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Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions

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Abstract
This article discusses, in light of the European experience concerning harmonization of unfair commercial practices law, the impact of social, cultural, and linguistic variations on the possibility of harmonizing or transplanting rules on commercial communications to consumers. Empirical research on national variations in consumers' responses to advertising and other marketing is used to create a typology of cases in which cultural factors should be taken into account when assessing a commercial practice from a consumer point of view. Differences between countries with regard to consumers' trust, understandings, rationality patterns, decision-making behaviour, values, and preferences are discussed as relevant cases. The empirical examples provide a basis for a criticism of culturally blind harmonization and transplantation attempts.

Keywords
Commercial law--International unification; Europe; Commercial law--social aspects

HARMONIZING UNFAIR COMMERCIAL PRACTICES LAW: THE CULTURAL AND SOCIAL DIMENSIONS©

THOMAS WILHELMSSON*

This article discusses, in light of the European experience concerning harmonization of unfair commercial practices law, the impact of social, cultural, and linguistic variations on the possibility of harmonizing or transplanting rules on commercial communications to consumers. Empirical research on national variations in consumers' responses to advertising and other marketing is used to create a typology of cases in which cultural factors should be taken into account when assessing a commercial practice from a consumer point of view. Differences between countries with regard to consumers' trust, understandings, rationality patterns, decision-making behaviour, values, and preferences are discussed as relevant cases. The empirical examples provide a basis for a criticism of culturally blind harmonization and transplantation attempts.

À la lumière de l'expérience européenne afférente à l'harmonisation de la loi sur les pratiques commerciales déloyales, l'article analyse les effets qu'exercent les variations d'ordre social, culturel et linguistique sur la possibilité d'harmoniser ou d'acclimater les règles concernant les communications commerciales destinées aux consommateurs. La recherche empirique sur les variations nationales concernant les réactions des consommateurs envers la publicité et les autres outils de marketing sert à établir une typologie de cas, où il faut tenir compte des facteurs culturels lorsque l'on évalue une pratique commerciale du point de vue du consommateur. Les différences entre pays sur le plan de la confiance des consommateurs, de leur perception, de leurs schémas de rationalité, de leur comportement de prise de décision, de leurs valeurs et de leurs préférences sont débattues comme des cas pertinents. Les exemples empiriques fournissent une base permettant la critique de tentatives culturellement aveugles d'harmonisation et d'acclimatation.

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I. "LIFTING" AND THE RELEVANCE OF SOCIAL, CULTURAL, AND LINGUISTIC FACTORS

In a landmark decision released on 13 January 2000, the European Court of Justice addressed the issue of cultural variations in the understanding of commercial communications. The case, often cited either with reference to the plaintiff as *Estée Lauder* or with reference to the debated word "lifting," has established the relevance of "social, cultural, or linguistic factors" in the application of harmonized EU legislation related to such communications.[1]

Formally, the case concerns—in addition to the application of Articles 28 and 30 of the Treaty Establishing the European Community[2]—the interpretation of Article 6(3) of the EU Cosmetic Products Directive.[3] Article 6(3) states that "Member States shall take all measures necessary to ensure that, in the labelling, putting up for sale and advertising of cosmetic products, text, names, trade marks, pictures and figurative or other signs are not used to imply that these products have characteristics which they do not have." In reality, the case addresses more generally the application of the concept of

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[1] *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*, C-220/98, [2000] E.C.R. I-117 [*Lifting*].

[2] See *Treaty Establishing the European Community*, consolidated version [2002] O.J. C 325/33 [*Treaty*].

[3] EC, *Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products*, [1976] O.J. L 262/169, as am. by EC, *Council Directive 88/667/EEC of 21 December 1988*, [1988] O.J. L 382/46 and EC, *Council Directive 93/35/EEC of 14 June 1993*, [1993] O.J. L 151/32.

misleading advertising[4] in various cultural settings. The key issue was whether it is acceptable to use the word "lifting" in the name of a skin firming cream—in this case "Monteil Firming Action Lifting Extreme Crème"—or whether it is misleading, as the plaintiff contended, "because it gives purchasers the impression that use of the product will obtain results which, above all in terms of their lasting effects, are identical or comparable to surgical lifting, whereas this is not the case so far as the cream in point is concerned."[5] In 1996, the German Federal Court of Justice, in its "lifting crème" judgment, found that a lower court ban on the word "lifting" in a similar case was "not incompatible with practical experience."[6] A consumer organization obtained a similar injunction against Estée Lauder in a regional German court,[7] and the *Lifting* case was Estée Lauder's attempt to force a competitor to follow the injunction as well.

After reviewing the various legal grounds, the European Court of Justice noted that particular national factors may be relevant to the case:

> In order to apply that test to the present case, several considerations must be borne in mind. In particular, it must be determined whether social, cultural or linguistic factors may justify the term 'lifting,' used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word 'lifting.'[8]

Therefore, even though the European Court of Justice assumes that the "average consumer"—who, according to the consumer image created by the Court, is conceived of as "reasonably well informed and reasonably

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[4] *Supra* note 1 at paras. 4-8. The court, when citing relevant Community legislation, expressly refers to the Misleading Advertising Directive: EC, *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*, [1984] O.J. L 250/17.

[5] *Supra* note 1 at para. 13.

[6] *Ibid.* at para. 16.

[7] See *Lifting*, *supra* note 1 (Opinion of Mr. Advocate General Fennelly delivered on 16 September 1999), at para. 2, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998C0220:EN:HTML> [Opinion of Advocate General].

[8] *Supra* note 1 at para. 29.

observant and circumspect"[9]—ought not to expect the cream to produce enduring effects,[10] it nevertheless leaves it to the national courts to decide the issue.

The phrase "social, cultural, and linguistic factors" is similar to a phrase used by the European Court of Justice in a previous case concerning the possible misleading effects of the trademark "Cottonelle" for toilet paper and disposable handkerchiefs not containing cotton.[11] The phrase quickly evolved into a technical term in European law—has even been used in the drafting of European legislation.

Part of the EU experience is the need to take into account national and even local variations when attempting to harmonize the rules on unfair commercial practices. An increase in globalized marketing strategies and other factors have led to pressure for harmonization on a broader, global level; obviously in this context there are even bigger differences between societies with regard to social, cultural, and linguistic factors. This article draws on the European experience and analyzes, from a legal policy point of view, the weight and importance of such factors with regard to regional and global harmonization of unfair commercial practices law.

The basic substantive rules of unfair commercial practices law often relate directly or indirectly to some concept of the average consumer. In legal terms, the question can often be rephrased in the

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[9] This is the Gut Springenheide test, developed in *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, C-210/96, [1998] E.C.R. I-4657 at paras. 31, 37. See also *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH*, C-470/93, [1995] E.C.R. I-1923 at para. 24; *Verbraucherschutzverein e V v. Sektkellerei G.C. Kessler GmbH und Co.*, C-303/97, [1999] E.C.R. I-513 at para. 36; *Verein gegen Unwesen in Handel und Gewerbe Köln e V v. Adolf Darbo AG*, C-465/98, [2000] E.C.R. I-2297 at para. 20; *Toshiba Europe GmbH v. Katun Germany GmbH*, C-112/99, [2001] E.C.R. I-7945 at para. 52; and *Pippig Augenoptik GmbH & Co. KG v. Hartlauer Handelsgesellschaft*, C-44/01, [2003] E.C.R. I-3095 at para. 55.

[10] Opinion of Advocate General, *supra* note 7 at para. 30 was more ironic: "[T]he national court has not averted in its order for reference to any particularities liable to render German consumers more susceptible to being misled by the word lifting than consumers in other Member States... ."

[11] *F.lli Graffione SNC v. Ditta Fransa*, C-313/94, [1996] E.C.R. I-6039 at para. 22 [*Graffione*]: "it is possible that because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another." The case is referred to in the Opinion of Advocate General, *supra* note 7 at para. 31.

following way: to what extent is it possible to speak about an average cross-border consumer, and in what respects does one encounter different average consumers when crossing borders?

The analysis involves a concrete discussion of the differences that can be relevant. Even in the EU context, where the reference to "social, cultural and linguistic factors" has become an established part of the law, there are few indications as to when these factors could be legally decisive. In what situations should the variations concerning these factors affect the content of unfair commercial practices law? To what degree can one speak about an average European consumer? In Europe, where the field is largely covered by EU legislation, the discussion relates primarily to the application of harmonized law.

Globally, the discussion relates to the drafting of commercial practices law. The focus is both on conscious, regional, and global harmonization efforts and on attempts to make use of foreign legal models when developing national legislation, sometimes referred to as "transplantation." The analysis in this article may offer one explanation of why such "transplantation" is sometimes considered impossible in a deeper sense.[12]

In a global context, a general discussion of this kind may appear to be pure nonsense. It seems self-evident that average consumers live quite different lives in various parts of the world. The problems faced by consumers in a developing country are very different from those faced by consumers in a developed country, and regulatory needs will vary accordingly.[13] However, this article does not address specific problems of particular localized markets; it focuses instead on the need for local responses to commercial practices that target large supranational regional markets or even the global marketplace. This necessarily implies a somewhat ethnocentric, developed world approach to the selection of practices that are assessed.

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[12] On the debate, see *e.g.* Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens: University of Georgia Press, 1993); Alan Watson, "Legal Transplants and European Private Law" (2000) 4:4 E.J.C.L., online: < http://www.ejcl.org/44/art44-2.html>. For a contrasting view see Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 M.J.E.C.L. 111. For a new perspective see Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 Mod. L. Rev. 11.

[13] See *e.g.* many of the essays in Iain Ramsay, ed., *Consumer Law in the Global Economy: National and International Dimensions* (Aldershot: Ashgate, 1997).

II. DEFINING THE SCOPE OF THE STUDY

The concept of "unfair commercial practices" has been given a rather broad meaning in EU legislation, covering both pre-contractual and post-contractual practices, as well as commercial communication and other practices. In a legal policy discussion addressed to an international audience, such a broad definition would make the analysis practically borderless. In this article, therefore, only communicative pre-contractual commercial practices are discussed, with the focus on regulation of commercial communications aimed at attracting customers. Still, commercial communications must be understood broadly. The analysis relates to the relevance of social, cultural, and linguistic factors with regard to the harmonization and transplantation of the laws on marketing, in particular on advertising but also including the use of trade names and brands.

For policy reasons as well as concerns related to the availability of empirical evidence—marketing research in this area has mainly focused on commercial communications to consumers—this article only discusses the regulation of commercial communications to consumers.

As a result, the analysis cannot be applied to commercial communications to businesses. Even though it is well known that cultural diversity affects business behaviour,[14] one may assume that businesses generally are more socialized into a business culture that has strong international features. In fact, the contemporary discourse on an emerging, or even existing, internationalized *lex mercatoria*[15] to some extent presupposes a common regional or global understanding of how transnational trade should be carried out. Businesses, therefore, may tend to be more receptive to marketing measures anchored in a partially internationalized business culture than consumers, who are still[16] more

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[14] Fons Trompenaars & Charles Hampden-Turner, *Riding the Waves of Culture: Understanding Cultural Diversity in Business* (London: Nicholas Brealey, 1997). The authors underline the importance of sensitivity towards cultural differences in business management.

[15] See *e.g.* Berthold Goldman, "Frontières du droit et 'lex mercatoria'" Archives de philosophie du droit (1964) 177; Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International, 1999); Felix Dasser, *Internationale Schiedsgerichte und lex mercatoria* [International Arbitration and Lex Mercatoria] (Zürich: Schulthess, 1989); and Filip de Ly, *International Business Law and Lex Mercatoria* (Amsterdam: Elsevier, 1992).

[16] The growing use of the virtual marketplace may contribute to a gradual convergence of virtual shopping cultures, and accordingly of protection techniques. See Gralf-Peter Calliess,

closely tied to their national markets and cultures. As Geert Hofstede notes, "[c]hances for globalization are relatively better for *industrial marketing*, the business-to-business area. Although industrial marketing is more culture sensitive than many newcomers to the international field realize, it is a scene where *international* purchasers and international salespersons meet."[17] Some empirical research supports the view that standardized international advertising is more feasible in the business-to-business area.[18] If this is the case, there should be less need in this field for regulation that takes cultural differences into account. When one also considers the fact that regulation generally tends to be much less dense in the business-to-business field than in the consumer area, clearly the regulatory problems related to cultural differences in this field are not comparable to those found in consumer marketing.

This should not be understood, however, as a claim that such problems do not exist or can be ignored. Businesses and consumers are legal concepts, and the varying levels of protection required in different areas do not necessarily coincide with the spheres of those concepts. Of course there are businesses, and even lines of business, that are less socialized into an internationalized business culture and have the same kinds of expectations and needs as consumers. The focus on consumers in this article is based on assumptions concerning the nature of the most important practical problems, and it does not preclude the use of similar reasoning in comparable situations for business-to-business commercial communications.

One should also note that the word "consumer" in this article refers to the addressee of the communications, not to the addressee of the regulations. Rules that formally protect businesses and give standing to businesses may very well relate to communications to consumers and indirectly aim to protect consumers and the public at large; consumer expectations and needs may very well be relevant in applying such rules.

"Transnationales Verbrauchervertragsrecht [Transnational Consumer Contract Law]" (2004) 68 Rabels Zeitschrift für ausländisches und internationales Privatrecht 244. However, one cannot yet draw any conclusions from this possible convergence, in a sector that still represents only a small part of the total consumer expenditure, about consumer expectations related to daily shopping activities in the physical environment of the consumers.

[17] Geert Hofstede, *Culture's Consequence: Comparing Values, Behaviors, Institutions, and Organizations Across Nations*, 2d ed. (Thousand Oaks, CA: Sage Publications, 2001) at 451.

[18] Nikolaos Papavassiliou & Vlasis Stathakopoulos, "Standardization Versus Adaptation of Iinternational Advertising Strategies: Towards a Framework" (1997) 31 Eur. J. Market. 504 at 513.

The business-to-business case *Lifting*, which turned on the understandings of German consumers, is a good illustration. Business-to-business provisions of this kind are within the scope of the analysis presented here.

III. WHY HARMONIZE UNFAIR COMMERCIAL PRACTICES LAW?

Commercial practices are embedded in the social, cultural, linguistic, and economic environment in which they are performed. What is normal usage in one context may be unheard of in another. The usefulness of a measure varies depending on the country in which that measure is applied. To fulfill their intended purpose, commercial communications have to be adapted to local markets. Advertising styles can be differentiated according to the receiving community:

> While the British aim for cuteness and are sometimes funny, Americans explore a lot of emotions like hunger, sex, fatherhood, and so forth. In advertising, the Japanese share the French attraction to allegories, showing the brand in context. Half-words are second nature in Great Britain, the country of understatement. Spain makes a specialty of unexpected demonstrations and visual unforgettables. German advertising assumes responsibility for being advertising. German ads seek to sell, they strive to convince. Norwegian advertising is characterized by crazy, random humor. In Asia, there is a humility and a humanity that give messages a very particular sensibility.[19]

As will be discussed below, the success of marketing and advertising on a cross-border scale is, to a large extent, dependent on sensitivity towards variations in consumer behaviour in the targeted countries. In the words of an international marketing professional: "To market a product or service successfully to consumers in any single market, a manufacturer must invest the time, money, and sensitivity to discover, understand, and relate to those consumers' needs, attitudes, values, emotions, and behaviour."[20]

Different value orientations cause differences in consumer preferences: variations in consumers' understandings of self and identity

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[19] Marieke de Mooij, *Consumer Behavior and Culture: Consequences for Global Marketing and Advertising* (Thousand Oaks, CA: Sage Publications, 2004) at 216 (summarizing Jean-Marie Dru, chairman of the BDDP Group).

[20] Harold F. Clark, "Brand and Consumer Values in Global Marketing," in John Philip Jones, ed., *International Advertising: Realities and Myths* (Thousand Oaks, CA: Sage Publications, 2000) 57 at 70.

affect their behaviour; motivations and emotions are formed by culture; cognitive processes are culture-bound; and attitudes towards various marketing methods, media use, and complaint behaviour are likewise varying.[21] Cross-border or global campaigns that neglect such variations are likely to be less successful, at least in some of the targeted areas. Despite globalization of some products and brands, one cannot assume that these variations quickly diminish and disappear,[22] thereby allowing for more efficient global marketing strategies. Rather, it seems that fully standardized international advertising campaigns have lost considerable ground since the 1980s to partly or substantially localized campaigns.[23]

If this is the case, why has harmonization of unfair commercial practices law become an issue? If businesses have to adapt to local circumstances anyway, does harmonized law really matter? If businesses attempt to market globally but fail because of cultural differences, local law will not usually react to that attempt since law is not normally concerned with marketing that does not work.

To some extent, the discussion of harmonization seems to be driven by reasons other than the need for harmonization. Behaving tactically, those looking after business interests may clothe demands for deregulation, which may be politically difficult to justify, in the dress of harmonization, which seems more neutral, or even positive—who can be against harmony? In some quarters, the positive attitude towards the harmonization of unfair business practices law in Europe has obviously been driven by such attitudes, and the result has indeed been a lowering of the level of protection, at least for some EU Member States, as will be shown below in Part IV.

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[21] de Mooij analyzes issues like these with reference to many empirical studies, attempting to demonstrate the need to understand the relevance of local culture in global marketing. See *supra* note 19, c. 2, 4, 5, 6, 7. Some criticize de Mooij, arguing that she sees the glass as half empty, while others, looking for similarities rather than differences, might see it as half full. See *e.g.* Roderick White, "International Advertising: How Far Can It Fly?" in Jones, *ibid.*, 29 at 33. David Luna and Susan Forquer Gupta describe previous research on how culture influences consumer behaviour in a framework with four manifestations of culture: values, heroes, rituals, and symbols. All are shown as having an influence on consumer cognition, affect, and behaviour. See "An Integrative Framework for Cross-Cultural Consumer Behaviour" (2001) 18 Int'l Market. Rev. 45.

[22] See de Mooij, *ibid.* c. 3. de Mooij argues that consumer behaviour tends to diverge, rather than converge, with increasing wealth, as value differences can then be made more manifest.

[23] John Phillip Jones, "Introduction: The Vicissitudes of International Advertising" in Jones, *supra* note 20, 1 at 5.

Such reasoning is not the privilege of businesses alone. Consumerists may favour harmonization for the opposite reason: as a way to improve consumer protection in countries where the level of protection has been low. When assessed from the consumer's point of view, the European harmonization has certainly brought about improvements in some countries.

When the reasons for harmonization are analyzed in the following Parts, such tactical approaches are ignored. Nevertheless, in practice such reasons are probably very decisive, since legal policy actors behave much more tactically than one would like to believe.

Businesses acting across borders and those engaged in creating regional or global markets have an interest in defending harmonization, even when it does not have the effect of lowering the average level of protection offered by the laws of the countries involved. In this article, the need for harmonization is discussed in this pure form—that is, assuming that harmonization is not intended to lead to an average deregulation of the area.

In the European Union, harmonization of consumer law has been justified by the need to create consumer confidence in the national markets. This argument seems exaggerated, but becomes understandable when considering that minimum harmonization measures designed to push those countries lagging behind to adopt legislation that conforms to a common minimum standard allows countries that use more stringent standards to continue doing so. However, it is hard to see why consumer confidence would require complete harmonization.[24] Maximum harmonization of unfair business practices law is no doubt primarily in the interest of businesses that want to target the whole market affected by the harmonizing measure without being caught by differences in the levels of protection.

Even though businesses in many cases have to adapt their marketing to local needs in order to be successful, they may still be able to use the same commercial communications in several national markets in order to save costs.[25] For example, in the first stages of penetrating a

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[24] I have elsewhere extensively analyzed this abuse of the consumer confidence argument. See Thomas Wilhelmsson, "The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law" (2004) 27 J. Consum. Pol'y 317.

[25] It has, for example, been suggested, already when the European Union had only twelve members, that if the Coca-Cola Company could use its U.S. advertising throughout the European

market with a new type of product, standardized global marketing may be very successful.[26]

When using standardized communication, businesses risk running into problems with national regulations because of the varying levels of protection in various countries. In addition, cultural variations can cause legal problems if the standardized communication becomes too misleading or aggressive in a particular cultural environment. Even though the law is not interested in marketing measures that fail because of cultural insensitivity, it does react to cultural mistakes that make marketing too "effective."

From a business point of view, informational and substantive problems arise when laws are not harmonized. The informational difficulty, which relates to the lack of transparency concerning the variations in national laws, may be the most important problem because it forces businesses to incur considerable transaction costs in determining the content of the appropriate laws. In the area of unfair commercial practices law, this informational problem is exacerbated by the vagueness and variations in the structures and locations of the national rules in question.[27] Unfair commercial practices law is often much more difficult to "find" than, for example, contract law. Even in the European Union, the informational situation has been problematic. Some rules on unfair commercial practices in certain EU Member States have been located within the sphere of private law, while others have appeared in various sectors of public law. Even though compilations of rules concerning unfair business practices exist in some Member States, in others the rules have been spread over a large variety of legal instruments. Member States have used general clauses and specific legislation in various combinations, and practice concerning the general clauses varies. In some Member States, codes of conduct are important; in others, their role is less central. The situation has been called a

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Union, it could reduce expenses by roughly fifty million dollars: see U. Reese, *Grenzüberschreitende Werbung in der Europäischen Gemeinschaft* [Cross-Border Marketing in the European Community] (Munich: C.H. Beck, 1994) at 5.

[26] de Mooij, *supra* note 19 at 290, mentioning Coca-Cola and Nokia as examples.

[27] For the EU see Reiner Schulze & Hans Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, June 2003, online: The European Commission <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf>.

"cacophonic mixture of institutional traditions, historical legacies and procedural designs."[28] A harmonization measure in the area of unfair commercial practices law could most certainly ease the task of finding the right provisions in respective national laws. Such a measure would make it easier for businesses to avoid hidden traps that could lead to costly mistakes.[29]

Informational improvement, however, would not solve all problems for businesses. Even for a business that knows the laws, the wide variations in the levels of consumer protection within the European Union, as well as the numerous differences in detail, can make it very difficult to develop cost-saving regional or global marketing strategies.

Businesses seem to perceive the differences in legal regulation in this area as significant obstacles to cross-border trade. In the Impact Assessment made when preparing the measures to harmonize European unfair commercial practices law, the European Commission identified natural barriers to cross-border trade such as language and distance, and policy related barriers such as those caused by the fragmented regulation of unfair commercial practices. The commission referred to data, that 47 per cent of European businesses that were surveyed cited the need for compliance with different national regulations on commercial practices and other consumer protection as very or fairly important obstacles to cross-border trade. This figure is high, particularly compared to the answers given concerning tax differences (46 per cent) and language barriers (only 38 per cent).[30]

Harmonization needs of businesses differ depending on the kind of commercial communications affected by regulatory measures. Two main groups of situations are distinguishable.

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[28] Antonina Bakardjieva Engelbrekt, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation* (Dissertation, Stockholm University, 2003) at 609 [unpublished].

[29] With regard to contract law, Hugh Beale argues that the main purpose of harmonization efforts should be to eliminate the risk of running into such hidden traps. See Hugh Beale, "Finding the Remaining Traps Instead of Unifying Contract Law" in Stefan Grundmann & Jules Stuyck, eds., *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) at 67.

[30] EC, Commission, *Extended Impact Assessment on the Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC (the Unfair Commercial Practices Directive)*, SEC (2003), 724 at 5-6.

First, measures affecting issues related to the *product* are very important for cross-border trade. A typical case of an obstacle to trade occurs when a regulation forces the business to change the product or its packaging when selling it in another country. Brand names and slogans printed on the products or on packaging, as well as non-verbal communication inherent in trademarks and packaging designs, are examples of commercial communications that travel with the product. Businesses' harmonization interest is obviously very high regarding communication of this kind, despite the fact that even packaging design can be culturally sensitive in a way that may force the business to search for localized solutions.[31] A market that frequently hinders products from moving without changes to the product or packaging can hardly be defined as an internal market. It is not surprising that the two cases from the European Court of Justice mentioned in Part I, *Lifting* and *Graffione*, relate to commercial communication of this kind.

Second, regulatory measures are somewhat less intrusive when they affect only the *marketing and distribution* of products and services, without affecting the product or its packaging. The harmonization needs in this context relate to the ability of businesses to use regional or global marketing campaigns and to create coherent cross-border marketing strategies. Cross-border advertising might be affected by variations in such rules, and different regulations regarding acceptable selling methods can hinder the creation of coherent distribution schemes. The variations in European unfair commercial practices laws have been expressly mentioned as an obstacle to pan-European marketing strategies and campaigns.[32] With regard to the weight of this argument, it is worth noting that, according to marketing specialists, the cost savings to be gained by advertising internationally instead of locally may be negligible because translation costs, artists' fees, and similar costs may consume most of the savings.[33] It may therefore be the case that those who gain the most from harmonized regulations are the internationalized advertising agency networks that can produce international advertising services more easily.

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[31] Lianne van den Berg-Weitzel & Gaston van de Laar, "Relation Between Culture and Communication in Packaging Design" (2001) 8 J. Brand Manag. 171.

[32] Schulze & Schulte-Nölke, *supra* note 27 at 95.

[33] White, *supra* note 21 at 35.

Nevertheless, the harmonization needs of businesses are real and legitimate. This article focuses on the issue of whether and to what extent national social, cultural, and linguistic factors ought to outweigh those needs. Whereas additional justification is needed to defend diverging national rules in the first group, because of their character as direct barriers to trade, giving priority to national viewpoints can probably be more easily justified in the second group of cases.[34] Before continuing the legal policy discussion, a short overview of how this balancing is accomplished in the new European legislation is necessary.

IV. THE EUROPEAN WAY: THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

In Europe, harmonizing the rules on commercial communications and other commercial practices has been on the agenda for quite a while. In the 1980s, the *Misleading Advertising Directive*[35] and the *Television Without Frontiers Directive*,[36] which contained a chapter on television advertising, were adopted. However, the idea of comprehensive legislation based on a broad, general clause could not be realized, largely because of resistance from the United Kingdom, which was unfamiliar with the idea of such a general clause.[37]

However, in the new millennium[38] the time was finally ripe for a larger harmonization effort. The publication in 2001 of the Green Paper on European Union Consumer Protection[39] launched a public consultation on the need for a framework directive in the area, and after

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[34] In the EU context see *Criminal proceedings against Bernard Keck and Daniel Mithouard*, C-267/91, 268/91, [1993] E.C.R. I-6097 at para. 16, according to which negative harmonization measures to remove barriers to trade should not extend to "selling arrangements." This could have been meant to imply a distinction between, for example, advertising rules that affect the product directly and those that do not: see Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law* (Aldershot: Ashgate, 1997) at 132.

[35] *Supra* note 4.

[36] EC, *Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, [1989] O.J. L 298/23 as am. by [1997] O.J. L 202/60.

[37] See Ludwig Krämer, *EEC Consumer Law* (Brussels: Story Scientia, 1986) at 158-59.

[38] And earlier: see *The Green Paper on Commercial Communications in the Internal Market*, COM (96) 192 final.

[39] COM (2001) 531 final. See, on the results of the consultation, *Follow-up Communication to the Green Paper on EU Consumer Protection*, COM (2002) 289 final.

that a proposal for a directive on unfair commercial practices[40] was prepared relatively quickly. The *Unfair Commercial Practices Directive* was adopted on 11 May 2005.[41] National legislation transposing the *Directive* will be adopted by 12 June 2007 and will become applicable by 12 December 2007.[42] From that point onward, the EU will be governed by a rather broad legal regime concerning unfair commercial practices.

The *Unfair Commercial Practices Directive* may potentially have a strong impact on the unfair commercial practices law of Member States. This is due to several features that distinguish this piece of EU legislation from many other European consumer protection directives.

First, the *Directive* has a very broad scope of application. It applies to unfair business-to-consumer commercial practices before, during, and after a commercial transaction related to a product.[43] Both pre-contractual and post-contractual practices are within the scope of the *Directive*. It covers not only commercial communications, but also other acts, omissions, and courses of conduct. Therefore, at least by its wording, the *Directive* affects a broad range of national legislative measures and a number of different fields of law.[44] However, an important limitation of the *Directive*, which may affect its usefulness from the point of view of businesses, is the exclusion of business-to-business relationships from its scope. This division between rules for the protection of consumers and rules for the protection of business customers and competitors reflects the situation in some Member

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[40] *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*, COM (2003) 356 final.

[41] EC, *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council*, [2005] O.J. L 149/22 [*Unfair Commercial Practices Directive* or *Directive*].

[42] *Ibid.*, art. 19.

[43] *Ibid.*, art. 3.

[44] Hans Schulte-Nölke & Christoph W. Busch, "Der Vorschlag der Kommission für eine Richtlinie über unlautere Geschäftspraktiken KOM (2003) 356 endg. [The Commission Proposal for a Directive on Unfair Commercial Practices]" (2004) 12 *Zeitschrift für Europäisches Privatrecht* 99 at 116; Axel Beater, "Europäisches Recht gegen unlauteren Wettbewerb – Ansatzpunkte, Grundlagen, Entwicklung, Erforderlichkeit [European Law Against Unfair Competition: Starting Points, Basis, Development, Necessity]" (2003) 11 *Zeitschrift für Europäisches Privatrecht* 11 at 40 speaks in this respect about the problem of complexity.

States, but is alien to others.[45] It may only be a temporary solution because according to the Preamble of the *Directive*, the Commission has the task of examining the need for EU legislation on unfair competition beyond the sphere of the present *Directive*.[46]

Second, the *Directive* has broad regulatory content, based on a general clause outlawing "unfair" commercial practices.[47] A commercial practice is deemed unfair if it is contrary to the requirements of professional diligence and if it materially distorts or is likely to materially distort economic behaviour, with regard to a product, of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.[48] Even though the *Directive* attempts to clarify its content with the help of more elaborate provisions on misleading and aggressive practices,[49] including a provision on misleading omissions[50] and an extensive list of commercial practices that are in all circumstances considered unfair,[51] it leaves a very broad discretion to the decision maker. This may—and probably will—dilute the direct harmonizing effect of the *Directive*, since national decision makers will tend to stick to their traditions. However, it also leaves the door open for very unpredictable interventions by the European Court of Justice in a wide range of circumstances.

Third (probably the most important feature and the one most liable to criticism), the *Directive* is a maximum harmonization directive,

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[45] The variations in this respect are described as a barrier to trade in the *Green Paper on European Union Consumer Protection*, COM (2001) 531 final at 6. For more on the national variations see, for example, Schulze & Schulte-Nölke, *supra* note 27.

[46] *Supra* note 41, recital 8. In the first round of consultation, only two Member States wanted the *Directive* to also cover business-to-business relationships: see COM (2002) 289 final at 9.

[47] *Ibid.*, art. 5(1).

[48] *Ibid.*, art. 5(2).

[49] *Ibid.*, arts. 6-8.

[50] *Ibid.*, art. 7. Although the Commission does not want to speak about a "duty of disclosure," see COM (2002) 289 final at 9. See also U.K., English Department of Trade and Industry, *An Analysis of the Application and Scope of the Unfair Commercial Practices Directive*, by Christian Twigg-Flesner *et al.*, (18 May 2005) at 54, online: <http://www.dti.gov.uk/files/file32095.pdf?pubpdfdload=05%2F2112>. The authors note that "the UCPD effectively imposes a duty of disclosure, whereas existing UK law makes no such demand." See also Malek Radeideh, *Fair Trading in EC Law* (Groningen: Europa Law, 2005) at 271. Radeideh speaks about the *Directive* "as a tool to incorporate some basic positive information duties."

[51] *Supra* note 41, annex 1.

unlike most previous consumer protection directives which are minimum directives. The *Unfair Commercial Practices Directive* therefore not only fixes the minimum level of consumer protection that national law has to provide, but also forbids the national legislator from offering more protection than the *Directive* allows. The *Directive*, in fact, is the first important expression of the shift in EU consumer policy. For a few years, the Commission has advocated for a change from a minimum to a maximum harmonization approach.[52] Therefore, the *Directive* significantly affects the legal orders of the Member States, since it can function as a device for outlawing more far-reaching consumer protection measures. The potential importance of this mechanism is enhanced by its combination with the *Directive's* above-mentioned broad scope and the wide discretion it confers on decision makers.

The *Directive* certainly provides an increased level of consumer protection in many Member States. For example, in the United Kingdom, the change can be considered fairly dramatic, since the enactment of a broad general clause is an innovation for a country that previously regulated much of the area by soft law (for example, codes of conduct). In addition, the express provisions on pre-contractual disclosure within the provision on misleading omissions[53] have been mentioned as one of the situations in which the *Directive* envisages "control over commercial practices not readily tamed under existing English law."[54] On the other hand, it is also easy to point to elements of the *Directive* that can affect certain national laws in a way that decreases consumer protection. The paradigmatic example relates to the basic understanding of how consumers behave, and ought to behave, in the marketplace. The images of the consumer used to guide the application of consumer protection rules in various Member States vary considerably. The "average consumer" used to guide the application of the provisions of the *Directive* is defined in the preamble, in line with the *Gut Springenheide* test, as a person who is "reasonably well-

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[52] For references and criticism, see Geraint Howells & Thomas Wilhelmsson, "EC consumer law: has it come of age?" (2003) 28 Eur. L. Rev. 370.

[53] *Supra* note 41, art. 7.

[54] Geraint Howells & Stephen Weatherill, *Consumer Protection Law* (Aldershot: Ashgate, 2005) 433.

informed and reasonably observant and circumspect."[55] This characterization obviously gives traders more leeway than the definition in those countries where the "credulous consumer" was previously used as a benchmark.[56] The provisions relating to the protection of children against unfair commercial practices offer another example of how the maximum approach can lead to the lowering of standards in some of the Member States. Even though the *Directive* admits the need to provide special protection to vulnerable groups such as children, it certainly does not go as far in this direction as, for example, Nordic marketing law,[57] where one finds both strict limits on measures that are allowed in advertising to children[58] and outright bans on such advertisements.[59]

With a new *Directive* going this far toward harmonizing the European provisions on unfair commercial practices, it is important to consider how the "social, cultural, and linguistic factors" mentioned in the *Lifting* case can be taken into account in future decision making. Variations in these matters undoubtedly exist within the EU, and can affect both legitimate expectations concerning the level of consumer protection and fair assessment of particular practices. How is this reflected in the *Directive*?

The *Lifting* formula is indeed mentioned in the *Unfair Commercial Practices Directive*, but only in the preamble. According to the preamble, the *Directive* "takes as a benchmark the average consumer ... taking into account social, cultural and linguistic factors, as

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[55] *Supra* note 41, recital 18.

[56] See Bakardjieva Engelbrekt, *supra* note 28 at 623 for the argument that the *Directive* directly targets the relatively strict German requirements based on the *Unfair Competition Act*. See also Twigg-Flesner *et al.*, *supra* note 50 at 30 for a look at the United Kingdom, where the approach adopted by the courts seems compatible with the concept of the "average consumer."

[57] On the high level of protection in the Nordic Member States, see also Schulze & Schulte-Nölke, *supra* note 27 at 98-99.

[58] The Finnish Market Court has, for example, expressly stated that marketing to children should not be suggestive (Market Court 1984:11) and should avoid emotional devices such as reference to children's loneliness and need for friends (Market Court 1990:16).

[59] On the Swedish ban under the *Television Without Frontiers Directive*, see *Konsumentombudsmannen v. de Agostini & TV Shop*, C-34/95, 35/95, 36/95, [1997] E.C.R. I-3843. As the European Court of Justice left it to the Swedish court to make the concrete decision whether this ban conflicted with the *Treaty*, the Swedish Market Court upheld the ban (Market Court 2000:4). One could argue that this ban falls outside the scope of the *Directive*, as a matter of taste and decency (see 480-482).

interpreted by the Court of Justice ... ."[60] In other words, the average consumer test, which offers the basic measure for assessment according to the *Directive*, can be interpreted as partially bounded by culture. This gives national courts an opportunity to take into account the expectations of local consumers. The impact on commercial communications of the particular social, cultural, and linguistic background of the nation can be taken into account in the decision-making process. The reference to social, cultural, and linguistic factors might also support consumers in countries where they have become accustomed to protection that does not require them to constantly act in an observant and circumspect manner.

In any event, because the *Directive* is vaguely worded, it is likely that previous experiences and traditions of each Member State will be reflected in the emerging practice within each country. The obligation to apply the rules in a harmonized manner, as supervised by the European Court of Justice, can remove such differences only to a limited extent. Practically, only a very small portion of the cases can be referred to this court, and the court will most certainly acknowledge this by restricting its decisions to matters of principle.[61]

The need to take into account social, cultural, and linguistic factors in the application of the *Directive* arises in several contexts. One can ask to what extent the information needs of consumers are culturally relative. How is the relation between information, emotional assessments, and legitimate commercial exaggeration connected to national cultural patterns and cultural codes for how communication is understood in different societies? In what way is the impact of information on consumers' likely transactional decisions related to national habits and expectations? Is the question of whether information should be considered ambiguous at least partially related to cultural predispositions?[62]

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[60] *Supra* note 41, recital 18.

[61] See, in relation to the *Unfair Contract Terms Directive*, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter et Ulrike Hofstetter*, C-237/02, [2004] E.C.R. I-3403.

[62] The examples are taken from Geraint Howells, Hans-W. Micklitz & Thomas Wilhelmsson, *European Trade Practices Law: The Unfair Commercial Practices Directive* (Aldershot: Ashgate, 2006), c. 5(b)(ii), c. 5(b)(iv), c. 5(c)(ii), and c. 5(c)(iii).

When analyzing the space left by the *Directive* for decision making that takes into account national social, cultural, and linguistic factors, its provisions on scope should be taken into account as well. Even though the *Directive* has a large scope, there are also important limitations. One limitation, the regulation of business-to-consumer relationships, has already been mentioned. Other limitations that may be relevant from the point of view of this article are the provisions according to which the *Directive* is without prejudice, both to national rules relating to health and safety, and to specific rules governing regulated professions.[63]

The limitation that most clearly recognizes the need for sensitivity towards social and cultural variations is the exclusion of "taste and decency" matters from the scope of the *Directive*. This limitation is not expressed directly in the articles of the *Directive*, but follows from the provision on purpose, according to which the *Directive* attempts to approximate the rules on unfair commercial practices "harming consumers' economic interests."[64] Therefore, as a rule, "matters of taste, decency and social responsibility will be outside [its] scope."[65] According to the preamble, the *Directive* "does not address legal requirements related to taste and decency which vary widely among the Member States" and the Member States are therefore able to continue to ban commercial practices on these grounds, regardless of the *Directive*.[66]

The line between rules to defend taste and decency and rules to protect consumers is obviously blurred. Some types of provisions are self-evidently outside the scope of the *Directive*. National rules on pornography, protection of religious beliefs, or combatting racism in commercial practices could be cited as examples; issues related to gender equality and sexism also belong to this sphere. Advertisers who want to use scantily clad persons in their advertisements, or use messages that are otherwise problematic from a gender equality point of view, may continue to face considerable variation in the rules to be applied in different Member States.[67] Another issue that appears to be

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[63] *Supra* note 41, arts. 3(3), 3(8). Art. 3 contains a fairly long list of other delimitations.

[64] *Ibid.*, art. 1.

[65] *Supra* note 40 at 10.

[66] *Supra* note 41, recital 7.

[67] Examples of such rules can be found in several Member States. See Hans-W. Micklitz & Jürgen Kessler, eds., *Marketing Practices Regulation and Consumer Protection in the EC Member*

outside the scope of the *Directive* is the use of violent scenes in advertising.[68] The assessment of some of the famous Benetton advertisements containing, for example, pictures of HIV patients and dead soldiers, is also basically related to how one understands taste and decency. The variations in the assessments of these advertisements in different parts of Europe[69] would therefore not necessarily have been affected by the present *Directive*.

Obviously, regulations that aim to protect features of the national culture beyond the requirements of taste and decency are also left outside the scope of the *Directive*. At an early stage of the preparation of the *Directive*, the Commission signalled that issues related to "pluralism" and to "the protection of culture" should be excluded from its scope.[70] This means, among other things, that Member States' rules on language in commercial communications that primarily aim at safeguarding the position of the national language, or of a recognized minority language, cannot be set aside using the *Directive*.[71]

V. TYPOLOGY OF RELEVANT DIFFERENCES

Looking now more closely at the relevance of cultural differences in the context of commercial communications, one starting point could be the contributions of general cross-cultural studies. A much-used model for understanding cultural variations is the one developed by Geert Hofstede. Hofstede distinguishes five dimensions of national cultures: *power distance* (how societies handle human

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States and the US (Baden-Baden: Nomos, 2002). Regarding Denmark, Finland, Ireland, the Netherlands, Portugal, Spain, and the United Kingdom, respectively, see 57, 71, 196, 260, 271, 353, 409.

[68] On the acceptance of games that involve "playing at killing" as a public policy issue, see *Omega Spielhallen- und Automatenaufstellungs-GmBH v. Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, [2004] E.C.R. I-9609.

[69] The Finnish decision is reported at (1996) 45 GRUR Int. 251. See also comparative comments with references in A. Kur, "Anmerkung [Remark]" (1996) 45 GRUR Int. 255.

[70] *Green Paper on European Union Consumer Protection*, COM (2001) 531 final 13.

[71] But, they may be in conflict with the basic freedoms of the *Treaty*. See the Piageme doctrine elaborated first in *Piageme and others v. BVBA Peeters*, C-369/89, [1991] E.C.R. I-2971 at para. 16, according to which "[t]he obligation exclusively to use the language of the linguistic region constitutes a measure having equivalent effect to a quantitative restriction on imports, prohibited by Article 30 of the Treaty." See also *Groupement des Producteurs, Importateurs et Agents Généraux d'Eaux Minérales Etrangères,' VZW (Piageme) and others v. Peeters NV*, C-85/94, [1995] E.C.R. I-2955.

inequality related, for example, to prestige, wealth, and power);[72] *uncertainty avoidance* (how societies attempt to cope with uncertainty about the future);[73] *individualism and collectivism* (the nature of the relationship between the individual and the collectivity);[74] *masculinity and femininity* (which, in Hofstede's words, relates to "what implications the biological differences between the sexes should have for the emotional and social roles of the gender," looking, for example, at the relative importance of "ego goals such as careers and money" and "social goals such as relationships, helping others, and the physical environment");[75] and, finally, *long-term versus short-term orientation*, with implications for family, work, and social life, as well as for religious and philosophical themes.[76]

Hofstede's distinctions are not primarily designed for analyzing marketing strategies. However, Hofstede notes their usefulness in this context, and criticizes prevailing marketing theory for largely neglecting the influence of national culture on consumer behaviour.[77] The Hofstede dimensions have been used successfully in marketing research by others, who stress the need to take into account the national context in globalized marketing strategies.[78]

National and local cultures vary in many ways. As each culture—and it is wise in this context to refrain from defining "culture"—is unique, every classification in some way diminishes the richness of the culture being classified. The parameters around which the variations might be assessed are abundant. Indeed, many classification schemes of national cultures have been offered other than the one developed by

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[72] Hofstede, *supra* note 17 at 79. See also Geert Hofstede & Gert Jan Hofstede, *Cultures and Organizations: Software of the Mind: Intercultural Cooperation and Its Importance for Survival*, 2d ed. (New York: McGraw-Hill, 2005), c. 2 at 39ff.

[73] Hofstede, *ibid.* at 145. See also Hofstede & Hofstede, *ibid.* c. 5 at 163ff.

[74] Hofstede, *ibid.* at 209. See also Hofstede & Hofstede, *ibid.* c. 3 at 73ff.

[75] Hofstede, *ibid.* at 279. See also Hofstede & Hofstede, *ibid.* c. 4 at 115ff.

[76] Hofstede, *ibid.* at 351. See also Hofstede & Hofstede, *ibid.* c. 6 at 207ff.

[77] Hofstede, *ibid.* at 449.

[78] de Mooij employs the Hofstede dimensions extensively. See *supra* note 19 at 33-37. For other examples, see Ven Sriram & Pradeep Gopalakrishna, "Can Advertising be Standardized Among Similar Countries? A Cluster-Based Analysis" (1991) 10 Int'l J. Advert. 137; and Mindy F. Ji & James U. McNeal, "How Chinese Children's Commercials Differ From Those of the United States: A Content Analysis" (2001) 30:3 J. Advert. 79.

Hofstede.[79] For internationalized marketing strategies, other local environmental factors are obviously relevant, such as economic and legal conditions, competition, and advertising infrastructure.[80] In this context, however, there is no need to take the analysis of the various classifications further. The discussion merely focuses our attention on the need to comprehend the cacophony of cultures in the world and to have some yardsticks against which these differences can be measured. The Hofstede dimensions and other similar parameters can be used in this sense as shorthand for complicated explanations of differences; indeed, they are used in this manner later in this article, although they do not directly offer analytical tools for the regulatory approach of this article.

The marketing research that is founded on this approach is primarily relevant for assessing the efficiency of marketing. For a marketer, it is interesting to know that, for example, showing single persons in advertisements can be counter-productive in a collectivistic culture, as the "lonesomeness" can be regarded as an indication of the product being bad.[81] From a regulatory perspective, this is of course of less relevance. As previously noted, the regulator is not concerned with a marketing measure that is not effective. The variations relevant to the regulatory perspective are those that are concerned with the purpose of marketing, not with the purpose of regulation.

Much of the regulation of marketing and commercial communications is based on consumer protection aims. This is indeed the case with the *Unfair Commercial Practices Directive.* When discussing the relevance of cultural variations for regulation of this kind, the consumers' need for protective regulation must be the angle from which the issue is approached. In the following discussion, the existing empirical knowledge and the theoretical discussions of the various

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[79] See *e.g.* Hofstede & Hofstede, *supra* note 72 at 31-34; de Mooij, *supra* note 19, c. 2. In a business context, somewhat similar parameters are used by Trompenaars & Hampden-Turner, *supra* note 14: universal vs. particular (c. 4), individualism vs. communitarianism (c. 5), affective vs. neutral (c. 6), specific vs. diffuse (c. 7), status by achievement vs. ascription (c. 8), orientation to future vs. orientation to past (c. 9), and controlling nature vs. letting it take its course (c. 10).

[80] See the useful comprehensive overview by Papavassiliou & Stathakopoulos, *supra* note 18 at 504-27, in particular at 506. Another broad analytical framework for international marketing research is offered by Terry Clark, "International Marketing and National Character: A Review and Proposal for an Integrative Theory" (1990) 54:4 J. Market. 66 at 75.

[81] Hofstede, *supra* note 17 at 449.

dimensions of culture are read through this lens. What kind of cultural variations are relevant with regard to the consumers' need for protection?

The purpose of this analysis is not to give an overview of existing research on national cultural variations and marketing. It does not purport to duplicate or describe marketing research as such, but rather to use examples collected from marketing research, chosen from a regulatory perspective. In other words, this is not a study of marketing, but a study of the regulation of marketing.

Cultural variations have an impact on how consumers receive commercial communications. From the point of view of consumers' need for protection, factors that seem relevant include variations related to the trust, understandings, rationality patterns, decision-making behaviours, and values and preferences of consumers. This list is in no way exhaustive. One could very well imagine other variations that would be equally important from the point of view of regulation.

A. *Trust*

Consumers, to some extent, can be expected to adapt their decision making in the marketplace to the level of trust they have in the other players in the arena. The less trust they have in the overall honesty of the marketplace, the more they will feel a need to be on guard against unfair practices.

One factor that affects this trust is the degree of reliance consumers place on the system of protection and the relevant authorities. Globally, the variations in the level of trust in the consumer protection authorities must be immense. According to empirical evidence, even within the European Union the level of consumer trust in the consumer protection system is strikingly varied. In fact, consumers in some countries, especially in the south of Europe, such as Italy, Greece, and Portugal, appear to trust foreign systems more than their own; in contrast, for example, German, Swedish, and Danish consumers have a reversed pattern of expectations.[82] The gap between those who believe most strongly in their own legal system of consumer protection—Finnish consumers—and those who are most skeptical

[82] See the European survey, "Flash Eurobarometer 117: Consumers Survey: Results and Comments" (EOS Gallup Europe, January 2002) at 33-37.

concerning their protection at home—Greek and Portuguese consumers—is wide.[83] In the European Union, the inclusion of former socialist countries, where the public often has a quite negative attitude towards authorities, has probably broadened the spectrum even more.[84] Harmonization of substantive consumer protection rules—the aim of the *Unfair Commercial Practices Directive*—does not necessarily affect such variations in the patterns of trust in the protection systems, as these are often embedded in deeper layers of culture.

It seems clear that if consumers have such different expectations concerning their legal protection, they will also have very different views about how cautiously they must behave as a consumer. The average consumer behaves differently in a marketplace that the consumer regards as well regulated and supervised than in one where the consumer feels less safe.

Of course, the trust and confidence of consumers in the marketplace does not relate to consumer protection alone. In addition to the trust in the authorities as guarantors of a reasonably safe marketplace, the trust in the relative moral integrity of the business sector, or at least in the businesses the consumer is dealing with, also matters.

The culture of the marketplace most certainly varies in this respect as well. To mention one European product-specific example, there was considerable variation between EU Member States (before enlargement) concerning the degree of consumer confidence in the safety of food available on the market.[85] This result probably reflects variations in trust both in regulators and in the businesses and the agricultural sectors of each country, but may also be attributable to variations in the patterns of uncertainty avoidance in the Member States. Still, such variations—which can be identified for other products and sectors as well—are relevant when discussing the informational requirements related to, for example, the safety aspects of the products.

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[83] *Ibid.* at 32-33. Eighty-two per cent of the Finns feel themselves to be well protected, compared to only 21 per cent of Greek and Portuguese. The survey only covers the then fifteen Member States.

[84] See Hans-W. Micklitz, ed., *Rechtseinheit oder Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten* [Legal Unity and Legal Pluralism in Europe: The Role and Function of Consumer Law in the EC and in the States of Middle and Eastern Europe] (Baden-Baden: Nomos, 1996).

[85] de Mooij, *supra* note 19 at 116.

In examining consumer trust in businesses, one should also note an interesting contrast between individualistic and collectivistic cultures. In the latter, much more emphasis is put on the cultivation of a lasting and trusting relationship between the business and the consumer. It has been said that Japanese advertising aims at building relationships of "dependency" rather than selling products, and that Asian branding "emphasizes trust, confidence and security in popular, famous brand names and corporations."[86] Therefore, Asian marketers use more company brands, while product brands are more typically Western.[87] The degree of brand loyalty varies between cultures.[88] To the extent that variations are present, regulators in countries with high dependency behaviour should obviously be more alert to misleading and dependency-building practices than in countries where more individualistic consumer behaviour is the norm. The fact that collectivistic consumers tend to make complaints less frequently, because of loyalty and the need for harmony,[89] may also underline their need for preventive protection.

B. *Understanding Communications*

People do not understand communications in the same way. It is well known, for example, that education affects abilities and patterns of understanding. Variations in the level and profile of education therefore affect the protection that consumers need. This rather self-evident starting point is reflected to some extent in the national setting, in the discussion concerning the particular needs of vulnerable consumers. However, even though the *Unfair Commercial Practices Directive*, contains a special reference to vulnerable consumers,[90] the harmonization discourse usually does not address the issue of systematic

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[86] *Ibid.* at 210, 165; see also 264, 311, 312.

[87] *Ibid.* at 293.

[88] *Ibid.* at 223, according to which brand loyalty is stronger in lower-income countries.

[89] Harry S. Watkins & Raymond Liu, "Collectivism, Individualism and In-Group Membership: Implications for Consumer Complaining Behaviors in Multicultural Contexts" in Lalita A. Manrai & Ajay K. Manrai, eds., *Global Perspectives in Cross-Cultural and Cross-National Consumer Research* (New York: International Business Press, 1996) at 69.

[90] *Supra* note 41, art. 5(3): "a clearly identifiable group of consumers who are particularly vulnerable ... because of their mental or physical infirmity, age or credulity."

variations in education levels between countries. It is not brought to the fore that the "vulnerableness" may be more or less "average."

Only in respect of command of foreign languages has this issue been discussed in European legal quarters.[91] While "average consumers" in some countries are expected to know only their mother tongue, in other countries many have command of other languages as well. Within the European Commission there seems to be a rather naive belief that the problem of unilingualism is diminishing.[92] However, even in countries where many claim to be able to speak English, comprehension of the content of commercial communications in English varies.[93] Variations in *Vorverständnis* (pre-understanding) may lead to different understandings of the same English word, as recognized in *Lifting*. In the context of misleading information, such variations are clearly relevant.

These variations can also be related to differences in non-linguistic symbols. Since the colour purple in some Asian countries is associated with something expensive, in contrast to the United States where the perception is the opposite,[94] visual messages based on this colour may have very different meanings in these cultures.

The variations in understanding reflect education and linguistic skills as well as symbolic differences. To some extent, they are founded in deeper layers of culture. A common example is the difficulty encountered in translating humour across cultures; use of humour in cross-border marketing strategies is considered very risky.[95] From a regulatory point of view it may happen that a humorous overstatement in one culture may be a misleading statement in another.

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[91] See Hans-W. Micklitz, "Zum Recht des Verbrauchers auf die eigene Sprache [The Right of Consumers to Their Own Language]" (2003) 11 *Zeitschrift für Europäisches Privatrecht* 635.

[92] See *Extended Impact Assessment on the 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*, SEC (2003) 724 at 5: "Language barriers are falling. 53% of EU consumers say they can speak at le[a]st one European language in addition to their own and 26% two other languages, while 71% think that everyone in the EU should be able to speak another European language in addition to their mother tongue."

[93] For examples see de Mooij, *supra* note 19 at 194.

[94] *Ibid.* at 197.

[95] See *e.g.* Ming-Hui Huang, "Exploring a new typology of advertising appeals: basic, versus social, emotional advertising in a global setting" (1998) 17 Int'l J. Advert. 145 at 153-54.

More generally, patterns of understanding vary in different types of cultures. Collectivist cultures are often high-context communication cultures, in which much of the information of a message is implicit in the context or the person, as opposed to individualistic low-context communication cultures, which employ more explicit verbal messages.[96] Advertising tends to be very different in high-context and low-context communication cultures[97]—for example, in the relatively high-context France as compared to the very low-context Germany[98]—and so the regulations must vary accordingly. The greater the importance placed on the implicit messages in the culture, the greater the need for regulations that are capable of looking beyond the mere words of the commercial communication. What is misleading is not just a linguistic issue; it relates to much deeper layers of culture.

C. *Rationality Patterns*

Much of Western consumer protection debate turns on the supposed rationality of the consumer. To a varying extent, the consumer is expected to be rational. The *Unfair Commercial Practices Directive* assumes that the consumer is "reasonably well-informed and reasonably observant and circumspect." However, the *homo economicus* may be just "a social construct of the Western world."[99] Even within that part of the world, conceptions of what is rational and levels of "rationality" may vary considerably.[100]

The rates of fun shopping and impulsive buying, as opposed to planned purchasing, show distinct cross-cultural variations.[101] It is

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[96] Michael Callow & Leon Schiffman, "Implicit Meaning in Visual Print Advertisements: A Cross-Cultural Examination of the Contextual Communication Effect" (2002) 21 Int'l J. Advert. 259; de Mooij, *supra* note 19 at 33, 211.

[97] de Mooij, *ibid.* at 217-23.

[98] Michael Solomon, Gary Bamossy & Søren Askegaard, *Consumer Behaviour: A European Perspective* (New York: Prentice Hall, 1999) at 426.

[99] de Mooij, *supra* note 19 at 84. For further analysis see Gerrit Antonides, "An Attempt at Integration of Economic and Psychological Theories of Consumption" in Mary Lambkin *et al.*, eds., *European Perspectives on Consumer Behaviour* (London: Prentice Hall, 1998) 317.

[100] Trompenaars & Hampden-Turner, *supra* note 14 at 7. The authors claim, with reference to examples, that "there is a clear-cut cultural border between the northwest European (analysis, logic, systems and rationality) and the Euro-Latin (more person-related, more use of intuition and sensitivity)."

[101] de Mooij, *supra* note 19 at 262-65.

interesting to note, however, that although individualistic Western cultures adhere more strongly to the vision of a rational consumer, impulsive buying seems more prevalent in those cultures; collectivistic Asian consumers seem to be better able to suppress such traits.[102] This paradox may indicate that protection is not considered as important in "fun" shopping as in "rational" shopping; the "fun" may include an element of risk and the acceptance of a certain chance of failure. Be that as it may, since the cultural patterns of "rational" behaviour in different segments of the market are not the same in every country, the demands put on regulation must vary accordingly.

Most certainly, the "rational" and the "affective" never appear in pure forms in consumer behaviour, but rather interact with each other. The interaction between them varies according to cultural predispositions. For example, while consumers in an individualistic culture like the United States tend to focus more on product-related claims in advertisements, their collectivistic Taiwanese counterparts are more persuaded by the aesthetic qualities and appropriateness of the advertisement.[103] With regard to an important consumer product such as food, the relationship between the affective and cognitive components takes very different forms even within Western societies, with different emphases on pleasure, health, and purity.[104] While detailed product data are important to German car buyers, Italians focus more on the images connected with the car.[105] The "rationality" of price consciousness in comparison with matters related to the pleasure of shopping also differ—"hard discounters" like Lidl have been able to attain a much bigger market share in Germany than in the rest of Europe.[106] The role and effectiveness of comparative advertising is very different in different

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[102] Jacqueline J. Kacen & Julie Anne Lee, "The Influence of Culture on Consumer Impulsive Buying Behavior" (2002) 12 J. Consum. Psychol. 163 at 173.

[103] Sharon Shavitt, Michelle R. Nelson & Rose Mei Len Yuan, "Exploring Cross-Cultural Differences in Cognitive Responding to Ads" (1997) 24 Adv. Consum. Res. 245.

[104] de Mooij, *supra* note 19 at 186-87.

[105] *Ibid.* at 184.

[106] *Ibid.* at 295. However, some data suggest that the extent to which price information is included in advertising is not culturally based. See Bob D. Cutler, Rajshekhar G. Javalgi & M. Krishna Erramilli, "The Visual Components of Print Advertising: A Five-Country Cross-Cultural Analysis" (1992) 26:4 Eur. J. Market. 7 at 16.

cultures.[107] The reliance on "scientific" data and brands—for example, *Clinique*[108]—may vary depending on, among other things, the degree of uncertainty avoidance of the culture in question.[109] In short, even the "reasonably well-informed and reasonably observant and circumspect" consumer may look very different in different cultural surroundings.

D. *Role of Commercial Communications in Decision Making*

The pressure and effects of advertising and other commercial communications on consumers in a certain culture obviously have some correlation with the relative importance of various sources of information and influence in consumer decision making in that culture.

In collectivist cultures, the relative weights of the information sources used in consumer decision making are not the same as in more individualistic cultures. Communications with friends, colleagues, and other word-of-mouth communications, seem to be more important in China and Japan than advertisements and salespeople, which carry more weight in the United States.[110] Attitudes towards marketing and acceptance of marketing also vary between cultures. For example, students from New Zealand, Denmark, and Greece have been shown to be significantly more critical of advertising than their peers from the United States,[111] and the British consider advertising more favourably than the Germans and the French.[112] Such variations in the attitudes toward marketing and its importance may have an impact on how strictly one has to regulate marketing in order to sufficiently cater to the consumers' need for protection.

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[107] Jung Ok Jeon & Sharon E. Beatty, "Comparative Advertising Effectiveness in Different National Cultures" (2002) 55 J. Bus. Res. 907.

[108] *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC et Estée Lauder Cosmetics GmbH*, C-315/92 [1994] E.C.R. I-317. It is no surprise that this case, outlawing a measure that prohibited the name "Clinique" for certain cosmetics because consumers might believe it had pharmaceutical properties, was originally a German case.

[109] de Mooij, *supra* note 19 at 301 (concerning cosmetics and other personal care products).

[110] *Ibid.* at 222.

[111] J. Craig Andrews, Steven Lysonski & Srinivas Durvasula, "Understanding Cross-Cultural Student Perceptions of Advertising in General: Implications for Advertising Educators and Practitioners" (1991) 20:2 J. Advert. 15 at 25.

[112] *Supra* note 98.

Advertisers also make use of such differences. For cultures in which dependence upon and conformity to group behaviour is very important, commercial communication can be adapted to reinforce these feelings, rather than to offer a basis for perceived individual decision making.[113] In China, marketers of ice cream and beer have made efforts to make their products have the appearance of being used by consumers—for example, asking restaurant staff to leave empty beer bottles on the table—because this seems to be the best way of influencing other consumers' buying decisions in that culture.[114] In such cultures the problem of product placement has a larger dimension than in more individualistic cultures. If conformity to the behaviour of others is very important in a certain culture, this could give rise to new forms of aggressive marketing, which may be unacceptable.

The particular problem of commercial communications directed towards children manifests differently depending on the position of children in the family. Children are more independent, from a relatively young age, in low power distance cultures than in high power distance cultures, and therefore the regulation of marketing to children is more important in low power distance cultures. In contrast, children in high power distance cultures depend on their parents to a greater extent in making decisions,[115] and so regulation is less essential. The conflicts even within the EU concerning the regulation of marketing to children may reflect these kinds of variations. The Nordic countries, in which children are given independent decision-making opportunities fairly early on, regulate commercial communications to children more strictly than other European countries, in which children are more protected by their dependence on their parents in this respect.

E. *Values and Preferences*

Different cultures contain different value orientations, and these cause consumers to prefer different products and brands. This is fairly

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[113] For example, in the individualistic United States, advertising that emphasizes individual benefits is shown to be more persuasive, whilst in the collectivistic South Korea advertising emphasizing family or in-group benefits is more persuasive. See Sang-Pil Han & Sharon Shavitt, "Persuasion and Culture: Advertising Appeals in Individualistic and Collectivistic Societies" (1994) 30 J. Exp. Soc. Psychol. 326 at 343.

[114] de Mooij, *supra* note 19 at 163.

[115] *Ibid.* at 34, 159.

self-evident. What is perhaps more surprising, however, is that these variations are not necessarily diminishing as a consequence of globalization, and indeed may even be growing because of increased wealth.[116] When basic needs are catered to, there is more space for realizing values and preferences. Therefore, the impact of cultural preferences on consumer protection may be seen as a luxury problem. However, with such a yardstick, large parts of consumer protection in affluent societies may be given a luxury label as well.

Variations in values and preferences influence consumers' assessment of what information is important when acquiring a product or service. For example, in high uncertainty avoidance cultures, the interest in health and purity issues may be much higher than in cultures less obsessed with such topics.[117] Other Hofstede distinctions, such as differences between feminine and masculine cultures, may affect consumer informational needs as well: in the "feminine" Swedish culture, more than 30 per cent of the consumers did not know the engine size of their car; the same information was unknown to only a little more than 2 per cent of the consumers in the "masculine" British culture.[118] Attitudes towards environmentalism and consumer responsibility in this respect are affected by several of the cultural parameters.[119] National pride and similar attitudes strongly affect consumers' views on whether to acquire domestic or foreign products and which foreign products are preferred.[120] The reason for acquiring the same product may also be rather different in different cultures: whilst a McDonald's meal is considered a cheap, fast meal in the United States, it might very well be seen as a status expression in a less affluent country.[121] The video-CD player became popular more quickly in Asia than in the West because it could be used for karaoke.[122] In fact, almost all product categories contain some culture-specific product values.[123]

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[116] *Ibid.*, especially c. 3.

[117] *Ibid.* at 142-43.

[118] *Ibid.* at 256.

[119] *Ibid.* at 142.

[120] *Ibid.* at 120-22.

[121] Trompenaars & Hampden-Turner, *supra* note 14 at 3.

[122] de Mooij, *supra* note 19 at 291-92.

[123] *Ibid.* at 296-302.

Variations in consumer preferences obviously affect consumers' informational needs. Not only does the relative importance of particular data for consumers have an impact on the way misleading communications of such data are assessed, it must also affect the application of rules on misleading omissions. For example, the indirect duty of disclosure contained in the *Unfair Commercial Practices Directive* cannot be wholly unaffected by what consumers in various EU Member States consider important to their decisions.

Beyond the impact on consumers' informational needs, variations in values or preferences may have a much broader significance for the assessment and acceptance of commercial communications of various kinds. Of course, attitudes towards issues like religion, racism, gender equality, pornography, and violence in different cultures lead to different boundaries for acceptable commercial speech. Various cultural interpretations of messages may also affect their perceived offensiveness in these respects.[124] Therefore, even within the European Union, legislators have recognized the impossibility of harmonizing regulations related to such culturally sensitive issues by leaving out matters of taste and decency from the scope of the *Unfair Commercial Practices Directive.*

VI. NATIONAL STEREOTYPES AND LATE MODERN LIFESTYLES

The above analysis indicates the continuing relevance of national social, cultural, and linguistic factors as a counterbalance to business and market-driven harmonization and transplantation processes in the regulation of unfair commercial practices law. There is, however, an obvious counter-argument to the analysis so far: are the "differences" discussed in Part V national stereotypes, which have a decreasing importance in the globalized world? Do they appear increasingly strange to the emerging class of globalized consumers? Are they perhaps still applicable to an older, more traditional generation, but not to younger generations accustomed to cultural encounters?

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[124] Callow & Schiffman, *supra* note 96 at 260. Whilst a Benetton advertisement showing a white baby nursed by a black woman won awards in Europe, as it was perceived as a message of equality and unity, it was controversial in the United States because it was easily read as referring to black nannies as slaves.

In late modernity, many would claim that consumer groups are more distinguishable by lifestyle than by national affiliation, that contemporary chaos and ambivalence[125] affect national identities and behavioural patterns, and that the grand narrative of the homogeneous nation-state has been replaced by multiculturalism, subcultures, and cross-border networking.[126] If this is true—if lifestyles indeed are replacing national consumer cultures—it would seem odd to look at national differences when discussing variations in consumers' need for protection.

Some may argue that this claim is strongly overemphasized. According to this line of argument, the decline of the relative importance of national cultures, if any, has been much more modest than is assumed by the critics. Even though a superficial glance at consumption patterns indicates growing similarities between consumer groups in different countries, with similar groups adhering to similar fashions and trends, a closer look reveals the deep cultural cleavages that persist beneath the similarities.[127] As has been said, "[g]oods, techniques, and fashions can be imported by a society without necessarily leaving deep marks in the sediment of its inner cultural-meaning structures."[128]

There is some empirical evidence supporting the view that national cultures have continuing importance. For example, Hofstede notes that the country variable still explains much more of the consumption variance than the lifestyle variable.[129] Much of the other research mentioned, as well as marketing practice, also indicates the relevance of national variations. It is particularly notable that some of the empirical analyses have been done on students from various

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[125] Zygmunt Bauman, *Modernity and Ambivalence* (Cambridge: Polity Press, 1991).

[126] See especially Manuel Castells, *The Information Age: Economy, Society and Culture*, vol. 2: *The Power of Identity*, 2d ed. (Oxford: Blackwell, 1997).

[127] See *e.g.* Güliz Ger & Russell W. Belk, "I'd Like to Buy the World a Coke: Consumptionscapes of the 'Less Affluent World'" (1996) 19 J. Consum. Policy 271.

[128] Hansfried Kellner & Hans-Georg Soeffner, "Cultural Globalization in Germany" in Peter L. Berger & Samuel P. Huntington, eds., *Many Globalizations: Cultural Diversity in the Contemporary World* (Oxford: Oxford University Press, 2002) 119 at 142. This collection contains several essays analyzing the continuing importance of local culture beneath surface-level globalization phenomena.

[129] Hofstede, *supra* note 17 at 450.

countries,[130] and that students can probably be expected to represent one of the most globalized groups of consumers.

It is not necessary in this context, however, to stick to such a strong argument against the claim that lifestyle variations are more important than national variations. Even when one admits the fragmentation and globalization of consumer cultures—and it would indeed seem odd to deny it in the face of general features of a late modernity that relativizes tradition[131]—the national perspective remains important from a regulatory point of view. Even if variations in lifestyles and affiliation to sub-groups are more important than national variations, it cannot be denied that regulation of markets is either a national responsibility, or the responsibility of an international or regional organization. In the European context, the discussion is primarily about the division of competencies between national and European Union lawmakers to issue and apply regulatory measures, and not about whether one should have different rules for different lifestyle groups.

One could, of course, conceive of an application of law that focuses on lifestyle differences rather than national differences, or imagine the creation of different codes of conduct to be used in relation to different consumer groups. However, (leaving aside the special rules for vulnerable groups such as children, which is yet another way of attaching relevance to variations) such differentiation does not really happen because the market, as the entity to be regulated, is perceived in national and regional terms.

In fact, on a national level the variations in lifestyles, as well as variations related to wealth, gender, place of living, and other similar factors, are usually hidden behind the "average consumer" concept. The concept works as an instrument for creating homogeneous rules for a fragmented group of consumers. A fundamental criticism of the concept would, of course, claim that even on a national level there does not exist any "average consumer" that would be representative of the fragmented collection of lifestyles and subcultures that form contemporary society. To some extent this is most certainly true. However, in legal discourse the "average consumer" is used as a normative instrument and cannot

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[130] See *e.g.* Andrews, Lysonski & Durvasula, *supra* note 111.

[131] Anthony Giddens, "Living in a Post-Traditional Society" in Ulrich Beck, Anthony Giddens & Scott Lash, eds., *Reflexive Modernization* (Cambridge: Polity Press, 1994) 56.

therefore be ignored. Using this concept in a regulatory text, one cannot avoid the question of whether and to what extent the "average"—even though it should be understood as normative rather than empirical—should refer to the national average or to some broader harmonized average as the starting point for the normative discussion.

VII. CONCLUSIONS

A taxonomy of possible variations that can create a need to take into account national social, cultural, or linguistic factors when assessing a commercial practice from a consumer point of view has been presented in this article. It shows that there are differences between countries with respect to consumers' trust, understandings, rationality patterns, decision-making behaviour, and values and preferences that can influence the outcome of unfair commercial practices regulation. The empirical examples provide a good foundation for a criticism of culturally blind harmonization and transplantation attempts.

Of course, one should avoid drawing direct conclusions on regulation from empirical data collected for the purpose of marketing research. The data only offer examples of differences that might be relevant from a regulatory perspective. Whether the cultural variations recorded in these examples are significant enough to justify variations in regulation is a normative question. Since the application of regulatory measures to the field of commercial communications often involves a delicate balancing of arguments based, for example, on general clauses like the one in the *Unfair Commercial Practices Directive*, it seems reasonable to assume that the national variations noted could be regarded as relevant. The very fine-tuned assessments in this area are often made with reference to the supposed understandings and behaviour of average consumers or of similar ideal types. The above analysis should make it clear that one needs to recognize variations in the content of such ideal types in different national settings. The existence of variations neither could be nor should be neglected in the balance.

Such variations do not only exist globally, but also exist within more culturally similar areas, such as the European Union.[132] It is worth noting that the Hofstede dimensions have been validated by country scores both globally and in Western Europe.[133] In a cluster-based analysis of the relevance of economic, cultural, and media-based differences for international advertising campaigns between forty countries, the Western European countries were clustered into three of the six global groups that the authors distinguished.[134] The Euro-consumer is still absent.[135] The existence of numerous languages alone may suffice to retain such a situation for a long time.[136]

The social, cultural, and linguistic differences between receivers of commercial communications in different countries have, to date, largely been ignored. Contemporary research on consumer marketing, however, has shown a rapidly growing interest in the effect of cultural variations on the efficiency of marketing. As shown, there is a growing awareness of and a bulk of empirical research looking at such issues from the point of view of marketers. The literature on global or international marketing today recognizes the need to combine global and local perspectives.[137] This recognition has also affected advertising practices. Even in the European Union, advertising agencies are advised to "think for Europe, but act locally."[138]

Against this background, the almost total silence concerning the relevance of cultural variations in regulatory literature attracts attention.

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[132] The cultural similarity of the EU is of course arguable; see *e.g.* Trompenaars & Hampden-Turner, *supra* note 14 at 8: "Nowhere do cultures differ so much as inside Europe."

[133] de Mooij, *supra* note 19 at 36.

[134] Sriram & Gopalakrishna, *supra* note 78 at 144. The (partially) European clusters were the United Kingdom and Ireland (together with many former British colonies); the Nordic countries and Holland; and the other West European countries.

[135] Solomon, Bamossy & Askegaard, *supra* note 98 at 434. See also Berend Wierenga, Ad Pruyn & Eric Waarts, "The Key to Successful Euromarketing: Standardization or Customization?" in Manrai & Manrai, *supra* note 89 at 39.

[136] Kellner & Soeffner, *supra* note 128 at 142, identify language invasion as the important factor leading to cultural change.

[137] See *e.g.* the strong caveats against forgetting local aspects, contained in almost all papers in Jones, *supra* note 20. See also B.J. Moon & S.C. Jain, "Consumer Processing of Foreign Advertisements: Roles of Country-of-Origin Perceptions, Consumer Ethnocentrism, and Country Attitude" (2002) 11 Int'l Bus. Rev. 117.

[138] Sally Dibb, Lyndon Simkin, & Rex Yuen, "Pan-European Advertising: Think Europe - Act Local" (1994) 13 Int'l J. Advert. 125 at 136.

In part this may be explained by the national focus of most legal doctrines. A national analysis of regulatory issues related to commercial communications easily takes the consumer expectations and needs within its own culture as a given, and therefore is not forced—except when the society itself is strongly multi-cultural[139]—to discuss the impact of cultural variations thoroughly.

What is remarkable is the almost equal lack of discussion concerning the issue, even in legal harmonization literature. Within the European Union the harmonization of unfair commercial practices law has been discussed either as a whole or in parts for more than twenty years. Still, the question of the impact of cultural differences between consumers from different countries on their need for protection has been largely neglected. Lawyers have indeed discussed the consequences for and limitations of various harmonization projects resulting from the large variations in *legal* culture between the Member States of the European Union.[140] This discussion, however, has very seldom broadened its scope beyond the realm of the lawyers' socialization into their particular way of dispute resolution, to look at the expectations and practices of non-lawyers and their regulatory relevance. While the impact of consumer culture has occasionally been addressed in legal harmonization discourses, it has usually been with a focus on relatively peculiar individual cases, such as *Lifting*. There seems to be a fairly general understanding that a *Lifting*-type approach is sufficient to cater to the particular needs that may arise as a consequence of cultural differences.

The analysis in this article attempts to show that such an approach, which rests more or less purely on assessments *in casu* in a few cases regarded as exceptional, is not sufficient. It does not bring the impact of cultural variations on the need for protective regulation to the legal agenda in a way that would correspond to an assessment based on empirical knowledge about the existence and breadth of such variations. The prevailing approach tends to give the impression that such variations may be of relevance only in practically peripheral, particular

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[139] See *e.g.* Trompenaars & Hampden-Turner, *supra* note 14, c. 14. Using the same parameters as in comparisons between nations, the authors show how South Africa contains most of the variations that can be found in a global analysis.

[140] One of the most cited contributions is Pierre Legrand, "European Legal Systems Are Not Converging" (1996) 45 I.C.L.Q. 52.

cases, such as *Lifting* and *Graffione*, which are related to linguistic and/or cultural variations in the understanding of certain words. However, as has been shown, the relevant cultural variations may relate to the core of regulatory philosophy, such as the rationality patterns that are presumed to be typical for consumer behaviour. The large variations in approaches to advertising to children may also reflect deep societal and cultural cleavages.[141]

The traditional way to bring issues to the legal agenda is through conceptualization and systematization. The typology of relevant cultural differences elaborated in this article can be seen as an attempt to offer some building blocks for such an endeavour. By noting the variations in trust, understandings, rationality patterns, decision-making behaviour, and values and preferences of consumers and their impact on regulatory needs, the cultural perspective is brought more explicitly to the agenda of the harmonization debate. It makes it possible to discuss the balancing of consumer protection needs with the legitimate harmonization needs of businesses in a more transparent and focused manner.

In the European context, the need to create such visibility largely relates to questions concerning the application of the law. As the *Unfair Commercial Practices Directive*—a maximum harmonization directive—has already been adopted, it is necessary to reflect appropriately on cultural variations when discussing its application. When developing the legal content of the vaguely worded directive in cooperation between the European Court of Justice and the national courts, it is essential that the *Lifting* formula is taken seriously enough as one of the basic starting points, rather than being seen just as an easy way to reach acceptable results in a few exceptional cases of linguistic character. One should recognize that the "average consumer," even in Europe, is not as average as the European Commission may imagine. What can be demanded of a "reasonably well-informed and reasonably observant and circumspect" consumer—if one accepts this description—may be different in different national settings.

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[141] See Iain Ramsay, *Advertising, Culture and the Law* (London: Sweet & Maxwell, 1996) at 115, according to which "[t]he battles over children's advertising in the USA might be viewed as surrogates for more general class conflicts over who establishes the ground rules of consumer capitalism, and the impact of this culture on social life."

In fact, the issue seems important enough not to be left only to the realm of the law's application in some particular cases, but to be taken into account when drafting harmonized rules. In Europe this train has already left the station with regard to the *Unfair Commercial Practices Directive*, but new items related to commercial communications are being placed on the legislative agenda, the most important of them being the proposed revision of the *Television Without Frontiers Directive*.[142] In other regions and globally, harmonization issues of this kind are still underway. In such projects, there should be sufficient acknowledgment that legal transplants do not fulfill their protective tasks well if the impact of variations in consumer culture is neglected.

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[142] *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, COM (2005) 646 final.