (the consumer may have a preference for exactly 16 oz). At least because this pricing scheme goes against the above-mentioned general perception, it would make sense to require the disclosure of price per litre (13,49 €/l and 14,69 €/l, respectively). But even in this situation, it may also be believed that a number of (thus vulnerable) consumers will not be able to understand the information to make an informed decision, and probably a lot more will just discard the information altogether and go for the large—falling prey of the right to self-determination. Such an analysis will be helpful in considering whether the trader has complied with the requirement of professional diligence. The decision where to set the threshold depends upon how many consumers should be protected, and whether one should weigh in the likelihood of consumers ignoring relevant information.

180Fernando Gómez Pomar: The Unfair Commercial Practices Directive: A Law and Economics Perspective, *Revista Para el Análisis del Derecho*, January 2006, p. 16f.

181Regulation 1169/2011 on the provision of food information to consumers, Article 37 and Recital 47. See also Case C-51/94 (Béarnaise Sauce), paragraph 40, finding—in the context of food law—that additional particulars accompanying the trade description must be necessary for the information of consumers.

3.2. Improvement Through Revision of the Directive

The European Commission, in its first report on the Directive, finds that it does not seem appropriate to amend the Directive at this stage, and that the feedback from the consultation has not signalled significant problems in relation to vulnerable consumers.¹⁸² The average consumer is well protected under the current scheme, but the question is what loss those consumers will experience if regulation was stricter so as to protect those consumers who are below this average. In the 2012 resolution on vulnerable consumers, the European Parliament stresses that a strategy for addressing consumer vulnerability must be proportionate, so as not to restrict individual freedoms and consumer choice.¹⁸³

It is well-known that regulation comes at a cost, but also that gains from increased competition finally accrue to consumers.¹⁸⁴ The purpose of regulating commercial practices is to prohibit behaviour that will hinder effective markets by distorting the economic behaviour of consumers. A cost of regulation seems widely accepted in this context as the benefits of prohibiting *unfair* commercial practices outweigh the cost of regulation. So the question is not *whether* to have regulation, but *which* and *how much* of it. One will also have to consider the loss in consumer welfare when stricter regulation deprives consumers of certain choices, i.e. traders have less possibility to distort economic behaviour.

3.2.1 . Reconsider the Dual Legal Standards Approach

The model of requiring both *professional diligence* and *economic distortion* as it is laid out in the Directive—and applied by the Court—entails the risk that certain commercial practices fall between two stools, i.e. in particular those discussed above which will distort the economic behaviour of consumers without being contrary to the requirement of professional diligence. As discussed above, matters become worse when the Court's standards for the care expected by the average consumer resembles more that of *Econs* than *Humans*. In that light the Legislature could consider if it should not in general be undesired: 1) when traders fail to act in accordance with the requirements of professional diligence and 2) when at least the average consumer's economic behaviour is distorted without considering professional diligence.

Under the current model adverse consequences stem from the fact that the care that should be exercised by the trader and consumer, respectively, are to be assessed interdependently. Basically, the unfair assessment is a matter of settling who should bear the risk of possible distortion of consumers. This speaks in favour of a single requirement model which should still weigh in professional diligence and economic distortion. If consumers show reasonable care and material distortion will still be likely, it doesn't seem unreasonable to burden the professional party with an obligation to exercise greater care. This model would require the trader to consider the expected reactions of consumers, thus placing the burden of uncertainty on the shoulders of the stronger part—which is an intrinsic element of consumer protection.

3.2.2 . Vulnerable Groups and Individual Consumers

Given the way the protection of vulnerable groups is introduced in Article 5(3) it should be considered in all cases of commercial practices. It does, however, entail some uncertainties and it

¹⁸²See report of 14 March 2013 on the application of Directive 2005/29/EC, COM(2013) 139, under 6 and 3.3.2, respectively.

¹⁸³European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, paragraph 4.

¹⁸⁴Fernando Gómez Pomar: The Unfair Commercial Practices Directive: A Law and Economics Perspective, *Revista Para el Análisis del Derecho*, January 2006, p. 11.

seems inexpedient that the list of vulnerable groups seems to be exhaustive. It would make sense to open the protection to other consumers who may be particularly vulnerable with regard to their *economic behaviour*. It has been noted that the restrictive list of Article 5(3) seems quite arbitrary, and the question has been raised why factors such as education, race and ethnicity and level of income were not included in the vulnerability threshold.¹⁸⁵ However, if one were to assume that the quality of consumers' decisions will depend on time spent and cognitive ability, it would be controversial—provided all people in average would use the same amount of time—to suggest vulnerability due to e.g. gender,¹⁸⁶ ethnicity, and religious beliefs. To the extent commercial practices were to *offend* these groups—in contrast to *distorting* their economic behaviour—it would more likely be a matter of taste and decency which falls outside the scope of the Directive; no matter how offensive the practice would be.

Even though *undue influence* is part of the prohibition of aggressive commercial practices, it could be considered whether the provision on vulnerable consumers should focus on situations in which consumers are particular vulnerable, including rare decisions, decisions that are usually taken fast, and decisions with severe risk for consumers.

3.2.3 . Per Se Prohibitions and a White List

The cost of regulation could be lowered by making clearer legislation—this includes costs relating to both compliance and enforcement. The per se prohibitions in the Annex is a vehicle for introducing legislation that may be easily explained to and understood by traders. Even though it must be admitted that far from all items on the list are easily comprehensible. It should be mentioned that decreases in the transaction costs involved in cross-border commercial activity entails a reduction of real costs in the economy, which is a direct and tangible social benefit.¹⁸⁷

In the (withdrawn) proposal for a regulation concerning sales promotions in the Internal Market,¹⁸⁸ the goal was to eliminate national bans on certain types of sales promotions, including discounts, gifts, premiums, and promotional games. The idea was that information could render prohibitions superfluous. However, as it is discussed above, overwhelming the consumer with information may not necessarily lead to more informed decisions. In addition to this, some of these sales promotions draw upon known biases and heuristics increasing the likelihood of economic distortion.¹⁸⁹ With reference to the goal of 'empowering' consumers to make efficient choice, it could be argued that little welfare is lost by prohibiting the use of sales promotions which intrinsically remove the consumers attention from the product or the offer he is expected to assess.

A per se ban will increase foreseeability on the part of the trader and it would increase consumer protection when prohibiting practices that are known to cause material economic distortion. Of course the marketing industry will loose some creative flexibility, which for some consumers may lead to a duller life with fewer marketing gimmicks. However, it may seem unreasonable that consumers above average should be entertained by commercial practices that lead to bad consumption for those who are below average. Also, some of these sales promotions may be

185Jules Stuyck, Evelyne Terryn & Tom van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 121f.

186See e.g. European Parliament resolution of 3 September 2008 on how marketing and advertising affect equality between women and men (2008/2038(INI)), point C: 'whereas advertising which conveys discriminatory and/or degrading messages based on gender and all forms of gender stereotyping are obstacles to a modern and egalitarian society'.

187Fernando Gómez Pomar: The Unfair Commercial Practices Directive: A Law and Economics Perspective, Revista Para el Análisis del Derecho, January 2006, p. 10.

188Proposal for a regulation concerning sales promotions in the Internal Market, COM(2001) 546 final, 2001/0227 (COD).

189See Jan Trzaskowski: Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive, Journal of Consumer Policy, number 3, September 2011, p. 387 ff.

prohibitively expensive for smaller businesses leading to adverse effects on competition or availability—recognising that this is an argument concerning competition rather than consumer protection directly.

It is necessary to consider the welfare cost related to the deprivation of certain commercial practices. Consumers may have a tendency to like complicated commercial schemes such as loyalty programs etc. However, it should also be borne in mind that the more complicated commercial practices are, the higher is the risk of economic distortion and the transaction costs wasted on the consumers' attempt to fully understand such schemes—not to speak on the creative people's elaboration of these schemes.

As part of the current consumer programme¹⁹⁰ it is an objective to protect consumers effectively from the serious risks and threats that they cannot tackle as individuals. Even though this objective focus on serious risks *to life* this idea could, however, be extended to comprise serious risks to consumers' economic behaviour. In product safety it is normal to establish specific requirements—i.e. per se ban on products that do not meet these requirements—in order to achieve a desired level of safety. Further studies in behavioural economics—as encouraged by the European Parliament—may provide insight in how consumer welfare may be enhanced by way of information and prohibitions.

In addition to the blacklist in Annex I, it could be considered—with the same arguments—to introduce a 'white list' of commercial practices that are accepted and under which requirements. This could draw inspiration from the withdrawn proposal for a regulation concerning sales promotions in the Internal Market, and would ideally lower the cost of regulation for traders.

3.2.4 . (Re-)Consider the Full Harmonisation Approach

There is no doubt that the Directive has introduced full harmonisation, even though this is not necessarily clear from the Directive itself.¹⁹¹ The Court has derived the full harmonisation from Article 4 which—as discussed above—deals with Internal Market issues. Other observers have deduced the full harmonisation from Recital 5,¹⁹² article 3(9)¹⁹³ and Article 19.¹⁹⁴ None of these references are convincing compared to Article 4 of the Consumer Rights Directive which on 'level of harmonisation' explicitly provides that 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.' In this vein it should be mentioned that the full harmonisation (or its implications) apparently came as a surprise to quite a number of Member States.¹⁹⁵ So maybe Member States did not make an informed decision when adopting the ambiguous text. However, the intention on behalf of the Commission is clear from the declaration that 'the Commission can only agree to the deletion of article 4.1 [which was subsequently deleted] of its proposal on the understanding that the present directive provides for a full harmonisation of the domain covered by the directive ...'.¹⁹⁶

190See Communication from the Commission to the Council on EU Consumer Policy strategy 2007-2013, COM(2007)99, under 3.

191See the discussion in Jan Trzaskowski: Towards a Common European Marketing Law, EUI Working Paper Series, Law, 2010-21.

192Bert Keirsbilck: Towards A Single Regulatory Framework on Unfair Commercial Practices?, EBLR 2009, p. 507ff, p. 508.

193Peter Shears: Overviewsing the EU Unfair Commercial Practices Directive: Concentric Circles, EBLR 2007, p 781.

194David Kraft: Advertising restriction and the Free Movement of Goods – The Case Law of the ECJ, EBLR 2007, p 517ff, p. 522.

195See Jan Trzaskowski: Towards a Common European Marketing Law, EUI Working Paper Series, Law, 2010-21, p. 45.

196See Communication from the Commission, COM (2004)753, p. 7. See also Jules Stuyck, Evelyne Terryn & Tom

The full harmonisation only relates to the framework of prohibiting commercial practices, but not necessarily how the various Member States may interpret or use this framework. Traders may still benefit from the Internal Market provision in Article 4. As most consumers do not exactly know the content of their own law, it cannot be relevant for them to know that the law is harmonised, and thus the full harmonisation seems to be primarily in the interest of the businesses and their possibilities to operate smoothly in the internal market.¹⁹⁷ The implication on cross-border trade is quite similar to that provided in the E-Commerce Directive which contains an internal market clause, allowing providers of information society services in general to rely on the marketing law in the country of establishment—without fully harmonising material law ('coordinated field'). As electronic commerce seems to be the engine that drives cross-border business-to-consumer trade in the Internal Market, it could be argued that this would be sufficient. Thus it could be considered to roll-back the full harmonisation as it does not substantially increase clarity and that it in addition prohibits Member States from using well-known bodies of marketing law. However, this is a controversial suggestion which would be akin to getting toothpaste back in the tube. So a more realistic approach would be to aim for real, full harmonisation coupled with effective and uniform enforcement as discussed immediately below.

3.3. Improvement Through Enforcement and Coordination

The European Commission has drawn up the above-mentioned staff working document¹⁹⁸ which aims at providing guidance on the key concepts and provisions of the Directive perceived to be problematic. However, the document has no formal legal status and in the event of a dispute, the ultimate responsibility for interpretation of the Directive lies with the Court.¹⁹⁹ In addition to this document the Commission has also drawn up a brochure²⁰⁰ and a web page²⁰¹ which provide information about unfair commercial practices. The Commission has also developed a legal database to support national enforcers in achieving a common understanding and a uniform application of the Directive.²⁰² The data base gives public access to national laws transposing the Directive, jurisprudence, administrative decisions, references to related legal literature and other relevant materials. Decisions by national courts and enforcement agencies will be made available in English, which will foster a uniform application of the Directive.²⁰³

It is unclear who have been heard in the process of drawing up the staff working document and thus which 'validity' it has. Especially if Member States are not involved in the drawing up and updating of this document, it may seem problematic that the European Commission interpret this ambiguous Directive with the risk of the working document becomes a self-fulfilling prophecy.²⁰⁴ As it is clear

van Dyck: Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market, CMLRev 43: 107-152, 2006, p. 118.

197Thomas Wilhelmsson: The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law, *Journal of Consumer Policy* 27: 317-337, 2004, pp. 323 and 328.

198Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009.

199It is noted in the staff working document that 'this document cannot provide a formal interpretation' and that 'it does also not provide legal advice on issues of national law'. This also follows from case law. See e.g. Case C-74/69 (Krohn), paragraph 9.

200The Unfair Commercial Practices Directive – New laws to stop unfair behaviour towards consumers, European Commission 2006, ISBN: 92-79-01903-1.

201www.isitfair.eu.

202<https://webgate.ec.europa.eu/ucp/>.

203European Parliament: State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation, July 2010, p. 12 and chapter 2.6.

204See the discussion in Jan Trzaskowski: Towards a Common European Marketing Law, *EUI Working Paper Series, Law*, 2010-21, pp. 35ff., p. 46. See also Georgios Anagnostaras: The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?, *CMLRev* 47, p. 147-171, 2010, p. 170.

from the discussion above, the Directive and case law does not provide much foreseeability for traders and the Directive's subject matter is very difficult to deal with. As long as the Commission is the sole provider of guidance, it has been left to bureaucrats to foresee problems in the market. It would benefit observance and enforcement if guidelines were prepared with the help of national consumer authorities and experts within consumer behaviour and marketing law.

One solution could be to establish an independent advisory forum similar to the Article 29 Working Party dealing with privacy and which includes members from the Member States. This would create a forum where Member States can share experiences, discuss best practises and express possible solutions. Such a group could also provide valuable input to the revision of this ambiguous Directive. Taking this a step further, it could be considered to establish an EU consumer protection authority that could enforce EU marketing law in the Internal Market.²⁰⁵ Similar set-ups are found in competition law where enforcement powers are given the Commission and in trademarks where some administration is left to the Office for Harmonisation in the Internal Market (OHIM). For consumer protection such an authority is already in place in the financial services sector.²⁰⁶ A common EU authority on marketing law could also include supervision within other areas of consumer protection.

3.3.1 . Guidelines

Guidelines could in particular help traders and enforcers. The above-mentioned group could provide valuable input to the revision of this ambiguous Directive and provide guidelines for traders. Guidelines could address particular issues or products. A high level of consumer protection may be achieved if it is made easy for traders, including in particular smaller businesses, to understand and apply the Directive. The proposed regulation concerning sales promotions may provide inspiration for such guidelines as the regulation intended to remove national bans on sales promotions by introducing information requirements.

4. Conclusions

The prohibition of commercial practices that are unfair is of fundamental importance for efficient markets. In the staff working document on the Directive, it is noted that the Directive ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, enabling consumers to make informed and *meaningful* choices.²⁰⁷ This may be taking it too far, but the prohibition of aggressive and misleading practices as well as information requirements and per se prohibitions will protect many consumers from bad consumption, but the Directive seems to fail on the protection of a huge amount of consumers who are vulnerable with regard to their economic interest. The Directive does address vulnerable consumers in Article 5(3), but the provision is limited only to particular groups of vulnerable consumers and it maintains an average consumer approach which allows for distortion of the economic behaviour of the most vulnerable of these groups. The provision is further limited to what the trader could reasonably foresee which places a burden of bad consumption on the vulnerable consumers in case traders could not reasonably foresee the actual consequences of their commercial practice.

205See in general on enforcement Gerrit Betlem: Public and Private Transnational Enforcement of EU Consumer Law, EBLR Vol. 18, No. 4, pp. 683-708, 2007..

206European Supervisory Authorities (ESAs). See also Proposal for a Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511.

207Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009, p. 6.

The primary reason for the risk of bad consumption lies in the interdependent interpretation of the dual requirement of professional diligence and economic distortion—setting the standard for the care to be exercised by the trader and consumer, respectively. Commercial practices can only be prohibited if the trader fails to meet the requirements of professional diligence *and* this is likely to materially distort the economic behaviour of an average consumer showing the necessary care. Thus, it is legitimate to apply commercial practices that do not meet the requirements of professional diligence as far as it only distorts the economic behaviour of those consumers who are ‘below average’—i.e. do not exercise due care. It does not help consumers that the Directive adopts the case law of the Court which seems to perceive consumers as *Econs* rather than *Humans*, i.e. setting the standard for due care of the consumer higher than what studies in e.g. behavioural economics can justify. Another consequence of the dual approach is that it is allowed for traders to in fact distort the economic behaviour of consumers as long as the trader applies a ‘legitimate’ commercial practice such as product placement, puffery, and the offering of incentives.

Consumers (*Humans*) suffer from limited time, cognition, experience, and rationality. Research on human decision making—such as behavioural economics—may be used to improve the protection of consumers in general and vulnerable consumers in particular. This insight may help to set the standards for professional diligence and economic distortion of the average consumer, and may be applied to identify commercial practices that should be prohibited per se. Under the ‘information paradigm’ information is the preferred means of ensuring that consumers make efficient choices, but it is clear that more information is not always better, that information may infer several different beliefs in the minds of consumers, and that consumers are not likely to read all available information. This suggests a more critical attitude towards information requirements and raises the question whether some commercial practices are better prohibited than justified through information requirements. Per se prohibition benefits the vulnerable consumer in particular, as he is protected even though he fails to exercise the care that is required by the average consumer.

The desired level of protection for consumers’ economic behaviour is of course a political question concerning the desired degree of paternalism. But it also requires consideration of the impact on markets and traders—recognising that efficient markets also benefit consumers. In order to set the threshold for unfair commercial practices it would be relevant with empirical evidence concerning the welfare gained by vulnerable consumers and the welfare loss suffered from non-vulnerable consumers. There is a real welfare gain if more consumers will be empowered to make better purchase decisions, but the welfare loss on non-vulnerable consumers may be difficult to measure—what is the loss of not being able to use e.g. premiums, coupons, and promotional lotteries? Behavioural economics and other sciences may be used to identify commercial practices that notoriously distract the consumer from the product or the offer, which subsequently is likely to lead to bad consumption—the ban of such practices will benefit all consumers. Traders may incur a loss if they are deprived of efficient means to distort the economic behaviour of consumers.

Uncertainties in the Directive may increase the cost of compliance and enforcement. Further case law and possible guidelines may help to increase foreseeability and thus lower the cost of regulation. Guidelines on the interpretation could include consideration of the trader’s (assumed) intention and in the context of information; whether the information (easily) could have been provided in a less confusing manner. If more descriptive sciences are accepted by the Court, traders and law enforcers would be equipped with predictive tools to forecast the interpretation of the Directive. Insights in e.g. behavioural economics would help judges, traders, and law enforcers to determine what can reasonably be expected of *Humans* and thus demanded of traders. At this point it is unclear which factors legitimise puffery, product placement, and the offering of incentives.