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Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive

JAN TRZASKOWSKI*

Abstract

The Unfair Commercial Practices Directive prohibits unfair business-to-consumer commercial practices with a view to protect consumers' economic interests. In a market economy such regulation cannot protect the economic interests of all consumers in all situations – there must inevitably be some 'collateral damage'. In that vein this article discusses situations where consumers may have their economic behaviour distorted by commercial practices that are not unfair under the Directive. It is expected that many consumers will make relatively good decisions most of the time and that there will be a 'long tail' of more vulnerable consumers. The fact that the law allows certain forms of 'economic distortion' affects those who have general difficulties in making economic decisions ('Long Tail Natives') and all other consumers who, occasionally, are likely to make inferior decisions ('Long Tail Visitors'). The article suggests how behavioural sciences may be applied to understand these situations in order to protect more consumers from having their economic behaviour distorted by commercial practices. It is suggested that per se prohibitions may be advantageous in some instances as long as traders are not deprived of effective means to inform consumers about themselves and their products.

1. Introduction

Advertising and other commercial practices are an important source of information to consumers, and (truthful) marketing is important for markets to work properly. Marketing law hence plays a potentially important, efficiency enhancing role. For traders, marketing serves the legitimate purpose of influencing consumers' preferences; it may, however, be difficult to draw the line between the traders' *legitimate influence* of consumers and their *illegal distortion* of consumers' economic behaviour. The role of commercial practices in consumers' decision making is recognised in the Unfair Commercial Practices Directive¹ (hereafter 'the Directive') as it focuses on whether commercial practices distort or are likely to distort consumers' economic behaviour, i.e. impairing the consumer's ability to make an informed decision.² As

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¹ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

² Directive 2005/29/EC, Art. 2(1)(e).

consumers have different preferences, an informed decision must, in this context, be one that matches the consumer's preferences/values.

The purpose of this article is to analyse situations in which consumers may suffer economic harm from commercial practices that are not considered unfair under the Directive. In the first part of the article, the Directive and concepts of citizens and consumers are introduced. In the following two chapters the concepts of the average consumer and requirements of professional diligence, respectively, is analysed and discussed with a view to identify legitimate distortion of economic behaviour. The analyses draw on insight in consumer behaviour (behavioural sciences, including in particular psychology and neuroscience) in the guise of *behavioural economics*, which is introduced in the chapter concerning consumer concepts. The analyses suggest how behavioural economics may be applied in the interpretation of the Directive, and how consumer protection may be improved. In chapter 6 per se prohibitions are discussed. It is not the purpose of the article to pursue a thorough economic analysis – recognising that such regulation, after all, also depend on a political choice concerning a desired level of *paternalism* (libertarian or not)³ taking into account both economic efficiency and social welfare.

2. The Unfair Commercial Practices Directive

The Directive applies to unfair business-to-consumer commercial practices which is a broad concept⁴ that comprises commercial activities before, during and after a commercial transaction. Before the Directive, commercial practices in the form of 'advertising' were regulated in the Misleading Advertising Directive.⁵ In that directive the primary focus is on 'information' whereas the scope of the Directive is broadened to include commercial conducts ('aggressive practices'). Commercial practices that are unfair generate a market failure; as competition is compromised by impairing the consumer's ability to make informed choices which also gives rise to distortions of competition because the trader acting unfairly wins business away from competitors who play by the rules.⁶ The Directive provides full harmonisation⁷ which entails that Member States may not introduce or maintain a higher level of consumer protection

³ C Sunstein & R Tahler, *Libertarian Paternalism Is Not an Oxymoron* 70 U. Chi. L. Rev. 1159 (2003).

⁴ See e.g. *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-59/12 and *Pelkmans Turnhout*, C-559/11. See also in general Trzaskowski, J et al, *Introduction to EU Internet Law* (Ex Tuto Publishing 12015), Ch. 7.

⁵ Now (consolidated) *Directive 2006/114/EC* concerning misleading and comparative advertising. See also H-W Micklitz in N Reich et al., *European Consumer Law*, p 67ff. (2nd ed., Intersentia 2014).

⁶ *Proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market*, COM (2003) 356, 2003/0134 (COD), para. 16.

⁷ See combined cases *VTB-VAB*, C-261/07 and C-299/07, para. 49 and *Plus Warenhandelsgesellschaft*, C-304/08, para. 36. See also *Eronics Belgium*, C-343/12; *Köck*, C-206/11; *Telekomunikacja Polska*, C-522/08; *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, para. 21: 'As is evident from recital 6 in the preamble to the Directive, only national legislation relating to unfair commercial

than provided by the Directive – which makes it even more important to achieve a high level of consumer protection.⁸

The Directive's aim of protecting consumers' economic interests is achieved with a general prohibition of 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. Two more detailed prohibitions concern misleading commercial practices (both misrepresentation and non-disclosure) and aggressive commercial practices. The practices under these detailed prohibitions are as such considered to be contrary to the requirements of professional diligence; such practices must, however, still be likely to materially distort the economic behaviour of the average consumer in order to be unfair under the Directive.⁹

The actual or potential distortion must be 'material' which entails that there must be a real risk of distortion of economic behaviour.¹⁰ This must be understood in relation to how much the practice 'influences' consumers in general and not necessarily the loss on individual consumers. Material distortion of economic behaviour is closely linked to the effect of 'causing the consumer to take a transactional decision that he would not have taken otherwise'. 'Transactional decision' is broadly defined, and includes decisions concerning whether or not to buy (or complain about) products and on which terms, including the decision to enter the shop,¹¹ which indicates a relatively low threshold as to the effect or loss inflicted on the consumer. The Court of Justice of the European Union (hereafter 'the Court') has emphasised that the act or omission on the part of the professional need not be recurrent or concern more than one consumer in order to be a commercial practice within the meaning of the Directive, but the Court did not consider the question of material distortion of economic behaviour in such situations.¹²

From an economic perspective¹³ the requirement of 'professional diligence' may be perceived as a standard for due care to be exercised by traders, and 'material economic distortion' as a standard that incorporates the due care that the average con-

practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is thus excluded from that scope.'

⁸ See also S Weatherill, *EU Consumer Law and Policy*, 317, (2nd ed., Edward Elgar 2013).

⁹ J Stuyck, E Terryn & T van Dyck, *Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market* 43 CMLRev, 107, 127 (2006). See also cases *CHS Tour Service*, C-435/11 and *Trento Sviluppo*, C-456/93.

¹⁰ See cases: *Sektellerei Kessler*, C-303/97, para. 33; *Zentrale zur Bekämpfung unlauteren Wettbewerbs v. Langguth*, C-456/93, para. 29 and *Darbo*, C-456/98, para. 28.

¹¹ *Trento Sviluppo and Centrale Adriatica*, C-281/12, para. 36. See also Art. 2(1)(e) and (k).

¹² *UPC Magyarország*, C-388/13, para. 42. Compare to US law where false claims are assessed with regard to the likely interpretation by a 'reasonable' consumer, and the effect of misleading one single consumer is not sufficient ground for liability. See also R Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere* 92 Virginia Law Review 565, 595 (2006).

¹³ From a legal perspective, intention and negligence is irrelevant in the interpretation of and assessment under the Directive. See *UPC Magyarország*, C-388/13, paras 47–48.

sumer is expected to exercise.¹⁴ Save for 31 *per se* prohibitions (blacklisted practices) listed in Annex I, 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. Due to the cumulative requirement, material economic distortion is lawful 1) as long as it only affects those consumers who fail to exercise due care and 2) in situations where the trader has exercised due care (i.e. complied with the requirement of professional diligence). Both situations are further analysed in chapters 4 and 5, respectively.

3. Citizens, Consumers, and Vulnerable Consumers

There are more than 500 million people in the European Union (EU-27) – some 16 per cent below 15 years of age.¹⁵ Due to various cultural, social, financial, and educational backgrounds these consumers represent large diversity measurable on many parameters. It is obvious that consumers may be vulnerable for many different reasons and in many different contexts.¹⁶ In this context, the focus is on consumers who are vulnerable with regard to their transactional decisions caused by commercial practices.

Consumer empowerment is the mantra of the European Commission's consumer strategy which *inter alia* aims to both protect the economic interests of consumers, and to promote their right to information and education.¹⁷ Empowered consumers are considered to make optimal decisions by understanding their own preferences and the choices available to them, and they 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 are supposed to be both confident and knowledgeable and have knowledge of their protection.¹⁸ However, according to a consumer empowerment survey only two per cent could answer questions correctly on their rights of withdrawal, guarantees and protection from unfair commercial practices,¹⁹ which indicates that consumers are not as empowered as the consumer policy tends to assume.

¹⁴ F Gómez, *The Unfair Commercial Practices Directive: A Law and Economics Perspective*, Revista Para el Análisis del Derecho (2006).

¹⁵ EUROSTAT, *Consumers in Europe* (2009 ed., ISSN 1831–4023).

¹⁶ See examples of protecting 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. See also B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, PhD dissertation, University of Amsterdam, 180ff. (2014).

¹⁷ Proposal for a *Regulation on a Consumer Programme 2014–2020*, COM(2011)707, Art. 2. See also current *EU Consumer Policy Strategy* (2007–2013), COM(2007) 99.

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

¹⁹ Eurobarometer 342, *Consumer Empowerment* (April 2011).

Decisions are a function of a number of decision rules, including human limitations (motivation, knowledge and ability), circumstances (opportunity, time pressure, distraction and presentation), and the nature of the decision (importance and frequency).²⁰ The less experience and knowledge we have, the more information we may need to comprehend in order to make good decisions. In economic theory, consumers are expected to read and understand available information in order to make rational ('efficient') choices. This approach is adopted by the Court²¹ 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,'²² and the average consumer is expected to be aware of the purpose and effects of advertising and sales promotions and thus able to rationally decide whether to purchase a product.²³

Thus, in order for markets to be efficient, consumers must be both active and competent – which entails not only that consumers have cognitive abilities to make efficient choices, but also that they take the time to make such decisions. In general, efficient decisions 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 human decision making) as elaborated on below. For good measure, it should be mentioned that feedback from a consultation concerning the Directive conducted by the European Commission did not signal 'significant problems in relation to vulnerable consumers'.²⁴

3.1. Behavioural Economics

Consumers must make a massive amount of decisions every day. *Transactional decisions* – the term used in the Directive – are generally based on goals, experience, and available information. Basically, consumers are expected to make purchases that match their preferences. However, research indicates that consumers have difficulties in choosing products that best fit their stated preferences despite truthful information.²⁵ As the economic behaviour of consumers is a matter of human decision making, it

²⁰ See also: L Waddington, *Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law*, European Law Review 757 (2013), who notes that vulnerability has a 'dynamic and relative nature'.

²¹ See in particular *Rewe v. Bundesmonopolverwaltung für Branntwein*, C-120/78, para. 12.

²² *Estée Lauder*, C-220/98, para. 25.

²³ *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, opinion of Advocate General Trstenjak, para. 104.

²⁴ See report of 14 March 2013 on the application of *Directive 2005/29/EC*, COM(2013) 139, under 6 and 3.3.2, respectively.

²⁵ See e.g. K. Gidlöf, *Material Distortion of Economic Behaviour and Everyday Decision Quality* 34 Journal of Consumer Policy, 389 (2013).

makes sense to turn to the fast-growing body of research in *behavioural economics* which combines economics with behavioural sciences.²⁶ Already in 1935 it was suggested that practically everything that people want is wanted for some unconscious reason that the average person does not understand, and that apparent reasons are merely excuses ('rationalization').²⁷ 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.²⁸ Behavioural economics may give guidance on how consumers in general are likely to respond to particular commercial practices. Other sciences such as neuroscience, and more specific methods such as eye-tracking and A/B-testing may also be applied to determine how consumers behave or respond to commercial practices.

In order for consumers to make decisions that match their preferences, they process available information and react to conducts based on both a *logical* and *emotional* response. In traditional economic *expected utility theory* emphasis is laid on the logical ('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 amounts for all purchase decisions and the availability will depend on both the consumer (cognition and availed time) and the circumstances (urgency and complexity). Research in behavioural economics has shown that our emotions ('pragmatic inferences' as opposed to 'logic inferences') play a significant 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. Emotional responses allow us to make faster decisions, but emotions are difficult to turn off even when we have more time available.²⁹

Human decision making relies to a large extent on the prefrontal cortices of the brain that are closely related to our emotions which are important for effective learning.³⁰ It has been noted that *Humans* have limited computational skills and seriously flawed memories,³¹ and research in behavioural economics demonstrate that we are not as good at learning as we tend to believe.³² Our decisions are often intuitive and guided by what we happen to see at a given moment ('the availability heuristic'). Thus 'a particularly unrealistic assumption of the rational-agent model is that agents make their choices in a comprehensively inclusive context, which incorporates all the

²⁶ See in general the discussions in R Posner, *Rational Choice, Behavioral Economics, and the Law* 50 Stan. L. Rev. 1551 (1997–1998) and C Jolls, C Sunstein & R Thaler, *Theories and Tropes: A Reply to Posner and Kelman* 50 Stan. L. Rev. 1593 (1997–1998).

²⁷ D Laird, *What Makes People Buy*, 22f (McGraw-Hill 1935).

²⁸ D Kahneman, *Maps of Bounded Rationality: Psychology for Behavioural Economics* 93 *The American Economic Review* 1449, 1449 (2003).

²⁹ See also W Mischel, *The Marshmallow Test* (Little Brown 2014).

³⁰ See in particular A Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (2005).

³¹ C Jolls, C Sunstein & R Thaler, *Theories and Tropes: A Reply to Posner and Kelman* 50 Stan. L. Rev. 1593 (1997–1998).

³² See about learning in D Kahneman, *Thinking, Fast and Slow*, ch. 35 (2011).

relevant details of the present situation, as well as expectations about all future opportunities and risks'.³³ A 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.³⁴

As examples of behavioural economics revelations, 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.³⁵ Also the 'halo effect' refers to the tendency to like (or dislike) everything about a person, including things that are not observed.³⁶ These and other biases of judgement and choice are fundamental to behavioural economics, and includes present-biases, issues of overconfidence, framing effects, and base-rate neglect.³⁷ It is not the intention of this article to discuss these concepts, but to discuss how such insight about human decision-making can be applied in the context of unfair commercial practices as regulated in the Directive.

Decision-making is complex, and it is difficult both to form and follow preferences along the many dimensions of products that satisfies various aspects of our preferences in different ways; especially because we have limited time and cognition at hand, and because we tend to focus on what is salient at the time of decision, including possible instant gratification ('present bias').³⁸

3.2. *The Long Tail of Vulnerable Consumers*

People are different and will react differently to commercial practices. More 'sophisticated' individuals may be less likely to suffer negative consequences from a commercial practice that may easily trick less 'sophisticated' consumers. In order to illustrate decision quality – both in general and following a concrete commercial practice – it may be helpful to consider consumers to be represented along a continuum that runs from very sophisticated ('invulnerable') to very vulnerable. One could assume a normal distribution (bell-curve) or probably more likely a power law distribution³⁹ – the latter suggesting a lot of consumers who are not particularly vulner-

³³ D Kahneman, *Maps of Bounded Rationality: Psychology for Behavioural Economics* 93 *The American Economic Review* 1449, 1469 and 1459, (2003). See also Richard A Posner, *Rational Choice, Behavioral Economics, and the Law* 50 *Stan. L. Rev.* 1551, 1559 (1997–1998) and Daniel Kahneman, *Thinking, Fast and Slow*, ch. 35 (2011).

³⁴ See R Thaler & C Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin Books 2009).

³⁵ *Ibid.*, p 62.

³⁶ *Ibid.*, p 82.

³⁷ *Ibid.*, p 87f.

³⁸ See e.g. W Mischel, E Ebbesen, & A Zeiss, *Cognitive and Attentional Mechanisms in Delay of Gratification* 21 *Journal of Personality and Social Psychology* 204 (1972) and D Read & B van Leeuwen, *Predicting Hunger: The Effects of Appetite and Delay on Choice* 76 *Organizational Behavior and Human Decision Processes* 189 (1998).

³⁹ See in general on distribution of human abilities in N Taleb, *The Black Swan* (2007).

able and a long tail of vulnerable consumers exercising a decreasing level of sophistication in their decisions. For the purpose of this article, the depiction of the distribution in itself is not as relevant as the fact that it is inevitable that some consumers will be negatively affected by virtually all commercial practices – even practices elaborated in good faith. This is one reason why there must be an accepted level of ‘collateral damage’ in marketing law – recognising that marketing is a prerequisite for markets to work. This is also recognised in Recital 18 of the Directive, which states that ‘it is appropriate to protect all consumers from unfair commercial practices; *however* the Court of Justice has found it necessary [...] to examine the effect on a notional, typical consumer’ (my emphasis).

As recognised in consumer protection law, consumers are as such considered to be the weaker – hence vulnerable – party of a business-to-consumer interaction. The notion of ‘vulnerable consumers’ is usually used to denote groups of consumers that are *particularly* vulnerable, i.e. more vulnerable than the average consumer. On the above-mentioned continuum, members of these groups will primarily be found in the long tail and may thus be considered ‘Long Tail Natives’. However, consumers will not necessarily be consistent in the applied level of sophistication in all decisions. Long Tail Natives may do well in some decision and highly sophisticated consumers may occasionally exercise a low level of sophistication, and may in those circumstances be considered ‘Long Tail Visitors’. Based on this conceptualisation, it may be found that most – if not all – consumers will occasionally act below average (Long Tail Visitors) and vulnerable consumers will usually act below average (Long Tail Natives).

As an economic analysis of human behaviour, behavioural economics reveals insight in how Humans in general behave and may deviate from the expected behaviour of Econs. Therefore this insight may, in particular, help to understand general vulnerabilities (flaws) in Humans’ decision-making. However, this insight will not reveal how individual consumers will react to commercial practices.

4. Material Distortion of the Average Consumer

‘The average consumer’ plays a significant role in the Directive; as the material distortion of ‘him’ is required for the prohibition of a commercial practice, save for those listed in the blacklist. Put differently, a trader may apply any commercial practice that is not on the blacklist as long as the economic behaviour of the average consumer is not distorted; even in situations where the practice would be contrary to the requirements of professional diligence as discussed below.

Material distortion of the economic behaviour of consumers entails that a commercial practice appreciably impair the consumer’s ability to make an informed decision, and that it is likely to cause the consumer to take a *transactional decision* that he would not have taken otherwise. What makes this equation difficult is 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. This test should be made in an 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 when and how these three particular groups mentioned in the Directive should be applied.

Taken literally, the analysis would require an identification of the relevant group(s) of consumers and an assessment of whether the average consumer in this/these group(s) is likely to change his behaviour due to the commercial practice. However, every step of such a test would be cumbersome and in most cases right out impossible. National courts and authorities must determine the typical reaction of the average consumer which in mathematical terms sounds more like a *median* than the *mean* – but it does not make the above-mentioned exercise easier. It appears to be an oxymoron, when it follows from Recital 18 that the *average* consumer test is *not* a statistical test. In that vein 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, notably without any discussions of a psychological, economic or mathematical nature. This illustrates that the average consumer is in fact a 'normative abstraction' setting a standard for; not how consumers *do* behave, but how they *should* (are expected to) behave.

It follows further from Recital 18 that in applying the benchmark of the average consumer, social, cultural, and linguistic factors should be taken into account.⁴⁰ 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 a literal interpretation of Item 20 of Annex I;⁴¹ but not from the Commission's non-binding interpretation.⁴² In the *Clinique* case,⁴³ 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,⁴⁴ 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

⁴⁰ See e.g. *Fratelli Graffione*, C-313/94, para. 22.

⁴¹ 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.

⁴² Commission staff working document guidance on the implementation/application of Directive 2005/29/ec on unfair commercial practices, SEC(2009) 1666, 3 December 2009 (hereafter 'Staff Working Document') p 56ff.

⁴³ *Verband Sozialer Wettbewerb v. Clinique Laboratories and Estée Lauder*, C-315/92.

⁴⁴ Paragraph 21.

reluctant to admit arguments of a linguistic nature, but it may change due to the explicit reference hereto in the Directive.

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*. Such a consumer could 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 standard, as applied by the Court, has little in common with the behaviour of the real average consumer (i.e. *Humans*).⁴⁶ The idea of clever consumers falls well in line with the consumer policy focusing on *the empowered consumer*. From preparatory works it appears to be a conscious choice to adopt the Court’s average consumer as the Directive’s benchmark rather than the vulnerable or atypical consumer.⁴⁷ Earlier case law concerning the Misleading Advertising Directive made reference to distortion of the economic behaviour of ‘a significant number of consumers’⁴⁸ which from a linguistic perspective may include both relative and absolute figures.

4.1. *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 that consumers influence decision-quality by the time devoted to the decision. The average consumer 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 an Advocate General’s assumption that 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.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

The consumers’ right to self-determination entails that consumers who fail to exercise due care in their decision-making are not protected, i.e. the consumer is 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.⁵¹ The consumer’s

⁴⁵ See Staff Working Document, p 25.

⁴⁶ See R Incardona & C Poncibó, *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution* 30 *Journal of Consumer Policy* 21 (2007) and Jan Trzaskowski, *Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive* 3 *Journal of Consumer Policy* 381 (2011).

⁴⁷ Proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market, COM (2003), 356, 2003/0134 (COD), p 8.

⁴⁸ *X (Nissan)*, C-373/90, para. 15f.

⁴⁹ *Douwe Egberts*, C-239/02, para. 54.

⁵⁰ *Darbo*, C-465/98.

⁵¹ J Stuyck, E Terryn & T van Dyck, *Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market* 43 *CMLRev* 107, 125 (2006).

right to self-determination is closely linked to an ideology in which it is unnecessary and even immoral to protect people against their choices.⁵² The presumption that individual choices should be respected is usually based on the claim that people do an excellent job of making choices.⁵³ But most *Humans* often need help to make more accurate judgements and better decisions, and it may be difficult to distinguish laziness from random attention deficit or inability.

4.2. *Assessment by National Courts*

It is not clear to which extent Member States are free to assess commercial practices, i.e. how detailed guidelines the Court will impose. Under the Misleading Advertising Directive, the Court 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.⁵⁴ It is, however, emphasised in Recital 18 of the Directive 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. The Member States are also left with a margin of discretion as to the choice of national measures intended to combat unfair commercial practices, on condition that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive.⁵⁵

In recent case law the Court has left the assessment of central issues to the Member States – including the requirement of professional diligence,⁵⁶ sufficient information to consumers,⁵⁷ and whether national law pursues consumer protection objectives.⁵⁸ The Court seems to be reluctant to make such assessments in its decisions, and it is obvious that the full harmonisation will not annihilate differences in Member States' assessment of commercial practices.⁵⁹ In the *Mediaprint* case the Court found that a national court may establish 'material economic distortion' when 'at least part of the public concerned' had their economic behaviour distorted.⁶⁰ Even

⁵² D Kahneman, *Thinking, Fast and Slow*, 411 (2011).

⁵³ C Sunstein & R Tahler, *Libertarian Paternalism Is Not an Oxymoron* 70 U. Chi. L. Rev. 1159, 1167 (2003).

⁵⁴ *Gut Springenheide*, C-210/96, para. 30 with references.

⁵⁵ *Köck*, C-206/11, para. 44 and *UPC Magyarország*, C-388/13, para. 57.

⁵⁶ *Mediaprint*, C-540/08.

⁵⁷ *Vinge Sverige*, C-122/10 and *Purely Creative and Others*, C-428/11.

⁵⁸ *Wamo*, C-288/10.

⁵⁹ See F Gómez, *The Unfair Commercial Practices Directive: A Law and Economics Perspective*, *Revista Para el Análisis del Derecho*, 12f (2006)., J Stuyck, E Terryn & T van Dyck, *Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market* 43 CMLRev 107, 127, 121 (2006) and Vanessa Mak, *Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive* 1 *European review of Private Law* 25, 29 (2011). See also: European Parliament, *State of Play of the Implementation of the Provisions on Advertising in the Unfair Commercial Practices Legislation* 10 and ch. 2.4 (July 2010). See similar: European Parliament, *Misleading Advertising on the Internet* (July 2010).

⁶⁰ *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, paras 44–45.

though this is a vague notion, it could indicate that the Court is pulling back from its previous high standard for the care consumers are expected to exercise.

4.3. *Applying Behavioural Economics*

Since the concept of the average consumer sets the standard for how consumers should behave, it seems reasonable to consider research in human decision-making (behavioural sciences, including in particular psychology and neuroscience). 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.⁶¹ 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.⁶² According to the Staff Working Document, such knowledge should be taken into consideration, and national courts and administrative authorities are encouraged to consider the current state of scientific knowledge, *including the most recent findings of behavioural economics*.⁶³ 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.⁶⁴ 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.⁶⁵

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.⁶⁶ It has been suggested that Recital 18 of the Directive, emphasising that the average consumer test is not a statistical test, could be understood as to abolish the use of statistical (empirical) evidence as a means of proof.⁶⁷ Historically, the Court has favoured consumers’ *logical* inferences rather

⁶¹ European Parliament resolution on a strategy for strengthening the rights of vulnerable consumers, 2011/2272(INI), under 2 (22 May 2012).

⁶² *Commission Staff Working Paper on Consumer Empowerment in the EU*, (SEC(2011)0469), para. 4 (22 May 2012).

⁶³ Staff Working Document, p 32.

⁶⁴ *European Parliament Resolution on a New Strategy for Consumer Policy*, 2011/2149(INI), paras 10 and 41(7 April 2011).

⁶⁵ *Purely Creative and Others*, C-428/11, paras 38 and 49.

⁶⁶ *Gut Springenheide and Tusky v. Oberkreisdirektor des Kreises Steinfurt*, C-210/96, paras 32, 35 and 36. See also *Esteé Lauder*, C-220/98.

⁶⁷ G Howells, H-W Micklitz & T Wilhelmsson, *European Fair Trading Law – The Unfair Commercial Practices Directive*, 116 (Ashgate Publishing 2006).

than their *pragmatic* inferences. This can be illustrated by the *Mars* case where the marking of '+ 10%' on the wrapping of ice-cream bars occupied approximately 30 per cent of the total surface area of the wrapping.⁶⁸ The Court found that the average consumer was expected 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 increase⁶⁹ – thus ignoring likely *pragmatic* inferences from the package design. In that vein it should be emphasised that pictures etc. is a much more efficient way to disseminate information than written letters.

Using evidence of real consumer behaviour may relax requirements to the expected care exercised by the average consumer – and thus improving the protection of more vulnerable consumers. This could lead to a standard closer to the older – and now inapt and abandoned – German benchmark: 'the casually observing and uncritical average consumer'.⁷⁰ This body of research may help to answer questions concerning a) how consumers are influenced by commercial practices and b) what transactional decision consumers would be likely to *have taken otherwise* which is a fundamental part of 'material distortion'. Research may also be used when considering how much time the average consumer is expected to spend on their decisions.⁷¹ It is found that many choices in stores are based on brand names alone⁷² and often consumers do not look at the back of product packages.⁷³ In this vein it should be noted that longer time for consideration does not necessarily lead to better decisions; as emotions in certain situations are a better apparatus for decision-making than our rational minds.

Research in consumer behaviour may be applied either: 1) by testing the actual commercial practice or 2) by extracting general trends in human decision making.⁷⁴ 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.⁷⁵ When testing a particular commercial practice, one will still have to convert the result into a behaviour that can reasonably be expected from *the average consumer*. It should also be noted that consumer polls may not be reliable when consumers reflect on how they believe they are affected by marketing. Thus experts' opinions relying on e.g. behavioural economics could be cheaper and equally helpful. All parties in a case may provide evidence on

⁶⁸ D Kraft, *Advertising Restriction and the Free Movement of Goods – The Case Law of the ECJ*, EBLRev, 517, 521 (2007).

⁶⁹ *Verein gegen Unwesen in Handel und Gewerbe Köln v. Mars*, C-470-93, para. 24.

⁷⁰ See in general B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, PhD dissertation, University of Amsterdam, 81 (2014).

⁷¹ See e.g. K Gidlöf, A Wallin, K Holmqvist & P Møgelvang-Hansen, *Material Distortion of Economic Behaviour and Everyday Decision Quality* 36 *Journal of Consumer Policy* 389 (2013).

⁷² J Jacoby, RI Chestnut and WA Fisher, *Information Acquisition in Nondurable Purchase* 15 *Journal of Marketing Research* 532 (1978).

⁷³ J Clement, *Visual Influence on In-Store Buying Decisions: An Eye-Track Experiment on the Visual Influence on Packaging Design* 23 *Journals of Marketing Management* 917 (2007).

⁷⁴ See also J Trzaskowski, *Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive* 3 *Journal of Consumer Policy* (2011).

⁷⁵ See also R Craswell, *Interpreting Deceptive Advertising* 65 *B.U.L. Rev.* 657, 684 (1985).

actual human behaviour, and as general rule, the burden of proof of the unfairness of a disputed commercial practice lies with the plaintiff.⁷⁶

Consumer protection is an important and fundamental part of EU policies. It follows from Article 38 of the Charter of Fundamental Rights of the European Union, as incorporated into the Treaties by Article 6 TEU,⁷⁷ that ‘Union policies shall ensure a high level of consumer protection’.⁷⁸ 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’.⁷⁹ 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.⁸⁰ 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.⁸¹ The flexible nature of the provisions found in the Directive allows a consumer friendly interpretation and assessment.

4.4. *Particularly Vulnerable Consumers; Article 5(3)*

The Directive contains a provision aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.⁸² This protection is, however, limited to *groups* of consumers who are *particularly vulnerable* to the commercial practice because of their mental or physical infirmity, age or credulity, thus ignoring *general vulnerabilities* in human decision making. However, in these cases the protection requires that the commercial practice is assessed from the perspective of the average member of that group rather from the ‘normal’ average consumer. It is not a requirement that the vulnerable group is particularly targeted by the commercial practices,⁸³ which entails that *all* commercial practices that may distort members of the group of vulnerable consumers, must be assessed in the light of this provision. However, a 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.

⁷⁶ Proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market, COM (2003) 356, 2003/0134 (COD), para. 69. Art. 6(1f) makes an exception to this rule.

⁷⁷ The 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.

⁷⁸ See also Arts 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).

⁷⁹ Art. 12.

⁸⁰ See also V Trstenjak & E Beysen, *European Consumer Protection Law: Curia Semper Dabit Remedium?* 48 CMLRev 95 (2011).

⁸¹ *CILFIT v. Ministero della Sanità*, C-283/81, para. 20.

⁸² See also P Shears, *Overviewing the EU Unfair Commercial Practices Directive: Concentric Circles*, EBLRev 781, 784 (2007).

⁸³ G Anagnostaras, *The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?* 47 CMLRev 147, 168 (2010).

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 interests in the context of commercial practices. It is on the other hand 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 relate 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. This issue is addressed in Article 9(1)(c) which is included 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.

In the context of consumers' economic interests, the situations of possible vulnerabilities are vast and may cover all situations in which consumers make inferior choices relative to their preference *due to* a commercial practice. The focus on 'particular groups' does not protect all vulnerable consumers. Children and young people seem to be at least one clearly identifiable group of consumers who may be particularly vulnerable in many situations, 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 that extent it may be hard to find it possible to distort their economic behaviour within the meaning of the Directive. However, children and young people influence transactional decisions made by their parents which 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 (utilising 'pester power'). If read literally, the provision will have far-reaching implications on advertising copy. It seems clear that Article 5(3) does not protect the group of parents who eventually are at risk of making bad consumption due to the foreseeable influence from a vulnerable group (their offspring).

The restrictive list of vulnerable groups 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.⁸⁴ However, if the quality of consumers' decisions depend on time and cognition, it would be controversial to suggest vulnerability due to e.g. gender,⁸⁵ ethnicity, and religious beliefs.

⁸⁴ J Stuyck, E Terryn & T van Dyck, *Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market* 43 CMLRev 107, 121 (2006).

⁸⁵ See 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 egalitarian society'.

To the extent commercial practices were to *offend* these groups 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. 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,⁸⁶ but this does not seem to be a vulnerability relating to their *ability* to make rational transactional decisions.

In terms of due care, the expectations to the ‘quality’ of the average consumer’s behaviour are lowered under Article 5(3). Regarding the trader, the requirement of professional diligence is supplemented by a requirement to foresee certain distortions of the economic behaviour of these vulnerable groups – i.e. a defence available to the trader. A logical reasoning leads to the conclusion that traders may distort the economic behaviour of such vulnerable groups 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. In principle Article 5(3) provides a good protection of vulnerable consumers within its apparently narrow scope, but it does not seem to address more general vulnerabilities in human decision making, including in particular biases and heuristics as discussed above.

5. Requirements of Professional Diligence

Professional diligence is part of the dual requirement of the general prohibition, and 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 concept is comparable to notions of good business conduct found in most legal systems and must be understood also in conjunction with the two specific prohibitions, which exemplifies practices that are considered to be contrary to the requirement of professional diligence. As mentioned above, the requirement must be understood as a standard for due care to be exercised by traders as such; ignoring concrete intent and negligence.⁸⁷

The Directive covers a number of commercial practices that in addition to the protection of consumer’s economic interests also serve other purposes. In the *Media-print* case, a ban on 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.⁸⁸ 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 was contrary to professional diligence. It is thus still unclear whether e.g. the safeguarding of pluralism of the press

⁸⁶ Staff Working Document, p 30.

⁸⁷ See to that effect *UPC Magyarország*, C-388/13, paras 47–48.

⁸⁸ *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, para. 15.

and protection of the weakest competitors could constitute part of the professional diligence assessment.⁸⁹ The definition seems 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.⁹⁰

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 the *offering of incentives* and advertising based on *brand recognition* or *product placement*.⁹¹ It follows from the above-mentioned Article 5(3) that the advertising practice of making exaggerated statements or statements which are not meant to be taken literally ('puffery') is legitimate.⁹² However, product placement, for instance, which is regulated in the Audiovisual Media Services Directive,⁹³ may not necessarily be an accepted practice in all Member States.⁹⁴ Until recently the use of e.g. premiums, coupons, and promotional lotteries were not accepted commercial practices in all Member States. It is not yet clear how to determine whether a commercial practice meets this standard and to which extent Member States may apply national standards for the assessment of professional diligence. In the *Media-print* case the Court left it to the Member State to determine whether the selling of newspapers with a possibility of participating in a competition is contrary to the requirements of professional diligence.⁹⁵ In this context, the Court could have – e.g. with reference to the above-mentioned proposal – determined that the offering of incentives is an accepted practice. This seems to confirm the Court's reluctance to provide detailed guidance on the assessments.

5.1. Exploiting the Long Tail of Vulnerable Consumers

The 'long tail' – introduced above – 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

⁸⁹ Answered in the negative in G Anagnostaras, *The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?* 47 CMLRev 147, 159 (2010).

⁹⁰ *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Bauer Verlag*, C-368/95, para. 18.

⁹¹ Proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market, COM (2003) 356, 2003/0134 (COD), para. 53.

⁹² See about similar treatment of puffery under American law: D Hoffman, *The Best Puffery Article Ever* 91 Iowa L. Rev. 1395, 1396 (2006): '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".'

⁹³ See Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

⁹⁴ Arts 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.

⁹⁵ *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08, paras 44 and 45.

focus on fewer, but very popular (and profitable) items.⁹⁶ The driving force in making niches profitable is primarily the diminishing cost of shelf space in electronic commerce where 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, and in this context it may be applied to the diminishing cost of commercial communication in general through electronic communication, including *social media*. This suggests that a marketing campaign needs to influence fewer people in order to be profitable.

The low cost of communication, including by establishing a website or creating an app, makes it economically viable to target large audiences in order to profit from only a small group of consumers in the long tail. In that vein it would make sense to consider whether a particular business model is designed as to take undue advantage of (certain) consumers.⁹⁷ A long tail strategy is, for instance, utilised to the extreme 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.⁹⁸ ‘Subscription traps’ is a more contemporary example of commercial practices exploiting the low cost of setting up a website and the fact that many consumers often find themselves in the long tail. The website creates the impression that the trader is giving away products for free or selling them at a very low price. It follows explicitly from the fine print that the consumer agrees to pay for a subscription by means of the credit-card information used for paying delivery of the advertised product which constitutes a decoy. The consumer needs to scroll down to read the fine print and the subscription payment is not charged immediately, so it will take some time before the consumer realises this, and the amount is so low that only few consumer will be likely to pursue this legally; taking into consideration his embarrassment for not realising that the offer was in fact too good to be true. When consumers fail to exercise due care in this context, it is because they are blinded by the instant gratification of accepting a deal that is too good to be true. Even though the Danish Consumer Ombudsman⁹⁹ has successfully pursued a number of these schemes with criminal charges, welfare has been lost by consumers in the long tail – probably both Long Tail Natives and Long Tail Visitors.

With a population of more than 500 million people misleading just one per cent of consumers will in absolute figures entail ‘economic distortion’ for millions of citizen.

⁹⁶ See Chris Anderson, *The (Longer) Long Tail* (2008).

⁹⁷ See e.g. *OFT v. Ashbourne Management Services*, [2011] EWHC 1237 (Ch), para. 173: ‘... I believe that the defendants’ business model is designed and calculated to take advantage of the naivety and inexperience of the average consumer by using gym clubs at the lower end of the market.’ *OFT v. Purely Creative* [2011] EWHC 106 (Ch), para. 106. See also Paterson, JM & Brody, G, “Safety Net” Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models, *Journal of Consumer Policy*, *Journal of Consumer Policy*, 331 (2015).

⁹⁸ J Trzaskowski, *User-Generated Marketing – Legal Implications when Word-of-Mouth Goes Viral* 19 *International Journal of Law and Information Technology* 30 (2011).

⁹⁹ <http://www.consumerombudsman.dk>.

There may be many reasons why consumers fail to exercise the care expected by the average consumer, including in particular a decision not to (e.g. read information) and an inability to (e.g. understand information). In between these extremes are situations where consumers suffer from occasional 'attention deficit' where even salient details are overlooked or otherwise clear information misunderstood. This applies equally to *commercial conducts* where consumers fail to recognise them or understand their implications. As the Directive does not make a distinction between these situations, consumers who fail to meet the average consumer standard are treated the same way no matter whether the reason is laziness or cognitive limitations. Consumers may learn about commercial practices and how they affect them through experience, but learning to choose is not free, and traders may still benefit from those who have their first experience with a particular commercial practice; which may be a profitable strategy given the low cost of marketing that thanks to personal data may be targeted at particular groups.

The model of requiring both *professional diligence* and *economic distortion* as it is laid out in the Directive entails the risk that certain commercial practices fall between two stools as discussed above. As the requirement of professional diligence is cumulative to the economic distortion requirement, the requirement would be superfluous if it did not carve out some commercial practices that are likely to distort the economic behaviour of the average consumer. The fairness assessment in the Directive must be perceived as a matter of deciding who – the consumer or the trader – should bear the risk of possible distortion of consumers. This speaks in favour of an overall assessment of the situation – which still should weigh in professional diligence and economic distortion. If consumers show reasonable care and material distortion is still likely, it does not 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. In this context one could go as far as to suggest the use of another Boolean operator in order to prohibit commercial practices that either distort the economic behaviour of consumers *or* are (otherwise) contrary to the requirement of professional diligence.

5.2. *Applying Behavioural Economics*

As mentioned above, it follows from the Directive and preparatory works that puffery, product placement, brand differentiation, and the offering of incentives are accepted 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 high risk of distorting the economic behaviour of the average consumer. The trader is the professional party, and the standard of professional diligence could include expectations to his knowledge of how consum-

ers *in general* are likely to react to particular commercial practices – as expressly mentioned in the context of vulnerable consumers.

In the assessment of professional diligence, it could be helpful to consider possible improvements in the commercial practice,¹⁰⁰ and how difficult and/or expensive these improvements would be. The burden of proof would lie with the plaintiff who would have to specify alternatives for the courts to consider.¹⁰¹ 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 particular the requirement of disclosing information or re-designing the decision architecture (e.g. ‘nudging’) may be greater when a commercial practice is likely to take advantage of biases and heuristics identified in behavioural sciences. In general there is no economic reason not to require traders to increase (or decrease) the amount of information useful for consumers so they may 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.¹⁰²

For instance, the statement ‘save up to 70%’ gives little or no information about what savings the consumer may expect. Even though adding the text ‘in the entire store’ does not detract from the truthfulness of the former statement, the addition could make even more consumers infer that there is a 70 per cent ‘store-wide’ discount; thus assuming that the copy is intended to make such belief. From an economic perspective, the signalling from both versions is so vague that it should be disregarded altogether; when consumers infer meaning from such vague signals, it is primarily due to pragmatic inferences. In this context, adding the text ‘on selected items’ would probably be more helpful for consumers in order to avoid misunderstandings. Another example is native advertising where advertisements are made to look like the surrounding (often editorial) content; e.g. by adding 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. 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 – knowing that deception is likely.¹⁰³

¹⁰⁰ See also R Craswell, *Interpreting Deceptive Advertising* 65 B.U.L. Rev. 657, 660 (1985).

¹⁰¹ See similar in the context of contract law R Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere* 92 Virginia Law Review 565, 625 (2006).

¹⁰² F Gómez, *The Unfair Commercial Practices Directive: A Law and Economics Perspective*, *Revista Para el Análisis del Derecho* 16 (2006).

¹⁰³ According to Item 11 in Annex I such practice is prohibited to the extent *editorial content* is used for promotion and it is not made clear that a trader has paid for the promotion. See also case *RlvS*, C-391/12.

In order to seek a general applied, objective standard, the Directive makes no reference to the trader's subjective intention behind a commercial practice.¹⁰⁴ It is, however, not the same as ruling out the possibility of considering the likely purpose of particular commercial practices, such as the subscription traps discussed above; without considering the subjective intention of the trader in the concrete case. It lies in the model of the Directive that courts should consider both the effect (economic distortion) and the professional diligence, which in this context could be seen as a proxy for the 'assumed intention' behind a particular commercial practice. I.e. it is contrary to the requirement of professional diligence to use commercial practices that the trader *should* know is likely to cause economic distortion, taking into consideration what he as a professional trader *should* know about consumer behaviour.

As mentioned above, information always entail a risk of disappointment, and saying more is not always the solution, as it may impact the effectiveness of information. Issues of 'information overload' have been recognised by the Commission in particular in relation to the 'small print' of contract terms and conditions.¹⁰⁵ To a large extent information may primarily benefit consumers above average who are in fact reasonably observant and circumspect, whereas consumers in the long tail will be less likely to read and understand 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, because any statement may be affected by the context, including other information and illustrations.¹⁰⁶ In the food information regulation, *voluntary* food information may not be displayed to the detriment of the space available for *mandatory* food information.¹⁰⁷ A similar approach could e.g. be relevant in cases where the consumer is likely to spend little time on the decision or where irrelevant information is presented in a way that distorts the consumer's focus; thus wasting precious time dedicated to understanding the details. According to the *availability heuristic* in behavioural economics, we are likely to base our decisions on available information, and thus failing to identify which additional information is missing.

Commercial conducts are aggressive if they are likely to impair the average consumer's freedom of choice by harassment, coercion, including the use of physical force, or undue influence. It could in particular be considered whether the trader's exploitation of bounded rationality is to be considered *undue influence* which is

¹⁰⁴ *UPC Magyarország*, C-388/13, paras 47–48.

¹⁰⁵ *Commission Staff Working Paper on Consumer Empowerment*, para. 24 and European Commission 3.3. See also Jacob Jacoby, *Perspectives on Information Overload* 10 *Journal of Consumer Research* 432 (1984) and proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market, COM (2003) 356, 2003/0134 (COD), 14, para. 65.

¹⁰⁶ R Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere* 92 *Virginia Law Review* 565, 582 (2006).

¹⁰⁷ Regulation 1169/2011 on the provision of food information to consumers, Art. 37 and Recital 47. See also *Commission v. Germany (Bernaise Sauce)*, C-51/94, para. 40, finding – in the context of food law – that additional particulars accompanying the trade description must be necessary for the information of consumers.

defined 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’.¹⁰⁸ 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. At least in some instances the exploitation of known flaws in human decision making must be contrary to the requirement of professional diligence.

6. *Per Se* Prohibitions

As mentioned above, there are 31 *per se* prohibitions that protect *all* consumers – including, in particular, consumers in the long tail. As it is demonstrated above, the (more sophisticated) *average consumer* is – in contrast to less sophisticated consumers – well protected under the Directive. *Per se* prohibitions is the only measure in the Directive’s framework that protect consumers in the far end of the long tail from commercial practices that only distort the economic behaviour of such consumers. However, one should be careful to ‘over regulate’ as regulation entails costs of compliance and enforcement (‘the cost of regulation’) and because marketing is important for competition that eventually benefit consumers.

The use of *per se* prohibitions is a more radical measure than mandated disclosures and the general normative prohibition discussed above. However, *per se* prohibitions may be advantageous in some instances as long as traders are not deprived of effective means to inform consumers about themselves and their products. It should be borne in mind that the socio economic purpose of marketing is to support informed decisions by consumers. It would be detrimental to consumers in general if stricter regulation would impede competition; on the other hand welfare would increase if more consumers are protected from ‘economic distortion’. Regulation of marketing seems widely accepted; so the question is not *whether* to have regulation, but *which* and *how much* of it.

At least in principle, *per se* prohibitions are less flexibility and more predictably than the general normative prohibition, and may thus lower the cost of regulation by being clearer, i.e. easier to enforce and comply with – admitting that not all items on the current list are easy to interpret. Further studies in behavioural economics, as encouraged by the European Parliament, may provide insight in how and when consumer welfare may be enhanced by way of either information or prohibitions. For good measure, it should be emphasised that the items on the current list to a large extent, only restate what would be prohibited under the general principles of unfair

¹⁰⁸ Art. 2(1)(j).

commercial practices.¹⁰⁹ It falls outside the scope of this article to provide a comprehensive cost-benefit analysis of the law in question, but an important part of such an assessment is to determine the loss which would follow from a regime where account would be taken of consumers in the long tail. In such an assessment the loss suffered by individual traders due to the deprivation of effective means of distorting the economic behaviour of consumers must be perceived as a benefit to consumers, primarily those in the long tail.

In the (withdrawn) proposal for a regulation concerning sales promotions in the Internal Market,¹¹⁰ the goal was to eliminate national bans on certain types of sales promotions, including discounts, gifts, premiums, and promotional games – those bans are now history due to the Directive. The idea was that information could render prohibitions superfluous. However, as is discussed above, overwhelming the consumer with information may not necessarily lead to more informed decisions – in particular not by those in the long tail. In addition to this, some of these sales promotions draw upon known biases and heuristics distracting the consumer and increasing the likelihood of economic distortion.¹¹¹ With reference to the goal of ‘empowering’ consumers to make efficient choices, it could be argued that little welfare is lost by prohibiting the use of sales promotions which intrinsically remove the consumer’s attention from the product or the offer he is expected to assess.¹¹² Even though consumers may have a tendency to ‘like’ complicated commercial schemes such as loyalty programs and promotional games, it should be borne in mind that more complicated commercial practices entails higher risk of economic distortion and higher transaction costs wasted on the consumers’ attempt to understand such schemes. Also, some of these sales promotions may be prohibitively expensive for smaller businesses leading to higher entrance barriers with adverse effects on competition – which is to the detriment of consumers.

In the *Plus* case it was found that a Member State could not maintain a ban on commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services.¹¹³ The Court has recognised that for at least some consumers, the possibility of participating in a competition may represent the factor which determines them to buy a product (a newspaper *in casu*).¹¹⁴ With a per se ban, the welfare of those ‘at least some’ consumers would be increased as they would make their purchase decision according to their actual preferences. A clear prohibition would save the trader from

¹⁰⁹ J Stuyck, E Terry & T van Dyck, *Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market* 43 CMLRev 107, 132 (2006).

¹¹⁰ Proposal for a regulation concerning sales promotions in the Internal Market, COM (2001) 546 final, 2001/0227 (COD).

¹¹¹ J Trzaskowski, *Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive 3* Journal of Consumer Policy 387 (2011).

¹¹² See also D Caruso, *Black Lists and Private Autonomy in EU Contract Law* in D Leczykiewicz & S Weatherill, *The Involvement of EU Law in Private Law Relationships*, 291ff. (Hart, 2005).

¹¹³ *Plus Warenhandelsgesellschaft*, C-304/08.

¹¹⁴ *Mediaprint Zeitungs- und Zeitschriftenverlag*, C-540/08.

interpreting the general ban and elaborating detailed terms for the sales promotion. The welfare loss may be more difficult to assess; some consumers may have genuine preference for promotional lotteries that may not be satisfied by the availability of a commercial market for lotteries. Adverse effects of gambling are recognised by the Court,¹¹⁵ and it may be difficult to see why it should be better to sell a lottery ticket with a box of cereal – also from a transparency perspective. It is clear from case law that Member States may not prohibit the use of combined offers per se, but it is – despite the *Plus* judgment – not settled to which extent national courts may find such practices to be contrary to professional diligence or use gambling law to restrict the use of promotional lotteries.¹¹⁶

7. Conclusions

It is noted in the Staff Working Document that the Unfair Commercial Practices 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.¹¹⁷ This may be taking it too far, but the Directive protects many consumers from ‘economic distortion’, in particular those who are already blessed with a high level of sophistication, whereas the protection of more vulnerable consumers is limited. Save for the per se bans, commercial practices can only be prohibited if the practice distorts the economic behaviour of the average consumer, and consumers may also suffer from economic distortion if the trader applies a ‘legitimate’ commercial practice such as product placement, puffery, and the offering of incentives. The Directive addresses vulnerable consumers in Article 5(3), but the provision is limited only to the average consumer of particular groups of vulnerable consumers and to what the trader could reasonably foresee.

A trader may through commercial practices benefit from a lower level of sophistication exercised by consumers in the long tail; either Long Tail Natives or Long Tail Visitors. Such commercial practices may be directed to all consumers and thus not be unfair because they only distort the economic behaviour of consumers who act ‘below average’. There are many reasons why consumers fail to exercise the care expected by the average consumer and many consumers may not even be aware that they failed to act in accordance with their preferences. Consumers suffer from limited time, cognition, experience, and rationality, which the trader may benefit from when designing his commercial practices. Behavioural economics may be applied to the assessment of professional diligence and economic distortion – concepts that sets

¹¹⁵ See e.g. *Gambelli and Others*, C-243/01, paras 63 and 67 with references.

¹¹⁶ Promotional lotteries may either be perceived as an independent commercial practice or as a combined offer including a lottery ticket. In the latter case all products must be lawful, as it *inter alia* follows from Item 9 on the blacklist that it is prohibited to create the impression that a product can legally be sold when it cannot.

¹¹⁷ Staff Working Document, p 6.

standards for due care to be exercised by the trader and the consumer, respectively. Thus revelations concerning human decision making may be used to understand what the trader, as the professional party, should understand about likely reactions to commercial practices as well as to understand what care can reasonably be expected by consumers. Using evidence of real consumer behaviour may relax requirements to the expected care exercised by the average consumer – and thus improving the protection of more vulnerable consumers.

Analyses of commercial practices must take into account the nature of the product, the circumstances under which it is offered, and the complexity of the commercial practice; bearing in mind that consumers in general use little time on many purchases. It is suggested to consider to which extent the commercial practice actually aid or harm the consumers ability to make an informed decision, and to which extent and at which cost the commercial practices could be improved, *inter alia* through changing the amount or content of information. In this context it could also be considered to which extent the practice is likely to be used for 'fishing in the long tail'; in that vein it could be relevant to squint at the absolute number of consumers who are in the long tail.

Behavioural economics may also be applied to identify commercial practices that should be prohibited per se, e.g. commercial practices that notoriously distract the consumer from the product or the offer, which subsequently is likely to lead to economic distortion. Per se bans are the only way of protecting consumers in the far end of the long tail from commercial practices that *only* distort the economic behaviour of such consumers. Such prohibitions are more radical than the general prohibition discussed above, and as competition (efficient markets) is important for consumers, such market interventions must be carefully considered. It is suggested that per se prohibition may be advantageous in some instances, such as promotional lotteries, as long as traders are not deprived of effective means to inform consumers about themselves and their products. It may also be beneficial to consider to which extent the welfare loss suffered from consumers in the long tail is compensated by a gain in welfare for consumers that do not suffer economic distortion.

Consumers' trust is a prerequisite for an efficient Internal Market which in itself is an argument for a high level of consumer protection; in order to avoid costly disappointments for as many consumers as possible. Ideally, marketing should convey information that is meaningful to the decision that the consumer is about to make. Insights from behavioural sciences may help legislators, judges, traders, and law enforcers to determine what can reasonably be expected of *Humans* and thus demanded of traders. It is suggested that the yard stick for marketing should, having regard to insights in human decision-making, be based on an analysis of the extent to which the information is likely to assist or distract consumers, expecting e.g. salient information to be consistent with the fine print. Traders are expected to influence consumer's preferences through marketing, and due to limitation in availed time and cognition, it is likely to benefit the overall decision quality if competition is based on price, quality, and service rather than on obscure commercial practices that distract consumers' attention from such attributes.

