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## NEW CHALLENGES FOR THE ASSESSMENT OF FAIRNESS IN A COMMON MARKET

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**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**DEPARTMENT OF LAW**

*New Challenges for the Assessment of Fairness in a Common Market*

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## **Legal Uncertainty – A Neglected Aspect of Unfair Commercial Practices Law in Europe**

### **Abstract**

The regulation of unfair commercial practices in Europe did receive probably about the same amount of applause as of criticism from the very beginning. The practical questions addressed to the Courts remind of the theoretical problems that are still on the table. It seems that European lawmakers did contribute to the legal uncertainty, which triggered doubts as to what commercial practices are prohibited and what are illegal. In this article it is claimed that it is not the ever-complicated business activities that call for a complex legal regulation but the inappropriate legal standards that created legal uncertainty and – in consequence – added to the compliance doubts of EU businesses.

### **Keywords**

Directives, European law, harmonization

## **The Scope of Application of the UCP-Directive – “I Know What You Did Last Summer”**

### **Abstract**

The ECJ judgments VTB-VAB and Plus have at the same time made clear how far the Directive 2005/29 on Unfair Commercial Practices in the Internal Market (hereinafter: UCP Directive) is going to bear upon the future market conduct of market participants and raised the question whether its scope of application, if defined in such a comprehensive manner, is covered by its purpose. Following an introduction, this paper will first try to shed some light on the UCP Directive's provisions relating to the scope of application and the problems relating to them. At the bottom line a gulf between the protective purpose of the UCP Directive and its substantive scope of application will be uncovered. A critical analysis of the VTB judgement will assess whether the ECJ has closed the gap. The lessons learnt will be summarized. The recent judgements have left unanswered questions relating to the treatment of after-sale conduct without market effects and practices with such market effects engaged in by science, consumer associations or media.

### **Keywords**

Implementation, integration theory, media, *acquis communautaire*, economic law, harmonisation, preliminary rulings, European Court of Justice

## **Towards a Common European Marketing Law**

### **Abstract**

In two judgments the Court of Justice of the European Union establishes that the Unfair Commercial Practices Directive (2005/29) must be interpreted as precluding national legislation prohibition commercial practices concerning combined offers and use of prize competition and lottery, without taking account of the specific circumstances of individual cases. Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer

protection. A number of Member States have apparently been surprised by the decisions, which will require substantial changes in national law. This article discusses the judgments and illustrates some of the challenges in the shaping of a new European marketing law.

## **Keywords**

Unfair commercial practices, harmonisation, preliminary rulings, European Court of Justice, interdisciplinary approach

## **Methods of Legal Regulation and Real-Life Case Scenarios**

### **Abstract**

Both per se prohibitions and concrete case-by-case evaluation according to the 'average consumer' benchmark are well known in food law as different legal methods to counteract misleading practices. The two regulatory methods form parts of the legal starting points of the FairSpeak project. The project deals with potentially misleading presentation of food and aims at providing more precise operational knowledge to assist decision makers and practitioners confronted with questions of what is likely to mislead the 'average consumer'. Furthermore, it aims at providing tools for evaluating to what extent per se prohibitions (food standards, legal definitions etc.) represent a better method of regulation. One of the first steps of the FairSpeak project has been a study of administrative cases on misleading presentation of food brought before the Danish food authorities in 2002-2007. The case study aimed i.a. at identifying case scenarios of real life importance and at identifying essential research questions and providing a basis for formulating specific hypotheses to be operationalised and tested in experiments. The article highlights and discusses some of the results of the case study.

## **Keywords**

Unfair commercial practices, harmonisation, unfair food labelling, average consumer, regulation

## **What's in a (Food) Name? From Consumer Protection to Cognitive Science – and Back**

### **Abstract**

While the legal basis for determining whether a food name is fair or misleading when applied to a particular product is given by EU law, the specifics to which the rules must be applied in individual instances are cognitive and communicative rather than legal by nature: It is a matter of what words mean, and how (average) consumers can be expected to understand them in view of their general world knowledge and the cognitive and communicative skills at their disposal. Using a quantitative and qualitative review of 821 Danish cases on misleading food naming and labeling as an empirical frame of reference, this article offers a more detailed analysis of conflict scenarios relating specifically to food names. The pre-theoretical assumptions and arguments put forward by the immediate actors in the case files are transposed into more exact theoretical terms, revealing, among other things, the very different cognitive essence of conflict scenarios relating to established (familiar) and novel (unfamiliar) food names, respectively. The analysis aims at providing new cues for the continued development of administrative and legal practices on EU markets, and, not least, for the industry's self-regulation. The latter includes isolating the variables needed for making explicit hypotheses about the fairness and misleading potential of specific food naming solutions, and putting them to experimental test.

**Keywords**

Fairness, food naming, food labelling, cognitive science, knowledge, average consumer, regulation

**Match and Mismatch Between Consumer Knowledge and Packaging Design****Abstract**

Daily food products often fail to success on the market due to inappropriate packaging design which is unable to break through the clutter of visual information on the supermarkets' shelf. The in-store communication between packaging and consumer is a matter of good and fair information, which however can only be so if it is understandable to a majority of consumers. Consumers' background knowledge is an essential factor for how people decode relevant elements in the cocktail of signs on food labels. We present evidence for dividing consumers into two types based on their background knowledge: the *factual knowledge type* and the *signpost type*. Both groups count less informed, informed and well-informed consumers, whereby both groups imply prototypes of "the average consumer". By combining eye-tracking and a questionnaire survey we found data revealing how different kinds of information on food labels attract consumers' visual attention and are perceived differently by these two main types of consumers. A better understanding of diversities in consumer knowledge and their ways of searching for information is primordial for creating successful and fair food labels.

**Keywords**

Fairness, food labelling, average consumer, eye-tracking, knowledge



## Introduction

On November 23, the European University Institute, Florence, hosted a seminar on the challenges for Europe, the Member States, businesses, and consumer organizations in relation to the fairness of commercial practices. This Working Paper presents written versions of the talks given at this seminar.

The legal consequences of full harmonisation in the Unfair Commercial Practices Directive (UCPD) and the possible consequences hereof for future developments in administrative and legal practices as well as the best practices of European companies were discussed at the seminar. In the first article, Marcin Rogowski relates these issues to a wider theoretical discussion on the nature of uncertainty. He boldly argues that the ill-designed test of fairness presupposed by the UCPD contributes to legal uncertainty rather than to business certainty, which should be the cornerstone of an act aiming at full harmonization. Substantiating this critique in several regards, Jochen Glöckner states in his article that the simple wording of the UCPD entails a far reaching harmonisation of all commercial practices addressed towards consumers. The lack of guidance and generally accepted principles for assessing when a practice is unfair combined with the prohibition against *per se* rules in B2C commercial practices at Member State level leaves a number of questions open. Looking closer at the legal standards, especially the concept of the average consumer, it becomes clear that law and legal standards alone cannot provide valuable guidance as to when commercial practices are unfair. As pointed out in the next article by Jan Trzaskowski, insights from behavioural economics and the cognitive sciences should be taken into consideration when assessing commercial practices. However, today the legal assessment is based primarily on common sense rather than on empirical evidence and operational hypotheses susceptible to experimental testing.

The need for and challenges of providing such harder evidence for future practices is the subject of the next three articles which present selected results gained by the cross-disciplinary Danish research group FairSpeak, taking a specific focus on the fairness of food labelling. The group ([www.fairspeak.org](http://www.fairspeak.org)) was established to provide a new, shared frame of reference for food manufacturers, authorities, and consumer organizations for assessing in-store food-to-consumer communication through food labelling design from a fairness perspective. The key aim is to operationalize the legal concepts of potential misleadingness by providing an integrated theoretical analysis of the variables involved in the present form of communication, and developing new experimental techniques for testing the misleading hazards of individual food labelling solutions on empirical grounds. The group comprises researchers from Copenhagen Business School (CBS) specializing in language & cognition, semiotics, visual design, marketing, and commercial law. The group's main project "Spin or fair speak – when foods talk" is funded by the Program Commission for Food, Health and Welfare under the Danish Council for Strategic Research and is carried out as a collaboration between the FairSpeak Group, CBS, and key researchers from the Faculty of Life Sciences at Copenhagen University, the National Food Institute at the Technical University of Denmark, and Lund University Cognitive Science (Sweden).

In particular, the issues addressed include operationalisation of legal benchmarks such as the average consumer and questions relating to whether *per se* rules are a better regulatory method. In his article, Peter Møgelvang-Hansen presents the methodology and main findings of a quantitative and qualitative review of 821 Danish cases on misleading presentation of food products which has served as an important catalyst for identifying and classifying conflict scenarios of real-life importance. On that background, Viktor Smith presents a more detailed analysis of conflict scenarios relating to the alleged misleading potential of established and novel food names, uncovering the cognitive and linguistic specifics upon which a legal form must be imposed in such cases. A key point is that although consumers can feel misled by a single labelling element, such as the name, it is rarely one labelling element alone that causes consumers to be misled. The total labelling must be considered, and further matched against consumers' general background knowledge and expectable patterns of visual

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attention. The interplay between consumer knowledge and visual attention is taken further in the article by Jesper Clement, Henrik Selsøe Sørensen and Gorm Gabrielsen. The authors present empirical evidence of differing preconditions of individual consumers correlating with different behaviours in these respects, thereby providing additional arguments for questioning the simplistic view on the “average consumer” found in EU legislation.

The legal assessment of whether commercial practices, including food labelling, are misleading is today based on rather strict legal reasoning applying rather imprecise legal standards such as e.g. the “average consumer”. The seminar on November 23 as well as the articles presented in this Working Paper underlines the need for considering general empirical tests when determining whether fairness prevails or consumers are in fact misled.

## **Legal Uncertainty – A Neglected Aspect of Unfair Commercial Practices Law in Europe?**

Marcin Rogowski

### **The Concept of Uncertainty and its Relevance to Legal Studies**

#### ***Uncertainty and Indeterminacy, the Many Faces of Uncertainty***

Ask a layman what uncertainty means and quite probably you will hear that it is “something like doubt”; “inability to predict the future” or “confusion”. This illustrates two phenomena: 1) that the majority of us prefer to use terms the meaning of which we feel more comfortable about, and 2) that the ambiguous term uncertainty encompasses many compounds which the at-first-glance test indicates include unpredictability and information shortage, as well as very individual, mostly negative, feelings like confusion, doubt, etc.

This paper looks at selected aspects of uncertainty. I will claim that uncertainty is mostly concerned with information shortage and has its biggest impact in decision-making processes resulting from this state of limited information. Furthermore, I will demonstrate that this conceptualized perception of uncertainty is useful when analysing the law and, particularly, the regulation of unfair commercial practices.

The vagueness of the concept of uncertainty calls for the adoption of assumptions<sup>1</sup> as a starting point for coherent analysis. Perceptions of uncertainty vary from person to person. The scientific approach towards uncertainty reveals an abundance of perspectives and research techniques that in particular fields lead to specific outcomes. The results vary from discipline to discipline, in a similar way to the variation in the perception of the phenomena from person to person. Therefore, the very first observation we can make with regard to uncertainty is that our understanding of it is personalized, meaning that the definition one may offer is influenced by the point of departure one has adopted and the set of discovery tools one has used in the research process. However, in the case of uncertainty, the discovery process may be hampered by our inability to offer an objective view.

This research constraint is linked to the personalized nature of uncertainty. If the phenomenon reflects the concerns, assumptions, beliefs of a science (or a person), it cannot be presented without this context – without direct reference to the problems being analysed, or to put it in simple words – *it cannot be presented objectively*. This does not mean that one cannot strive to achieve the most objective research outcome of uncertainty by a diligent analysis of a variety of factors. Taking those observations as initial theoretical guidance, it is useful to structure two key assumptions with regard to a theoretical concept of uncertainty, namely: 1) that there are many *kinds of uncertainty* which might be described and presented, but hardly defined, because they depend strongly on the individual view (*ambiguity of uncertainty*), and 2) uncertainty must always be analysed within a certain context, which inevitably adds to the uncertainty itself.

I will refer to kinds of uncertainty when I describe the subject analysed as uncertain. It might be the uncertainty of the legal requirements, the uncertain outcome of the court proceedings, uncertainty with regard to sanctions against the illegal action, etc. So, I will use two terms: legal uncertainty and business uncertainty. The context of those two differs depending on the science applied. The first one,

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<sup>1</sup> It is true about the assumptions that they might be wrong. This, however, must not stop us from assuming certain theoretical points since every human activity is subject to error.

quite obviously, refers to uncertainty from a legal perspective, whereas the latter describes the state of incomplete information the firms experience in an ever-changing market environment.

It is an assumption of paramount importance that our analysis of uncertainty differs from risk-orientated research, whose analyses deal predominantly with the issue of risk assessment or management. Furthermore, the terms “risk” and “uncertainty”, although similar, do possess different meanings.

“The term ‘risk’, as loosely used in everyday speech and in economic discussion, really covers two things which, functionally at least, in their causal relations to the phenomena of economic organization, are categorically different. [...] The essential fact is that ‘risk’ means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character. [...] It will appear that a measurable uncertainty, or ‘risk’ proper, as we shall use the term, is so far different from an unmeasurable one that is not an effect of an uncertainty at all. [...] It is this ‘true’ uncertainty, and not risk, as has been argued, which forms the basis of a valid theory of profit and accounts for the divergence between actual and theoretical competition.”<sup>2</sup>

### *Uncertainty from the Cognitive Perspective*

William D. Rowe<sup>3</sup> approaches the issue of uncertainty from the perspective of cognition, which underlines a link of paramount importance, namely the one between uncertainty and information. From Rowe’s analysis, it is useful to adopt two perspectives: (1) uncertainty as related to the system, and therefore not necessarily individual uncertainty (doubt), and (2) its inherited links to information. Let us first consider the second aspect. Information is the key element in talking about uncertainty. Rowe distinguishes between descriptive and measuring uncertainty. The first occurs when there is an absence of information relating to the identity of the variables that explicitly define a system. The second is the inability to measure or assign values to variables in a system due to a lack of information. So uncertainty is the state of a lack of information and therefore the inability to identify some variables in a system or to think about their impact (values).

So the essential question we face when talking about uncertainty is which kind of information affects behaviour the most. Is it knowledge of the variables of the system or knowledge pertinent to their value?

This question brings us back to the aspect mentioned by Rowe that uncertainty is related to the system. Depending on the system, he distinguishes between two ways of minimizing the uncertainty – by analysing the rational behaviour of opponents or by analysing natural phenomena. For both of them, the key idea is that “getting information about the system is to learn the process underlying system operation and to find out how information is generated for the system”<sup>4</sup>. Before distinguishing the differences in cognition process of those two aspects, we should first note the information paradox which is inevitable in any process of gaining information. In this respect Rowe talks about “degrees of

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<sup>2</sup> FRANK KNIGHT, *Risk, Uncertainty and Profit* (Boston: Houghton Mifflin Company, 1921), I.I.26.

<sup>3</sup> WILLIAM D. ROWE, *An Anatomy of Risk*, Robert E. Krieger Publishing Company, Malabar, Florida 1988, p. 17. NB. He uses a definition of risk which does not link it so clearly to uncertainty as in the case of Knight’s definition. Rowe’s concept of risk is defined as “the potential for the realization of unwanted, negative consequences of an event” Rowe, p. 24.

<sup>4</sup> ROWE, *op. cit.*, p. 18.



freedom”<sup>5</sup>. The paradox is based on the concept that, for each new set of information to be learnt, a measurement scale and specification of values on that scale is required. Rowe shows that as one’s knowledge about the system improves (descriptive certainty increases), measurement uncertainty increases geometrically. Thinking about information and uncertainty in these two aspects of description and measurement leads to the conclusion that the more one learns the more uncertain one can become. Rowe’s delimitation of the uncertainty minimizing process based on information gathering is important for its possible usefulness in legal assessment.

The first aspect starts with the premise that a system operates due to the rational behaviour of the players (often opponents as in games of many kinds). Here the main point is made by stating that rationality looks plausible on paper, but in reality actions in the process, which is similar to a game, deviate from rationality and lean towards probability (game theories offer a good analysis of those actions), which means that the attempt to reduce uncertainty in these systems is rather futile. The second aspect starts with the premise that the system operates on the basis of natural phenomena and is less dependent on the behavioural impact of the players. Rowe mentions two possibilities here. The first is that the process operates on the basis of randomness. In this case, gaining information is primarily based on statistics. This possibility is of less importance in our analysis. The second requires the system to operate on the basis of natural, empirical laws. In this case, uncertainty is minimized because there is an increase in information due to the empirical observation of repeatable actions. This is very true for things like the basic rules of physics, but would not serve its role in minimizing uncertainty in a human-made system of rules like the law. Therefore, for legal analysis, one should think of a third possible way of analysing the system. The task is pretty challenging because one is trying to limit one’s uncertainty about a system of legal rules that were designed, interpreted and enforced by others, who were uncertain themselves<sup>6</sup>. Obviously, the relevant question is: What is an acceptable degree of uncertainty? To conclude on the aspect of minimizing risk one should say that – from a cognitive perspective – it is concerned with information management. I would like to emphasize the importance of this term. It does not necessarily relate to information gathering, but more to its selection – screening, assessing and then adopting or rejecting, depending on the purpose one has.

This strategy gains in plausibility due to the information paradox mentioned above. The way we think about the variables depends upon the information we have collected about them (theoretical knowledge, life experience, etc.). However, from a practical point of view, one may feel confused by the abundance of information and simply reduce the amount of information<sup>7</sup> available for the sake of increasing performance efficiency, or the value assessment done on the basis of (intentionally reduced) variables. These variables and the values attached to them may be perceived in the framework of the legal analysis.

Uncertainty must be understood as the state of having limited knowledge and therefore an inability to describe future outcomes or the variety of outcomes. Consequently we refer to uncertainty in three main aspects: doubt, inability to foresee, and ambiguity. Risk can be defined in a number of ways that vary depending on specific application and situational context. Notable about the risk is the fact that it is described both qualitatively and quantitatively, which is not the case for uncertainty. Probably the

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<sup>5</sup> That is the information necessary to describe the system. In his view, this is useful when talking about the “degree of uncertainty” – that is the proportion of information about a total system that is unknown in relation to the total information about the system.

<sup>6</sup> If a market player is uncertain about the law (in both descriptive and measurement ways) then his still-existent and initially-present uncertainty suffices as an argument for the lawmakers to be uncertain when trying to enact rules to control the market behaviour of this player.

<sup>7</sup> The screening and selection of information are considered as key skills in some professions. Most probably time management is perceived as a value in each and every professional activity. This argument itself suffices to justify the claim that assessing the information available is beneficial to increased efficiency. This bold statement, on the other hand, is justified by the fact that time is a scarce commodity, so its value in the professional environment is appreciated.

most famous delimitation between risk and uncertainty is that given by Frank Knight, for whom the difference between those two was based on measurability. In his own words, the essence of the problem discussed is:

“... that ‘risk’ means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character; and there are far-reaching and crucial differences in the bearings of the phenomenon depending on which of the two is really present and operating. There are other ambiguities in the term ‘risk’ as well, which will be pointed out; but this is the most important. It will appear that a measurable uncertainty, or ‘risk’ proper, as we shall use the term, is so far different from an unmeasurable one that it is not in effect an uncertainty at all. We shall accordingly restrict the term ‘uncertainty’ to cases of the non-quantitative type”<sup>8</sup>.

Knight distinguished risk from uncertainty by using the notion of probability to conclude that risk relates to objective probabilities, whereas uncertainty relates to subjective probabilities<sup>9</sup>. The problem with Knight’s distinction is that it is too narrow. My critique of his concept is based on a common understanding of risk entailing two elements – uncertainty and exposure, i.e. possible consequences – whereas Knight actually only discussed the first component.

Notable about the Knightian concept of uncertainty is that it was developed from the simple observation that knowledge and behaviour are different in the sense that, in my reading, the information we possess influences our decision-making process (broadly our behaviour), but does not necessarily dominate it in the sphere of economics. It is therefore extremely important to observe that some economic phenomena, such as uncertainty, are linked to imperfect knowledge. So uncertainty deserves attention from science<sup>10</sup>.

Furthermore Knight shows that very often in life (and hence in decisions of an economic nature) estimations and anticipations play a vital role. In his words:

“The ordinary decisions of life are made on the basis of ‘estimates’ of a crude and superficial character. In general the future situation in relation to which we act depends upon the behavior of an indefinitely large number of objects, and is influenced by so many factors that no real effort is made to take account of them all, much less estimate and summate their separate significances. It is only in very special and crucial cases that anything like a mathematical (exhaustive and quantitative) study can be made.”<sup>11</sup>

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<sup>8</sup> KNIGHT, *op. cit.*, I.I.26.

<sup>9</sup> In his words “To preserve the distinction (...) between the measurable uncertainty and an unmeasurable one we may use the term ‘risk’ to designate the former and the term uncertainty for the latter”. *Op. cit.*, III.VIII.1

<sup>10</sup> Which science should address this issue is, it seems, a difficult problem because of their different approaches to uncertainty. I mean here the methodology, purpose of the analysis, definition of terms, etc. Economics, however, seems to be interested in uncertainty in a totally different manner than legal science. If we look at the role of economics as a science that tries to predict the pattern of behaviour in the future judging by observations made in the past and by applying certain assumptions, uncertainty might be perceived as an unwanted element. One might be tempted to say that risk is addressed more often in this science because of its quantitative and qualitative nature, as opposed to uncertainty where vagueness seems to be the crux of the matter. This view of economists’ work has also been expressed by Knight, who observes that “we judge the future by the past” (Knight, *op. cit.*, III.VII.11) and that “We have, then, our dogma which is the presupposition of knowledge, in this form; that the world is made up of *things*, which, *under the same circumstances*, always *behave in the same way*.” (Knight, *op. cit.*, III.VII.12). Legal science, on the contrary, seems to be greatly concerned with this issue at first glance, as one might say. The interesting point is to see how the first science’s perspective contributes to legal thinking.

<sup>11</sup> KNIGHT, *op. cit.*, III.VII.20.

So, if choices are driven by expectations and estimations and if importance is attached to the fact that limited knowledge influences our behaviour, the far-reaching conclusion one may come to is that:

“It is a world of change in which we live, and a world of uncertainty. We live only by knowing something about the future; while the problems of life, or of conduct at least, arise from the fact that we know so little. This is as true of business as of other spheres of activity. The essence of the situation is action according to opinion, of greater or less foundation and value, neither entire ignorance nor complete and perfect information, but partial knowledge.”<sup>12</sup>

If assumed that uncertainty relates to risk in a particular manner, it is useful to exemplify the abstract notion of the risk and simultaneously demonstrate how the shortage of information may be used as a prime way to distinguish uncertainty. Various definitions of risk typically refer to the possibility of a loss or an injury created by a fact (let it be activity or an action of a person):

“Based on common usage, uncertainty is a state of not knowing whether a proposition is true or false. Suppose you are in a casino. A man is about to roll a die. If a result is a six, you are going to lose \$100. What is your risk? What, in your subjective opinion, is the probability that you will lose \$100? If you say it is one chance in six, you may want to reconsider. I neglected to say that the die is 10-sided. This example illustrates how one can be uncertain but not realise it. To clarify, an individual is uncertain of a proposition if she (1) does not know it to be true or false or (2) is oblivious to the proposition. Probability is often used as a metric of uncertainty but its usefulness is limited. At best, probability quantifies perceived uncertainty.”<sup>13</sup>

So, if risk consists of two core elements, namely uncertainty and exposure, this explanation offers insights but is flawed. However, the soundness of this theory might be put at jeopardy if one considers operationalism<sup>14</sup> a valid point of view. The example of the 10-sided die shows that one can be uncertain and unaware of the uncertainty at the same time. Therefore, Holton concludes his analysis by stating that “uncertainty that is not perceived cannot be defined operationally. All we can hope to define operationally is our *perception* of uncertainty”<sup>15</sup>. The nature of uncertainty suggests that the problem of defining this term is insurmountable. It does not allow for the operational definition, nor can it be explained by objective criteria since the common understanding implies its subjective nature. From the practical perspective, it is notable that uncertainty very often goes hand-in-hand with opportunity<sup>16</sup>. The same applies to risk. Nor should it be viewed as “inherently bad as all opportunities come with a certain degree of risk. An undertaking which is totally risk averse is not likely to be very attractive to investors and may be doomed ultimately to fail.”<sup>17</sup> To summarize the description of the various types of uncertainty we have analysed so far, the following table offers a good comparative perspective:

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<sup>12</sup> KNIGHT, *op. cit.*, III.VII.5

<sup>13</sup> GLYN A. HOLTON, Defining Risk, 60 Financial Analyst Journal 6, pp. 21–22.

<sup>14</sup> This belief is based on the following intellectual assumption: if all knowledge of this world stems from our experience, then definitions can only be meaningful if they refer to experience. So a concept is a “set of operations”.

<sup>15</sup> GLYN A. HOLTON, *op. cit.*, 24.

<sup>16</sup> In our analysis we will focus more on the subjective part of “opportunity” or “chance” enshrined in “anticipation”. For a more comprehensive study of the relationship between uncertainty and opportunity, see WOLFGANG HOFFMANN-RIEM, Wissen als Risiko – Unwissen als Chance Herausforderungen auch an die Rechtswissenschaft und INO AUGSBERG, Ungewissheit als Chance – eine Problemskizze [in:] INO AUGSBERG (Hrsg.) Ungewissheit als Chance, Perspektiven eines produktiven Umgangs mit Unsicherheit im Rechtssystem, 2009.

<sup>17</sup> ANTHONY TARANTINO, Governance, Risk, and Compliance Handbook. Technology, Finance, Environmental, and International Guidance and Best Practices, 2008, p. 15.

Uncertainty	Components	Minimizing Uncertainty
At first glance	<ul style="list-style-type: none"> <li>• Inability to foresee the future event</li> <li>• Doubt</li> <li>• Confusion</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction of the doubt – learn more about the subject</li> </ul>
Economic Perspective	<ul style="list-style-type: none"> <li>• Immeasurable risk</li> <li>• Related to estimations and anticipations</li> <li>• Lack of information as a cornerstone of “true uncertainty”</li> </ul>	<ul style="list-style-type: none"> <li>• Knight – possibilities of reducing uncertainty<sup>18</sup> (not a model or pattern of reducing it)</li> <li>• Assessing (only) by using factors proposed by Dixit, Pindyck and Knight</li> </ul>
Cognitive Perspective	<ul style="list-style-type: none"> <li>• Uncertainty with regard to variables – driven mostly by the lack of information</li> <li>• Uncertainty with regard to values – inability to assess, driven by the lack of information, but not only this</li> <li>• The “degree of freedom” – information to be assessed when compared to the system.</li> </ul>	<p>Generally by gathering more valuable information (quality not quantity)</p> <ul style="list-style-type: none"> <li>• From the other participants of the system discovery process (even from opponents)</li> <li>• From the design of the system itself (might be misleading though, depends on the qualities of the system)</li> </ul>

<sup>18</sup> The possibility of reducing uncertainty depends again on two fundamental sets of conditions: First, uncertainty is less in groups of cases than in single instances. In the case of *a priori* probability, the uncertainty tends to disappear altogether as the group increases in inclusiveness; with statistical probabilities, the same tendency is manifest to a lesser degree, being limited by defectiveness of classification. And even the third type, true uncertainty, shows some tendency toward regularity when things are grouped on the basis of almost any similarity or common element.

### ***Interim Conclusions***

In his work, Frank Knight talks at certain point about *true uncertainty*<sup>19</sup>, which is the higher (or shall we say more vague) form of uncertainty which is not susceptible to measurement and thus to elimination. In his economic analysis, this distinction helps us to perceive the role of uncertainty in relation to real-world (i.e. non-perfect) competition, and it is “this *true uncertainty* which by preventing the theoretically perfect outworking of the tendencies of competition gives the characteristic form of ‘enterprise’ to economic organization as a whole and accounts for the peculiar income of the entrepreneur”<sup>20</sup>. At this point in our analysis, we arrive at the crossroads with the economics-orientated thinking in relation to our key phenomenon and shift the focus towards the legal perception of it. However, it is precisely the true uncertainty that Knight distinguished from the measurable kind that mostly preoccupies those working for the advisory or insurance businesses. Let us not forget, however, that the pure state of being or feeling uncertain about the future outcomes of business activities is an almost insurmountable task to deal with, if defined as a goal of a coherent law rules. I would like to clarify the approach before moving on. What has been said so far – mostly under the impact of Frank Knight – contributes greatly to our understanding of uncertainty. However, this problem is very often approached in different ways by the law and by economics. In the economic world, it is business uncertainty that is of interest to business people. This uncertainty includes some of the legal aspects of the business enterprise ranging from a fee for a legal advisor through litigation costs to the possible cost of non-compliance with some regulations, such as those against unfair commercial practices. Notable about this kind of uncertainty is that the time and cost of dealing with it is, in the majority of cases, delegated to another business (legal advisors of various kinds), or to in-house lawyers but definitely as a side-problem to be eliminated by hiring others to tackle it. What remains is the legal uncertainty in the system. This is the source of the business uncertainty that could be eliminated, but one which is not subject to economic analysis (other than the analysis of the cost of the appropriateness of a regulation), but rather to legal analysis.

One certain thing to be mentioned at the beginning is that uncertainty and the law go hand-in-hand. However, in legal doctrine, the definition of uncertainty is rather limited and emphasis is placed on the ways of limiting its negative consequences rather than on defining the phenomenon. It would be futile to try to propose a coherent definition of uncertainty in law because, in most cases, it is described in more general terms. The notion of the difficulty of predicting perfectly *ex ante* how the law will be applied *ex post* by the courts<sup>21</sup> offers a good starting point, but definitely omits some important components we shall analyse. However, its lack of definition results not from the difficulty of the perception of what uncertainty is, but from its inherence in the law. Useful comment on this might be found in Blackstone’s Commentaries on the Laws of England, where in the more narrative way he describes this link:

“The uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humour, that he who should attempt to refute it would be looked upon as a man who was either incapable of discernment himself or else meant to impose upon others. This uncertainty must be imputed to the defects of human laws in general, and is not owing to any particular ill construction of the legal system.”<sup>22</sup>

However, the “ill construction of the legal system” in the quotation might be something worth analysing, especially in the context of 21<sup>st</sup> century lawmaking.

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<sup>19</sup> KNIGHT, *op. cit.*, III.VII.48

<sup>20</sup> KNIGHT, *op. cit.*, III.VII.48

<sup>21</sup> AHLEIVING, BETH AND DEAKIN, SIMON (2006), Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementary? Center for Business Research, University of Cambridge Working Paper No. 312.

<sup>22</sup> WILLIAM BLACKSTONE, 1765-1769, Book III, Ch.22.

## Legal Uncertainty Translated into the Context of EU Law on Unfair Commercial Practices

It is interesting to observe how the problem of “ill construction” *does* occur in EU law designed to cover the issue of fairness in business activities, or – to use the language of EU law – the issue of commercial practices, regulated by the means of a directive<sup>23</sup>. What I am going to demonstrate is that the uncertainty derives from the ill regulation of the matter and not from the complexity of the business activities themselves. The point is that in this case the legal uncertainty triggers business uncertainty for a number of reasons mostly concerned with two groups of arguments: 1) inappropriate standards used as the benchmarks for the legal assessment and 2) the doubtful choice of aims to be achieved by such regulation drawn up by the lawmakers.

### UCPD Standards

The Commission justified the choice of a general clause<sup>24</sup> by claiming that this approach is needed because of the framework nature of the act and favoured a structure encompassing two core elements – the unfairness of a practice and a consumer detriment test. The Commission reveals its intent to regulate all practices covered by the UCPD uniformly just to achieve its efficiency goals by breaking down the obstacles to trade created by the variation in the regulations on advertising and marketing strategies adopted by the Member States. It has been shown that the concept of fairness has been used many times in the doctrine<sup>25</sup> as a formative part of the European legal system. As a starting point for the ongoing debate, one thing seems certain – a European understanding of the term “fairness” does not exist as such. The question is how to give shape to this concept. It would be hard to take issue with H.W. Micklitz, who in this process favours guidelines given by the ECJ rather than the respective national concepts<sup>26</sup>. Even if we agree that the *Freiburger Kommunalbauten*<sup>27</sup> case cannot be used as a counter-argument for this preference, because of an ill-formulated preliminary question, it still does not shed enough light on the whole concept of fairness at the Community level because little help has so far been obtained from the Court. It has referred to the components of the unfairness test, but not to the concept as a whole. The challenge for the future of this interpretation seems to lie in the maximum harmonization, framework nature, and requirement of uniform standards adopted by the UCPD. However, this cannot be done without accepting the components of a fairness test as a starting premise. We will now examine them closer.

According to Article 2(h) of the UCPD, the term professional diligence has a broad meaning and covers standards for the special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity. It seems that the choice was driven by the study carried out by the Commission and announced in the Green Paper<sup>28</sup> on the most popular terms that occur in the Member State’s laws on unfair competition. As a result of this, the directive has constructed the test of

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<sup>23</sup> OJ 2005 L149/22 (hereafter UCPD).

<sup>24</sup> Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002), 289, point 25.

<sup>25</sup> H.W.MICKLITZ, The General Clause on Unfair Practices [in] G.HOWELLS, H.W.MICKLITZ, T. Wilhelmsson, European Fair Trading Law The Unfair Commercial Practices Directive, Ashgate 2006, p. 83 *et seq.*

<sup>26</sup> *Ibid.*, p. 88 *et seq.*

<sup>27</sup> Case C-237/02 *Freiburger Kommunalbauten v Hofstetter* [2004] ECR I-3403. Here the German Supreme Court wanted the European Court of Justice to decide on the legality of a concrete standard term but not on the question how to read the concept of good faith.

<sup>28</sup> Green Paper on European Union Consumer Protection, COM (2001) 531, point 6.

professional diligence on the requirements of honesty and good faith in marketing practices. The concept, however, seemed a bit underdeveloped in terms of having one precise meaning. The Commission<sup>29</sup> argued that its meaning is similar to good market practices and that certain actions, such as product placement, cannot satisfy the requirements of the professional diligence standard because of their non-compliance with this criterion. This looks like some sort of a legal mix done in order to ensure high standards because “good market practices” form a concept widely recognized by the Scandinavian courts and adopted in their laws<sup>30</sup>. The ambiguity of the adjective “professional” can be used as another argument to reveal the underdeveloped nature of this clause. The various groups of traders have different standards, so should we then understand them broadly as some sort of minimal standards, or are they based on the profession so that the requirement of good faith varies considerably from one business to another?

The introduction of the standard of honest market practice seems to be a reference to Article 10bis of the Paris Convention. The emphasis on honesty was seen then as a protection of individual interests and not of competition as such. It was, therefore, “the EC legislator’s intention to free unfair trading law from tortious traditions which are still alive in Germanic and Romance law tradition”<sup>31</sup>. The framework directive should, taking the above-mentioned into account, regulate communication on the market and – as a result of this – consumer protection should not be seen just as “a means to correct business practice, but equally as an important protective objective”<sup>32</sup>. The problem we may face at this point is the inappropriate role of consumer associations taking part in the elaboration of the codes of conduct or various forms of soft law in which the standards of professional diligence are to be put forward. If market participants other than consumers elaborated them, we might have a blurred image of the honesty in business-to-consumers relations, but no stable point of reference. This is especially dangerous because one possible way of giving shape to this concept lies in the development of this co-regulation means rather than using ECJ jurisprudence. If these unoptimistic conclusions should prove true, this may hamper the expected process of the Europe-ization of the concept of fairness<sup>33</sup>.

Material distortion of the economic behaviour of the consumers is explained in the UCPD. According to Article 2(e), it means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to make a transactional decision that he would not otherwise have made. For our comparative analysis, it is enough to mention just the main components of this concept. Its underlying idea may be summarized as a need to ensure the consumer’s autonomy<sup>34</sup>. This could be understood from the point of view of the objective criterion of the degree to which economic autonomy is distorted by emotional advertising. The subjective side could be taken into account as well. This would mean an analysis of intent and blame with regard to the distortion. This analysis is more pragmatic; it offers a clear perspective for understanding the definition of material distortion. The wording of the directive offers little guidance on distinguishing the meaning of economic behaviour, informed decisions, and transactional decisions, but with the above-mentioned approach such differentiation would be neither needed nor useful.

The UCPD adopted an exhaustive version of a black list of unfair commercial practices. The nature of this regulation was described in the preamble of this directive. According to the point 17:

“It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices.

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<sup>29</sup> See Proposal for the UCPD, COM (2003) 356 final, point 53.

<sup>30</sup> For more details see A.BAKARDJIEVA-ENGELBREKT, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeisation*, Stockholm University 2003, p. 165 *et seq.*

<sup>31</sup> H.W.MICKLITZ, *supra* note 42 p. 99.

<sup>32</sup> *Ibid.*, p. 99.

<sup>33</sup> For more details see *ibid.*, p. 101.

<sup>34</sup> Details were presented by H.W.MICKLITZ, *ibid.*, p. 104 *et seq.*

These are the only commercial practices, which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.”

There are two main observations that can be made on the basis of a definition so formulated. First, it emphasizes legal certainty as a reason for introducing this kind of regulation. Second, a point which has to be read between the lines, is what can be called the exclusive nature of the regulation of the black list. This needs to be analysed more carefully, but before that, we shall devote some time to discuss legal certainty as the justification for the black list.

### **UCPD Goals**

I have already referred briefly to the goals of the regulation and their contribution to legal uncertainty, including the idea of facilitating cross-border trade, which deserves some closer attention. The framework legal act was intended to provide certainty compliance for business. This term has a particular meaning. In order to understand it, we shall first observe that the point of departure for the drafters of the UCPD (which is visible in the way the standard of fairness was constructed) is the idea that only informed consumers can reach efficient choices that also ensure the maximization of their collective interests. So, the test of fairness is tailored in a way that demands that business should perform only those practices that represent a negligible chance of hampering those informed choices. But if we analyse the situation from the perspective of the companies, more doubts may occur.

“Consider for instance a trader who obtained a favourable judgement about an advertisement in the State where he is established and is planning to launch this advertisement on a cross-border basis - do all Member States have a power to, each on their own and regardless of that existing judgment, check the advertisement compliance with the UCPD or should in such case Article 4 be read as an obligation for these Member State to follow and conform to the first Member State's interpretation? It may be astonishing that such a fundamental question cannot be answered with total firmness.”<sup>35</sup>

This is the point where the idea of certainty compliance emerges.

“In our opinion Art. 4 does not constitute a conflict of law rule. It could therefore be proposed to read Article 4 more extensively. Once the Member State of establishment has conducted a compliance check of a particular commercial practice, and concluded that if it is not unfair according to the UCPD criteria, that trader would indeed benefit from a *de facto* presumption that he is acting in compliance with the UCPD. Only in that way can a trader obtain compliance certainty for a given commercial practice: once it has been cleared in the Member State of origin, he can be reasonably certain that he will not be attacked on the basis of the rules implementing the UCPD in the other jurisdictions where the commercial practice is deployed. This compliance certainty cannot be understood in the absolute; it is not a European passport. We would argue that compliance certainty involves a presumption that can be rebutted. The compliance certainty obtained in the Member State of establishment will give the trader reasonable certainty, i.e. the certainty that the other Member States shall accept the compliance, unless there are specific, objective and compelling circumstances (like significant cultural differences, a materially different impact of the practice on consumers etc.) justifying a different assessment. Such interpretation, we believe, could have the benefit that essentially the aims of the UCPD will continue to be attained (in particular the promotion of cross-border trade), whilst on the other hand, Member States will be able to apply Article 4 UCPD in a way that entitles them to marginally review the compliance

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<sup>35</sup> J.STUYCK,E.TERRY,N.T.VAN DYCK, Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market, *Common Market Law Review* 43: 107–152, 2006. , p. 135.



checks effectuated in the Member State of origin where particular circumstances justify such a review.”<sup>36</sup>

Achieving this aim is congruent with the goal of ensuring smooth cross-border transactions. Therefore the provisions of the UCPD read in this way may be understood as a coherent set guaranteeing the attainment of plausible goals for regulating advertising. However, the compliance certainty discussed here is understood as a tool of EC-wide recognition of practices. It does not address the issue of the substantive requirements for promoting marketing strategies abroad. This question is worth presenting in a slightly different context.

The general doubt I would address at this point can be framed in the following way: Is it plausible to regulate B2C advertising standards by taking the notion of a high standard of consumer protection as a yardstick? This is the approach adopted by the UCPD, which can be observed in the structure of the fairness test, the standard of the average consumer, and the desire to attain a high standard of consumer protection. One may argue that this is the case because the aim of this act is just to regulate B2C relations. However, as a counterargument to this, the above-described interrelation between consumer welfare and competitiveness on the market can be used to argue that legal assessment of a concrete practice cannot be done in one sphere only. In other words, creating standards for advertising taking the perspective of one market-player (the consumer in this case) is clearly a serious mistake, which inevitably contributes to a different sort of a market failure rather than an effective fight against inefficiency. Without further remarks on this issue, I would like to structure my critique of the UCPD’s one-actor protectionist provisions in two main strands.

First of all, this solution may simply cause a variety of problems with regard to understanding, interpreting and implementing EC standards. To present this issue in different words, it is the concern that certainty compliance cannot be achieved simply because the already existing legal differences hampering EC-wide advertising campaigns will not be reduced. The argument for this is based predominantly on the nature of any commercial practice. These activities are nothing more than attempts to promote a product or service using increased persuasion in order to reduce resistance. Here the problem can be summarized as the relationship between the Community and Member States’ legal systems because

“national legislation regulating commercial practices that are not directly related to influencing consumers’ transactional decisions do not fall within the harmonized field. This would imply that the regulation of marketing on ethical grounds, other than taste and decency, falls beyond the harmonized field, on the condition that this regulation is not directly related to influencing consumers’ transactional decisions. If, however this direct relationship does exist, the national legislation falls within the scope of the UCPD and needs to be assessed in accordance with the fairness tests of the UCPD. In that context the notion “professional diligence” would seem possibly to include the respect of ethical values and fundamental rights – the articulation of which can be different from Member State to Member State – other than taste and decency.”<sup>37</sup>

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

So the consumers' perspective cannot be used for a common standard of commercial practices in the EC simply because there is no such thing as an "average European consumer"<sup>38</sup>. Expectations towards traders, the sphere of privacy, and recognition of taste and decency vary depending on social background. Saying that they are different across Europe would be a tautology.

The second set of arguments should be based on market analysis. As a starting point we should observe that it is the common strategy for an EC consumer protection law to impose information obligations on the business. The idea behind this strategy is the belief that "sufficiently informed consumers can help themselves, while their autonomy of will could still be guaranteed"<sup>39</sup>. Therefore, the information given to the consumers may improve their bargaining power, which seems to be the core issue in the notion of protecting the weaker party. This view was adopted by the ECJ<sup>40</sup>. This is the view represented in the contractual relationship; the issue addressed in advertising law is different. Every communication of an advertising nature conveys some information. Even if we imagine one with no informative content, the consumer will still gain additional knowledge about the quality or at least will become aware of the existence of the product. The market failure, which we may call here "deficit of information", may be corrected by consumer protection rules.

I presented two types of informational market failures in order to juxtapose the different problems we face in those situations. The first type concerns market failure arising from imperfect information<sup>41</sup> in a voluntary contractual situation. Here the task of the EC protectionist is to ensure a trade-off in bargaining powers<sup>42</sup>. It seems tempting from the policy-making point of view (high standard of

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<sup>38</sup> S.WEATHERILL, Who is the "Average Consumer"? [in] S.WEATHERILL, U.BERNITZ (ed.), The Regulation of Unfair Commercial Practices under EC Directive 2005/29 New Rules and New Techniques is critical about this concept both in the EC legislation ["The 'average consumer' envisaged by the legislative *acquis* is smart enough to (for example) process disclosed information, but he or she is no perfectly rational actor" (p.123)] in the case-law ["(...) Court's case law is built on the notion of an average, reasonably circumspect consumer who possesses a degree of self-reliance, but that it is receptive to seriously presented arguments about the limits of consumer capability and the reality that some consumers are peculiarly vulnerable" (p.133)].

<sup>39</sup> S.HAUP, The Economic Analysis of Consumer Protection in Contract Law, German Law Journal Vol. 04 No.11 2003, p.1137-1164.; with a reference to MICHAEL MARTINEK, Unsystematische Überregulierung und kontrainentionale Effekte im Europäischen Verbraucherrecht oder: Weniger wäre mehr, [in] S.GRUNDMANN, Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts 2000.

<sup>40</sup> Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v. Rocio Marciano Quintero and others*. The Court stated in p.25 of the Judgement that "it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge".

<sup>41</sup> The problems that consumer law seeks to address may be classified in three groups: duress and undue pressure, pre-purchase informational imbalance, and post-purchase lock-in due to the information asymmetries, see J.VINCKERS, Economics for Consumer Policy [in] Proceeding of the British Academy 287, 2005.

<sup>42</sup> In this case, however, the belief that increasing the bargaining power of the consumer by enhancing the information obligations of the producers may not be a compelling argument from an economic point of view. "One may think that, if we were able to identify the existence of monopoly power in a setting of heterogeneous consumers and monopolistic ignorance of consumer types, consumer protection legislation should enter the picture by imposing a minimum level of quality in the contractual terms, so that no inefficient terms are introduced in the contracts offered by the monopolist with the purpose of discriminating among different types of consumers. The problem with this demand for consumer protection law to redress the evils of monopoly is that the impact of its rule in this setting is largely indeterminate, and, eventually, might act to the detriment of consumers, for three reasons. Firstly, because if not all the relevant terms that might be used by the producer for screening purposes are covered by the minimum standards imposed by consumer legislation, we would simply get a shift in the distortions towards those terms not regulated under the consumer protection measures. Second, because it is hard for legislators, regulators or Courts to collect and elaborate all the information required to reasonably determine the optimum floor for all relevant contract terms. Finally, and more

consumer protection), but from the market perspective this leads to inefficiencies because different market failures are tackled. What must be mentioned in this context is the fact that consumer law addresses substantially different problems than antitrust law. To conclude this part, a simple observation might be made that “if the antitrust solution is efficient, then consumer law designed along the same principles is also likely to yield economic welfare. In contrast to design consumer law in accordance with normative standards of fairness or good faith does not necessarily deliver an efficient set of rules”<sup>43</sup>.

The question which follows from this understanding of a lack of information as a market failure is how to ensure an optimal degree of information. From the efficiency perspective, the informational duties are justified to the extent that the benefits for consumers (their enhanced choices and reduced search costs) outweigh the costs of regulatory intervention. Taking as a premise that the marginal costs of information increase rapidly as more and more information is provided, the outcome is twofold. My first observation is that marginal benefits to the consumers’ welfare decrease rapidly after certain amount of information is given simply because people search only for the most relevant information and tend to find every additional unit of information more irritating than helpful. My second observation is that the state of information overload may lead to extreme inefficiencies because the consumer will ignore the information and it will be costly for producers to reveal it in a too detailed form.

I conclude that using consumer (protectionist) measures to create the standard of fairness in commercial communication is hazardous and is definitely not the appropriate tool. It may cause further inefficiencies in the sense that plausible goals of regulating marketing and advertising practices cannot be achieved. From this perspective, it is also worth mentioning that the ill-designed test of fairness contributes to the legal uncertainty rather than to business certainty, which should be the cornerstone of an act aiming at full harmonization.

(Contd.) \_\_\_\_\_

importantly, because the legal imposition of levels of quality and contract terms for consumer transactions involving a monopolistic seller might induce not a better serving of all types of consumers but simply a price rise that would leave those groups with a lower willingness to pay excluded from getting access to the product or service”. (F.GOMEZ,) *supra* note 28, p.197. For the purposes of this paper, it is important to note that trying to improve consumers’ well-being by regulating information obligations may not necessarily lead to solving the concerns that derive from the monopoly problem and in the long term might not increase the consumers’ welfare to the degree desired by the law-makers.

<sup>43</sup> G.MONTI, The Revision of Consumer Acquis from a Competition Law Perspective, *European Review of Contract Law* 3/2007, p.306.



## **The Scope of Application of the UCP-Directive – “I Know What You Did Last Summer”**

Jochen Glöckner\*

The ECJ judgments, VTB-VAB and Plus, have not only made it clear how far Directive 2005/29 on Unfair Commercial Practices in the Internal Market (hereinafter: the UCP Directive) is going to bear upon the future market conduct of market participants, but they have also raised the question of whether its scope of application, if defined in such a comprehensive manner, is covered by its purpose. Following an introduction, this paper will first try to shed some light on the UCP Directive’s provisions with regard to its scope of application and the problems relating to this, and then will critically analyse the VTB judgment, summarize the lessons learnt, and finally discuss some questions it leaves open.

### **Introduction**

#### ***The Law of Unfair Competition – A German Perspective***

The German term *Recht des unlauteren Wettbewerbs* (law of unfair competition) was coined in the second half of the 19<sup>th</sup> century in translation of the French *concurrence déloyale*. One of the earliest reported French cases, dating back to the 1840s, dealt with a producer of mineral water who sold his products in bottles shaped and made up similarly with regard to the labels and closures to the products of another producer<sup>44</sup>. This case exemplifies the original role of Unfair Competition Law as a sibling to the then young and developing Intellectual Property Law. The vicinity of Unfair Competition Law to Intellectual Property Law is likewise mirrored in the position of Art. 10<sup>bis</sup> of the Paris Convention alongside the setting of minimum standards for the protection of “industrial property rights”.

Soon after its reception in Germany shortly before the turn of the last century<sup>45</sup>, this new field of law underwent serious changes both in its economic significance and in its purpose. While the original act of 1896 had caused *Otto von Bismarck*’s disrespectful remark that the sound of its name (in German) reminded one of a quail in the field<sup>46</sup>, its 1909 successor emerged in the 1920s and 1930s and became one of the most significant side markers for corporate conduct in Germany, comparable in significance only to the Antitrust Law in the US legal environment. At the same time, its character changed considerably; soon after WW1, the courts discovered that the Act not only protected active market participants in their subjective rights, but also the other side of the market, notably consumers, and the general interest in undistorted competition. As early as 1937, *Eugen Ulmer*, who was to become director of the Munich-based Max Planck Institute for Intellectual Property Rights and the “father” of the initial efforts at a European harmonization in the 1960s<sup>47</sup>, pinpointed the tri-dimensionality of the protective purposes of Unfair Competition Law, intertwining the horizontal level of competitive

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<sup>44</sup> Cour d’appel de Lyon, 21.8.1851, D. 1854, 2, 266.

<sup>45</sup> After the German courts had found that general tort law was inadequate to protect against unfair competition, the legislator enacted the Act against Unfair Competition in 1896. Its narrowly drafted fact patterns soon made obvious the need for a general clause, which was provided by its successor, the 1909 Act against Unfair Competition, which remained in force until 2004.

<sup>46</sup> *Bismarck*, Die gesammelten Werke, Willy Andreas (Ed.) Vol. 9 [1926], Conversation with Reichstag member Dr. Albert Bürklin on Dec. 12, 1895 in Friedrichsruh, p. 430, 435.

<sup>47</sup> *Ulmer*, Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft: Gutachten, erstellt im Auftrag der Kommission der Europäischen Wirtschaftsgemeinschaft [1965].

relationships, the vertical level of exchange processes, and the public interest<sup>48</sup>. While *Ulmer* advocated that all three purposes mutually reinforced each other, it was not until the 1990s that it was clearly recognized that especially the constant broadening of social policy issues fed into Unfair Competition Law was challenging the simultaneous pursuit of all three goals<sup>49</sup>. Scholars offered as a solution a concentration on the public interest in effective competition, which as an objective goal was able to host protection both of consumers and competitors<sup>50</sup>. It is worth mentioning that in this perspective neither consumers nor competitors are protected as such – rather their individual rights are on the one hand limited by the force of effective competition, while on the other hand they can rely on and invoke the provisions of Unfair Competition Law to force other market participants to play by the same rules. So, with the benefit of hindsight, the term “Unfair Competition Law” reveals nicely its primary purpose as protection of competition as mentioned until recently in Art. 3 para. 1 (g) EC as “a system ensuring that competition in the internal market is not distorted”.

The Lisbon Treaty has relocated this goal of protecting competition from distortion into the Protocol (No 27) on the internal market and competition<sup>51</sup>. Pursuant to Art. 51 EU, the protocols form an integral part of the Treaties. As a consequence, there is no reason to believe that the relocation has caused any changes in substance. The multi-dimensional perspective of Unfair Competition Law, based on the goal of avoiding distortions of competition, was adopted by Directive 84/450 on Misleading Advertising<sup>52</sup> in its original version. The pertinent provisions in the recitals and in Art. 1 were amended only after the protection of consumers had been dealt with in the newly created UCP Directive. But even the UCP Directive ultimately accepted the interdependence of consumers, competitors and competition, cf. rec. 8. It was deemed appropriate, however, to separate the regulatory instruments.

### *The European Perspective*

European legislation makes ample use of the term “unfair”. English speaking lawyers will immediately think of the Unfair Terms Directive<sup>53</sup>. The Trade Mark Directive<sup>54</sup> permits Member States in Art. 5 para. 2 to prohibit any use of a sign “where the latter has a reputation in the Member State and where use of that sign without due cause takes *unfair* advantage of the distinctive character or the repute of the trade mark” (emphasis added).

In stark contrast, the term “unfair competition” seemed to be nonexistent in the sources of European Law for a long time. Almost surprisingly, the ECJ relied on this concept in the 2004 *Gerolsteiner* judgement relating to Art. 6 Trade Mark Directive. The ECJ found that it was for the national court to

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<sup>48</sup> *Ulmer*, Wandlungen und Aufgaben im Wettbewerbsrecht, GRUR 1937, p. 769 ff.

<sup>49</sup> *Beater*, Schutzzweckdenken im Recht gegen den unlauteren Wettbewerb, JZ 1997, p. 916 ff.

<sup>50</sup> *Schünemann* in Jacobs/Lindacher/Teplitzky, UWG Großkommentar [2006], Einl. C notes 23, 26; *Emmerich*, Unlauterer Wettbewerb [2004], § 3 II; *Sosnitza* in Münchner Kommentar zum Lauterkeitsrecht [2006], § 1 note 14.

<sup>51</sup> OJ 2008 C 115/309.

<sup>52</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ 1984 L 250/17. This directive has been amended several times. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ 2006 L 376/21 represents a consolidated version.

<sup>53</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

<sup>54</sup> First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ 1989 L 40/1, now Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version), OJ 2008 L 299/25.

carry out an overall assessment of whether the trade mark infringer's conduct could be "regarded as unfairly competing with the proprietor of the trade mark"<sup>55</sup>.

And it was only very recently that the European legislator addressed the Law of Unfair Competition directly, namely in Art. 6 of the Rome II Regulation<sup>56</sup> providing for a special rule clarifying the *lex loci damni* as described in Article 4 para 1: "In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public, and ensure that the market economy functions properly" (rec. 23). Yet, at the end of the day, the protection of fair competition as such is addressed quite scarcely in European Law. The approaches to Unfair Competition Law vary, but none of them go to the heart of the matter.

The individual rights of competitors, the protection of which can be observed at the outset of the development of Unfair Competition Law, were mostly conceived of as coming under the Member States' systems of property ownership pursuant to Art. 30, 295 EC (now Art. 36, 345 TFEU) and as such addressed in the form of Intellectual Property Rights. The Member States' Intellectual Property Rights were eventually harmonized by Directives, most notably the Trade Mark Directive and the Design Directive. Some Community IP Rights were created, such as the Community Trade Mark<sup>57</sup> and the Community Design<sup>58</sup>. The protection of the well-known Community trade mark against impairment, dilution and unfair exploitation<sup>59</sup>, as well as the protection of unregistered designs<sup>60</sup> and of databases<sup>61</sup>, can even be understood as codifications of specific areas of Unfair Competition Law within the framework of European IP law.

Moreover, IP rights were addressed from the perspective of negative integration under Art. 30 EC by the development of the distinction between the protection of substance matter versus the control of exercise<sup>62</sup> and the exhaustion doctrine<sup>63</sup>. More generally the teleology of market integration as an inherent principle of European Law blazed a trail towards – sometimes through – Member States' Unfair Competition Laws under the aspect of the product freedoms as granted in Art. 34, 56 TFEU (ex-Art. 28, 49 EC). The country-of-origin principle became the hallmark of this approach, spanning from *Cassis-de-Dijon*<sup>64</sup> over the E-Commerce Directive<sup>65</sup> to the Services Directive<sup>66</sup>.

Finally, the much younger political goal of consumer protection, as granted under Art. 4 para. 2 let. f, 114, 169 TFEU (ex-Art. 3 para. 1 let. t, 95, 153 EC), touches heavily on Unfair Competition Law. In particular the UCP Directive demonstrates the political thrust of this approach.

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<sup>55</sup> ECJ case C-100/02 – *Gerolsteiner*, 2004 ECR I-691, at [26].

<sup>56</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

<sup>57</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the community trade mark, OJ 1994 L 11/1 newly codified in Council Regulation (EC) No 207/2009 of 26 February 2009 on the community trade mark, OJ 2009 L 78/1.

<sup>58</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community design, OJ 2002 L 3/1.

<sup>59</sup> Art. 9 Community Trade Mark Regulation No 207/2009, OJ 2009 L 78/1.

<sup>60</sup> Art. 11 Community Design Regulation No 6/2002, OJ 2002 L 3/1.

<sup>61</sup> Art. 12 Community Design Regulation No 6/2002, OJ 2002 L 3/1.

<sup>62</sup> ECJ joined cases 56 and 58/64 – *Grundig/Consten*, 1966 ECR 299; ECJ case 24/67 – *Parke Davis*, 1968 ECR 55.

<sup>63</sup> ECJ case 144/81 – *Keurkoop*, 1982 ECR 2853; ECJ case C-10/89 – *Hag II*, 1990 ECR 3711.

<sup>64</sup> ECJ case 120/78 – *Cassis de Dijon*, 1979 ECR 649.

<sup>65</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on Electronic Commerce"), OJ 2000 L 178/1.

<sup>66</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36.

Yet, with all of these approaches, one cannot help wondering why there seems to be such a blind spot on the protection of fair competition, given the fairly clear instructions of the fourth Preamble and Art. 3 para. 1 let. g of the Treaty, as they existed for more than 50 years<sup>67</sup>. Perhaps, however, there is no such blind spot in fact, but rather a blind spot in wording and competencies. It is true that the European Commission's Directorate General IV – Competition – has denied responsibility for the field of unfair commercial practices. Likewise, it is true that commercial practices today are of concern primarily for DG Market and DG Sanco. Yet, this does not mean that market integration and consumer protection are fields of law in total independence of competition. This is very evident for market integration, because market integration has a natural tendency to open markets, as described in Art. 119 TFEU (ex-Art. 4 EC), and thereby to increase and strengthen competition. By the same token, European Consumer Law is conceived of as much closer to Economic Law than the traditional Consumer Laws of Member States. The more recent sources of European Consumer Law based on Art. 95, 153 EC (now Art. 114, 169 TFEU) combine consumer protection and market integration by stating as their goal to integrate markets by relying on cross-border shopping by consumers. For this, consumers needed the confidence of a minimum set of rights, if possible rights they are familiar with from their domestic legal orders<sup>68</sup> (“*consumer confidence*”). This is particularly clear in the recitals of the Consumer Credit Directive<sup>69</sup>, the Package Travel Directive<sup>70</sup>, the Unfair Terms Directive<sup>71</sup>, the Timeshare Directive<sup>72</sup>, the Distance Selling Directive<sup>73</sup>, and the Directive on Sale of Consumer Goods and Guarantees<sup>74</sup>.

To sum up, the focus of European legislation on either market integration or consumer protection should not lead to the – premature – conclusion that fair competition does not exist as a goal worth protecting by European Law<sup>75</sup>. Even the Commission's recent Guidance Paper on the implementation of the UCP Directive confirms that the Directive “aims to ensure, promote and protect fair competition in the area of commercial practices”<sup>76</sup>.

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<sup>67</sup> Art. 3 para. 1 let. g EC has been transformed into Protocol (No 27) to the Lisbon Treaty, see above.

<sup>68</sup> See for example Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final, para 6; Green Paper on Consumer Collective Redress, COM(2008) 794 final, paras 2 ff.; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy strategy 2007-2013, COM(2007) 99 final, p. 7 f.

<sup>69</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008 L 133/66, rec. 8.

<sup>70</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59.

<sup>71</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

<sup>72</sup> Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280/83.

<sup>73</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19 notes 2 ff.; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002 L 217/16, rec. 2 - 4.

<sup>74</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12, rec. 2.

<sup>75</sup> From a Common Law perspective *Wadlow*, The Case for Reclaiming European Unfair Competition Law from Europe's Consumer Lawyers, in: *The Regulation of Unfair Commercial Practices under EC Directive 2005/29—New Rules and New Techniques*. Stephen Weatherill/Ulf Bernitz (Eds.), 2007, p. 175 ff.

<sup>76</sup> European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, p. 6.



## **The Scope of Application of the UCP Directive**

The added value of these considerations for the analysis of the UCP Directive's scope of application seems questionable at first sight. The UCP Directive harmonized the treatment of unfair commercial practices, not Unfair Competition Laws. Yet, as indicated the relationship between the two is closer than the terms imply.

The Commission's original proposal sought to satisfy the goal of market integration with a full harmonization. Yet full harmonization was not meant to extend to all types of commercial practices, but only to those between business and consumers ("B2C"). The dividing line may have seemed clear to the authors:

"40. It also means that acts which constitute unfair competition in some Member States but which do not harm the economic interests of consumers, such as slavish imitation (i.e. copying independently of any likelihood of consumer confusion) and denigration of a competitor, are outside the scope of the Directive. Acts which are classed in some Member States as unfair competition which do harm consumers' economic interests, such as confusion marketing (which generates a danger of confusion among consumers with the distinctive signs and/or products of a competitor) are within scope."<sup>77</sup>

This simplistic idea met with immediate criticism. The German and the Austrian governments intervened stressing that economic competition features an inseparable combination of parallel and exchange processes, which make it impossible to limit the effects of any market conduct to either competitors or consumers<sup>78</sup>. The European legislator reacted to this criticism by accepting that the provisions of the UCP Directive approximated "the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors" (rec. 6). Furthermore, the recitals elaborate that the Directive indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it (rec. 8 sentence 2). As a consequence, it is clear that the concepts of unfair commercial practices and unfair competition are not totally independent. Rather, in the fields coordinated by the UCP Directive, they coincide.

As a result, Art. 3 para. 1 UCP Directive defines the scope of application as "unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product". By the term "business-to-consumer commercial practices", reference is made to the definition in Art. 2 let. d UCP Directive, encompassing "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".

This regulatory technique has created a series of problems. First, it is quite clear that the legislator has made a technical mistake in relying on the provision in Art. 5 when defining the scope of application in Art. 3 para. 1 UCP Directive. It is but a consequence of the principle of conferred powers, now laid down in Art. 2 TFEU, that the European legislator has to define the scope of application of any act by which the Member States are bound. That is what Art. 3 UCP Directive is supposed to do. Within its scope of application, as defined by this provision – one might call this its breadth of application – the UCP Directive itself provides for a regulatory profile, which may be compared to the depth of its

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<sup>77</sup> Proposal for an Unfair Commercial Practices Directive, COM (2003)356 final, para 40.

<sup>78</sup> The government of Austria's comment on the Green Paper on EU Consumer Protection is available at [http://ec.europa.eu/consumers/policy/developments/fair\\_comm\\_pract/responses/governments/austria\\_en.pdf](http://ec.europa.eu/consumers/policy/developments/fair_comm_pract/responses/governments/austria_en.pdf) (last visited on 3-4-2010). The position of the Federal Government on the European Commission Green Paper on European Consumer Protection, available on [http://ec.europa.eu/consumers/policy/developments/fair\\_comm\\_pract/responses/governments/germany\\_en.pdf](http://ec.europa.eu/consumers/policy/developments/fair_comm_pract/responses/governments/germany_en.pdf) (site last visited on 3-4-2010).

reach. That is what Articles 5 ff. UCP Directive are supposed to govern<sup>79</sup>. Defining the breadth of application, as Art. 3 UCP Directive does, by its depth of regulation (Art. 5 UCP Directive) shows insufficient drafting technique<sup>80</sup>.

The second problem arises from the relationship between regulatory purpose and the scope of application. It has been shown that the commercial practices and the Member States' rules coordinated by the UCP Directive adversely affect competitors' interests. Yet, the scope understood as the coordinated field was not defined clearly enough. Following the distinction of direct versus indirect prejudice, rec. 6 explains that the UCP Directive approximates the laws of the Member States on unfair commercial practices which *directly* harm consumers' economic interests and thereby *indirectly* harm the economic interests of legitimate competitors (emphasis added). Yet, the provision governing the scope of application has not been drafted in this way. Pursuant to Art. 3 para. 1, 2 let. d UCP Directive, it covers basically *any* act by a trader "directly connected with the promotion, sale or supply of a product to consumers" (not: "directly harming consumers ..."). While the repetition of the adverb "directly" suggests a harmonic definition of the purpose and scope of the UCP Directive, it takes but a closer look to see that many commercial practices may be directly connected with the promotion or sale or supply of a product to consumers without directly harming their economic interest. In this respect the scope of application of the UCP Directive, as defined in Art. 3 para. 1, 2 let. d, exceeds its purpose by far. The gap between scope and purpose was rendered very clear in the seminal VTB judgement of the European Court of Justice.

### The Case of VTB-VAB v. Total Belgium

Total's primary business is the sale of fuels at filling stations. Total started to offer free breakdown services for a period of three weeks (TOTAL ASSISTANCE) to customers with every purchase of at least 25 litres of fuel for their own vehicle or at least 10 litres for their own motorcycle. VTB-VAB, a company providing breakdown and accident assistance services, brought an action against Total, seeking an order prohibiting it from continuing that commercial practice. Article 54 of the Belgian Act on trade practices and consumer information and protection in fact plainly prohibits any combined offer to consumers, subject to limited exceptions. A combined offer exists where the acquisition, whether or not free of charge, of products, services or other advantages, or of vouchers with which they can be acquired, is tied to the acquisition of other, even identical, products or services.

VTB-VAB relied on the plain prohibition of combined offers; Total argued that such a prohibition fell under the scope of application of the UCP Directive and, since not covered by the "black list" of *per se* prohibitions in Annex I, was contrary to the UCP Directive. The crucial question therefore was the Directive's scope of application.

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<sup>79</sup> We are accustomed to this distinction by the process of qualification in conflict-of-laws: E.g. a form of conduct has to be qualified as a delict pursuant to Art. 4 Rome II Reg. irrespective of whether the specific form of conduct is prohibited under a given national set of rules.

<sup>80</sup> Although it has to be admitted that this form of drafting is not new, cf. Art. 1 para. 1 Unfair Terms Directive.

## ***Market Effects of the Commercial Practice***

### **Competitors**

Although it seems not to have been in the centre of interest during the proceedings before the ECJ, it seems appropriate to start by considering the market effects of Total's commercial practice. The adverse effect on competitors is quite obvious. On the market for combustion engine fuel sold at filling stations, the direct effect of Total's offer is that competitors will either have to match Total's offer or sell noticeably cheaper to make good for the consumers' advantage of free roadside assistance. This effect, however, is simply the result of well-functioning competition on the merits.

Apart from the effect of competition on the merits, however, there might be a foreclosure effect. After their decision to refrain from buying independent roadside assistance, consumers are broadly withdrawn from the fuel market<sup>81</sup>, because they have to keep buying fuel from Total in order to maintain their roadside assistance programme.

On the market for roadside assistance, the consequences of Total's combined offer are even more drastic. Given the incentive for the fuel sellers to match Total's combined offer, the market for independent roadside assistance may be foreclosed as a consequence of the services provided as a part of a "driving package" consisting of fuel and roadside assistance. If every refill buys the next three weeks of assistance and a refill of the amount required would be bought anyway, consumers will make up their minds whether it makes economic sense to buy roadside assistance separately<sup>82</sup>. So, combined offers may give birth to a new model for marketing roadside assistance through fuel sellers instead of selling it directly to automobile owners. However, if fuel sellers decide not to buy these services, but to vertically integrate instead, the sellers of roadside assistance may be displaced from the market. Altogether we find quite appreciable and direct horizontal effects on both product markets.

### **Consumers**

On the other hand, it is hard to discern any prejudice to the economic interest of consumers in the short run. It is widely accepted today that the key problem of combined offers (in any form, for that matter) for the opposite market side lies in the lack of transparency of their market value or, more generally, the increased transaction costs that have to be borne by the demand side, in this case, the consumers. It is noteworthy that the withdrawn proposal for a Regulation on Sales Promotions was intended to reconcile the interests of market integration and consumer protection by combining strict admissibility of all kinds of combined offers with a duty to inform about the market value of the offer<sup>83</sup>. Fully in line with this insight, the German Supreme Court held in 2003 that a "kind of abuse control" of combined offers should kick in only in cases of such a lack of transparency<sup>84</sup>. In later decisions, the

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<sup>81</sup> According to a Shell report from 2004, Shell PKW-Szenarien bis 2030: Flexibilität bestimmt Motorisierung, available on [http://daten.clearingstelle-verkehr.de/217/01/24\\_shell\\_pkw\\_studie\\_2004.pdf](http://daten.clearingstelle-verkehr.de/217/01/24_shell_pkw_studie_2004.pdf) (last visited on 12-7-2009) the average total distance driven per year per car amounted to approx. 11,400 km, while the average fuel mileage was approx. 8.4 litres per 100 km (data for Germany). So the average (one) car owner used a total of 958 litres of fuel. Filling up 30 l (to leave some safety margin for imprecise fuel guages) of Total fuel every three weeks, i.e. 520 litres per year, absorbs more than 50% of the average customer's requirement for fuel. It can be assumed that car-driving habits in Belgium are not overly different from those in Germany.

<sup>82</sup> Assuming that a basic roadside assistance package can be bought for a consideration of €30, the price of the Total fuel, of which at least 520 litres have to be bought, must not exceed the price of competitors by more than 5.7 cents per litre.

<sup>83</sup> Annex no. 3.1 of the Amended Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market (presented by the Commission pursuant to Article 250 (2) of the EC Treaty) COM(2002) 585 final.

<sup>84</sup> German Supreme Court – *Combined Offers I*, BGHZ 151, 84 at para 23 (2003).

German Supreme Court stated correctly that from a consumer perspective the mere value of the premium or the combined offer cannot make the offer unfair<sup>85</sup>.

Getting back to the facts of the VTB case, there is no such lack of transparency at stake. Hardly any consumer market is more transparent than the fuel market. Products and their quality are homogeneous and prices are highly transparent. No opinion polls are needed to know that most car drivers and motorbike riders are well aware of the current price of the kind of fuel they need to fill up with, even spot on the cent at most given times. Likewise, the market for roadside assistance is not too far from that. Sold by automobile associations or car insurance companies, the annual fee is perhaps not known by heart, yet easy to find out. The calculation of how much Total's fuel has to be more expensive to exceed the costs of independent roadside assistance<sup>86</sup> is but a simple arithmetic operation well within the intellectual reach of the average European consumer.

So, if any harm to consumers is to occur at all, it might be feared to occur in the long run. If the scenario depicted above comes true and the independent sellers of roadside assistance are displaced from the market, a monopolistic situation might come into existence causing harm to consumers. However, this situation is dealt with by Competition Law<sup>87</sup>. Moreover, even if such harm to consumers is feared in the long run, would it qualify as "direct harm" to consumers' economic interests in the meaning of rec. 6, 8 UCP Directive? Certainly not! On the other hand, it is quite clear that the combined offers are caught by the wording of Art. 2 let. d UCP Directive, since the commercial practice of offering the three weeks' roadside assistance in combination with the purchase of fuel is made directly to consumers.

### ***Advocate General Trstenjak's Conclusions***

So it was by no means surprising that AG *Trstenjak* identified the purpose of combined offers as the attraction of customers and an increase in the new-business potential of companies. In fact, there is nothing to object to in her appraisal that it was "logical to define them as acts or commercial communications including advertising and marketing, by a trader, directly connected with promotion or selling. They therefore accord fully with the notion of commercial practices within the meaning of Article 2(d) of Directive 2005/29"<sup>88</sup>.

Yet, the obvious conflict of such a broad definition of the scope of application with the much narrower protective purpose did not escape the attention of AG *Trstenjak*. She expressed her concern under a reasoning of the scope of application *ratione personae*. In the end, however, she took comfort from the explanation that while the UCP Directive

[71.] ... is aimed directly at protecting consumers, the economic interests of legitimate competitors are not for that reason regarded as less worthy of protection.

72. That follows, in the first place, from recital 6, but primarily from recital 8 in the preamble to the Directive, from which it is clear that Directive 2005/29 also indirectly protects businesses from their competitors who do not play by the rules in the Directive and thus guarantees fair competition in fields coordinated by it."

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<sup>85</sup> German Supreme Court – *Sonnenbrille*, GRUR 2006, 161.

<sup>86</sup> For an example, see Fn. 82.

<sup>87</sup> Competition Law: Communication from the Commission of 9 February 2009: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7.

<sup>88</sup> Conclusions AG *Trstenjak*, at para. 69, 70; repeated in Conclusions AG *Trstenjak*, case C-304/08 – *Plus*, at para. 61 f.

This point may explain why the subtitle<sup>89</sup> to this article has been chosen. It was certainly no sin the German and Austrian governments committed when they observed that it was impossible to split the protection of consumers and competitors provided by rules governing conduct in competition. Nevertheless, AG *Trstenjak*'s conclusion makes it appear as if this intervention, which led ultimately to the redrafting of recitals 6 and 8 of the UCP Directive, came back to haunt us in the application of the UCP Directive. Perhaps if the UCP Directive's purpose had been expressly limited to the protection of consumers, there would have been greater doubts about applying it to forms of conduct so far from directly affecting consumers' economic interests.

### ***The ECJ's Reasoning***

While AG *Trstenjak* at least chose to argue in favour of an application of the UCP Directive with reference to its protective purpose, the ECJ did not find even this necessary, but relied exclusively on the first part of AG *Trstenjak*'s reasoning, relating to the scope of application *ratione materiae*. The question of protected persons is not addressed at all. Instead, the ECJ stresses the pertinence of Art. 8, 9 UCP Directive. In its later judgment, *Plus*, relating to the German prohibition of tying the participation of consumers in a prize competition or lottery conditional on the purchase of goods or the use of services, both AG *Trstenjak* and the ECJ confirmed the approach taken in *VTB*<sup>90</sup>.

### ***The EU Commission Follows Suit***

In its recent Guidance paper on the implementation of the UCP Directive<sup>91</sup>, the Commission hurried to confirm the ECJ's position – again without even considering the argument of a limited protective purpose<sup>92</sup>. In defence of the Guidance it should be noted that the Commission clearly wanted to disapply the UCP Directive with regard to other promotion schemes it perceives as being purely market-oriented (see below).

### ***A Critique***

Neither AG *Trstenjak* nor the ECJ got to the point that the scope of the UCP Directive, whose limited purpose is to harmonize only commercial practices whereby consumers' interests are affected directly, is not at stake. The combined offer by no means aggressively influences consumers' business decisions, as the ECJ suggests, but is simply aggressive competition in the horizontal relationship with competitors!

While the reason for this failure, as shown above, can be found in the lack of coordination between its protective purpose and its scope of application within the UCP Directive itself, one might have expected the highest European court to make up for this legislative shortcoming. Instead the ECJ smiles at us with blue and innocent eyes, and faithfully applies the apparently simple wording of the UCP Directive. What may, on the face of it, look like an obedient execution of the legislator's intention, is in its consequences hardly less than a *coup de main*, by which the ECJ has brought about a far-reaching harmonization of commercial practices. Article 2 let. d UCP Directive encompasses all

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<sup>89</sup> Alluding to the title of the 1997 film directed by Jim Gillespie: Four teenagers try to cover up a hit-and-run. They accidentally hit a fisherman, think he is dead and dispose of him into the waters. One year later they get a strange letter that says "I know what you did last summer."

<sup>90</sup> ECJ case C-304/08 – *Plus*, not yet reported, para. 35-40. ECJ case C-522/08 – *Telekomunikacja Polska*, not yet reported, para. 31, confirmed again.

<sup>91</sup> European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666.

<sup>92</sup> European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, p. 10.

practices solely addressed towards consumers, including those not directly harming them at all. It is doubtful whether a full chamber of Europe's highest judges failed to notice the obvious consequences (see below).

One positive effect of this approach is, of course, to keep Member States from disguising rules originally designed for industrial policy reasons or in the pursuit of *Mittelstandsschutz* (protection of small and medium sized enterprises) as consumer protection. It should be kept in mind that the Belgian provision banning combined offers sails under the flag "Act on trade practices and consumer information and protection" (*loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur*), and in fact the French government invoked consumer protection as an argument in favour of the general ban<sup>93</sup>. Once more the "I know what you did last summer" theme reverberates – and this time we feel a little less sorry.

A sigh of relief might even be breathed when we think of the problems that lie ahead with regard to the positive harmonization of B2B commercial practices, as assigned to the Commission in recital 8 of the UCP Directive. An obstacle course, staked out by seemingly insurmountable differences about the protection of commercial privacy, the scope of protection of innovation and investment in the backyards of IP rights or the appropriate amount of protection in cases of commercial dependency, may have been circumvented in a short paragraph.

Yet, these benefits do not come for free. The European legislator has taken great care to give the courts and competition authorities of the Member States clear guidance with regard to the fact patterns the UCP Directive was aiming at: commercial practices directly connected with the promotion, sale or supply of a product to consumers *and* directly harming consumers' economic interests, in particular misleading and aggressive practices. These general types of competitive wrongdoing are hammered out in the UCP Directive in a detailed manner. The legislator even did its best to come to grips with the general clause in Art. 5 UCP Directive. Finally, there is the black list in Annex I.

For the commercial practices newly covered, i.e. all those only directly connected with the promotion, sale or supply of a product to consumers, there is no such guidance. There are no generally accepted principles. If there were such principles, positive harmonization would not be so troublesome! We do not know anything about their application except that *per se* prohibitions are *per se* prohibited by the UCP Directive. In fact, the *VTB* judgment has thrown the Member States' courts into ice cold water. Further consequences might be either that 27 different sets of rules start to develop, or that the ECJ is flooded with preliminary references.

## Lessons Learnt

The first lesson to be learnt from the *VTB* judgment is quite clear. The ECJ expressly states that Art. 2 let. d UCP Directive "gives a particularly wide definition to the concept of commercial practices" (para. 49<sup>94</sup>). Consequently, the ECJ favours a wide interpretation of Art. 2 let. d UCP-Directive. Yet the ECJ sees no need to cut back the scope of application resulting from this wide definition with regard to the much narrower protective purpose of the UCP Directive (see above).

The second lesson relates to the field of "newly" encompassed commercial practices. Many typical fact patterns of unfair competition, traditionally not seen within the scope of the UCP Directive must now be expected to be covered.

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<sup>93</sup> ECJ joined cases C-261/07 and C-299/07 – *VTB-VAB NV ./ Total Belgium NV*, not yet reported, para. 46.

<sup>94</sup> Confirmed by the ECJ, case C-308/08 – *Plus*, para. 36.

### ***Non-misleading Denigration of Competitors***

Natural persons have a natural honour protected by the law, even a right to privacy protecting them. Natural persons in the course of doing business or moral persons have a similar right, at least with regard to the commercial dimension of this right<sup>95</sup>: the market value of a good reputation. It may be questionable whether protection of this reputation going beyond false allegations (Directive on Misleading Advertising) or the unfair exploitation of trade marks (Trade Mark Directive) is covered by general Tort Law or Unfair Competition Law. But from now on, it is widely governed by the UCP Directive so long as the non-misleading denigration of competitors takes place in the course of directly promoting one's own products to consumers.

### ***Copying Competitor's Products***

As soon as there is a risk of confusion, the UCP Directive includes the imitation of products as a commercial practice. The reasoning of the Commission's original proposal cited above left no doubt about that, and rec. 14 UCP Directive kept to this approach.

Following AG *Trstenjak's* reasoning, however, any imitation of goods sold to consumers, even without a risk of confusion, would fall under the UCP Directive. Exterior product design ("get-up", livery), much like combined offers, serves to attract customers and to increase the new business potential of companies. So, once again, it can be considered only "logical to define them as acts or commercial communications including advertising and marketing, by a trader, directly connected with promotion or selling".

### ***Breach of Statutory Provisions***

Any breach of a statutory provision, e.g. a provision limiting shops' opening hours, might be caught by the VTB approach. The extension of shop hours to consumer-customers serves to attract consumers and increase business potential.

### ***Aggressive Pricing Practices (Predatory Pricing; Selling Below Cost; Giving Away of Goods)***

Just like combined offers, predatory pricing (in a narrower sense, pricing with exclusionary intent, and in a wider sense, encompassing any selling below cost) is also a marketing tool to attract customers and increase business potential.

The Member States have a plethora of rules that govern unilateral conduct more strictly on these matters than European Competition Law, including the subject matter under Art. 102 TFEU (ex-Art. 82 EC)<sup>96</sup>. Notably Art. 102 TFEU (ex-Art. 82 EC) requires a dominant position. Many national Competition Laws extend the liability under Competition Law for unilateral conduct below the level of market dominance<sup>97</sup>. The European legislator has condoned these differences in Art. 3 para. 2 Reg. No. 1/2003. While the Commission's discomfort with these provisions shows quite clearly in its recent report<sup>98</sup>, it is questionable whether there is sufficient political will to do away with this clause.

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<sup>95</sup> ECHR case 16/1994/463/544 – *Goodwin v. United Kingdom*, § 35 (1996).

<sup>96</sup> ECJ case C-62/86 – *AKZO*, 1991 ECR I-3359; case C-333/94 P – *Tetra Pak II*, 1996 ECR I-5951; case C-202/07 P – *France Télécom*, not yet reported.

<sup>97</sup> E.g. § 20 para. 2 of the German Act against Restraints of Competition. For a summary cf. the Commission's report on the functioning of Regulation 1/2003. COM(2009) 206 final, note 19 ff.

<sup>98</sup> Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003, COM(2009) 206 final.

With its *VTB* judgment, the ECJ might have solved all the political problems of opting in the Member States. One might think that the European legislator in the field of unfair commercial practices did not want to get in the way of the Competition Law legislator. And indeed, rec. 9 UCP Directive states that this directive is without prejudice to “Community competition rules and the national provisions implementing them”. The wording is clear – the UCP Directive only spares Community competition rules, but not Competition Law in general. The opening clause in Art. 3 para. 2 Reg. No. 1/2003 can hardly be considered part of the Community competition rules, since rec. 9 UCP Directive expressly relates to national provisions implementing Community competition rules. So, the national rules at stake deviate rather from European Competition Law, but do not implement the opening clause. The conclusion that *per se* prohibitions of certain consumer-directed pricing practices are covered by the UCP Directive and fall victim to the exclusive nature of its Annex I does not seem too far-fetched.

So in a way it seems surprising that the Commission does not seem to want to make use of this ace the ECJ has dealt it. In its 2009 Guidance paper on the implementation of the UCP Directive, the Commission states that national rules regulating selling at a loss do not fall within the scope of the UCP Directive<sup>99</sup>. This view seems a little contradictory given that today even rules prohibiting selling below cost under Competition Law are considered as ultimately protecting consumers from a recoupment by means of monopoly prices – by the very same Commission<sup>100</sup>. So consumer harm would have to be assumed even where prices below cost initially seem to benefit consumers.

#### ***Article 5 UCP Directive – Is there Any Way Out from Under?***

So far, the discussion has related only to the scope of application of the UCP Directive. Thus one might argue that the extension of the scope is not necessarily harmful so long as the substantive requirements allow for appropriate treatment, i.e. exclusion of liability. Yet, this is true only to a limited extent. At any rate, it is a consequence of the legislative technique of the UCP Directive that all *per se* prohibitions that go beyond its Annex I – for whatever reason – are prohibited, as the *VTB* case and the *Plus* case have shown.

The UCP Directive would bear even further on the application of national law: since no specific fact pattern in Art. 6 ff. UCP Directive applies, one would have to rely on the general clause in Art. 5 UCP Directive. The second criterion in Art. 5 para. 2 let. b will help only in limited cases. For example one might argue in the cases of a breach of statutory provisions regulating shop hours that the consumers’ transactional decisions with regard to what to buy would not be different, if they were made during “legal” shop hours.

Yet, this approach will not help for the denigration of competitors, the imitation of products and aggressive pricing practices. In all of these cases, it is quite usual that the business decisions of the consumers addressed are affected – that is what commercial practices are all about!

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<sup>99</sup> European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, p. 14.

<sup>100</sup> Communication from the Commission of 9 February 2009: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7, para. 70, cf. *Glöckner/Bruttel*, Predatory Pricing and Recoupment under EC Competition Law – *Per se* rules, Underlying Assumptions and the Reality: Results of an Experimental Study, accepted for publication in E.C.L.R.



## **Open Questions**

The *VTB* case, like the other recent preliminary references<sup>101</sup>, turns on the pivotal point of distinguishing B2C from B2B commercial practices – a distinction whose practicality and even sense have been hotly debated from the beginning in the Commission’s Green Paper<sup>102</sup>. Another distinction, required by the UCP Directive’s definition of “business-to-consumer commercial practices” in Art. 2 let. d, has received remarkably little attention so far: there are certain forms of conduct that may be directly related to the promotion or sale of products, as Art. 2 let. d UCP Directive sets forth, but that either lack market relevance or are applied in a very different social environment.

### ***Lack of Market Relevance***

**Example:** A consumer has bought a laptop computer from a professional seller. The computer crashes frequently. The buyer thinks that the computer is not in conformity with the contract and demands that the seller replace his laptop computer with another one in working condition. The seller rejects this demand by stating that some problems are known to occur with the most widespread operating system running on personal computers. Besides, he attributes the crashes to the – undisputed – installation of this software by the buyer or insufficient anti-virus protection. In any case, he denies in good faith that the condition of the computer is not in conformity with the contract. Assuming he is wrong in that assessment, is the unjustified rejection of claims caught by the UCP Directive?

The question has to be answered whether or not “any act by a trader, directly connected with the sale of a product to a consumer” is really covered by the UCP Directive. In the example, the seller’s conduct is an act that is connected with the sale of a product. So the plain wording of the provision seems to warrant an application of the UCP Directive. Yet, it seems questionable whether liability under the UCP Directive with the full thrust of its implementing rules is appropriate for cases in which no interests beyond the individual seller–consumer relationship are affected and in which these interests are protected adequately by the provisions of harmonized Contract Law.

No help from fact patterns within UCP Directive

Again, there is not necessarily room for escaping liability under the UCP Directive by applying its fact patterns, as the example shows. Assuming that the computer’s condition is in fact not in conformity with the contract, the seller’s statement is misleading; there is no reason to believe that the term “misleading” requires a subjective element, such as intent or negligence. The consumer, relying on this statement, may refrain from making use of the remedies granted by the Directive on the Sale of Consumer Goods. The exercise of a contractual right is a transactional decision under Art. 2 let. k UCP Directive, and, consequently, the statement on the product’s conformity with the contract is likely to cause the consumer to make a transactional decision that he would not otherwise have taken pursuant to Art. 6 para. 1 UCP Directive.

It might possibly be argued that the seller’s statement reflected his own honest belief, but did not amount to the statement of facts as required by Art. 6 UCP Directive. Such approach may have some merits. Indeed, it takes a statement of facts to mislead: opinions (“I like it”) or appraisals (“one gorgeous product”) are not apt to mislead at the outset. Yet, the goal of consumer protection requires one to interpret any statement from the perspective of the average consumer and to ask whether or not there is some sort of fact concealed behind an opinion or appraisal. In our hypothetical situation, it seems quite clear that the seller’s statement – from the buyer’s perspective – appears to be borne by a

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<sup>101</sup> Case C-540/08: Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged in on 4 December 2008 – *Mediaprint*, OJ 2009 C 69/18.

<sup>102</sup> Green Paper on consumer protection in the European Union of 2 October 2001, COM(2001) 531.

superior knowledge of the pertinent law and the “correct” assessment of the facts. So, in the hypothetical case, Art. 6 UCP Directive is highly likely to encompass the seller’s conduct.

### Scope of application

The legal order owes an answer to the prior question of whether the form of conduct exemplified in the hypothetical case falls under the scope of the UCP Directive, as the plain wording of Art. 2 let. d UCP Directive seems to warrant and Art. 3 para. 1 UCP Directive seems to stress (“... apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, *during and after* a commercial transaction in relation to a product“, emphasis added). Yet, the question needs to be asked: Is the UCP Directive designed to transform every act within the making of contracts or their performance into a commercial practice?

It should be pointed out that the scope of application of the UCP Directive is entirely independent of the existence of contractual remedies. So the latter neither preclude liability under the UCP Directive, nor is their existence required, to give rise to a “requirement of professional diligence” under Art. 5 UCP Directive. It is true that the violation of information requirements established by EU law constitutes a misleading omission under Art. 7 para. 5 UCP Directive, and one might think of the violation of any statutory provision enacted to protect consumers as a case for the application of the general clause in Art. 5 UCP Directive. Apart from that, however, it would be wrong to assume a mutual correspondence. Overlap with contractual rights is no argument against liability under the UCP Directive.

Nevertheless, there are good reasons to interpret the broad language of Art. 2 let. d and 3 para. 1 UCP Directive in a more purposive manner. Such a purposive interpretation is supported by various arguments based on the system and structure of acts of European secondary law. First and foremost, the language of the UCP Directive implies that “acts” (cf. Art. 2 let. d UCP Directive) are only caught, if they affect the market as opposed to only individual consumers. The title of the Directive highlights the key phrase “Commercial Practices”, as do Articles 3 para. 1 and 2 let. d when defining the scope of application and Articles 5 to 8 UCP Directive when defining the violations. The term “practice” in itself contains an inherent requirement of a certain market relevance. The term is defined in its pertinent meaning as “habitual or customary performance”<sup>103</sup>, ruling out applying the UCP Directive’s provisions to merely incidental or outright singular conduct. The same inference can be drawn from Articles 5 through 8 UCP Directive. All of them relate the commercial practice to the economic behaviour of an “average consumer” or an “average member of the group addressed”. This makes clear that singular conduct does not fit under the “practices” terminology, which forms part of all language versions of the UCP Directive (e.g. *pratiques, pratiche, Praktiken*).

Even though, as stated above, liability under the UCP Directive is independent of contractual rights, the UCP Directive expressly states that it “is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law” (rec. 9 sentence 2). Consequently, the legislator took care to adapt instruments granting contractual rights as a means of protecting economic consumers’ interests (cf. Art. 15, 16 UCP Directive). Yet, if the UCP Directive’s scope of application pursuant to Art. 3 para. 1 were interpreted to encompass any individual or singular conduct, the legal consequences of the UCP Directive would kick back into every individual contractual relationship.

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<sup>103</sup> See for example the definition of the term “practice” in Merriam-Webster Collegiate Dictionary [2004].

Last, but with a view to its purposive interpretation certainly not least, the UCP Directive protects collective interests of consumers, as Art. 1 para. 1 of the Directive on injunctions<sup>104</sup> makes clear. Where market effects are nonexistent and the conduct in question is limited in its effect to an individual and a bilateral relation to the consumer, collective consumer interests are not at stake. In such cases, conduct should be governed exclusively by the respective provisions made available by Private Law.

It goes without saying that as soon as such market effects are perceivable because a certain conduct is exercised in a regular manner, e.g. a trader putting off justified claims of his customers on a regular basis, or reaches a market as a whole, e.g. by the use of General Terms or a shop sign giving notice “no refund without cash slip”, such conduct is covered by the UCP Directive. The Commission’s Guidance is in line with such interpretation. While the Commission stresses that after-sales practices are covered by the UCP Directives scope of application, all of the examples provided depict cases in which the critical commercial practice has an appreciable market effect going beyond the individual impact on a bilateral relationship<sup>105</sup>.

### ***Lack of Competitive Purpose***

The difficulty of simply translating the German term *Wettbewerbsabsicht* into the awkward phrase “competitive purpose” shows that the second problem might be a home-made German one. But then again the same substantive problems addressed under this doctrine may crop up under the UCP Directive. Again, a – not so hypothetical – case may help understand the conflict of interests better.

**Example:** A Swiss scientist, Mr Hertel, published an article headlined “Microwaves: Scientific proof of health risks”. He and the journal’s editors were successfully sued under Swiss Unfair Competition Law for this statement, because the article failed to indicate that this thesis was contrary to the mainstream opinion in science and was therefore considered misleading.<sup>106</sup>

At first glance, a case like this seems far away from the scope of application of the UCP Directive. This is not the prototype rogue trader, and neither the scientist, Mr Hertel, nor the editors of the journal in which his article had been published had any vested interest in the market for kitchen appliances.

Yet, as a matter of fact, although the possible offenders may not have had any vested interest in the market, the plaintiff had. It was the association constituted by the electric appliances industry, suffering from negative headlines with regard to health risks brought about by any of their products, be it microwave ovens in the 1990s or perhaps mobile or cordless phones (“electrosmog” causing brain cancer?) as of today. The industrial association, which is granted standing to sue under Swiss Unfair Competition Law, brought the lawsuit.

Problems similar to the ones depicted in the *Hertel* case may arise from comparative tests and their publication through consumer organizations or the media, or from media reports on consumer products. In such cases, the market effect, the influence on transactional decisions of consumers, is obvious. On the other hand, there is a strong interest in the operation of information intermediaries, who provide information that individual consumers would not be able to obtain (how safe is a child’s car seat really?), or they would not have sufficient economic incentive to compile the information.

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<sup>104</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests, codified version in Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests, OJ 2009 L 110/30. The UCP Directive is now part of the Annex 1 to this directive, cf. Art. 16 UCP Directive.

<sup>105</sup> European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, p. 7 f. The same is true for the German case FCJ of 2-5-2009, I ZR 119/06 – Change of Preselection II.

<sup>106</sup> ECHR, case 25181/94 – *Hertel v. Switzerland*, 1998-VI, no. 87.

TV shows, magazines or newspapers may contain statements from scientists or journalists that relate to market participants or their products and that affect markets severely as soon as they reach them. Yet, such statements will typically be made in the framework of a specific interest of the public to be informed, e.g. about the health risks emanating from foodstuffs or baby toys, environmental harm caused by certain paints or car engines, or societal issues with regard to production facilities abroad. So, market relevance can hardly be doubted in these kinds of cases.

The language of Art. 2 let. d UCP Directive seems to be a little further away from such conduct. Most obviously, in our example, Mr. Hertel would not be considered a trader<sup>107</sup>. On the other hand, at least the editors of journals, magazines or the owners of privately run TV stations who publish his thesis would fall under Art. 2 let. b UCP Directive, because the publication in a newspaper, magazine or TV show is done while acting for purposes relating to their trade. The term “trade” is not limited to the exchange of goods for money. Articles 2 let. d and rec. 7 sentence 2 UCP Directive make sufficiently clear that the UCP Directive relates to the consumers' transactional decisions in relation to products. “Products” again relates to both goods and services, cf. Art. 2 let. c UCP Directive. Consequently, the distribution of information services (e.g. publication of newspapers, magazines, TV shows, and online databases) on a market is exercised by traders pursuant to Art. 2 let. d UCP Directive<sup>108</sup>.

Finally, the publication is directly connected with the sale of products, as Art. 2 let. d UCP Directive requires. This is entirely clear with regard to the magazine or the TV programme, whose attraction is determined by its contributions. However, the UCP Directive does not even require a direct connection of the act in question with the promotion of the trader's own products. In the example the editors directly influenced the sales of electric appliances for heating up food. Their depiction of health risks emanating from the use of microwave ovens caused direct prejudice to their producers just as much as it directly promotes the sales of grill ovens, traditional ovens or modern steam ovens. Of course, the harm caused depends entirely on the market effects. No appreciable market effects may occur if such a thesis is uttered in a scientific journal only read by a very limited number of people well acquainted with the problem and aware of the fact that such a thesis might give just an individual and perhaps peculiar view. On the other hand, such effects are likely, if the same thesis is published in a popular science magazine, in the Sunday edition of a newspaper, or in a TV show on consumer issues.

Starting from the protective purpose of the UCP Directive, a general exemption of media or consumer associations does not seem to be warranted. If a publication contains incorrect information on products consumers, may be misled, and if an article cites authorities or makes use of ugly pictures, it will be the consumers whose ability to make an informed decision may be appreciably impaired and who may be caused to make transactional decisions that they would not have made otherwise. As a consequence this author advocates an application of the UCP Directive for such cases, always provided that the “act” is not only directly connected with the promotion, but also directly harms consumers' interests (see above). There is no need to give scientists, the media or consumer associations *carte blanche* when they make or distribute statements that materially affect the economic decisions of consumers. Their statements can influence markets and consumer decisions just as much and just as directly as any advertisement could.

The only reason why it seems appropriate that scientists, the media or consumer associations should be treated differently is their protection by fundamental rights (freedom of science, expression, press) or

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<sup>107</sup> In the same vein the European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, p. 16, states that organizations pursuing charitable or other ethical goals are qualified as traders, if they engage in commercial activities.

<sup>108</sup> European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, p. 15.

legal policy seeking to empower consumers. Overly short bridles for consumer organizations would be counter-productive. Yet, instead of limiting the scope of application of the UCP Directive with regard to such statements, a solution respecting the fundamental rights and the policy of consumer protection ought to be found within the fact patterns of the UCP Directive, which have to be construed in the light of the fundamental freedoms<sup>109</sup>. For example it should be stated that what is misleading has to be decided striking a balance<sup>110</sup> in which fundamental rights and policy arguments also have weight.

## **Conclusions**

1. The substantive scope of application of the UCP Directive, which requires only that the commercial practices be “directly connected with the promotion, sale or supply of a product to consumers”, exceeds its purpose aimed only at harmonizing such rules that “directly harm” consumers’ economic interests.
2. The ECJ has failed to close that gap and gives precedence to the limited harmonizing purpose. In contrast, the ECJ perceives the giving of a “particularly wide definition to the concept of commercial practices” as intended, thereby encompassing many types of business conduct just because they are directly connected with the promotion or sale of products to consumers, even though they harm economic consumer interests only indirectly or not at all.
3. Such types of business conduct are in particular: non-misleading denigration of competitors to consumers, the non-misleading copying of competitors’ products sold to consumers, the breach of statutory provisions and aggressive pricing practices with regard to consumers. If these types of business practices are covered by the UCP Directive, the specific fact patterns, Art. 6 – 8, Annex I UCP Directive, provide no guidance, because consumers are neither misled nor unduly influenced. Article 5 para. 2 let. b UCP Directive will help out from under only in cases, in which the same transactional decision would have been made in any case. Apart from that, the regulatory scope of the UCP Directive has turned out to be huge, but the European legislator’s guidance for Member States’ courts and authorities is basically nonexistent for commercial practices that harm consumer interests only indirectly.
4. While the UCP Directive makes clear that its scope of application also covers acts during or after the commercial transaction, this does not mean that every act during or after the commercial transaction falls under the UCP Directive. As the term “commercial practice” already implies, and notably the purpose of the UCP Directive makes clear, only such acts are covered the effects of which go beyond their impact on an individual and the bilateral legal relationship, and bear on a certain class of cases. Not every individual breach in the course of the execution of a contract is transformed into an unfair commercial practice.
5. “Trade” relates to goods or services, and services will include information services rendered about a specific market. Consequently, consumer associations who sell their information (e.g. by access to online databases) and the media have to be considered as traders, and their statements and publications are subject to the requirements of the UCP Directive, i.e. they must not mislead or unduly influence the consumers’ decisions. On the other hand, the fundamental rights (freedom of speech, press, science) and the policy of empowering consumers by means of their associations demand that the fact patterns of the UCP be construed in the light of these fundamental rights and the policy of the act.

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<sup>109</sup> As the Court of Appeals (Oberlandesgericht) Cologne of 9-9-2009, 6 U 48/09 – Charlatans on the coaching market, did.

<sup>110</sup> In the same sense, the European Commission, Commission Staff Working Document of 3 December 2009: Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, p. 28, cites AG Fennelly, conclusions para. 29, ECJ case C-210/96 – *Gut Springenheide*, 1998 ECR I-4657, admonishing courts not to refrain from exercising their own judgement.



## **Towards a Common European Marketing Law**

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In a market economy, businesses offer goods and services on the market. Competition means that several competitors want to achieve the same goal (selling their products to the same group of buyers). Unfair competition law was introduced *inter alia* through the Paris Convention for the Protection of Industrial Property<sup>112</sup>. Its scope was to protect competitors from marketing that could create confusion in the markets, and to protect the public from misleading advertising. The primary purpose of marketing law is to ensure that the competition between businesses is fair. This entails that the marketing activities of a business should not be unfair, either towards their actual or potential customers, or towards competitors. In most Member States, marketing law is regulated by a flexible general clause that prohibits unfair competition in combination with more predictable *per se* prohibitions.

### ***Per se* Prohibitions**

In several Member States, there is a tradition of banning particular commercial practices, such as premiums, coupons, and promotional lotteries. Parallel to the negotiations on the Unfair Commercial Practices Directive, there were ongoing negotiations on a regulation concerning *sales promotions* in the Internal Market<sup>113</sup>, which *inter alia* implied a harmonization of rules concerning discounts, gifts, premiums, and promotional games. This proposal was withdrawn after the adoption of the Directive on Unfair Commercial Practices. The regulation had been intended to wipe out national *per se* bans in marketing law by introducing information requirements that would inform consumers about the details of the sales promotion.

In connection with the implementation of the Services Directive (2006/123) in Denmark, the question arose as to whether to revoke the bans on coupons and promotional games, because they could possibly conflict with the directive<sup>114</sup>. However, the Danish Ministry of Economic and Business Affairs was told by the Commission that the bans were not incompatible with the Services Directive insofar as they concern national situations (“national businesses”)<sup>115</sup>. For service providers from another EU/EEC country, the Danish ban would constitute a potential restriction of the free movement of services. The Danish bans have therefore been changed so they do not apply to services provided in Denmark by service providers established in another EU/EEC country<sup>116</sup>. As a consequence of the two judgments presented immediately below, these bans are now to be revoked.

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<sup>111</sup> The author wishes to thank Professor Peter Møgelvang-Hansen for valuable discussions and comments. The article is based on Jan Trzaskowski, *Om den unionsretlige markedsføringsret*, Danish Weekly Law Journal (UfR), 2010B.145.

<sup>112</sup> Convention of 20 March 1883 with amendments; see article 10bis.

<sup>113</sup> See Proposal for a European Parliament and Council Regulation, COM(2001) 546 final, 2001/0227 (COD).

<sup>114</sup> Økonomi- og Erhvervsministeriets høringsnotat af 26. januar 2009 (sag 08/02603/EBST) [in Danish].

<sup>115</sup> According to article 16 of the Services Directive, service providers shall have freedom to provide services within the scope of the directive, in Member States other than that in which they are established.

<sup>116</sup> Lov nr. 364 af 13. maj 2009 om ændring af næringsloven, markedsføringsloven, erhvervsfremmeloven og forskellige andre love på Økonomi- og Erhvervsministeriets område, § 7, nr. 1 og 3 [in Danish].

## The Cases

In the combined cases, C-261/07 and C-299/07, (concerning Total and Sanoma, respectively), and in case C-304/08 (concerning Plus), the European Court of Justice entered judgments with regard to a Belgian prohibition of combined offers<sup>117</sup> and a German prohibition of promotional games<sup>118</sup>, respectively. The question in both cases was essentially whether the Directive on Unfair Commercial Practices should be interpreted as precluding such prohibitions that do not take into account the specific circumstances of individual cases (“*per se* prohibitions”, which are prohibitions that apply in *all circumstances*).

In the case of Total, the Belgian motor fuel company offered three weeks of free road service to members of a loyalty programme for every time they bought 25 or 10 litres of petrol for their car or motorcycle, respectively. The proceedings were instituted by a competing road service provider (VTB-VAB). The Sanoma case concerned an issue of the weekly magazine *Flair*, in which consumers would find a coupon offering discounts of 15 to 25 percent for purchases in a chain of lingerie shops in Flanders. The legal action was taken by a competing Belgian lingerie shop (Galatea).

The Plus case concerned a promotional campaign launched by a German retail business. In the campaign *Ihre Millionenchance* (“Your chance to win millions”), the public was invited to purchase goods sold in its shops in order to collect points. Once they had 20 points, customers could take part free of charge in the draws held by the *Deutscher Lottoblock* (national association of 16 lottery undertakings). The proceedings were instituted by a German association founded to combat unfair competition (*Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*).

The European Court of Justice first established that the practices constituted commercial practices within the meaning of Article 2(d) of Directive 2005/29, and that the activities are consequently subject to the rules laid down by the directive<sup>119</sup>. Plus emphasized that promotional campaigns, such as the one carried out by the retail business, “clearly form part of an operator’s commercial strategy and relate directly to the promotion thereof and its sales development”<sup>120</sup>.

It was argued by several Member States that such sales promotions as dealt with in the two cases should fall outside the scope of the directive because these types of sales promotion were subject to the parallel negotiations of the above-mentioned regulation on sales promotions. The European Court of Justice rejected that argument with reference to the wide definition of the concept of commercial practices in the Directive on Unfair Commercial Practices<sup>121</sup>.

The cases concerned situations where national legislation was applied to businesses established in the same country as the targeted consumers. The Belgian case concerned subsidiaries to the French oil company, Total, and the Finnish publishing group, Sanoma, respectively. In the judgment, importance was not attached to that fact. In the Plus case, the court established, with reference to article 3 of the Unfair Commercial Practices Directive, that the directive applies “to any unfair commercial practice

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<sup>117</sup> See Total and Sanoma at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0261:EN:HTML>, paragraphs 14 to 18. See also Georgios Anagnostaras, The Unfair Commercial Practices Directive in Context, *Common Market Law Review*, 47 (2010), s. 147ff.

<sup>118</sup> See Total and Sanoma paragraphs 9 to 11.

<sup>119</sup> “[A]ny act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.”

<sup>120</sup> See Plus at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0304:EN:HTML>, paragraph 37. See similarly Total and Sanoma, paragraph 50.

<sup>121</sup> See Total and Sanoma, paragraph 49, and Plus, paragraph 33.



used by an undertaking with regard to consumers”, and that the application of the directive is not conditional on the presence of an external factor (paragraph 28). The European Court of Justice established that the directive fully harmonizes unfair business-to-consumer commercial practices. This entails that Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection<sup>122</sup>.

### **Commercial Practices That Are Unfair in All Circumstances**

The Directive on Unfair Commercial Practices contains in its Annex I an exhaustive list of 31 commercial practices, which, in accordance with article 5(5) of the directive, are regarded as unfair in all circumstances. It follows from article 5(5) that this list is to apply in all Member States and that it may only be modified by revision of the directive. The court did not find that the two national prohibitions in question were featured among those listed in the annex.

Although both the Belgian and German prohibitions contained certain exceptions, the European Court of Justice found that the prohibitions applied in all circumstances because they did not entail a case-by-case assessment as provided in articles 5 to 9 of the directive. As combined offers and promotional competitions are not listed in Annex I, the court found, with reference to the exhaustive nature of the annex, that the national legislation in question did not meet the requirements of the directive, which consistently precludes such prohibitions<sup>123</sup>.

Commercial practices that are not listed in Annex I must be assessed in the light of the criteria set out in articles 5 to 9 of the directive in order to establish whether they are unfair. According to article 5(2), a commercial practice is unfair if it a) is contrary to the requirements of professional diligence, and b) materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.

### **The Harmonized Field**

#### ***Purpose and Scope***

The *purpose* of the Directive on Unfair Commercial Practices is, according to article 1, *inter alia* to harmonize laws on practices that harm “consumers’ economic interests”. In recitals 6, 7, 10, and 12, the same terminology is used. According to article 3, the *scope* of the directive is “unfair business-to-consumer commercial practices” before, during and after a commercial transaction in relation to a product. This concept is further defined in article 2(1)(d). The title of the directive also suggests that the directive concerns *business-to-consumer commercial practices*. Thus there is no apparent coherence between the declared purpose and the declared scope of the directive.

In the directive’s article 4 concerning the Internal Market, there is a reference to “... the field approximated by this Directive”, which on the face of it must be understood as a reference to the *purpose*, which, in contrast to the *scope* as defined in article 3(1), refers to the field which is approximated by the directive. By way of comparison, the Directive on Misleading Advertising (2006/114) does not define its scope of application in the same manner – it only states its purpose, which *inter alia* is to “... protect traders against misleading advertising and the unfair consequences thereof ...”. This can be interpreted both as advertising that harms the *economic interest of a business* and as business-to-business advertising.

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<sup>122</sup> See Total and Sanoma, paragraph 52, and Plus, paragraph 41.

<sup>123</sup> See Plus, paragraphs 45, 48, and 49.

The difference between the declared purpose and the declared scope of the directive can be illustrated by two examples. 1) Commercial practices that include disparaging remarks about a competitor will often be targeted at consumers. Thus, this is a case of a business-to-consumer commercial practice (within the scope), but it will primarily concern a competitor's economic interest (outside the purpose). 2) Incentive programmes for vendors are a commercial practice which is targeted at business (outside the scope), and where the vendor is awarded a benefit for the sale of particular products. This may jeopardize the unbiased advice consumers may expect from vendors, and it may thus harm the consumer's economic interest (within the purpose).

With regard to *Plus*, the European Court of Justice addressed this question explicitly after observations submitted by the Austrian and Czech governments. The governments argued that the German prohibition has as its principal aim not to protect consumers, but rather competitors, against unfair commercial practices employed by certain operators, and that the German provisions do not come within the scope of the directive<sup>124</sup>. The court emphasized with reference to paragraph 36 of the judgment that the directive "is characterised by a particularly wide scope *ratione materiae* which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers"<sup>125</sup>. The European Court of Justice thus put emphasis on the scope as defined in article 3(1) without reflecting on the purpose of the national prohibition.

The purpose of the German regulation is to protect consumers, competitors and other market participants from unfair competition. Based on the legislative documentation, the Advocate-General found that the legislative purpose of the ban on promotional games is to protect consumers against having their decision-making freedom unreasonably influenced by exploitation of their propensity to gamble. With reference to the Advocate-General and to the fact that the German law refers expressly to the protection of consumers and not only to that of competitors and other market participants, the court dismissed the argument presented by the Austrian and Czech governments<sup>126</sup>. Based on the two judgments, it must be concluded that the Directive on Unfair Commercial Practices harmonizes laws on unfair business-to-consumer commercial practices as defined in the *scope*.

#### Protection of competitors' economic interests

As mentioned in the introduction, marketing law is to ensure fairness in the markets. It is common ground that marketing law is to protect consumers, businesses (typically competitors), and in some countries more general societal interests as well. The protection of competitors' economic interests is in principle laid out in the codified version of the Directive concerning misleading and comparative advertising (2006/114, the "Misleading Advertising Directive"). As stated in article 1 of that directive, the purpose is to protect traders against misleading advertising and the unfair consequences thereof<sup>127</sup>. The directive's scope of application is *advertising*, which is a narrower concept than *commercial practices*<sup>128</sup>. In contrast to the Unfair Commercial Practices Directive, this directive constitutes minimum harmonization<sup>129</sup>, which allows Member States to retain or adopt provisions with a view to ensuring more extensive protection for traders and competitors with regard to misleading advertising.

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<sup>124</sup> See *Plus*, paragraph 38.

<sup>125</sup> See *Plus*, paragraph 39.

<sup>126</sup> See *Plus*, paragraph 40; see also Opinion of the Advocate-General, paragraphs 65 and 66.

<sup>127</sup> And to lay down the conditions under which comparative advertising is permitted.

<sup>128</sup> Article 2(a) defines advertising as "the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations".

<sup>129</sup> Article 8(1) – except for the provisions concerning comparative advertising.

In the above-mentioned cases, it is found that the Unfair Commercial Practices Directive fully harmonizes the rules relating to unfair *business-to-consumer commercial practices* and that article 5 of the directive sets out the criteria on the basis of which practices may be classified as being unfair<sup>130</sup>. The focus in article 5 is on the distortion of the economic behaviour of the average consumer, and notably not on the businesses' economic interests. In principle, this entails that unfair business-to-consumer commercial practices that do not distort the economic behaviour of consumers cannot be prohibited by Member States. This may limit Member States' possibilities to protect businesses against disparaging remarks by a competitor, parasitic practices, including in particular unfair use of product designs (imitations) and trademarks that are not protected by copyright law or trademark law, respectively<sup>131</sup>. To the extent those practices are directed towards consumers (business-to-consumer practices), such practices must fall under the broad scope of the Unfair Commercial Practices Directive as interpreted by the European Court of Justice.

It follows from the explanatory parts of the proposal for the directive that the denigration of a competitor falls outside the scope of the directive, because it does not harm the economic interests of consumers. On the face of it, this must apply even when the denigration is placed in advertising directed towards consumers. Similarly, it is provided that confusion marketing (which generates a danger of confusion among consumers with the distinctive signs and/or products of a competitor) is within the scope because such marketing harms consumers' economic interests<sup>132</sup>. The preparatory works thus seem to focus on the interests at stake rather than to whom the commercial practices are directed.

It is stated in recital 6 of the preamble to the Unfair Commercial Practices Directive that the directive approximates the laws of the Member States on unfair commercial practices which *directly* harm consumers' economic interests and that the directive does not cover the national laws on unfair commercial practices which harm *only* competitors' economic interests. With reference to this recital, the court states that it is evident that only national legislation relating to unfair commercial practices which harm *only* competitors' economic interests is excluded from that scope<sup>133</sup>. However, the wording of the recital can also be interpreted as saying that such situations fall outside the scope of the directive *in all circumstances*. The recital does not explicitly deal with situations which do not only harm competitors and where the harm inflicted on consumers is only indirect. In recital 8, it is recognized that there are commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission is in that recital encouraged to carefully examine the need for Community action in the field of unfair competition beyond the remit of the directive.

It appears from the above-mentioned cases when read in conjunction with the preparatory works that the directive's scope of application is commercial practices that are directed towards consumers and which do not harm only competitors. However, the latter modification of the scope is only found in a recital to the directive. The relationship between the two directives needs to be further defined by the European Court of Justice. It would be a natural consequence of the above-mentioned judgments to interpret the Misleading Advertising Directive as dealing only with business-to-business commercial practices, and only to the extent that they qualify as "advertising". Even if the two directives were to be applied together, the limited scope of the Misleading Advertising Directive would not protect

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<sup>130</sup> See Plus, paragraphs 41 and 42.

<sup>131</sup> In Joined Cases C-236/08 to C-238/08, the European Court of Justice found that Google's use of signs identical with a trade mark as keywords, did not constitute use of that trade mark. However, the court did not consider whether the use of these signs as keywords constituted an unfair commercial practice.

<sup>132</sup> Proposal for a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356, 2003/0134/COD, paragraph 40.

<sup>133</sup> Plus, paragraph 39.

businesses' economic interests in connection with commercial practices that do not qualify as "advertising".

The difficulties in the qualification of a commercial practice can be illustrated with a real-life example. In England there is a shorter period of protection of *works of art* than in Denmark. This has been used by English businesses to market copies of Danish design furniture. The marketing of such furniture in Denmark could under Danish law be considered an unfair commercial practice ("parasitic commercial practice")<sup>134</sup>. It follows from the proposal for the directive that slavish imitation ("copying independently of any likelihood of consumer confusion") falls outside the scope of the Directive<sup>135</sup>, which is followed up by recital 9, which states that the directive is without prejudice to Community and national rules on intellectual property rights. Thus it would be easy to conclude that the Unfair Commercial Practices Directive has no bearing on this issue. However, the marketing activities are directed towards consumers, and thus fall under the scope of the Unfair Commercial Practices Directive as defined in the articles. Even though the most significant economic harm is felt by the Danish furniture manufacturers, it is difficult to argue that the marketing of copied design furniture is a commercial practice that can only harm competitors. In fact, it follows from item 13 of Annex I that it is a misleading commercial practice to promote a copied product in such a manner as deliberately to mislead the consumer into believing that the product is an original. If it is clear from the advertising that the furniture products are copies of the original, it could be argued that there is no consumer confusion<sup>136</sup>, and that a wider selection of furniture is in fact a benefit for consumers. To the extent that such practices fall under the scope of the directive, Danish courts must be barred from considering the economic detriment to the Danish manufacturers due to the full harmonization in the directive, and because the definition of unfair commercial practices in article 5(2) only focuses on the distortion of consumers' economic interest. The misleading advertising directive does not apply to the situation, because the problem in question concerns the commercial practice of copying others' works, and not the advertising in itself. It seems oddly circular if an application of the material provisions is to be applied in order to determine whether the commercial practices fall within the scope of application.

### *Taste and Decency*

It appears from recital 7 of the Directive on Unfair Commercial Practices that "it does not address legal requirements related to taste and decency which vary widely among the Member States"<sup>137</sup>. This concept is not further defined in the original proposal<sup>138</sup>, but it may include issues such as safety, health, and social responsibility. According to the ICC code on marketing communication, such communication is to respect human dignity and should not incite or condone any form of discrimination, violent, unlawful or anti-social behaviour. Such communication should not without

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<sup>134</sup> In most Member States, national law considers various violations of intellectual property rights to the detriment of competitors, such as slavish imitation, to be within the ambit of unfair practices law. See Thomas Wilhelmsson in Geraint Howells: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006. p. 71.

<sup>135</sup> Proposal for a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356, 2003/0134/COD, paragraph 40.

<sup>136</sup> It follows from item 13 of Annex I of the directive that it is a misleading commercial practice to promote a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

<sup>137</sup> See in general Thomas Wilhelmsson in Geraint Howells: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006. p 59ff.

<sup>138</sup> See paragraphs 39 and 68 in Proposal for a European Parliament and Council Regulation, COM(2001) 546 final, 2001/0227 (COD).

justification on educational or social grounds contain any visual portrayal or any description of potentially dangerous practices, or situations which show a disregard for safety or health, as defined by local national standards<sup>139</sup>.

According to article 18 of the above-mentioned ICC code, marketing communication should not undermine the social values of children and young people. This appears to fall under the concept of taste and decency. However, it follows from item 28 in Annex I of the directive that it is an aggressive commercial practice to include “in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them”. Member States should according to the above-mentioned recital be able to regulate commercial practices in their territory, in conformity with Community law, for reasons of taste and decency – even where such practices do not limit consumers’ freedom of choice.

The above-mentioned recital seems to emphasize the purpose of a particular restriction; cf. the discussion above. According to the recital, this exception can concern “commercial practices such as, for example, commercial solicitation in the streets, [which] may be undesirable in Member States for cultural reasons”. By means of comparison and in order to illustrate the difficulties in qualification, the European Court of Justice found in the Buet case (C-382/87) that a prohibition on “canvassing” is a matter of consumer protection.

The two judgments do not throw light on what falls within taste and decency as mentioned in recital 7. In the light of the judgments, it seems likely that the directive’s scope of application is to be interpreted widely and “legal requirements related to taste and decency” rather narrowly. It seems to stem from the preparatory works that the concept of taste and decency is limited to situations that *solely* concern taste and decency. It is noted that “matters of taste, decency and social responsibility will be outside the scope unless the trader establishes a specific connection between its obligations in these areas and its products in its marketing”<sup>140</sup>. However, this interpretation would lead to a situation where commercial solicitation in the streets necessarily would be included in the directive’s scope of application, because canvassing also concerns consumer interests – which again would be a contradiction to the example used in recital 7 (“commercial solicitation in the streets”).

For good measure it should be emphasized that this “exemption” only appears as a recital to the directive and that notably it is not repeated in the articles of the directive.

## **Full Harmonization and the Internal Market**

### ***The Legal Basis***

The European Court of Justice establishes in both cases that the directive fully harmonizes the rules relating to unfair business-to-consumer commercial practices. Full harmonization entails that Member States may not adopt stricter rules than those provided for in the directive. This is opposed to minimum harmonization, which is traditionally<sup>141</sup> used in connection with consumer protection, and

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<sup>139</sup> See Consolidated ICC Code of Advertising and Marketing Communication Practice, articles 4 and 17 on social responsibility and safety & health, respectively. Article 2 deals with “decency”, which provides that marketing communication should not contain statements or audio or visual treatments which offend standards of decency currently prevailing in the country and culture concerned.

<sup>140</sup> Proposal for a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356, 2003/0134/COD, paragraph 39. As an example, it is stated that the situation where a trader falsely claims that a certain proportion of the profits from the sale will be given to charity falls within scope.

<sup>141</sup> See below.

which allows Member State to introduce or maintain stricter rules than those provided for in the EU legislation.

Foundation for full harmonization can *inter alia* be found in article 3, which comprises exemptions for financial services, immovable property, and national provisions which implement directives containing minimum harmonization clauses. In these situations Member States may impose requirements that are more restrictive or prescriptive than those provided within the field which is approximated by the directive. Similarly, it appears from article 5(5) that the list in Annex I, which contains those commercial practices which are regarded as unfair in all circumstances, may only be modified by revision of the directive.

The full harmonization in the Unfair Commercial Practices Directive must be derived from the complete harmonization in combination with the absence of a *minimum harmonization clause*, which is normally used to indicate minimum harmonization. The wide scope of application as applied by the European Court of Justice (“business-to-consumer commercial practices”) is less problematic in connection with the application of full harmonization. However, if one took the *purpose* (“commercial practices harming consumers’ economic interests”) as the point of departure, it would be more problematic because the directive would only provide partial harmonization. In most situations within marketing law, the consumers and other businesses’ economic interest are closely connected<sup>142</sup>.

### ***The Internal Market Clause***

In both judgments it is found that Member States, as is “*expressly*” (!) provided in article 4, may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection<sup>143</sup>. The reference to article 4 does not seem logical, because the article according to its letter and the preparatory works focuses on mutual recognition within the Internal Market. Provided the directive entails full harmonization, it would constitute an EU standard for mandatory requirements that may be applied to justify restrictions in the Internal Market. In that case, the Member State may not apply further restrictions within the field harmonized by the directive. Thereby, free movement in the Internal Market has been secured, and article 4 would be superfluous.

It appears from article 4 of the directive, under the heading “Internal Market”, that Member States may “neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive”. The wording of article 4 seems to focus on cross-border situations, and notably not on situations that are purely national. In the proposal, it is provided that the Internal Market clause provides a country-of-origin principle that prevents other Member States from imposing additional requirements (i.e. mutual recognition)<sup>144</sup>. It follows that the directive fully harmonizes EU requirements relating to unfair business-to-consumer commercial practices which are “needed to address the *Internal Market barriers*” and “to provide the necessary support to consumer confidence to make a *mutual recognition* approach workable” (my emphasis)<sup>145</sup>.

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<sup>142</sup> See also above.

<sup>143</sup> See Total and Sanoma, paragraph 52, and Plus, paragraphs 41 and 50. In the Total and Sanoma cases, the Advocate-General refers also to the directive’s recitals 14 (“The full harmonisation approach adopted in this Directive ...”) and 15 (“Given the full harmonisation introduced by this Directive ...”). However, recitals 14 and 15 concern information requirements concerning “invitation to purchase” and general information requirements, respectively.

<sup>144</sup> Please note the changes from the proposal to the adopted text, as accounted for below.

<sup>145</sup> See proposal of 18 June 2003 for the Unfair Commercial Practices Directive, COM (2003) 356 final, 2003/0134 (COD), paragraph 30, bullets 2 and 3.

## Full harmonization and the Internal Market clause

Internal Market clauses can be understood as an interim solution between minimum harmonization and full harmonization. Such clauses focus on cross-border situations, but leave it for Member States to regulate domestic situations. Internal Market clauses are introduced in various forms in *inter alia* the E-Commerce Directive (2000/31, article 3)<sup>146</sup>, the Services Directive (2006/123, Chapter IV), and the Media Services Directive (89/552 as amended by directive 2007/65, article 2). There is no evidence in the wording that these clauses in themselves should lead to full harmonization. However, there is also no clear case law from the European Court of Justice on this matter – except for the above-mentioned judgments, where the full harmonization seems to be derived from the Internal Market clause.

The Services Directive's chapter IV ("free movement of services"), section 1, deals with freedom to provide services and related derogations. According to the Commission's information to the Danish government, this provision does not prevent Member States from maintaining national regulation of marketing as long as it does not hinder the *free movement of services*. In the E-Commerce Directive's Internal Market clause, a "coordinated field" is defined. This field is much wider than the regulation actually harmonized by the directive<sup>147</sup>. The purpose is to ensure the free movement of goods and services in areas that are not harmonized by the directive. These directives, which contain somewhat similar Internal Market clauses, are hardly to be interpreted as full harmonization, because the level of harmonization is not as general as that found in the Unfair Commercial Practices Directive.

If the Internal Market clause in article 4 is meant to include more than that which is in fact harmonized, it seems odd that the clause refers to "the field approximated by this Directive". It appears from recital 5 that the intention of the directive is to eliminate the obstacles to the free movement of services and goods across borders or the freedom of establishment that can be justified in the light of the case-law of the Court of Justice of the European Communities ("mandatory requirements")<sup>148</sup>. This end could have been achieved by interpreting article 4 as an Internal Market clause which only deals with the free movement and establishment across borders. With such interpretation, the Unfair Commercial Practices Directive would establish the mandatory requirements in these situations, and it would be left to each Member State to regulate situations of a purely domestic nature. This would be true to the actual wording of article 4 and correspond well with the principle of subsidiarity. The exceptions in article 3 and the exhaustive nature of Annex I would still make sense. This would also render it unproblematic to interpret the scope of application according to the *purpose* of the directive ("commercial practices harming consumers' economic interests"; cf. the discussion above). If that were to be the case, any justification for restrictions of free movement on the basis of consumer's economic interest would have to be evaluated in accordance with the directive.

In the original proposal for the directive, there was an article 4(1) that was later repealed. It read "Traders shall only comply with the national provisions, falling within the field approximated by this Directive, of the Member State in which they are established. The Member State in which the trader is established shall ensure such compliance"<sup>149</sup>. This paragraph was removed, and recital 12 was added. It follows from this recital that "Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial

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<sup>146</sup> See e.g. Jan Trzaskowski, *Legal Risk Management in Cross-Border Electronic Commerce*, Ex Tuto Publishing 2005, chapter 2.5.3.

<sup>147</sup> See e.g. Jan Trzaskowski, *Legal Risk Management in Cross-Border Electronic Commerce*, Ex Tuto Publishing 2005, chapter 2.5.3.2.

<sup>148</sup> Provided the obstacles seek to protect recognised public interest objectives and are proportionate to those objectives.

<sup>149</sup> Proposal for a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356, 2003/0134/COD, p. 23.

practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area". In connection with the deletion of article 4(1), the Commission has noted that it "... can only agree to the deletion of Article 4.1 of its proposal on the understanding that the present directive provides for a full harmonisation of the domain covered by the directive and that for this reason Article 4.1 is not legally required to ensure the proper functioning of the internal market in this field..."<sup>150</sup>. The deleted article 4(1) resembles the "home-country control principle" in article 3(1) of the E-Commerce Directive, which states that "Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field". The purpose of this provision in the e-commerce directive is to ensure proper enforcement in the country of establishment.

Although it may have been the political intention that the deletion of article 4(1) should lead to full harmonization, it could have been more elegantly reflected in the directive. As discussed above, the European Court of Justice decided to deduce full harmonization from article 4, which does not carry substantial evidence for the intention of full harmonization. By way of comparison, the intention to achieve full harmonization appears much more clearly in the proposed Directive on Consumer Rights<sup>151</sup>, where a corresponding article 4 under the title "full harmonisation" provides that "Member States may 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". It follows from the proposal for the Directive on Consumer Rights (p. 3) that the Directive on Unfair Commercial Practices "... complies with the fundamental principles of the EC Treaty, such as the principles of the free movement of goods and the freedom to provide services which will not be restricted by stricter national rules in the field harmonised by the Directive ...".

With the two judgments concerning the Directive on Unfair Commercial Practices, there is no doubt that the Unfair Commercial Practices Directive is to be interpreted as providing full harmonization. However, the intention to introduce full harmonization in that directive could have been more explicit, and a regulation would have been a more appropriate legal instrument than a directive. It follows from the Commission's white paper on European governance that "the use of regulations should be considered in cases with a need for uniform application and legal certainty across the Union. This can be particularly important for the completion of the Internal Market and has the advantage of avoiding the delays associated with transposition of directives into national legislation"<sup>152</sup>.

It has been argued that full harmonization is not necessary for achieving the purpose of consumer confidence. Since consumers have little knowledge of their own law, it cannot be relevant for them to know that the law of another Member State is more or less identical to their own. In such cases, it is sufficient for consumers to know that there is a minimum set of protection rules in force throughout the Union<sup>153</sup>. It has further been noted that "maximum harmonisation is indeed more a political than a

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<sup>150</sup> See also Hans-W. Micklitz in Geraint Howells: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006, p. 44f. with references.

<sup>151</sup> COM(2008) 614 final, 2008/0196 (COD), 8 October 2008.

<sup>152</sup> The Commission White Paper on European Governance, COM(2001) 428 final, 25 July 2001, p. 20.

<sup>153</sup> Thomas Wilhelmsson in Geraint Howells: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006, p. 246f.



legal necessity”<sup>154</sup>, and that “the true reason for combining the country of origin principle with maximum harmonisation ... has never been made explicit”<sup>155</sup>.

### ***Paradigm Shift***

With reference to the Commission’s consumer policy strategy for 2000-2006<sup>156</sup>, it has been argued that the directive is part of a paradigm shift from minimum to maximum harmonization<sup>157</sup>. It appears from paragraph 3.1.2.1 of the strategy that there “is also a need to review and reform existing EU consumer protection directives, to bring them up to date, and progressively adapt them from minimum harmonisation to ‘full harmonisation’ measures ... provided a sufficient degree of harmonisation is achieved, the country of origin approach could be applied to remaining questions”. The Council has in their response to the strategy encouraged the Commission to put a specific emphasis *inter alia* on prioritizing a high level of consumer protection also in other Community policies and activities<sup>158</sup>. In the proposal for the directive on consumer rights, it is mentioned that “[t]he Commission recognises that the full harmonisation approach successfully pursued with the Unfair Commercial Practices Directive in the field of consumer protection marks a new departure in the area of consumer contractual rights”<sup>159</sup>.

As argued above, it is not clear from the wording of the Unfair Commercial Practices Directive that it was intended to provide full harmonization as interpreted by the European Court of Justice. The ambiguity of the directive combined with the Internal Market clause may have worked as a decoy in the negotiations of the directive, which in connection with the two judgments has apparently led to surprises in several Member States as to the consequences. In the Plus case, nine governments submitted observations<sup>160</sup>. The Spanish government argued that the dispute was between two German undertakings and that the situation at issue was confined in all respects within a single Member State, with the result that the directive was not applicable. The German and Italian governments took the view that Member States may lawfully prohibit commercial practices other than those listed in Annex I on condition that the trader’s conduct is to be regarded as unfair in the light of the criteria listed in Article 5. It was argued by the Polish, Czech, and Austrian governments that the directive is not applicable, because the contested national provisions are not designed to protect consumers from unfair commercial practices, but rather to protect competition<sup>161</sup>.

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<sup>154</sup> See Hans-W. Micklitz in Geraint Howells: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006. p. 35f. with reference to Geraint Howells: *The Rise of European Consumer Law – Wither National Consumer Law?*, *Sydney Law Review*, 2006 (28), 63.

<sup>155</sup> Hans-W. Micklitz in Geraint Howells: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006. p. 42.

<sup>156</sup> Communication from the Commission of 7 May 2002 “Consumer Policy Strategy 2000-2006”, COM (2002) 208 final.

<sup>157</sup> Hans-W. Micklitz, *Jack is out of the Box – the Efficient Consumer-shopper*, *Tidskrift Utgiven av Juridiska Föreningen i Finland*, 2009: 3-4, p. 424f., Hans-W. Micklitz, *The Targeted Full Harmonisation Approach: Looking Behind the Curtain*, in Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, p. 47ff, and Hans-W. Micklitz in Geraint Howells: *European Fair Trading Law – The Unfair Commercial Practices Directive*, Ashgate Publishing, 2006. p 27f.

<sup>158</sup> Council Resolution of 2 December 2002 on Community consumer policy strategy 2002–2006 (2003/C 11/01), paragraph 6(II)(1).

<sup>159</sup> COM(2008) 614 final, 2008/0196 (COD), 8 October 2008, p. 7.

<sup>160</sup> The German, Belgian, Czech, Spanish, Italian, Austrian, Polish, Portuguese, and Finnish governments. See in particular the opinion of the Advocate-General, which contains a more thorough presentation of the observations submitted by the governments; see paragraphs 21 ff.

<sup>161</sup> See paragraphs 21ff.

## **Towards a New Common Marketing Law**

In the wake of the two judgments from the European Court of Justice, the Unfair Commercial Practices Directive's role as an important cornerstone in the common EU marketing law has been emphasized. National courts and authorities must interpret national legislation in the light of the directive as interpreted by the European Court of Justice. The judgments are, in contrast to the directive itself, unambiguous. Modifications and clarifications must be expected, but it is not likely that the opinions in the judgments will be altered profoundly.

The two judgments constitute a fundamental step away from several national marketing regulations, and towards one common EU marketing law. Despite full harmonization, the state of the law has not become much clearer. It is still an open question as to when commercial practices are to be considered unfair and, in particular, to what extent it will be left to the Member States to apply their own standards for professional diligence and assessment of when consumers' economic interests are distorted.

The Commission has drawn up a staff working document which aims at providing guidance on the key concepts and provisions of the directive<sup>162</sup>. The guidance aims at developing a common understanding and a convergence of practices when implementing and applying the Directive. However, the document has no formal legal status, and in the event of a dispute, the ultimate responsibility for the Directive's interpretation lies with the European Court of Justice. The document will be supplemented and updated on a regular basis, and may become an important means of coordination until a clear practice materializes. However, precautions should be taken so that the content of this staff working paper does not become a self-fulfilling prophecy on the lack of clear regulatory measures.

### ***The Scope of Application***

The court has primarily dealt with the directive's scope of application, the nature of the harmonization, and whether Member States may uphold *per se* prohibitions in national marketing law. However, the court has not shed much light on how the ban on unfair commercial practices is to be interpreted. Thus there is substantial work ahead in shaping the European concept of unfair commercial practices. In particular, there is a pressing need to clarify the actual scope of the directive, including how it affects Member States' ability to protect competitors' economic interests in relation to unfair commercial practices as discussed above, and there is also a need for a better understanding of the nature and scope of the concepts of taste and decency as discussed above. Under all circumstances, from a regulatory perspective, it seems unfavourable that the scope is derived from the articles, and the "exceptions" mentioned are only found in the recitals, as seems to be the case with commercial practices harming [only] competitor's economic interests (recitals 6 and 8), and taste and decency (recital 7). It seems to be a general and unfortunate weakness of the directive that several exemptions are only found in the recitals<sup>163</sup> and/or in the original proposal.

For good measure, it should be noted that the EU guidelines for the drafting of legislation<sup>164</sup> provide that "the drafting of a legislative act must be 1) clear, easy to understand and unambiguous, 2) simple, concise, containing no unnecessary elements, and 3) precise, leaving no uncertainty in the mind of the

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<sup>162</sup> Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices. Commission staff working document, SEC(2009) 1666 (3 December 2009).

<sup>163</sup> See also recital 9 of the directive.

<sup>164</sup> 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, respectively.

reader”, and that “the purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations”.

### Branding

Another important issue is whether branding is included in the scope of the directive, because the definition of commercial practices emphasizes that they are “directly connected with the promotion, sale or supply of a product to consumers”. It is hard to see that branding is necessarily *directly connected* with a product. On the other hand, the state of law will be further complicated if there is to be a different treatment for commercial practices connected with the promotion of a product and those practices not directly connected with a product.

By way of comparison “commercial communication” is defined in article 2(1)(a) of the proposed regulation on sales promotions as “any form of communication designed to promote, directly or indirectly, the goods, services or *image of a company*, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession...” (my emphasis). According to the Misleading Advertising Directive, advertising is defined in article 2(a) as “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations”.

### ***When is a Commercial Practice Unfair?***

The two judgments deal with national *per se* bans, and the court establishes that the Unfair Commercial Practices Directive precludes national prohibitions that do not take account of the specific circumstances of individual cases. However, the court does not explicitly commit itself to establishing whether the combined offers and promotional lotteries at issue in the main proceedings are in fact contrary to the ban on unfair commercial practices if account is taken of the specific circumstances of the individual cases.

In case C-540/08 (Mediaprint), the European Court of Justice was asked to consider whether the directive precludes a national provision “which makes it illegal to announce, offer or give bonuses, free of charge, with periodicals and newspapers, and to announce bonuses, free of charge, with other goods or services, apart from exhaustively specified exceptions”. If the first question is answered in the affirmative, the court was asked to consider whether such practice is to be considered an unfair commercial practice within the meaning of article 5(2) of the Unfair Commercial Practices Directive merely because that opportunity is, at least for some of those to whom the offer is addressed, not the only, but the decisive reason for purchasing the newspaper. The Advocate-General came in its opinion to the conclusion that the directive does preclude the national prohibition and that such commercial practices are not unfair within the meaning of article 5(2).

### Behavioural economics and other scientific knowledge

In the Commission staff working document mentioned above, reference is made to “new insights from *behavioural economics*” (p. 32f.). Studies show that not only the content of the information provided, but also the way the information is presented can have a serious impact on how consumers respond to it. According to the document, such knowledge should be taken into consideration, and national courts and administrative authorities must assess commercial practices with reference, among other considerations, to the current state of scientific knowledge, including the most recent findings of

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behavioural economics<sup>165</sup>. These disciplines may provide useful insight for drawing the fine line between commercial activities' legitimate influence and illegal distortion of the average consumer's behaviour. Ongoing European research supporting such purposes includes the FairSpeak Project, which has a specific focus on food-labelling and aims at providing new knowledge and tools for assessing the fairness and misleading hazards of food-labelling solutions on empirical grounds. That research is further presented in the three articles that follow in this volume.

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<sup>165</sup> See e.g. Dan Ariely, *Predictably Irrational*, Harper 2008, Read Montague, *How We Make Decisions*, Plume 2007, and Richard H. Thaler and Cass R. Sunstein, *Nudge*, Caravan Books 2008.

## **Misleading Presentation of Food Methods of Legal Regulation and Real-Life Case Scenarios**

Peter Møgelvang-Hansen

### **The “Average Consumer” Benchmark in Food Law**

The “average consumer” benchmark is the general yardstick applied in EU law when deciding whether a commercial practice is likely to mislead consumers<sup>166</sup>. Provisions stipulating the “average consumer” as the relevant reference person are found in Unfair Commercial Practices Directive 2005/29<sup>167</sup>. In the context of foodstuffs, it should be noted that the UCPD is “without prejudice to Community or national rules relating to the health and safety aspects of products”<sup>168</sup>. Furthermore, in the case of conflict with the UCPD, other Community rules regulating specific aspects of unfair commercial practices “shall prevail and apply to those specific aspects”<sup>169</sup>.

The benchmark provisions of the UCPD are based on ECJ rulings concerning the “old” directives on misleading advertising, etc. that contained no explicit benchmark provisions. Art. 16 of Regulation 178/2002, which lays down the general principles and requirements of food law, does not define any benchmark, but simply states that the presentation of food “shall not mislead consumers”. On this basis, art. 16 of Regulation 178/2002 is most likely to be interpreted in a similar way to the UCPD as far as the benchmark is concerned<sup>170</sup>. In this respect, Regulation 1924/2006 on nutrition and health claims made about foods is explicitly in line with the UCPD<sup>171</sup>. Thus, as far as the “average consumer” benchmark is concerned, there seems to be no essential difference between the UCPD and the specific rules on misleading presentation for sale of food.

### ***Per se* Prohibitions in Food Law**

In food law, there is also a strong tradition of general prohibitions forbidding specific misleading practices *per se*. Whereas the “average consumer” benchmark is meant to be applied on a case-by-case basis and evaluate the concrete commercial practice in question, the *per se* prohibitions are general in the sense that they ban specified practices as such, i.e. without an assessment of their misleading effects *in concreto*.

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<sup>166</sup> Cf. Incardona and Poncibò (2007) for a comprehensive analysis.

<sup>167</sup> Hereinafter UCPD

<sup>168</sup> UCPD art.3.3.

<sup>169</sup> UCPD art. 3.4

<sup>170</sup> In fact, C-210/96, Gut Springenheide GmbH, 1998 ECR I-4657, often referred to as the leading case, actually concerned food law, or to be more precise, the interpretation of art. 10,2,e, of Regulation 1907/90 on certain marketing standards for eggs (“likely to mislead the purchaser”).

<sup>171</sup> Regulation 1924/2006, art. 5,2: “The use of nutrition and health claims shall only be permitted if the average consumer can be expected to understand the beneficial effects as expressed in the claim”.

Recital 16 of the Regulation reels off the by now almost ritual formula “.. this Regulation takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but makes provision to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to misleading claims. Where a claim is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the claim be assessed from the perspective of the average member of that group. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.”

In the context of misleading presentation, food standards belong to the classical *per se* rules. Thus, national “recipe law” and national food standards<sup>172</sup> are some of the archetypical obstacles to the free movement of food products and have been a major source of input to endeavours to harmonize food standards at the EU level and also to the development of EU case law on mutual recognition<sup>173</sup>. According to MacMaoláin, “it was because of the acceptance of mutual recognition and future reliance on the principles developed in the decision in Cassis that it was later felt that it was possible to dispense with the harmonisation programme for the composition of food products”<sup>174</sup>. At the EU level, some relics of food standard harmonization are still found in directives on chocolate, fruit juices, honey, coffee, minced meat, milk, butter, margarine, etc.<sup>175</sup>

In recent years, *per se* rule regulation of potentially misleading presentation of food has attracted new attention, now in the shape of rules defining the precise legal meaning of a wide range of nutrition claims, e.g. “reduced x”; cf. Regulation 1924/2006 on nutrition and health claims on food art. 8:

“Nutrition claims shall only be permitted if they are listed in the Annex and are in conformity with the conditions set out in this Regulation.”

Cf. the following example (out of 25 examples) from the Annex entitled “Nutrition claims and conditions applying to them”:

“REDUCED (NAME OF THE NUTRIENT)

A claim stating that the content in one or more nutrients has been reduced, and any claim likely to have the same meaning for the consumer, may only be made where the reduction in content is at least 30% compared to a similar product, except for micronutrients where a 10% difference in the reference values as set in Council Directive 90/496/EEC shall be acceptable and for sodium, or the equivalent value for salt, where a 25% difference shall be acceptable.”

## The Approach of the FairSpeak Project

The overall theme of the project is to provide knowledge on how the in-store product-to-consumer communication actually works, especially by mapping out empirically when and how the presentation of a given food product is likely to mislead consumers.

Some of the general considerations underlying the project are based on a critical view of the notion of the “average consumer” as a realistic benchmark for assessment of misleadingness.

Decision makers’ assessments of how the various elements of food packaging affect the “average consumer” generally seem to be very rough estimates, based on common sense rather than solid empirical evidence and operational knowledge of how the complex communication between food packaging and consumers actually functions in practice. From a lawyer’s point of view, this is not necessarily a problem. Legal notions similar to the “average consumer” are known in other areas of the law, e.g. the *bonus pater familias*. Under the current law, it could be argued that there is no need for more knowledge about the “average consumer” than about *bonus pater familias*, because both benchmarks are legal abstractions or phantoms that should not be taken literally in the sense that the

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<sup>172</sup> MacMaoláin (2007) p. 93 ff on EU “recipe laws” and p. 123 ff on EU “foodstuff specific quality legislation”.

<sup>173</sup> E.g. Case 178/1984, Commission v. Germany, 1987 ECR 1227 (Bier, Reinheitsgebot) and Case 90/1986, Criminal Proceedings against Zoni, 1988 ECR 4285 (Pasta, Durum wheat only).

<sup>174</sup> MacMaoláin (2007) p. 130.

<sup>175</sup> See for details MacMaoláin (2007) p. 93 ff and p. 123 ff and Ohm Søndergaard, M./ Selsøe Sørensen, H. (2008) for a critical evaluation of the directive on fruit juice as a means to protect consumers against misleading food names.

decision maker should actually empirically ascertain how and to what extent the “average consumer” would be affected by a certain claim or how *bonus pater familias* would have acted in the given circumstances.

From a broader legislative point of view, however, the benchmark for determining whether consumers are misled should aim at ensuring, to the greatest extent possible and practical, that the decisions reflect up-to-date knowledge about the way in which consumers perceive certain types of communication<sup>176</sup>. This does not imply that each and every case should be based on empirical evidence about the concrete question of the case, but rather that the results of general empirical tests should be taken into consideration when the “average consumer” benchmark is applied.

Not only decision makers and other practitioners applying the law, but also political decision makers would gain from better insight into the mechanisms that according to empirical evidence are actually likely to affect consumers and the mechanisms that are not likely to affect consumers<sup>177</sup>.

Better insight into the mechanisms that actually make the presentation of food likely to mislead consumers may also be important in relation to a legislative evaluation of the various *per se* rules in food law. Although the application of *per se* rules does not presuppose an assessment of their misleading effects *in concreto*, they are, seen in a legislative context, based on the assumption that the practice prohibited by the rule is generally likely to mislead the “average consumer”. To the extent such legislative assumptions are based on common sense estimates rather than knowledge and empirical evidence, they may be subject to the same scepticism as the legal decision practice of applying the “average consumer” benchmark. Conversely, better knowledge and empirical evidence may show that certain practices, etc. are likely to mislead in a particularly problematic way that could speak in favour of a *per se* prohibition in certain areas.

To sum up, three of the main questions dealt with in the FairSpeak Project are:

- Is the “average consumer” benchmark operational if it is taken literally? 178
- How can more precise operational knowledge be obtained about the decoding of food names, claims and other verbal and nonverbal design elements on the product packaging during in-store decision making by the “average consumer”?
- To what extent are *per se* rules, in the shape of food standards or prohibitions against misuse of terminology, a better regulatory method than the “average consumer” benchmark?

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<sup>176</sup> Put in other terms, the “average consumer” is a tool applied in order to define the “victim” (i.e. the interest protected by the prohibition against misleading practices). In contrast, the *bonus pater familias* is/was a tool applied in a tort context to define the “offender” (i.e. the behaviour that attracts fault liability). The difference may explain that the latter question is more likely to rely on normative considerations based on general sources of law rather than empirical evidence (and in turn also why *bonus pater familias* sometimes – at least among law students – was said to have a striking resemblance to a high court judge).

<sup>177</sup> Cf. Incardona & Placibò J. Consumer Policy (2007) 30: 34: “The findings of cognitive psychology and behavioural science, together with more empirical research, may help not only to better define the average consumer in the framework of commercial practices, but also to shape EU consumer policy more effectively. European policy makers, for example, could gain some additional tools for tailoring labels and information requirements in a consumer-friendly manner that could effectively improve consumer information and understanding.”

<sup>178</sup> In order to generate empirical evidence about the way in which the “average consumer” decodes food packaging communication, it is necessary to find methods to identify individuals who represent the “average consumer”.

For a discussion of this question and an attempt to define the level of knowledge of the “average consumer” in a food context, see Selsøe Sørensen *et al.* (in preparation). “The Benchmark Consumer: Who is Informed and Circumspect and who is not?”

## A Study of Danish Administrative Cases 2002–2007<sup>179</sup>

The general starting point for the FairSpeak Project was a study of cases of potentially misleading presentation of food products. One of the aims of the study was to identify and specify various conflict scenarios of real-life importance, i.e. the various factors actually alleged by consumers and others to make food label information misleading in real-life situations dealt with by the food authorities. Another aim of the case study was to establish a realistic and comprehensive set of examples for identifying essential research questions and formulating specific hypotheses to be operationalized and tested in experiments.

The overall case material consists of cases concerning misleading presentation of food products registered by the Danish regional food authorities in the period 2002–2007. Cases can be brought before the food authorities by complainants (individual consumers, consumer organizations, competitors, etc.) or initiated by the food authorities themselves as a result of their inspection activities.

To obtain a representative corpus of cases from the period, those selected for further analysis were identified in the following way: 12,210 cases were identified as potentially relevant on the basis of their file code numbers, of which 3,847 were selected on the basis of their titles and, after an examination of the material of these cases, 821 cases turned out to concern misleading presentation of food.

The 821 cases were subject to further analysis and registration by relevant formal circumstances (the parties and authorities involved, food category concerned, legal provisions applied, outcome, etc.).

As far as the qualitative content of the cases is concerned, a basic distinction was made between the various labelling elements allegedly causing consumers to be misled on the one hand, and the various subject matter categories of the allegedly unjustified claims, etc., i.e. what the consumers were allegedly “misled about”, on the other hand.

## Which Labelling Elements Allegedly Caused Consumers to be Misled?

Five different labelling elements allegedly causing consumers to be misled were identified, and the relevant element(s) in question in each case were registered:

- *Verbal claims (text)*, i.e. non-mandatory textual messages or representations which state, suggest or imply that a food has particular characteristics<sup>180</sup> and which are not brands. This category was allegedly a misleading element in **39%** of the instances.
- *Food names*, i.e. the name of the food according to a legal definition, e.g. “pear nectar”<sup>181</sup>, or the customary name, e.g. “macaroons”, or “a description of the foodstuff, and if necessary of its use, which is clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused”<sup>182</sup>. This labelling element was allegedly misleading in **27%** of the instances.

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<sup>179</sup> For a comprehensive review of the study, see Smith *et al.* (2009) p. 105 ff.

<sup>180</sup> Compare the definition in Regulation (EC) 1924/2006 on nutrition and health claims art. 2.2.1), which also includes pictorial, graphic and symbolic representation. In the FairSpeak context, such representations are dealt with as a separate category labelled “non-verbal elements”.

<sup>181</sup> Cf. directive 2001/112/EC relating to fruit juices and certain similar products.

<sup>182</sup> Indication of food name on labelling is compulsory according to art. 3,1(1), cf. art. 5,1 of directive 2000/13/EC on the labelling, presentation and advertising of foodstuffs.



- *Facts & figures*, i.e. “technical” information typically presented on the back of the package and to a considerable extent prescribed by law with regard to e.g. the list of ingredients, the date of minimum durability, net quantity, etc.<sup>183</sup> This type of information was allegedly misleading in **21%** of the instances.
- *Non-verbal design elements (illustrations, etc)*, i.e. pictures, drawings, colours, shape of packaging, etc. were allegedly misleading in **8%** of the instances.
- *Brands and signpost labels*, i.e. trademarks, name of product series, logos of collective schemes, e.g. organic farming, signifying that the conditions according to the scheme are met, were allegedly misleading in **5%** of the instances.

### **What Were Consumers Allegedly Misled About?**

Six different subject matter categories of what consumers were allegedly misled about were identified and the relevant categories registered in each case:

- *Content*, i.e. ingredients, quantity of the whole product or of certain ingredients, etc., was the category allegedly misled about in **48%** of the instances.
- *Nutrition & health*, i.e. particular beneficial properties due to the presence or absence of energy (calorific value), nutrients or other substances, or an existing relationship between the product and health<sup>184</sup>. This subject category was allegedly misled about in **26%** of the instances.
- *Origin*, i.e. the geographical origin or place of production was allegedly misled about in **10%** of the instances.
- *Production process*, e.g. date of production, freshness, durability, etc., was allegedly misled about in **9%** of the instances
- *Ecology & ethics*, i.e. special values not linked to the product generically, but to the production process, etc. This category was allegedly misled about in **4%** of the instances.
- *Sensory properties*, i.e. taste, smell, texture, visual appearance, etc. of the product was allegedly misled about in **3%** of the instances.

### **Which Labelling Elements Allegedly Misled Consumers About What?**

The study showed a statistically significant correlation between the following labelling elements allegedly misleading consumers and the following subject matter categories that consumers were allegedly misled about:

<i>Labelling element</i>	<i>Subject matter category</i>
• Food name -----	Content
• Brands and signpost labels -----	Origin
• Brands and signpost labels -----	Ecology& ethics
• Verbal claims (text) -----	Nutrition & health
• Non-verbal elements -----	Content

This means that, in cases where e.g. the element “verbal claim (text)” allegedly misled consumers, the subject matter allegedly misled about was more likely to be “Nutrition & health” than any of the other subject matter categories in the study.

<sup>183</sup> Cf. directive 2000/13/EC on labelling, presentation and advertising of foodstuffs art. 3.

<sup>184</sup> Cf. the definitions in Regulation (EC) 1924/2006 on nutrition and health claims art. 2.2.4)–6).

## Who Initiated the Cases?

The study deals with cases concerning misleading presentation of food registered by the Danish regional food authorities in the period 2002–2007, irrespective of whether the case was initiated by a complaint or by the food authorities themselves *ex officio*, and no matter who brought the complaint before the food authorities (individual consumers, consumer organizations, competitors, etc.). The initiator of each case was registered. Furthermore, information on the outcome of the case was registered where such information was available (in approximately half of the cases initiated by a complaint).

<i>Initiator of case</i>	<i>Share of cases</i>	<i>Outcome of case</i>	
		<i>positive</i>	<i>negative</i>
Individual consumers	46%	29%	19%
Consumer organizations	14%	35%	26%
Competitors	15%	34%	14%
Food authority ( <i>ex officio</i> )	15%	-	-
Others	10%	-	-

It is noteworthy that nearly half of the cases were initiated by individual consumers and that the individual consumer complainants' success rate was relatively high. Given the fact that consumer organizations, compared to individual consumers, generally are specialists in the area, it may seem surprising that a higher percentage of their cases had a negative outcome. One plausible explanation is that consumer organizations in accordance with their complaint policy not only act as watchdogs contributing to the general enforcement of consumer protection law by bringing clear violations to the attention of the authorities, but also try to influence the development of case law by bringing more doubtful borderline cases before the authorities.

The percentage of registered cases initiated by the food authorities *ex officio* is rather low and probably does not reflect reality, partly because an unknown number of instances of misleading presentation are spotted during regularly recurring inspections and presumably often dealt with on the spot so that no formal proceedings are initiated.

### **Allegedly Misleading Top Two for the Various Case Initiators**

The following table shows what, according to the various case initiators, were the two most frequent labelling elements allegedly causing consumers to be misled and the two most frequent subject matter categories allegedly misled about:

<i>Initiated by</i>	<i>Allegedly misleading element about</i>	<i>Subject allegedly misled</i>
<i>Individual Consumers</i>	Verbal claim (35%) Facts & figures (30%)	Content (52%) Nutrition & health (18%)
<i>Consumer org.</i>	Verbal claim (43%) Food name (27%)	Content (50%) Nutrition & health (28%)
<i>Competitors</i>	Verbal claim (49%) Food name (28%)	Nutrition & health (39%) Content (38%)
<i>Ex officio</i>	Food name (39%) Verbal claim (35%)	Content (51%) Nutrition & health (29%)
<i>Total</i>	Verbal claim (39%) Food name (27%)	Content (48%) Nutrition & health (26%)

The variations between the various case initiator categories are few. Only the relatively high ranking of the labelling element “facts & figures” as number two (30%) on the individual consumer complainants’ hit list stands out. The same labelling element was number three (18%) on the food authorities’ (*ex officio*) list and lower on the ranking lists of consumer organizations and competitors. Given the fact that the “facts & figures” category reflects information of a rather technical nature, these results may seem surprising in that the generally least professional category of players was by far the most common complainant. The explanation is, however, quite simple when one takes a closer look at the content of the cases. It then appears that quite a lot of the “facts & figures” cases initiated by individual consumers were about rather “trivial” (but important) questions such as the faulty indication of minimum durability, illegible lists of ingredients, and similar instances that are detectable for individual consumers. In comparison, the “facts & figures” cases initiated by the food authorities (*ex officio*) to a greater extent concerned violations generally only detectable for specialists, e.g. erroneous indications on lists of ingredients. In this way, there seems to be a “division of labour” between the different groups of players, so that, e.g. as far as “facts & figures” cases are concerned, individual consumers and the food authorities (*ex officio*) deal respectively with the “practical” and the “technical” aspects.

A closer look at the cases in the other different categories also points in the same direction, because within each of the various categories there seemed to be qualitative differences reflecting a similar “division of labour” between the different types of case initiators. Thus, the apparently minor variations between the different categories of case initiators are to some extent a result of the fact that the categorization criteria applied in the study were too broad to distinguish between different levels of complexity. This is a general limitation of the case study.

## **Limitations of the Case Study and their Effect on the Continued Work**

The categorizations applied in the study did not distinguish between “trivial” and more “subtle” case scenarios of misleading presentation of food. On the one hand, the categories “verbal claims (text)” allegedly misleading consumers about the “origin” of the product thus apply to cases where the stated country of origin was outright false, and the case was therefore “trivial” in the sense that it was and should be dealt with quite simply by insisting that the verbal claims must be true<sup>185</sup>. On the other hand, the same categories also apply to cases where the text might be “story-telling”, i.e. containing ambiguous information that could be understood by consumers in a way which is not consistent with textual information elsewhere on the labelling. In the context of the FairSpeak Project, such more “subtle” case scenarios attract special attention because deeper analysis of cases registered in the various categories defined above is needed in order to define more precisely the case scenarios of special interest in the context of the FairSpeak Project. One example of such a deeper analysis is offered by Smith (in this volume) with special focus on case scenarios concerning the misleading potential of both established and novel food names.

The results of the case study also indicate that some case scenarios are generally “too subtle” to trigger complaints from consumers feeling misled. This may be due to the fact that it can, for instance, be difficult to verbalize (in a complaint) the effects of the non-verbal design elements, let alone the interplay between two or more of the various potentially misleading design elements.

One example of this seems to be the small percentage of cases concerning the sensory properties of the food products. The small number of cases could be taken to suggest that sensory elements play a less important role than might be expected. But it is widely assumed among innovative food developers that sensory properties are the most powerful influence on food liking, preference, and choice. It would therefore be reasonable to expect that sensory factors also play a major role when consumers feel disappointed or misled by a product and/or its immediate presentation. The case study does not support this assumption. However, a plausible explanation seems to be that the complaint behaviour of consumers is indeed often influenced by sensory factors, but that the complainants choose to rely on “harder” product facts simply because they are easier to verbalize than sensory ones. This point seems particularly relevant in the context of legal decision-making. The legal rules on misleading presentation of food products become more manageable if the real-life situations dealt with in a legal setting are described in “hard” facts rather than in the more “elusive” sensory terms. This is bound to affect the argumentation of parties and decision-makers involved and, not least, the final outcome of the cases. The findings of the FairSpeak study of the 821 cases are therefore likely to underestimate the influence of the sensory aspects on consumers' complaint behaviour<sup>186</sup>.

The review of the administrative case material from 2002–2007 served as an important starting point for the identification of various conflict scenarios of real-life importance. Yet, since supposedly only a relatively small fraction of instances where consumers feel misled by the labelling of food result in a complaint to the food authorities, the case material cannot stand alone but has to be supplemented by information from other sources as the work proceeds, in particular, from the corporate partners and consumer organizations taking part in the FairSpeak Project.

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<sup>185</sup> From an enforcement perspective, the “trivial” cases mentioned are by no means insignificant and can be seen as more problematic than the more “subtle” ones because consumers often have no possibility of finding out that the information given is actually false.

<sup>186</sup> For detailed analysis of misleading presentation of sensory properties, see Smith/Møgelvang-Hansen/Hyldig (in press).

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## **What's in a (Food) Name? From Consumer Protection to Cognitive Science – and Back**

Viktor Smith

### **Background, Aims, and Scope**

“Having a word for it” is essential to our day-to-day (re)identification and categorization of objects and events in the infinite variety of reality (e.g. Gumperz & Levinson, 1996; Piaget, 1926; Vygotsky 1962 [1934]). This is also true of food names. In their case, the name is not only crucial for the product's cognitive identity, but also to its legal identity. According to the EU Labelling Directive 2000/13/EC, any food product sold in the EU must carry a name, so that consumers can check whether what they are buying is e.g. *cannelloni*, *spaghetti*, or *potato gnocchi*. Nevertheless, ordinary consumers, as well as competitors and the food authorities, sometimes disagree with the name chosen by a manufacturer or retailer for a particular product to such an extent that they take formal action against it.

In an in-depth review of 821 Danish administrative cases on misleading food names and labelling carried out by the FairSpeak Group (Smith, Ohm Søndergaard, Clement, Møgelvang-Hansen, Selsø Sørensen & Gabrielsen, 2009; see also Møgelvang-Hansen, this volume), 272 out of 1000 instances of allegedly misleading labelling elements (27,2%) concerned the product name. Since these figures are likely to show us only the tip of a far larger iceberg (Smith, Møgelvang-Hansen & Hyldig, in press), there are good grounds for asking how such conflicts are best resolved or, even better, avoided. Yet a closer examination of the explicit arguments put forward by the immediate actors in the case files reveals that this is a far from trivial question and one which recurrently poses severe difficulties of argumentation for complainants, manufacturers, and authorities alike.

In essence, determining whether a food name is misleading or not is a matter of determining whether the implicit identity statement “This is *bacon*, *apple juice*, *butter cookies*, *cannelloni*, etc.” is true or not. In turn, that is a matter of determining what exactly these words mean. In some cases, the matter is settled *a priori* by national or transnational food standards containing legal definitions, e.g. for fruit juices or for chocolate<sup>187</sup>. While the legal conclusion in such cases is clear, it may be questioned whether such definitions always reflect the actual expectations of ordinary consumers (Ohm Søndergaard & Selsø Sørensen, 2008).

However, the vast majority of food names in Denmark and other EU countries are not legally defined. In these cases, the question of whether the name is used correctly or in a potentially misleading way is a question of what it means as an element of the general language in question. In the EU, the legal basis for such judgments is the general prohibition against misleading commercial practices in the Unfair Commercial Practices Directive (2005/29/EC) as related specifically to food labelling by the Food Regulation (2002/178/EC) and implemented in the national legislation of the Member States. These rules leave ample room for individualized common-sense reasoning in which a key benchmark is whether the “average consumer” would be misled or not (MacMaoláin, 2007; Incardona & Poncibò, 2007; Howells, Micklitz & Wilhelmsson, 2006). However, the specifics to which the rules must be applied in the present case are in themselves not legal, but linguistic in nature: it is a matter of what words mean, and how (average) consumers understand them. In turn, this cannot be determined in isolation from other cognitive phenomena, such as knowledge, categorization, concept formation, and visual attention, as will be argued shortly. In sum, dealing with the specifics leads us from law straight

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<sup>187</sup> Directive 2001/112/EC relating to fruit juices and certain similar products and Directive 2000/36/EC relating to cocoa and chocolate products.

into the cross-disciplinary fields of research nowadays often subsumed under the heading of cognitive science (for overviews, see Boden, 2006; Thagard, 2005)<sup>188</sup>.

In structuralist terms, originating from Saussure (1983 [1916]) and generalized beyond linguistics by Hjelmslev (1953 [1943]: 80-81), law can be described as a *form* which is imposed on a far more complex *substance* to make selected aspects of it manageable and susceptible to external regulation in institutionalized legal settings (Smith 2007: 127-130). This article aims at digging a layer deeper into the substance itself, focussing on the part of it that relates to the cognitive mechanisms which determine consumers' understanding and use of food names. While posing several interesting research questions in its own right, a systematic analysis of the conflict scenarios found in real-life cases on misleading food names from a cognitive standpoint might at the same time provide new cues and types of evidence for future administrative and legal regulation, and, not least, for the industry's self-regulation, as suggested by "and back" in the title.

In the following, the case material just mentioned will serve as a point of departure and source of authentic examples. The types of arguments and common-sense reasoning put forward by the parties and authorities in the case files will be generalized and transposed into more exact theoretical terms, drawing on relevant insights and evidence from non-legal fields, mainly cognitive psychology, cognitive linguistics, and experimental psycholinguistics. In this way, a basis can be established for utilizing the experience accumulated in the cases in a more proactive fashion. This includes formulating explicit research questions and predictions pertaining to conflict scenarios of recurring (generic) interest and isolating the variables needed for putting these to experimental test. The present article presents the main elements of a conceptual framework suited for supporting such purposes and points out some prominent tendencies and regulatory dilemmas emerging from the case material as a whole. More detailed analysis of individual conflict scenarios related to food names and original experimental findings have been reported in separate studies.

## Two Archetypes of Conflict Scenarios and a Fuzzy Boundary

In terms of essence and the types of arguments brought forward by the parties, a basic distinction<sup>189</sup> can be made between conflict scenarios relating to:

- *Established food names* for (more or less) familiar products. Here the question is what names like *orange juice*, *coffee whitener*, or *macaroons* in fact mean to the different parties of concern (consumers, gastronomic experts, manufacturers, authorities, etc.).
- *Novel food names* for entirely new types of products with which the (average) consumer cannot be expected to be familiar. Here the questions are how names like *halal ham* or *surimi shrimps* are likely to be interpreted when first encountered, and what they may eventually come to mean to consumers and others.

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<sup>188</sup> In view of the accelerating harmonization of sometimes very different national legal rules and practices within the EU, recent years have seen an increased interest in contributions from outside the strictly legal sphere, including cognitive and linguistic research, e.g. Incardona & Poncibò (2007); Engberg (2007); Smith 2007; Legrand (1996).

<sup>189</sup> In some cases, this difference does not seem to be clearly recognized by the immediate actors. For example, in a case concerning a product named *crème fraîche dressing* which contained less than 20% *crème fraîche*, the complainant treated the name as one in need of an element-by-element interpretation (which may be true of novel names, but doubtful for established ones, see sections 5 for further discussion) and insisted that the only correct interpretation was therefore that *crème fraîche* should be the main ingredient. By contrast, the manufacturer insisted that there were similar products on the market carrying the same name with a similar content of *crème fraîche*, and that this was well known by consumers, i.e. treated the name as an established (generic) term. Case No: 2004-07-722-09899 (id 279).



This boundary is bound to become somewhat blurred in practice for both individual consumers and products due to the steady pace of market developments. Thus, a term like smoothie may be familiar to a great many consumers, but novel to some. When dealing with various degrees of familiarity with a given product on the market as a whole and the naming and labelling challenges emerging from this (while allowing for some variation from consumer to consumer), the FairSpeak Group distinguishes between the following main categories:

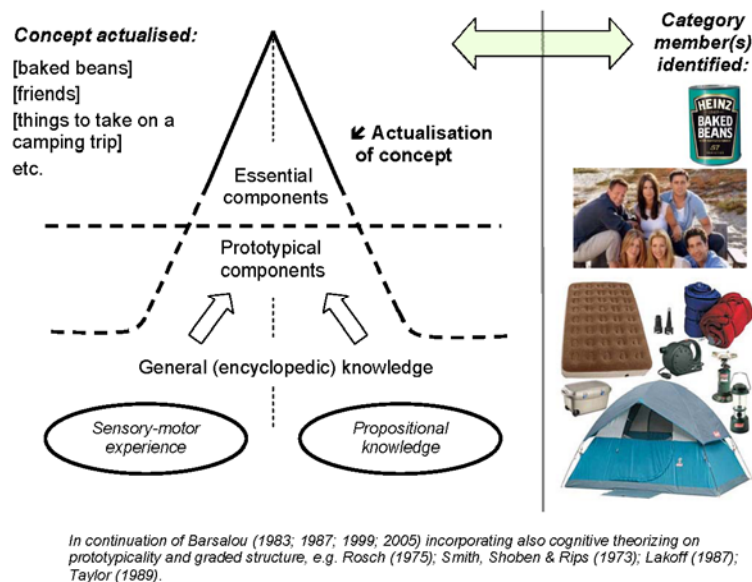
- *Product repetition*, e.g. yet another brand of peach ice tea, macaroons, coffee whitener, ketchup, etc.
- *Product evolution*, e.g. low-fat version of traditionally fat cold meat product, or avocado dip containing 0.4% dried avocado powder.
- *Product innovation*, e.g. caviar “lookalike” made of sea kelp, or a replacement for “real” pizza cheese which is not primarily made of cheese.
- *Product re-incarnation*, e.g. ordinary dark chocolate marketed and labelled as a diet product.

In the following, we first focus on conflict scenarios relating to food names that are treated as more or less established by all parties involved (which does not exclude them being unfamiliar to some consumers), while also highlighting the variation that may arise in the essence of the conflict depending on whether the specific use of the name relates to an instance of product repetition or product evolution. Thereafter, we consider the various types of conflict scenario that relate to food names that are comprehended as novel by all parties involved (though they may already have become familiar to some) in that the product has come about as an instance of recent product innovation. To cope with these issues, however, we will first need to specify the notion of meaning a bit further.

### **Meaning, Concepts, and Knowledge: Some Basic Assumptions and Prerequisites**

In line with the predominant view of cognitive language theory (e.g. Evans & Green, 2006; Talmy 2000), we here identify the meaning of a food name (like any other name) with a psychologically real concept which has been enrolled into the supra-structure known as language (i.e. lexicalized), but also serves the wider purpose of *categorization* in the course of situated thinking and acting, e.g. when shopping, eating, or developing new food products.

Following, primarily, Barsalou (1983; 1987; 1999; 2005), whose approach, in turn, incorporates earlier theorizing and experimental evidence on prototypicality and graded conceptual structure (e.g. Taylor 1989; Wierzbicka, 1985; Rosch 1975; Smith, Shoben & Rips, 1973), the basic “anatomy” of human concepts can be displayed as illustrated in Fig. 1.



**Fig.1. The concept as a time-bound graded structure.**

In the present model, concepts are not understood as static entities permanently present in the mind of anyone who “has” the concept in question (as tacitly assumed in a great many accounts), but as time-bound mental states that “originate in a highly flexible process that retrieves generic and episodic information from long-term memory to construct temporary concepts in working memory” (Barsalou 1987: 101). Put more plainly, concepts are seen as mental “checklists” that we compile and retrieve (actualize) for current needs from our pool of general world knowledge whenever we have to distinguish some objects or phenomena in surrounding reality from others for a certain purpose. The analysis extends both to concepts actualized for mere *ad hoc* purposes – e.g. for distinguishing things that one needs for an upcoming camping trip from all the things that one doesn’t need to take – and categories that play a more permanent (i.e. steadily recurring) role in a person’s understanding of reality, e.g. baked beans or friends. There is however an important difference as to means of linguistic expression: While concepts of the former kind usually have to be rendered linguistically by more complex paraphrases, e.g. *things I need for my camping trip*, or given mere *ad hoc* names like *my camping stuff*, concepts of the latter kind will prototypically have been provided with a single, generally accepted name such as *baked beans* or *friend*. The name may well consist of two or more independent words, but they will still be comprehended and used as an indivisible whole (see Smith, 1999/2000: 47-48, for further discussion). In that case, we say that the concept has been *lexicalized*. As we will see below, novel food names constitute a challenging transitory case between these two extremes.

The internal structure of the concept may, in either case, be described as a complex hierarchy of mental criteria (components) used for determining whether a given real-world object qualifies as a

member of the category or not<sup>190</sup>. A further distinction can be made between (a) *essential components*, which correspond to properties that any real-world object must possess in order to be accepted as a member of the category in question, e.g. that cheese should be made of milk, (b) *prototypical components*, which correspond to properties that are a salient part of our conceptualization of the category as a whole, but do not need to be manifest with any particular exemplar, e.g. that cheese is prototypically made of cow milk, though goat or even horse milk can be used too, and (c) *individual background knowledge*, e.g. knowing that one's ex-girlfriend hates cheese. For components at all levels, a distinction may furthermore be drawn between (a) *propositional components*, which involve factual knowledge potentially reducible to logical propositions susceptible to truth-conditional evaluation, e.g. knowing which ingredients a product should contain in order to be a cheese, and (b) *sensory components*, which rely on immediate recall of the taste, smell, texture, etc. of the cheeses that one has previously encountered (see also Smith, Møgelvang-Hansen & Hyldig, in press; Moskowitz, Reisner, Itty, Katz, & Krieger, 2006).

## Established Food Names: What do They Mean, and Who is to Decide?

On the above basis, let us first consider some typical conflict scenarios relating to *established food names* for (more or less) familiar products, as illustrated by the examples in Fig. 2 below.

<p><b>Example 1: Whole milk or skimmed?</b>  Product labelled <i>sødmælk</i> = 'whole milk', but tastes more like <i>letmælk</i> ≈ 'semi-skimmed milk' according to consumer. Case No(s): 2004-08-274-00162 (id 272) CONSUMER</p>	
<p><b>Example 2: Mead – an alcoholic drink, but by which means?</b>  Consumer expects <i>myd</i> 'mead' to be made through fermentation of honey and objects to alcohol being added later in present product. The authorities established that the product <i>is</i> indeed made through fermentation of honey, yet with even more alcohol added afterwards, a method which they find no formal grounds for questioning. Case No(s): CONSUMER; 2003-03-274-00020 (id 85); 2003-12-274-00011 (id 196) CONSUMER</p>	
<p><b>Example 3: What's (in) a real smoothie?</b>  According to consumer, the product does not <i>taste</i> like what (s)he would expect of a smoothie. Complaint sustained by authorities, but the decision is motivated (only) by the <i>low fruit content</i> (0,2%). So what if the "smoothie feeling" had been simulated better? Case No(s): 2003-04-274-00297 (id 102) CONSUMER</p>	
<p><b>Example 4: Almonds for texture or for taste?</b>  <i>Makroner</i> = 'macaroons' made of apricot kernels, not of almonds as demanded by traditional Danish recipes. Artificial almond flavour is added. Manufacturer(s) insists that this has been so since the 1940ies and that consumers like and buy the product. Case No(s): 2007-S5-274-0792 (id 735) DAF; 2007-S5-274-00795 (id 736) DAF</p>	
<p><b>Example 5: Nutrition and taste vs. tradition... and identity?</b>  Very traditional Danish meat product called <i>rullepølse</i> re-introduced in a low-fat version made of fillet and not pork belly, as demanded by all traditional recipes. Fat reduced from 25% to 3%... but has the standard recipe and <i>name</i> been violated? Case No(s): 2005-04-271-00034 (id 329) DAF; 2005-05-274-00437 (id 370) DAF</p>	

Fig. 2. Examples 1-5: Conflict scenarios relating to established food names.

<sup>190</sup> Some versions of the prototype approach allow for borderline cases with "degrees" of class membership, in continuation of principles developed in *fuzzy set* theory (Zadeh1965).

A common trait for these cases is that all parties involved seem to agree that the name has a quite distinct meaning, the question being what exactly that meaning is, or should be.

In Example 1, the answer would seem to be given in advance in that the product is covered by a food standard<sup>191</sup>. However, the standard concerns fat content, and what the consumer is concerned about is taste. In Example 2, the roles are switched in that the consumer does not mention the taste at all, but objects to certain hard facts about the process of manufacturing. Yet in this case, the authorities refrain from intervening for lack of any formal criteria on how the desired alcohol content should be reached in mead. In Example 3, there are no standards to resort to either, and, moreover, the product name (and type) may still be relatively new and negotiable to some consumers. Yet the complainant clearly seems to operate with certain fixed criteria, and these again (as in Example 1) concern the sensory impression of the product. Nevertheless, hard facts, in terms of low fruit content (0.2%), end up being decisive to the outcome on their own, this time in favour of the consumer. In Example 4, we once again observe a clash between hard facts and consumers' (alleged) sensory preferences and liking. Furthermore, the number and type of evaluation criteria accessible to and potentially applicable by various real-life actors of relevance (manufacturers, gastronomic experts, and consumers) are clearly not the same. A similar situation is displayed in Example 5, with the additional circumstance that the product has in fact been significantly modified as to ingredients compared to current benchmark products on the market which carry the same name. Yet the modification concerns "only" the ingredients, while the key sensory properties have been maintained. So what should be decisive?

Cases like these raise several basic questions with regard to the cognitive essence of the disputes as well as the optimal way of resolving or preventing them.

Transposed to the terms introduced above, the examples seem to indicate that the actors involved are operating with different variants of the concepts at issue, which display different numbers and "mixtures" of sensory and propositional components, and different lines of demarcation between essential and prototypical components of either type. Moreover, it seems that this is not (only) a matter of conceptual structure, but (also) of the actors' selection of ammunition for explicit argumentation from the total pool of conceptual components available to them. To cope with this, it is tempting to apply Putnam's (1975) hypothesis of "division of linguistic labour", according to which members of society collaborate on knowing the exact meaning of the words they use, and ultimately will rely on the judgment of "experts". The question is, however, whether the expert's final judgment will always have status as a built-in component in ordinary consumers' variant of the concept in question, i.e. an empty slot for which only the expert may provide the right filler. This might well prove to be the case for luxury products like *caviar* and *foie gras*, but does the mechanism extend to *macaroons* or *pepperoni*? Other questions would be: Who are the relevant experts? And are national and cross-national food standards the only (and the right) solution as argued by some while questioned by others in the EU debate?

An additional consideration here (see also Smith, Møgelvang-Hansen & Hyldig, in press) is whether sensory or propositional product attributes should be given preference when determining product identity. The examples demonstrate a steady "competition" between criteria (and corresponding conceptual components) that rely on first-order perceptual experience, e.g. the feel and taste of macaroons, and those that rely on second-order information available from other, mostly verbal, sources (text on the packaging, the mass media, cookbooks, product tests, etc.) about e.g. the methods and ingredients used for producing macaroons commercially. So, in short: Is product identity a matter

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<sup>191</sup> Council Regulation (EC) 1234/2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products article 114, cf. Annex XIII.

of taste or facts? The dilemma is highlighted, in particular, in cases of product *evolution*, as illustrated most clearly by Example 5. Here all previous conceptualizations of the product are deliberately challenged by the manufacturer and may gradually change with consumers as well. The manufacturer would seem to have a good case in arguing that (s)he is merely trying to retain the feel and taste of a popular food product while meeting consumer demands for better nutrition value. Changing the name to something completely different would most likely blur this subtle point. Instead the name is retained and the change highlighted by a low-fat claim and the relevant facts in the list of ingredients. It is therefore fair to consider whether different fairness criteria should apply in such cases than in those of mere product *repetition*. On the other hand: Should the reasoning then be extended to cases like Example 4, where the potential conflict is rooted more than 60 years ago and seems to have been tacitly accepted (or never questioned for lack of information?) by a great many consumers? Or even to cases like Example 2, where we would need to go back about 7000 years to trace the gradual evolution of mead production across time and civilizations. Perhaps it is the knowledge and expectations of the “average consumer” that we should rather try to trace?

Definitive answers to such questions are beyond the scope of this article, though certainly not the FairSpeak Project at large. However, it should be mentioned that a basic assumption of the FairSpeak Group is that consumers’ psychologically real concepts should be given priority here, including the degree to which such concepts are indeed sensitive to external influence in the shape of “experts’ final judgments”. To support future best practice on such issues, ongoing FairSpeak work includes testing the limits for consumer acceptance of selected name/product combinations on experimental grounds by exposing different groups of experimental subjects to taste samples alone (sensory product attributes), taste samples in combination with nutrition facts & ingredients list (adding propositional product attributes), and each of these in combination with authoritative definitions (adding experts’ final judgments).

### **Novel Food Names: What *will* They Come to Mean, and Can We Predict It?**

Let us now consider the quite different types of conflict scenario that relate to food names which are treated as novel by all parties involved. In these cases, the manufacturer has taken the full consequence of having created an entirely new product or product variant by providing it with an equally new name.

When encountering such a name for the first time, the consumers will not be able to activate any pre-determined concept whatsoever. That concept needs to be crystallized and acquired first.

(S)he will be left to make a situational (pragmatic) on-the-spot analysis based on the information at hand (Zlatev, Smith, van de Weijer & Skydsgaard, in press), which is, however, bound to result in the generation of some “sketchy” *ad hoc* concept (e.g. “some kind of new food product which is in this package, and in other packages carrying the same name, but about which I really have no idea”) that may later on develop into a more elaborate and permanent one.

Before addressing the conflict scenarios shown in Figure 4 below, let us first briefly consider some overall trends in the treatment of novel food names in current administrative and legal practice, and relate these to what is known from psycholinguistic and cognitive empirical research about people’s actual decoding and processing of novel versus familiar names (food names or any other).

Most novel food names by far, like most other new entries in the lexicon (word stock), are created by combining existing word elements into larger units that are nevertheless used and understood as “one name”<sup>192</sup>. In languages like Danish, English, or German, the most predominant pattern is

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<sup>192</sup> An alternative model is adding a new meaning to an existing word, which is how e.g. *caviar* has come to (also) denote a product made of artificially coloured lumpfish’s roe and not (only) “real” caviar in Danish. While this circumstance is now widely known and accepted by consumers, a further extension of the name to a specially marinated variant of cod’s

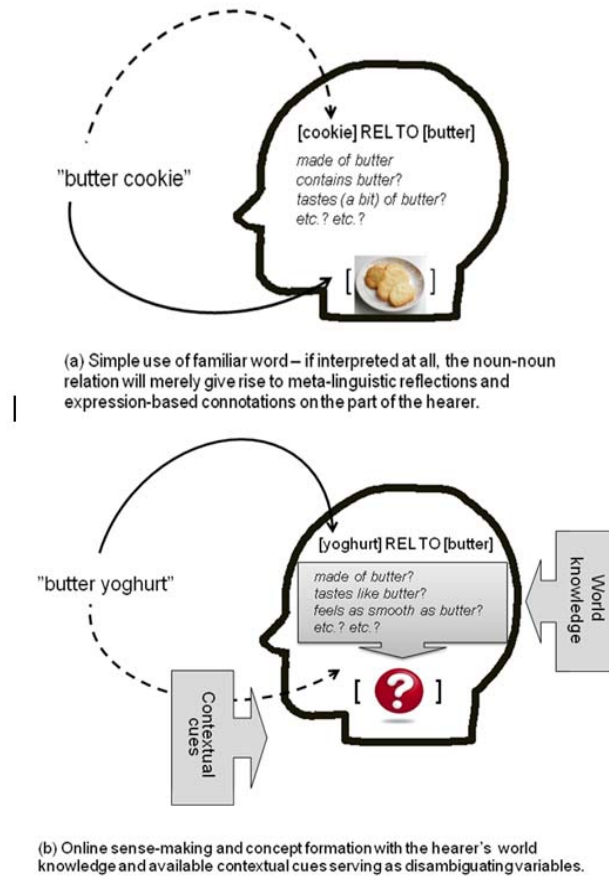
compounding (Libben & Jarema 2006; Sager 1997), i.e. a simple juxtaposition of word stems as in *gooseberry*, *papaya milkshake*, or *butter yoghurt*, and we will concentrate on that pattern here. In current administrative and legal practice on food naming (for an overview covering the EU as a whole, see MacMaoláin, 2007: 102ff), two assumptions tend to be taken for granted by authorities and complainants alike when it comes to interpreting composite names. First, that the meaning of the whole must necessarily be a function of its parts, and, second, that there is only one “objective” and “correct” way of interpreting the relation between the name’s constituents. For instance, *butter cookies* should objectively contain butter and Alsace ham should objectively come from Alsace in France. Exceptions are reluctantly accepted for established (“generic”) names – in that no one would expect e.g. *wine gums* to contain wine or *Brussels sprouts* to come from Brussels – but for novel names judgments are less liberal.

However, existing theory and experimental evidence on the semantics and processing of complex lexical expressions call for certain modifications to these common-sense assumptions. It is thus widely recognized that “2 + 2 does not equal 4” in a compound (Ferris 1983: 66), as might be argued for whole sentences (Benches, 2006; Stekauer, 2006). Thus, a compound like *snow smoothie* does not in itself tell us whether it should be interpreted as ‘white as snow’, ‘with fresh snow added’ (served as a drink), ‘to be enjoyed in the snow’ (by thirsty skiers), etc., etc. Moreover, the information deducible from the constituents themselves, even when narrowed down as above, is usually only a vague hint (a semantic-to-semantic sign) of the full-word meaning (concept) hiding behind it (Libben 2006: 11; Smith 2001, 1999/2000: 13ff; Wüster 1959/60: 191). Thus, it takes more than just containing butter for a cookie to be recognized as, and conventionally called, a *butter cookie*. As for established compounds, our familiarity with the full-compound meaning may sometimes help us interpret the relationship between the constituents in a sensible way, but never *vice versa*. Yet even that is not strictly necessary. Experimental research indicates that we do not routinely split up (decompose) familiar compounds and analyse the semantic relationship between the constituents in order to retrieve their established whole-word meaning (e.g. Libben, 2006; Andrews & Davis, 1999; Schreuder & Baayen, 1995; Sandra, 1990; Manelis & Tharp 1977)<sup>193</sup>. In other words, we do not need to speculate on why strawberries are called strawberries in order to understand and use the word *strawberry* correctly. Yet again, we are free to do so at any time, as shown in Figure 3(a).

(Contd.) \_\_\_\_\_

roe has been subject to complaints (e.g. Case No: L 935-105). The fairness challenges connected with this sort of semantic shifts are however beyond the scope of this article.

<sup>193</sup> Some studies indicate that decomposition may play a certain role for word recognition, but without reaching the semantic level. See Libben (2006) for a critical overview of existing findings.



**Fig. 3 a/b. Processing of (a) established and (b) novel food name.**

For novel compounds, the case is different. Since there is no established whole-word meaning to retrieve, the consumer is bound to decompose the compound and try to make some sense of the constituents and their mutual semantic relations in their own right. When presented in isolation, the outcome is sensitive to such factors as analogies with other, familiar, compounds that share the same first/second constituents (Krott and Nicladis, 2005; Gagné, 2001), and the cognitive “compatibility” of the constituent concepts (Gill & Dubé 2007; Murphy, 1990), which often require a metaphorical extension of one or both of them, e.g. *land yacht* for a luxury car (Fauconnier & Turner 2002: 357; Benches 2006). However, it has also been demonstrated that if the compound is presented in a sufficiently informative context, such default interpretations may well be abandoned in preference to alternative ones that fit the context (Gagne, Spalding & Gorrie, 2005; Zlatev et al., in press). Finally, as already indicated, the need for any interpretation disappears once the relevant whole-word meaning has been acquired. But in the process of acquisition, it will function as an index facilitating the gradual crystallization of the novel meaning (concept) together with additional cues from the surrounding context and the recipient's general background knowledge as illustrated in Figure 3 (b) above.

The above adds new shades to current judgments on the misleading potential of novel food names, which tend to circle around the name's built-in semantic potential and its “objective” meaning. Consider Examples 6-9 in Figure 4.



<p><b>Example 6: Halal ham</b> Consumer insists that the product cannot be correctly named <i>halal skinke</i> ≈ 'halal ham' since it is made of turkey and not pork. While this may potentially compromise <i>skinke</i> 'ham', it at the same time justifies <i>halal</i>. Case No(s): 2005-01-274-00386 (id 319) CONSUMER; 2003-10-274-00462 (id 177) CONSUMER</p>	
<p><b>Example 7: Surimi shrimps</b> New variant of minced fish meat product well-known to Danish consumers as <i>surimi</i> and originally designed to imitate crab meat. Complainant objects to the name <i>surimi-rejer</i> ≈ 'surimi shrimps' for a new, shrimp-shaped version because the product contains no shrimps. Case No(s): 2006-N4-274-00885 (id 506) CONSUMER</p>	
<p><b>Example 8: Pizzatop</b> Product developed as functional (and sensory) equivalent to pizza cheese, but mainly containing other ingredients than cheese, marketed under the names <i>Pizzatop</i> and <i>Pizza Topping</i>. Main objection: Cheese is what you normally put "on top" of a pizza. Case No(s): 2006-N4-274-00998 (id 508) DAF; 2006-N4-274-00999 (id 509) DAF</p>	
<p><b>Example 9: Spread or butter?</b> The name <i>Lurpak smørbar</i> ≈ 'Lurpak spreadable' on a blend product made of butter and vegetable oil claimed to be misleading for two interconnected reasons: 1. The brand name is also associated with "real" (high quality) butter, 2. the word <i>smørbar</i> ≈ 'spreadable' is etymologically related to <i>smør</i> ≈ 'butter' in Danish. Case No(s): 2006-06-274-00467 (id 458) CONSUMER</p>	

**Fig. 4. Examples 6-9: Conflict scenarios relating to novel food names.**

In Example 6, the alleged misleading potential comes down to the fact that *halal* and *ham* mutually exclude each other. However, it might alternatively be argued that precisely that conceptual clash might also facilitate a non-misleading interpretation. This certainly requires a metaphorical extension of *ham* (just like of *yacht* in *land yacht* above), but if that is achieved, the constellation may indeed be a rather apt and compact way of conveying the following subtle message: This is as close as you get to something that looks, tastes, and feels like ham without disobeying a religious proscription against eating pork. A related case could be made for *surimi rejer* ('surimi shrimps') in Example 7 considering that many Danish consumers are familiar with "standard" *surimi* which, in turn, speaks against taking shrimps too literally. In cases like this, the misleading potential is certainly present, but the outcome is not determined by the meaning of the constituents alone. Ultimately it will depend on how their relationship is specifically interpreted in view of the consumer's general background knowledge, and, not least, by what has been done to support the intended interpretation through the surrounding context. In the case of commercial food products, the relevant context is constituted, first and foremost, by other words, texts, and images on the surrounding labelling (Smith, Zlatev & Barratt, forthcoming), and here, claims such as "great taste, no pork" or "now also in shrimp shape" would clearly make a difference. In Examples 8 and 9, there is even less in the built-in semantic potential of the names themselves that speaks against an interpretation which is fully consistent with facts, even without resorting to metaphorical extensions<sup>194</sup> (though other interpretations are always possible and a potentially misleading one is canonized as the "correct" one on etymological grounds in Example 9).

<sup>194</sup> Then again, some adjustment of general brand expectations (related to *Lurpak*) may be needed in Example 9, but this is frequently required of consumers in a steadily evolving food market and poses certain fairness challenges that go beyond the strictly name-related ones addressed here (for further discussion on the branding dimension, see Smith et al 2009; Smith, Clement, Møgelvang-Hansen & Selsøe Sørensen, in review).



Since consumer knowledge can only be subject to general estimates, the key variable for ensuring the “right”, i.e. the intended, interpretation (in view of such best estimates) therefore remains other words, texts, or pictures on the surrounding labelling. The name can *never* do the job alone – otherwise it would not be a name, but a definition.

Developing creative techniques for achieving such disambiguations through total packaging design may be well worthwhile for manufacturers, because finding obvious name alternatives for conveying subtle messages like the ones above is not an easy task either. Ongoing work in the FairSpeak Project includes the development of a schematized food labelling matrix in which four key biasing units (brand, verbal claim, illustration, colour(s)) can be varied systematically to test their joint potential for pushing the interpretation of a potentially ambiguous novel food name both in a misleading direction, and towards consumer understanding and acceptance (Smith, Zlatev & Barratt, forthcoming). The variables of interest here are not only the semantic (communicative) potentials of the individual labelling elements, but also their capacity to attract the consumer’s visual attention. Whether this happens and the sequence in which this happens are thus also decisive to the final outcome (see also Clement, Selsø Sørensen & Gabrielsen, this volume).

One final issue that deserves attention here is where assessments of the misleading potential of food names stop and disagreement with general developments in the food market and in society at large begins. No matter how much care the manufacturer might take to ensure that the name is interpreted as intended, the consumer will still need to irreversibly change his or her conceptual “world view” in order to get the message. That is, gradually generate a new concept for a food product that (s)he might never have expected would come to exist, and whose existence (s)he perhaps even regrets. So it might be hypothesized that some complaints might be triggered by a sense of resistance to entering into the conceptual restructuring required to understand the name in the first place, rather than by a sense of having been misled about any actual facts. If so, the real question is: Is the word wrong, or is the world going wrong according to some consumers? Or speaking more generally: Where should the line go between preventing unfair commercial practices and entering into food politics?

## **Concluding Remarks**

As we have just seen, the substance upon which a legal form is imposed in real-life cases on misleading food naming turns out to involve rather subtle cognitive issues that not only relate to the name as such, but also to consumer knowledge and the bias exerted by other labelling elements. Does this mean that in-depth cognitive analyses along the lines sketched above should be performed by the authorities and immediate actors for each and every case to ensure better future practices? The answer is clearly no, if for no other, then for practical reasons. On the other hand, in a rapidly evolving food market with new foods being created every day – and the names given to them being essential to their future identity and degree of consumer acceptance – challenges like those illustrated above are bound to increase in number in the future and call for a consistent regulation. This is particularly true within the EU with a still increasing integration of established national rules and practices. Apart from ensuring fair competition, a key concern here is to support public nutrition and health, as highlighted for example by new types of functional and medicinal foods.

One viable path here might be an increased focus in the food industry itself upon predicting possible misleading hazards and systematically testing the impact of alternative naming and labelling solutions on empirical grounds<sup>195</sup>. In the event of complaints, hard evidence of the expectations and choices actually caused in test-consumer panels by the disputed name (or other labelling elements) might thus

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<sup>195</sup> Other things being equal, today most resources are spent on pre-testing such variables as consumer liking, preference, and choice, whereas fairness considerations often come down to a quick legality-check with the company’s legal department (a judgment that finds some support in a diary study of current routines and practices in selected Danish companies and design agencies, cf. Clement, Smith & Selsø Sørensen, 2010).

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supplement the common-sense reasoning which predominates in such cases today. In turn, this might supply new generic knowledge and cues for the development of administrative and legal practice at large. This article has presented some stepping-stones for proceeding further along these lines.

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## **Match and Mismatch Between Consumer Knowledge and Packaging Design**

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### **Introduction – Purchasing Commodities**

Food labels are one of the key communication channels between the food industry and the consumer. Increasing legal obligations as well as consumer demands for healthy, environmentally friendly and safe food products have made food labelling more challenging and intricate than ever before (Selsøe Sørensen, 2008). It has been known for several years that consumers spend only a few seconds looking at food labels (Hoyer, 1984), and they may not always be aware, themselves, of what attracts their visual attention and what influences their decision (Ambler, Braeutigam, Stins, Rose & Swithenby, 2004, Clement, 2007). The situation is further complicated by consumers making their buying decisions for everyday food products under circumstances characterized by a lack of time (Pieters & Warlop, 1999), and this time pressure forces customers to rush through the process of searching for information, and analysing and weighing it so they can quickly reach their final decision. Time pressure has an impact on the amount of information collected for the decision process (Iyer, 1989), and the amount of information has an impact on the amount of time consumers are willing to spend on the decision (Fasolo, Carmeci & Misuraca, 2009).

The scenario is further complicated by the increasing number of alternative products to choose among, and the overwhelming presence of visual stimuli in the end make consumers take less deliberate decisions (Schwartz, 2004). The conflict between information overload and limited information processing capacity in the purchasing situation results in information interference and a reduction in the consumers' attention level, so they may even become immune to the information (Iyengar & Lepper, 2000, Iyengar, Ansari & Gupta 2003). With this discrepancy between the volume of product stimuli and consumers' need for information to make a well-informed purchase decision, the supermarket shelves become a fighting arena, where products fight for consumers' visual attention. This is further accentuated by the complexity of the multiple information items on food labels (Craddock, 2008) and the severe space constraints, given the small size of most labels. During their short decision-making process, consumers may not see or may misinterpret information, and the risk of being misled increases.

The EU works constantly to improve the information on food labels and in 2008 reached the conclusion that further prescriptions on the legibility of food labels would be opposed by the business stakeholders insofar as they feared it would increase the costs of packaging and reduce their flexibility. Independent or voluntary food assurance schemes as a way to help consumers on the other hand could cause confusion and scepticism because consumers find it difficult to understand what a given certification involves (Eden, Bear & Walker, 2008). This is a key issue in an ongoing revision effort undertaken by the EU, since it does not make sense to set obligations as to the information to be provided to the consumer, if the latter is unable to make use of it. It was considered that there would be no benefit from a revision of the labelling legislation, unless it would lead to more readable labels (Commission Staff Working Document 2008). Although the word "readable" is used, we assume that the true intention would have been better rendered if the word "understandable" had been used. The use of "understandable" is more controversial, however, because it directly evokes the ability of each individual consumer to understand a complex message on packaging in the supermarket, and empirical evidence for what it requires to relate purchase decisions in a store to "understanding" is scanty. This article is an attempt to contribute to rectifying this, and is moreover part of the Danish project "FairSpeak" (2007–2010) which aims at establishing best practices in fair information on food labels.

## **Framework – What Affects the In-Store Purchase Decision?**

The visual impact of packaging design on in-store buying decisions seems to be widely acknowledged (Pilditch, 1973, Nickels & Jolson, 1976, Schoormans & Robben, 1997), although less research has been done on the role played by visual effect at the moment of a purchase decision (Pieters & Warlop, 1999) or the influence exerted by the design elements (Clement, 2008). Even so, assumptions about this influence have led to recommendations and even legislation on labelling, on the use of type-faces, and on a format for packaging. A well-known and fully implemented example is the health claims and warnings printed on cigarette packaging in the EU; black text sat in Helvetica on white background. However, this is not in accordance with the recommendations made by Bone & France (2001), who investigated how colours and pictures on packaging influence consumer beliefs about important product characteristics. They found that colours, pictures and illustrations have a significantly better long-term effect on product beliefs and purchase intentions than even very precise verbal information. The research by Bone & France (2001) demonstrated that the consumer's information processing is influenced by factors such as vividness and graphic manipulation.

The EU-authorities' argumentation in relation to health claims on tobacco can be interpreted as a simplified version of the general psychological assumption: people distrust information when they hear or see it the first time, but when they hear it repeatedly, they will eventually accept it (Zajonc & Markus, 1982). What this does not take into consideration is the fact that when people get used to certain stimuli, they pay less attention to the specific information (Willingham, 2003). Interpretation of packaging information follows the same rules: an increase in exposure to a particular packaging design might result in a positive reaction, whereas overexposure leads to a decrease in attention. This effect is strongest when stimuli are simple and have little semantic content (Obermiller, 1985), whereas it is difficult to create such simple impressive exposure when the stimulus is semantically loaded. In other words, people simply like information that is easy to interpret and understand (Reber & Schwarz, 1999).

Initiatives similar to the health claims on tobacco are scheduled for food products in the EU. The EU Health Claims Regulation (Regulation 1924/2006/EC, 2006) gives official advice on health issues and marketing restrictions and harmonizes rules for the use of nutrition and health claims with a view to ensuring a high level of consumer protection. Transferring this complex of knowledge to a non-homogeneous target group under conditions of time pressure and space constraints is a non-trivial task for knowledge engineers (Selsøe Sørensen 2008). The question is, however, does the textual and graphic design of such claims and health recommendations actually attract consumers' visual attention and, in the end, does it affect consumers' interpretation of product qualities and attributes as planned? That depends on the individual consumer's background knowledge.

Directive EU 2005/29/EC (2005) on unfair commercial practices takes as its point of departure the average consumer, who is described as a "consumer who is reasonably well-informed and reasonably observant and circumspect". We shall consider the reasonably well-informed consumer and the average consumer as one and the same for this purpose without further discussion. The directive refers to consumers below average level, but nothing is said about well-informed consumers and their risk of being misled. Consumers below average are those "whose characteristics make them particularly vulnerable to unfair commercial practices". The Directive does not go into details about the risk that non-expert consumers may misinterpret information and thus be misled even by a food label that represents completely "fair commercial practice". The directive is based on the assumption that consumers with an average level of knowledge both see and understand all the information given on the packaging. These kinds of generic recommendations tend to neglect consumers' different abilities to find and decode information. This leads to our overall research question: Is there a mismatch between consumers' knowledge and the information printed on packaging?



## **Visual Attention – What do Consumers See?**

Consumers' visual attention is often described using the spotlight metaphor. Just as the spotlight beam is needed for seeing, visual attention is needed for detection, and visual attention deals with limited areas just as the spotlight covers limited areas. The spotlight metaphor might suggest that the area within the spotlight beam is fully perceptually processed. However, this is not correct, and in simple terms the visual attention process can be divided into four phases:

- (1) detection of the object in the visual field,
- (2) discrimination between useful and less useful objects,
- (3) integration of the data in a cognitive process,
- (4) action taken on the interpreted data (Arp, 2008).

Being selective and taking action are crucial elements in the process (Simons & Chabris, 1999). Unlike the spotlight beam, visual attention relates to the object and not to a spatial location, and consequently consumers' visual attention is likely to focus on a special design element or on a certain packaging with salient information (Neisser & Becklen, 1975, Willingham, 2003) rather than on a given area of the shelf.

This selective visual attention is described in the literature as a distinction of *where* an object is and *what* an object is, and is characterized as either *orientation-attention* or *discover-attention* (Posner, Snyder & Davidson, 1980). Orientation-attention is a parallel low-level unselective pre-attentive search process. It works fast and enables lots of input to be processed simultaneously. It gives people the opportunity to get an overview of the visual field, e.g. the range of products in a certain category. Orientation-attention occurs before the slow and high-level serially processed discover-attention, which processes one feature stimulus at a time. Discover-attention allows people to concentrate on a single object.

Pashler (1998) elaborates on the parallel and serial visual search and divides attention into *selective-attention* and *divided-attention*. Selective-attention bears similarities to orientation-attention, describing a situation where subjects process stimuli fast and under favourable conditions people drop the fully perceptual process. People do parallel processing if target and non-target stimuli differ significantly in visual features. In an in-store purchase situation, consumers use parallel processing to distinguish between products in a given category as a result of clear differences in brand and packaging design. Limited-attention, which is similar to discover-attention, describes a situation where people have to slow down the search process due to limited perceptual capacity (Miller, 1956, Neisser, 1976). People use and need this serial search process for fully processed perception to achieve an understanding of the visual stimulus.

In the purchase situation, orientation-attention and discover-attention can describe a process in which consumers first search the shelf in the supermarket for a specific product, perceiving a lot of visual impressions and relying on orientation-attention (fast, pre-attentive, and parallel search), and then, when a specific product with a salient design catches the consumer's attention, he or she shifts to serial search and slows down the visual search.

Consumers do not use the two systems separately (Duncan & Humphreys, 1989) but switch easily and make use of the interplay between the two systems, so that parallel and serial searching become the two poles of the visual search, which varies along a continuum of search efficiency (Wolfe, 1998). In his theory of visual search, Wolfe (1998) defines visual design features that stimulate either bottom-up processes (affected by the stimuli itself) or top-down processes, i.e. processes controlled by the mind. Bottom-up features are prominent in ordinary situations where consumers locate e.g. buttermilk in the supermarket just by perceiving a specific colour on the shelf. The colour of the packaging attracts attention provided that the colour was already known to the consumer as being related to buttermilk, which is typically the case in repeated purchase situations. This underlines the view that colours are

closely related to culture and learning (Varela, Thompson & Rosch, 1991), and that fast search and decision-making in the supermarket is highly linked to culture and what the individual person knows.

Research in cognitive science has found the greatest impact on visual search strategies when various prominent visual features are combined (Theeuwes & Kooi, 1994, Theeuwes, Kramer, Hahn & Irwin, 1998). Combined design features, and in particular contrast and shape, attract any consumer's attention (Hoffman, 1998, Yantis, 1998). Even in a situation when a consumer uses a top-down controlled search for a specific brand, he cannot prevent his involuntary attention from being captured by such a visual object using identical design features, which in this case may be described as a "visual distracters". Consumers' in-store search strategy and consequently their visual attention are also influenced by their level of involvement (Bauer, Sauer & Becker, 2006). This creates a situation with fluttering visual attention distracted by prominent packaging design features, such as claims for less fat, highlights for new recipes, or illustrations on the packaging.

### **Knowledge – What do Consumers Understand?**

Our objective is to link consumers' visual search strategies revealed in patterns of visual attention to their background knowledge, so in this section we qualify the aspects of understanding and knowledge.

Understanding factual information, e.g. nutrition labels, is important not only for people on a diet but for anybody trying to live a healthy life. It is generally assumed that people can read and interpret the information printed on the labels, but this cannot be taken for granted (Rothman, Housam, Weiss, Davis, Gregory, Gebretsadik et al., 2006). Consumers with low-level literacy and numeracy skills are more likely to give up understanding food labels and thus risk being misled. A review by the Food Standards Agency found that 38% of consumers have difficulties in understanding the information on the packaging (Harper, Souta, Ince & McKenzie, 2007). Similar research on labelling found that only one in three consumers have sufficient knowledge to understand the information (Dutch Ministry of Health Welfare and Sport, 2005). Yet it is commonly assumed that decoding the cocktail of information on packaging, such as texts, illustrations, brand-elements, content descriptions, and both regulated and unregulated signs can be done smoothly by a benchmark person, namely the *average consumer*.

The EU legislation defines the "average consumer" in the following terms:

"this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices" (Directive 2005/29/EC, 2005).

This rather vague notion, which is repeatedly referred to in judicial and regulatory contexts, is based on how much knowledge and reasoning the individual consumer can be expected to possess when they decode a food label or packaging. We argue that the term *informed consumer* is more appropriate than *average consumer*, given that the latter has been used with a different meaning in a marketing context.

However, whether we refer to an *informed consumer* or an *average consumer* as the Directive does, it will always be possible to find consumers with knowledge below as well as above the average level. Above-average consumers might be described as dedicated, selective, and having a broad knowledge of food and food-related issues. We might assume they are able to reason and to spot weak or contradictory points in a complex label, because they are used to planning visual search strategies and processing multiple threads before reaching a buying decision. Consumers below the average level, on

the other hand, may not be able to decode the signs on the packaging or make sense of the information. We can assume that consumer knowledge varies along a continuum from *less informed* through *informed* to *well informed* consumers.

Directive 2005/29/EC (2005) does not differentiate between types of consumer knowledge, e.g. by relating levels of knowledge to different types of design elements. The directive assumes that a well-informed consumer is able to decode and understand equally well all the elements on a food package. Studies of semantic memories and the influence of priming effects in everyday life (Kvavilashvili & Mandler, 2004) and of consumer understanding of dietary guidelines (Tuttle, 2001) do not support this simplistic view of consumer knowledge. Research in cognitive science has even found a relationship between the ease of interpretation and the judgment of truth (Reber & Schwarz, 1999, Unkelbach, 2007, Winkielman, Halberstadt, Fazendeiro & Catty, 2006). The research indicates that experience of processing fluency may overrule memory-based knowledge in the judgement of a statement. People simply trust information which is easy to decode, and findings on the coherence between people's search strategies and their expectations of reward (Hayhoe & Ballard, 2005, Yarbus, 1967) enable us to conclude that visual features which give useful information are prioritized.

### **Bringing Visual Attention and Knowledge Together**

The fuzzy description of the average consumer proposed by the EU Directive does not seem to help either knowledge engineers and label designers or authorities who must discern whether or not a certain consumer may be misled by the packaging information. It is our general hypothesis that the variety in consumers' interests, levels of education and life conditions creates significantly uneven levels of background knowledge on nutrition/health issues, on signpost labels, and on all the other details on labels. We expect these diverse sets of knowledge to be reflected in different patterns of visual attention and search strategies.

In order to investigate this, we advance the following hypotheses to be tested in an exploratory survey on the relationship between visual attention and consumer knowledge:

1. Consumer knowledge varies, and the individual consumer favours certain fields of knowledge,
2. Patterns of visual attention may correlate with the specific field where a given consumer has knowledge,
3. Prominent design features attract visual attention regardless of consumer knowledge,
4. If a consumer does not have the knowledge required to decode certain elements, such items will attract marginal attention. Health claims, e.g., will attract marginal attention from consumers who are unable to decode the information.

### **Research Design**

The survey was conducted from May to July at the Copenhagen Business School with a sample of 46 consumers, 35 women, 11 men, mainly students at CBS aged between 20 and 30 (32 respondents) and 14 over 30.

One part of the survey consisted in a practical consumer test aimed at rating a given consumer according to his/her knowledge about food and health information commonly found on food labels. The questionnaire included 9 open-ended questions related to information with a degree of difficulty varying from low to high. Furthermore, the respondent's familiarity with signpost labels was rated. 15 common labels found on food packages in Denmark were shown, and the respondents were asked about their interpretation. Information was collected on shopping habits, values, diet, and demographic data for each respondent. A prototype of the questionnaire was tested on a smaller group of respondents and adjusted before it was used in the survey.

Another part of the survey was aimed at gaining evidence about how design elements on food labels attract consumers' visual attention, revealed in gaze-time (fixations) and eye-movements (saccades) by the individual consumer (Duchowski 2003, Godijn & Theeuwes 2003). We conducted an eye-track survey with a Tobii 1750 eye-tracker, recording the respondents' pattern of eye-movements while deciding whether or not to buy a number of 28 different common Danish food products shown to them on a computer screen. They were asked to consider whether, in a real purchase situation, they would decide to buy the shown food package. Once they had said yes or no, the next product was shown. There was no time limit and they were free to gaze as long as they wished, and all sides of the packages were visible on the same screen. For the purpose of this survey, the actual buying decision was not taken into account.

To avoid biasing the subjects and their spontaneous interest for a certain design element when they saw a product on screen, the respondents were asked to fill in the questionnaire only after they had done the eye-track test.

To decode data from the eye-track survey, each design element of the 28 food products was identified and corresponding areas of interest (AOI) were defined. The design elements were classified into one of three groups with related sub-groups:

1. **Product information** with subgroups: product name, brand-logo, brand-name, ingredients, nutrition facts, and other facts
2. **Claims** with subgroups: product-related, health-related, content-related, quality-related, ethical claims
3. **Illustrations** with subgroups: rendering of product, picture not related to product, regulated signpost label, unregulated signpost label

For each AOI, the eye-track data were analysed in relation to three parameters of visual attention:

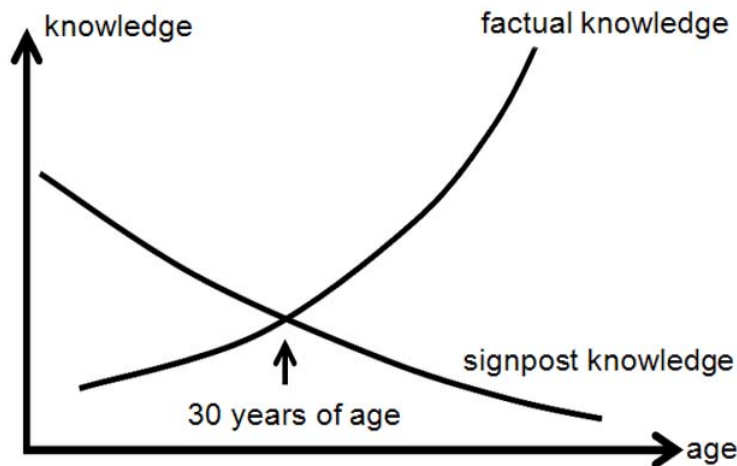
1. **Time to first fixation**, revealing the sequence in which the design elements attracted the consumer's visual attention
2. **Mean gaze time**, representing the amount of visual attention for each design element
3. **Number of fixations**, representing the design elements' ability to attract and re-attract the consumer's visual attention

## **Findings**

On average, the consumer test showed that only 40% of the signpost labels were recognized by the respondents. The official and regulated Danish label for organic products was known to almost everybody (93.5%), while the official and regulated EU label for organic products was only recognized by 19.5%. Among all respondents, 45% answered correctly to 6 of the 9 factual questions, namely those with a degree of difficulty which had been projected to be easy or medium, whereas only 9% had more than 6 correct answers.

We constructed a rating scale of knowledge for each respondent and identified two consumer profiles: A group of consumers strong on factual knowledge, and a group that proved strong on signpost labels. The 9 questions related to factual knowledge showed a Cronbach's alpha value of 0.740 and the Cronbach's alpha value for the 15 signpost labels was 0.841, indicating that the items could be summarized into a rating scale. In other words, it is possible to scale participant's knowledge of these two types of information.

Further analysis of the rating-scale data from the respondents showed an interesting inverse correlation between age and general food knowledge on one hand and age and understanding of signpost labels on the other. The number of recognized signpost labels decreased significantly for subjects over 30 years of age. On the other hand, this age group performed better than those under 30 on factual food knowledge (see Figure 1). Consumers with a high level of factual food knowledge seemed to have a lower level of knowledge on signpost labels and vice versa. No correlations were found with respect to



**Fig. 1 Correlation between age and knowledge**

Combining the two scales with the eye-track data in a logistic regression analysis with at least one fixation as response, we tested whether the consumers' knowledge profiles were reflected in their patterns of visual attention. We found significant differences in visual attention between the two groups. Consumers with a high score on factual food knowledge had a longer than average gaze time and seemed in general to spend more time before they actually fixated a certain area of interest (AOI). This group seemed to search for specific factual information, whereas they quickly filtered out information that did not fulfil their search criteria and dwelled on what they were looking for. E.g. consumers with a high score on general food knowledge tended to pay attention to signpost labels earlier in the search process ( $p < 0.001$ ), but spent a significantly shorter gaze time on signpost labels irrespective of whether these were regulated or unregulated.

The group with a high degree of knowledge of signpost labels also had many fixations, but did not seem to use a dedicated search strategy. Instead their strategy was characterized by many random fixations, which could be interpreted as if they did not see the specific items they were looking for.

In both groups, illustrations with no relation to the product attracted attention early in the search process, measured as time to first fixation ( $p < 0.001$ ). Consumers with a high score on factual food knowledge spent only a short time identifying and filtering out these pictures. In general, this group focused on these design elements later in the search process ( $p < 0.056$ ). In general, signpost labels attracted visual attention late in the search strategy, in contrast with product information and claims, which the test persons tended to gaze at first in their visual search.

Gaze time at a certain design element was for all respondents between 0.2 sec and 0.9 sec. Product information got more gaze time / visual attention than signpost labels and illustrations, and health claims got most gaze time. Health claims were able to extend consumers' gaze time, but consumers with a high score on factual food knowledge had shorter gaze time than others at health claims and product information, such as brand logo, product name, and ingredients.

It is commonly known that an object of interest re-attracts the eye again and again (Willingham, 2003), and this tendency was also found in this survey. Product information and pictures illustrating the product got the highest number of fixations. Pictures with no relation to the product got fewer fixations ( $p < 0.001$ ), as did signpost labels ( $p < 0.010$ ). For the group of consumers with a high score on factual food knowledge, we found a tendency that the higher the score, the more fixations were found, whereas in the group of consumers with a high score on knowledge of signpost labels, a similar pattern could not be documented.

## **Conclusions and Implications**

Our survey demonstrated the ambiguity in consumers' interpretation of the design elements on food packages and a certain correlation between the level of knowledge of the consumers and their pattern of eye movements and visual attention. Two distinct groups of consumers were identified based on whether they have a high level of general food knowledge or a high level of knowledge in relation to signpost labels. This underlines the defectiveness of the simplistic view of the *average consumer* as defined by the EU legislation. Consumer knowledge must be broken down and related to specific fields of knowledge. This verifies our first hypothesis about the complexity of the consumer and the difficulties involved in communicating in a fair manner with individuals who have such diverse backgrounds for understanding and such different ways of looking at food labels.

Various search strategies related to these groups were detected, which underlines the challenges met when trying to define a "well-informed average consumer". However, some similarities in the visual search strategies related to each group could be identified. Signpost labels attract visual attention to a lesser degree than pictorial information, and obviously consumers gaze at product information, because it is their intention to find and buy a certain kind of product. Consumers simply want to find information that fulfils their expectations and criteria for purchase. On the other hand, the two groups of consumers we identified have significant variations in their search strategies. Consumers with a high level of general food knowledge have a more distinct search strategy: they quickly filter out unwanted information. As a result, they also examine more design features than consumers with high knowledge of signpost labels. This group has a fuzzier search strategy, with gaze-time more equally spread over the different elements and less dwelling on selected elements, which might indicate difficulty in determining whether or not a certain design feature is relevant for the decision. This would partly verify our second hypothesis stating that patterns of visual attention concentrate on certain fields, namely those where the consumer has her/his knowledge.

For all participants, pictorial information attracted attention regardless of its nature and of its relation to the product. Illustrations with no relevance for the product, such as pretty houses and happy people attracted visual attention significantly faster than other kinds of illustrations. This does not imply, however, that this type of information attracts visual attention for a long time. Product illustrations and product names were the design elements that got most visual attention. Signpost labels generally attracted visual attention late in the search and got less attention than other design elements. Consumers with a low level of knowledge on signpost labels but with higher levels of food knowledge were expected to have shorter gaze-time on these labels, but this could not be documented. This verifies our third hypothesis stating that prominent design features attract visual attention regardless of the level of consumer knowledge. It partly verifies our fourth hypothesis stating that design elements, such as signpost labels and health claims, will only attract marginal attention from consumers who lack the background knowledge needed for decoding them.

Health claims printed on the packaging attracted more attention than other design features and influenced the search strategy for consumers with a high level of general food knowledge. Health

claims did not seem to influence consumers with a high degree of knowledge of signpost labels, which could indicate that these consumers tend to rely more on the signpost labels and are less used to decoding information in the form of textual health claims.

## **Discussion**

Fair communication on food labels is two-sided: it presupposes skilful knowledge engineering and label design as well as a certain level of background knowledge on the side of the consumers. The results reported will be used to fine-tune methods to reduce or avoid unintended misleading practices, a task that becomes ever more crucial as more and more information gets squeezed onto food labels. The Cronbach's alpha value for the scale related to food knowledge indicates that further improvements are necessary. Given that the notion of being misled has to refer to information printed on the packaging which has actually caught the given consumer's visual attention, only consumers who saw and tried to interpret and understand the design feature risk being misled. Further research is needed to document whether this means that less informed consumers who e.g. only look at the price tag cannot claim to have been misled. Our hypothesis is that the creation of fair food labels could benefit from a remodelling along the following lines. Fair communication presupposes food information cleverly engineered on the basis of a solid knowledge of the differences in consumer understanding combined with respect for sound food label design where text and graphics do not compete for attention but interact to enhance fair communication.

Best practice in fair communication on food labels is not a question of finding the ultimate universal solution, but rather of reaching the optimal compromise between what attracts the visual attention of consumers and what is understandable to them. It is a constant struggle for compromises based on predictions of consumer knowledge, a selection of relevant information, and appropriate ways of presenting food information in text and graphics. The potential of the proposed approach in a further developed and fine-tuned version is that it may become a tool which can be used on a permanent basis to check the quality, the efficiency and the fairness of on-label food information.

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