The Steady Creep of an Average Consumer as a Reference Consumer in the Assessment of the Transparent Provision of Mandatory Information

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Abstract

This article documents the steady creep of the average consumer benchmark across various areas of European consumer law related to the transparent provision of consumer information. It critically examines and rejects current justifications provided by the Court of Justice of the EU and its Advocates General for this evolution under the provisions of the Unfair Contract Terms Directive and the Consumer Rights Directive. Whilst the use of an objective benchmark is advisable, these directives currently do not prescribe the benchmark to be set at the high level of an average consumer, as applied under the provisions of the Unfair Commercial Practices Directive.

Keywords: average consumer; information obligations; Consumer Rights Directive; unfair terms; transparency.

1. Introduction

The Unfair Commercial Practices Directive (UCPD)[1] introduced the notion of the average consumer to European consumer legislation and, subsequently, to national laws of the Member States, including the Netherlands.[2] Previously, European case law concerning marketing standards and trademarks used this notion to identify a reference consumer whom traders target with their marketing practices.[3] To remind the readers, a European average

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[1] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22 (Unfair Commercial Practices Directive).

[2] See art 6:193b BW.

[3] See e.g. Case C-315/92 *Clinique* EU:C:1994:34; Case C-470/93 *Mars* EU:C:1995:224; Case C-210/96 *Gut Springenheide* EU:C:1998:369; Case C-465/98 *Darbo* EU:C:2000:184.

consumer is a consumer 'who is reasonably well-informed and reasonably observant and circumspect'.[4] The mismatch between the use of the notion of the average consumer in European consumer protection framework and the reality of consumer behaviour has previously been elaborated on in academic literature.[5] European policymakers could, however, justify the application of the benchmark of an average consumer in the area of consumer protection against unfair commercial practices, twofold. First, by relying on the principles of effectiveness and proportionality, as the introduction of a general benchmark facilitated an assessment of unfairness of commercial practices for national enforcement authorities.[6] Second, due to the specific application of the UCPD to the protection of the collective interests of consumers and the particularities of its unfairness test, which did not require an individual consumer concluding a contract with a trader.[7]

This paper indicates a steady creep of the benchmark of the average consumer to other areas of European consumer protection and questions whether such a broad application thereof could be justified by the above-mentioned objectives. To that purpose the next paragraph will discuss the judgments of the Court of Justice of the EU (CJEU) interpreting provisions mainly of the Unfair Contract Terms Directive (UCTD)[8] and the Consumer Rights Directive (CRD),[9] where the CJEU relied on this benchmark in the assessment of the transparent provision of mandatory information. The discussed judgments refer either to the general notion of an average consumer or to the more specific notion of an average member of a

[4] See Case C-210/96 *Gut Springenheide* EU:C:1998:369, para 31. See also Recital 18 UCPD.

[5] See eg Rossella Incardona and Cristina Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 Journal of Consumer Policy 21-38; Bram Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015); Vanessa Mak, 'De gemiddelde consument van fictie naar feit' (2017) 7 Ars Aequi 592-599.

[6] Recital 18 UCPD.

[7] See eg Case C-281/12 *Trento Sviluppo* EU:C:2013:859. See also Mak (n 5) 595-596.

[8] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29 (Unfair Contract Terms Directive).

[9] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304/64 (Consumer Rights Directive).

targeted consumer group. Both these tests are used in the assessment of the unfair character of commercial practices under Article 5(2)(b) UCPD and neither of them has been included in the UCTD or the CRD. However, Recital 34 CRD to an extent could be interpreted as referring to an average consumer of the targeted consumer group, which will be further explained. The third paragraph will look into how Dutch courts have so far applied the average consumer notion, examining whether they uncritically imitate the CJEU's approach. Upon illustrating the current scope of the application of the average consumer benchmark, it is explored whether the European legislator and the CJEU could indeed justify its expansion in European consumer law.

2. Steady creep of average consumer notion in European consumer law

2.1 Assessment of unfairness of contract terms

In the judgment *Pereničová and Perenič*,[10] the CJEU compared the European system of consumer protection against unfair commercial practices and unfair contract terms, and came to the conclusion that:

'A finding that such a commercial practice is unfair is one element among others (author's emphasis) on which the competent court may, pursuant to Article 4(1) of Directive 93/13, base its assessment of the unfairness of the contractual terms relating to the cost of the loan granted to the consumer.'

Consequently, the CJEU adamantly distinguished between the unfairness tests in the UCPD and the UCTD, preventing an automatic recognition of an unfair contract term, simply on the basis that this term led to an unfair commercial practice.[11] The latter could, however, weigh in on the assessment of the unfairness of a contract term.

To prove the unfairness of a contract term, a consumer needs to establish pursuant to Article 3(1) UCTD that a non-individually negotiated term causes a significant imbalance in parties' rights and obligations, contrary to good faith and to the detriment of the consumer. Further, Article 4(1) UCTD requires courts to assess the unfairness, whilst taking into account all

[10] Case C-453/10 *Pereničová and Perenič* EU:C:2012:144, para 47.

[11] ibid, para 44. See Joasia Luzak, 'Unfair Commercial Practice ≠ Unfair Contract Term ≠ Void Contract: The CJEU's Judgment in the Case C-453/10 (Pereničová and Perenič)' (2012) 61 Ars Aequi 428.

circumstances surrounding the conclusion of a contract. When assessing, however, the unfairness of a commercial practice, a national court would check whether the practice was either misleading or aggressive, pursuant to Articles 6-9 UCPD or whether it was contrary to the requirements of professional diligence and materially distorted, or was likely to materially distort, the transactional decision-making of an average consumer, pursuant to Article 5(2) UCPD.

It was the reference in Article 4(1) UCTD to the need to test the contract term's unfairness by examining all circumstances of a particular case, suggesting a more individualised approach to the unfairness' test of a contract term, which led the CJEU to distinguish between these two tests.[12] This meant that the subsequent UCTD case law referring to the average consumer benchmark adopted in the UCPD, came mostly as a surprise.[13]

AG Wahl was the first one to use the benchmark in the area of consumer protection against unfair contract terms.[14] In the case *Kásler* AG Wahl posed a question as to the comprehensibility of terms of a credit contract, which required consumers to compare selling and buying prices of a foreign currency, in which the credit was provided. The Advocate General did not think such information would be known to average consumers, despite them being reasonably observant and circumspect. This question required an answer in the process of assessing the transparency of credit contract terms when submitting them to the unfairness test, either pursuant to Article 4(2) or 5 UCTD. The CJEU took over the reference to the average consumer from the AG Wahl's opinion.[15] It obliged national courts to check whether average consumers, 'well informed and reasonably observant and circumspect', would be aware of the difference between the selling and buying rates of a foreign currency, and further could evaluate economic consequences of concluding a loan contract with terms referring to the calculation of this loan in a foreign currency.

[12] ibid.

[13] Although some scholars predicted the applicability of this benchmark to the UCTD, see eg Irene Klauer, 'General Clauses in European Private Law and "Stricter" National Standards: The Unfair Terms Directive' (2000) 8 European Review of Private Law 200-202.

[14] Case C-26/13 *Kásler*, Opinion of AG Wahl EU:C:2014:85, para 88.

[15] Case C-26/13 *Kásler* EU:C:2014:282, para 74.

Since the *Kásler* case, the CJEU has used the benchmark of the average consumer repeatedly to assess the transparency of contractual terms and conditions.[16] This development has been observed in the academic literature as 'interesting',[17] 'logical',[18] although 'potentially raising the bar for accessing consumer rights'.[19] It has not been particularly contested and with the list of judgments referring to the benchmark steadily growing, it could be hypothesised that the application of this benchmark in the area of consumer protection against unfair terms has been affirmed. It bears mentioning that the CJEU did not explain in any of its judgments why national courts when assessing the transparency of standard contract terms and conditions are supposed to refer to an average consumer, instead of establishing the understanding of a term of an individual consumer. After all, if national courts are supposed to consider all circumstances of a given case, pursuant to Article 4(1) UCTD, this could involve also particularities of a contractual relationship between a trader and a *given* consumer. We will come back to the discussion of possible justifications for the use of the benchmark in part 4 of this paper.

2.2 Compliance with providing transparent information pursuant to CRD

After the *Kásler* judgment was issued, scholars wondered whether it was feasible to expect a further broadening of the scope of the application of the notion of an average consumer.[20] This seemed the most likely to occur in similar circumstances, i.e. when national courts were

[16] Case C-143/13 *Matei* EU:C:2015:127, para 75; Case C-96/14 *Van Hove* EU:C:2015:262; Case C-348/14 *Bucura* EU:C:2015:447, para 66; Case C-186/16 *Andriciuc and Others* EU:C:2017:703, para 51; Case C-51/17 *OTP Bank and OTP Faktoring* EU:C:2018:750, para 78; Case C-126/17 *ERSTE Bank Hungary* EU:C:2018:107, para 35; Case C-125/18 *Gómez del Moral Guasch* EU:C:2020:138, para 56; Case C-452/18 *Ibercaja* Banco EU:C:2020:536, paras 46 and 55.

[17] See Mak (n 5) 595.

[18] Marco BM Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23 European Review of Private Law 188.

[19] Joasia Luzak, 'Vulnerable Travellers in the Digital Age' (2016) 5 Journal of European Consumer and Market Law 130. Similarly, Loos (n 18), 188-189.

[20] ibid. See also eg Eva Théocharidi, 'Effectiveness of the ADR Directive: Standard of Average Consumer and Exceptions' (2016) European Review of Private Law 110-111.

to assess whether a mandated disclosure was transparent, as courts could then similarly decide to use the average consumer as the reference consumer. With Articles 5 and 6 CRD establishing a long list of mandatory information, which traders were to provide to consumers 'in clear and comprehensible manner', thus transparently, the CRD became a prime candidate for such an expansion.

2.2.1. Average consumer targeted by information

Depending on the point of view, the CJEU did or did not disappoint when the average consumer notion was mentioned in the judgment *Walbusch Walter Busch*.[21] The trader in this dispute issued an advertising leaflet to consumers, which only included a limited list of pre-contractual information, referring consumers to the trader's website for further information. Article 8(4) CRD allows traders to restrict the amount of information given to consumers in case the contract is to be concluded at a distance and the means of distance communication used limit the available space or time for the information provision. The compliance with this provision requires an assessment of whether the method of communication used, *in casu* the leaflet, indeed limited the space or time to display the information. In that evaluation, the CJEU informs the national courts to consider whether with the use of the minimum size font, which was appropriate for the average consumer targeted by the communication, all the information listed in Article 6(1) CRD could have been included on the leaflet.

Although the use of the average consumer benchmark leads here to determining the character of the method of communication (whether it has a limited display), it still hinges on whether average consumers found the information listed on the communication medium transparent. There is thus a clear link to the reasoning adopted in the UCTD-based case law on the average consumer notion. Further, we could also draw a link to the UCPD, as Article 7(3) UCPD similarly permits, in the assessment of whether a given commercial practice was a misleading omission, to take into account limitations of space or time of the communication

[21] Case C-430/17 *Walbusch Walter Busch* EU:C:2019:47, para 39. Technically, the CJEU has used the average consumer benchmark at least once before in case C-485/17 *Verbraucherzentrale Berlin* EU:C:2018:642, paras 43-45, however, in this judgment the benchmark was used not in relation to the assessment of the impact of the information on the reference consumer. Instead, the national courts were advised to examine whether a particular stand at a trade fair gave an average consumer an impression of constituting business premises of a trader. The benchmark was then used to determine the scope of application of the CRD, pursuant to its art 2(9).

medium used by traders. This connection was noted by AG Tanchev in his opinion to *Walbusch Walter Busch*.[22] Specifically, he referred to the interpretation of this UCPD provision in the case *Canal Digital Danmark*,[23] although without explicitly mentioning himself the average consumer benchmark.

In *Walbusch Walter Busch* the CJEU takes a small step towards introducing this benchmark to the consumer rights' protection framework of the CRD. Namely, it mentions the average consumer only as an 'average consumer targeted by that communication'.[24] The CJEU could claim this is based on the requirement mentioned in Recital 34 CRD, which obliges traders to provide information in such a way that it is transparent also to vulnerable consumers, if traders could reasonably foresee that vulnerability. Obviously, when traders target a particular group of consumers, e.g. elderly, their special needs could be foreseeable to them, and consequently, traders should adjust the information thereto, or as the CJEU claims to the average consumer of that targeted communication. This does not (yet) signify the need for traders to test the comprehensibility of their information generally against the average consumer benchmark.

Next, it was AG Pitruzzella that mentioned the notion of the average consumer in his opinion in the case *Amazon EU*.[25] The case revolved around the information obligations of online traders set in Article 6(1)(c) CRD, specifically whether they were required to provide a contact phone number to consumers, even if they normally would not use this means of communication. In his opinion AG Pitruzzella comes to the conclusion that the use of a phone is not always necessary to facilitate contact between consumers and online traders.[26] In his preliminary statements on this matter, AG Pitruzzella describes the e-commerce, i.e. that

[22] Case C-430/17 *Walbusch Walter Busch*, Opinion of AG Tanchev EU:C:2018:759, paras 65-66.

[23] Case C-611/14 *Canal Digital Danmark* EU:C:2016:800, paras 42, 69-70.

[24] See also Joasia Luzak, 'Will the Imaginary Active Consumers Please Stand up? Case Note to Walbusch Walter Busch: Case C-430/17 *Walbusch Walter Busch GmbH & Co KG v Zentrale Zur Bekämpfung Unlauteren Wettbewerbs Frankfurt Am Main EV*, EU:C:2019:47' (2019) 26 Maastricht Journal of European and Comparative Law 713.

[25] Case C-649/17 *Amazon EU*, Opinion of AG Pitruzzella EU:C:2019:165, paras 35 and 37.

[26] ibid, para 118.

consumers willing to purchase goods from online traders have to be familiar with the trader's website, virtual means of payment, online interaction.[27] Interestingly, he also concludes that an online trader fulfilling their information obligations needs to 'take into account the characteristics of the average consumer who uses e-commerce'.[28] It could be inferred that AG Pitruzzella refers here to the average consumer of the targeted group then, albeit broadly defined, rather than a general average consumer notion.

It is worth making a note of the use of the benchmark in this opinion due to the justifications for this provided by AG Pitruzzella. Namely, he mentions 'general case-law on consumer rights' and 'more specific case-law on the obligations to provide information laid down in the Directive on electric commerce', as case law that previously asserted the use of this benchmark in European consumer law.[29] The general case law no doubt refers to UCPD and perhaps also UCTD case law, mentioned above. What is interesting, however, is the reference to the Directive on electronic commerce[30] and its interpretation, rather than to *Walbusch Walter Busch* judgment at this stage, i.e. a month after the judgment was published. This is especially puzzling as the CJEU's case law on the Directive on electronic commerce does not (yet) refer to the benchmark, except for the case *Verband Sozialer Wettbewerb*,[31] where the CJEU interpreted not only provisions of this directive but also Regulation 1924/2006, which explicitly acknowledged the average consumer benchmark.[32] Therefore, once again, the justification seems lacklustre. For the sake of completeness, it should be mentioned that the CJEU does not refer to the average consumer benchmark in *Amazon EU* case, however, it does mention Recital 34 CRD and the need for traders to ensure that targeted vulnerable consumers are provided with relevant information.[33]

[27] ibid, paras 29-33.

[28] ibid, para 35.

[29] ibid, para 36.

[30] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce [2000] OJ L 128/1 (Directive on electronic commerce).

[31] Case C-19/15 *Verband Sozialer Wettbewerb* EU:C:2016:563.

[32] Regulation (EC) No 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods [2006] OJ L 404/9, Recital 16 and art 5(2).

[33] Case C-649/17 *Amazon EU* EU:C:2019:576, paras 45-46.

2.2.2. Average consumer

In this paragraph we continue to explore how the CJEU took the next step towards importing the average consumer benchmark in the interpretation of the CRD provisions. First, though, it is worth noticing that one month before the *Walbusch Walter Busch* judgment was issued, AG Saugmandsgaard Øe's used the benchmark of the 'average consumer' in his opinion in another case, *slewo*.[34]

In *slewo* the CJEU was asked to elaborate on the scope of the exception introduced in the CRD for providing consumers with the right of withdrawal, when they purchased sealed products through distance selling schemes.[35] If this exception applies to products that are sealed for hygienic reasons, e.g. mattresses, then the national court wonders how specific a warning traders should provide to consumers about the fact that they will lose the right of withdrawal upon removing the product from a sealed packaging. AG Saugmandsgaard Øe thought that this warning should be specific, which means that it would need to draw consumers' attention to the fact that the goods they are purchasing have been sealed and that the removal of the seal would result in the loss of the right of withdrawal.[36] It is when he was elaborating on the timeframe and form, in which this information should be provided to consumers, that AG Saugmandsgaard Øe mentioned the 'average consumer' benchmark.

Namely, as traders are to provide this information to consumers 'in a clear and comprehensible' way, without any ambiguity, AG Saugmandsgaard Øe believes the information should allow an informed decision-making to an average European consumer.[37] Interestingly, to justify his reference to the benchmark, AG Saugmandsgaard Øe refers to two cases in what he claims is the area of 'consumer protection', which have little to do with the factual situation at hand and the provisions of the CRD.[38] It is hard to see how the application

[34] Case C-681/17 *slewo*, Opinion of AG Saugmandsgaard Øe EU:C:2018:1041, para 55.

[35] Art 16(e) CRD.

[36] *Slewo* (n 34), para 60.

[37] ibid, para 55.

[38] Case C-44-17 *Scotch Whisky Association* EU:C:2018:415 pertained to the protection of geographical indications of spirit drinks, whilst Joined Cases C-54/17 and C-55/17 *Wind Tre and Vodafone* EU:C:2018:710 elaborated on aggressive commercial practices.

of this benchmark in these two cases could be of relevance for and could lead to justifying the use thereof in *slewo*. As the CJEU decided in the case *slewo* that mattresses did not classify as sealed goods within the meaning of Article 16(e) CRD, the Court did not engage with the part of the AG's opinion referring to the average consumer.

This was remedied in the most recent CJEU judgment on the interpretation of the CRD provisions – *EIS*.[39] In this case the question was again about what contact information online traders should issue to consumers pursuant to the CRD provisions. Specifically, whether the sole fact that an online trader provides a phone number on their website signifies that this phone number should also be made available to consumers for purposes of notifying the trader about their intention to withdraw from a contract. The CJEU answered this question by relying on the average consumer benchmark. Namely, if an average consumer upon spotting a phone number at the online trader's website could assume that the trader uses this phone number for contact purposes with their customers, the trader would be under an obligation to treat it as such.[40] That is, traders would need to inform consumers about the option to use this phone number for purposes of notifying their withdrawal from a contract, as well.

For this paper, it is the use of the notion of the average consumer that is particularly of interest, as it is not qualified by any reference to Recital 34 CRD or otherwise to targeted average consumers.[41] Instead, the CJEU refers to a previous case on the interpretation of provisions in the area of the distance marketing of consumer financial services, which provisions also did not contain an explicit reference to the benchmark of the average consumer.[42] Interestingly, in the *Romano* case the CJEU stated that traders need to provide the information on the right of withdrawal to consumers in a clear and comprehensible manner and that

[39] Case C-266/19 *EIS* EU:C:2020:384.

[40] ibid, para 40.

[41] ibid, para 37.

[42] Case C-143/18 *Romano* EU:C:2019:701, para 54.

‘The perception of the average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer, is all that is relevant in that regard’.[43]

To justify this conclusion, the CJEU refers in *Romano* to the previous judgment in *Verbraucherzentrale Berlin* case, which used the benchmark for the interpretation of the CRD provisions.[44] We could note then that the CJEU uses a circular reasoning to justify the steady adoption of the average consumer benchmark throughout the whole field of European consumer protection. The CJEU also mentions in *Romano* that it is the full harmonisation character of a directive that

‘entails the adoption of an interpretation of the model of the reference consumer that is common to all Member States’.[45]

We will come back to this justification in part 4.

2.3 Other application of average consumer benchmark in European consumer law

The previous paragraph already indicated the use of the average consumer benchmark in interpreting other European consumer protection rules, such as the rules on distance marketing of consumer financial services. The main instrument of consumer protection in the Distance Marketing of Consumer Financial Services Directive are the information rights and the right of withdrawal, similarly to the CRD.[46] This could explain the wish of the CJEU to use the same benchmark when the need arises to assess whether consumers received a transparent information, as long as the CJEU aimed for the full harmonisation in such assessments across European consumer law. *Romano* is, however, the only judgment in this area of consumer protection that refers to the average consumer benchmark and this shift has occurred quite recently, in October 2019, as well. This may suggest that we are now on the verge of observing the CJEU starting to use the benchmark more freely throughout the whole

[43] ibid, paras 53-54.

[44] See (n 21) above.

[45] ibid, para 55.

[46] Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services [2002] OJ L 271/16 (Distance Marketing of Consumer Financial Services Directive).

area of European consumer protection with the aim of more fully harmonising the application of European consumer law.

It was AG Pitruzzella, who provided an opinion to *Romano* and suggested to the CJEU the use of the average consumer benchmark in assessing the transparency of the provided information.[47] This was motivated by the preliminary question to that effect posed by the German regional court in Bonn (*Landgericht Bonn*).[48] AG Pitruzzella compared the consumer notions in Article 2(d) Directive on electronic commerce, Article 2(a) UCPD and Article 2(b) UCTD, correctly finding them identical. This finding was, however, inexplicably followed by a statement that the CJEU has previously ruled on this consumer notion

'holding that the 'average consumer' is taken to be a reasonably well informed and reasonably observant and circumspect consumer'.[49]

The judgments referred to are again, seemingly random, in the area of both UCPD and UCTD interpretation, but what is important is that in none of them was the use of the average consumer benchmark tied to the notion of a consumer itself.[50] AG Pitruzzella does not distinguish, however, between the notion of a consumer shared by all these directives and a benchmark of an average consumer, which only appears in one of them. Instead, he states that although this is the first time that the CJEU was asked by national courts to provide

[47] Case C-143/18 *Romano*, Opinion of AG Pitruzzella EU:C:2019:273, paras 76-83.

[48] ibid, para 22. It needs to be mentioned that there were previously questions referred to the CJEU indicating the intent of national courts to apply the average consumer benchmark even where the European consumer law provision did not use the benchmark itself. The CJEU previously did not address such suggestions, if the interpretation questions did not pertain to UCPD, eg in case C-448/17 *EOS KSI Slovensko* EU:C:2018:745, para 32(2).

[49] ibid, para 79.

[50] These judgments are: *Andriciuc and Others* (n 16), para 47; Case C-562/15 *Carrefour Hypermarchés* EU:C:2017:95, para 31; Case C-632/16 *Dyson* EU:C:2018:599, para 56; *Wind Tre and Vodafone Italia* (n 38), para 51; *OTP Bank and OTP Faktoring* (n 16), para 78.

interpretation of the concept of the consumer for distance marketing of consumer financial services,

'there is nothing in that directive to suggest that the concept should be understood differently from the way in which the Court has interpreted it in relation to the other consumer protection directives…'[51]

We will revisit this argumentation in part 4.

To round up this European consumer law overview it is important to mention that the CJEU uses the average consumer benchmark more broadly than just in the assessment of the transparency of the information, which traders released to consumers. Namely, another extension of the use of the average consumer benchmark occurred recently in the case *Fülla*.[52] In this case a tent, ordered by phone, was delivered to the consumer's home, and this tent was non-conforming to the contract pursuant to Article 3 Consumer Sales Directive (CSD).[53] The CSD does not introduce any information obligations for traders nor requires information transparency. The case pertained to a different consumer right – a right to conforming goods. When the consumer asked for the tent to be brought back into conformity, the dispute arose as to where this should occur and who should pay for the costs of transporting these goods to this location. Interestingly for this research, the CJEU referred to the average consumer benchmark when determining whether such a consumer would consider a place designated as a location for restoring the goods into conformity as significantly inconvenient.[54] Further, whether the set transport costs could deter a consumer from asserting their rights should be assessed by a reference to an average consumer, as well, pursuant to the CJEU.[55]

[51] Opinion of AG Pitruzzella in *Romano* (n 47), para 80.

[52] Case C-52/18 *Fülla* EU:C:2019:447.

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

[54] *Fülla* (n 52), para 40.

[55] ibid, para 55.

Whilst the CJEU uses the average consumer benchmark in the given case, it does not explain what justifies such a reliance on this benchmark for the purpose of interpreting provisions of the CSD, which again did not name that benchmark. AG Wahl provided more explanation in his opinion.[56] Namely, he thought that similarly to other EU consumer law instruments, national courts should not look into what might deter an individual consumer from asserting their rights, but rather rely on an objective standard of what would burden an average consumer. This justification is further elaborated on in part 4.

3. Dutch approach

3.1. Unfair contract terms

Article 6:238 paragraph 2 BW implemented the obligation for traders to draft their standard terms and conditions in a plain and intelligible way. Following the *Kásler* judgment, this provision has been interpreted in Dutch scholarship as requiring the transparency assessment to be conducted with the reference to the average consumer.[57] Dutch courts have emphasised that the average consumer benchmark is a legal one, which means it requires a very limited examination of whether and how consumers have actually read and understood standard contract terms.[58] This has been criticised for raising the bar of consumer protection, which may not be an appropriate objective in the area of unfair contract terms.[59] Dutch courts and scholars have also posed a question whether an average consumer could become a reference consumer for other purposes of interpreting provisions implementing the UCTD, not just in the process of assessing the transparency of standard terms.[60]

It should be mentioned, however, that some Dutch courts have already referred to this benchmark in earlier judgments, prior to *Kásler*. For example, in evaluating the transparency of a clause in a revolving consumer credit agreement, which does not explicitly indicate the

[56] Case C-52/18 *Fülla*, Opinion of AG Wahl EU:C:2019:22, para 68.

[57] See eg RHC Joneneel, '16. Duidelijkheid en begrijpelijkheid van algemene voorwaarden' in B Wessels and RHC Jongeneel (eds), *Algemene voorwaarden (Recht en Praktijk nr. CA1)* (Wolters Kluwer 2017) 439; Charlotte Pavillon, 'Wat Maakt Een Beding Oneerlijk? Het Hof Wijst Ons (Eindelijk) de Weg' (2014) 4 TvC 167-168; MBM Loos, *Algemene Voorwaarden* (3rd edn, Boom juridisch 2018) 235.

[58] PHR 5 April 2019, ECLI:NL:PHR:2019:346, para 4.15.

[59] See Pavillon (n 57) 167.

[60] ibid. See eg PHR 6 juli 2018, ECLI:NL:PHR:2018:788, para 5.26.

end date of the contract, the court of first instance in Alkmaar determined it likely to be non-transparent for an average consumer debtor.[61]

Overall, it seems that despite some expressed criticism of the European adoption of the average consumer benchmark for testing the transparency of standard terms and conditions, Dutch law easily adjusted to this interpretation requirement.[62]

3.2. (Pre-)contractual information obligations

When the Dutch legislator adopted the CRD to the Dutch Civil Code (BW), interestingly it mentioned the benchmark of the average consumer in the accompanying parliamentary documents (*Kamerstukken*), but only in relation to one provision, Article 6:230t BW.[63] This provision implemented Article 7 CRD and pursuant to its first paragraph when a consumer concludes a contract outside the business premises of a trader, the information that the trader provides should be legible and in plain, intelligible language. The Dutch legislator thinks that whether the information was indeed thus formulated should be assessed from a perspective of an average consumer, as defined in Article 6:193b paragraph 2 BW and the relevant CJEU's case law.[64] Therefore, they draw a clear link between the use of the benchmark in the area of unfair commercial practices and for the purposes of applying the transparency principle from the CRD. The Dutch legislator further mentions Recital 34 CRD, as it would oblige traders to adjust the transparency level of the information provided to targeted, vulnerable groups from

[61] Rb. Alkmaar 26 November 2008, ECLI:NL:RBALK:2008:BG9074, para 4.4.

[62] See eg Hof Den Haag 30 June 2015, ECLI:NL:GHDHA:2015:1977, para 7; PHR 4 December 2015, ECLI:NL:PHR:2015:2658, para 8.4.2; Hof 's-Hertogenbosch 2 May 2017, ECLI:NL:GHSHE:2017:1875, paras 7.7, 7.9, 7.11-12, 7.14; Hof Arnhem-Leeuwarden 1 August 2017, ECLI:NL:GHARL:2017:6579, para 5.13; Hof Den Haag 12 December 2017, ECLI:NL:GHDHA:2017:3449, para 10; Rb. Amsterdam 6 December 2019, ECLI:NL:RBAMS:2019:9117, paras 13, 21-24, 31; PHR 8 May 2020, ECLI:NL:PHR:2020:455, para 3.6.

[63] *Kamerstukken II* 2012/13 33520 nr. 3, 48. As art 6:230v para 1 BW is similar to art 6:230t para 1 BW, the same interpretation should apply there, as well.

[64] ibid.

the one applied to average consumers.[65]Any such mention of the reference consumer group was missing from the guidance of the European Commission to the CRD.[66]

Considering the explicit reference by the Dutch legislator to this benchmark, it is unsurprising that Dutch courts have used it, as well, prior to the CJEU issuing its judgments in *Walbusch Walter Busch, slewo* and *EIS* cases.[67] As the above-mentioned CJEU judgments are all quite recent, they have not yet been referred to by the Dutch courts. This also means that when Dutch courts refer to the average consumer benchmark when assessing the transparency of consumer information, they refer to the general benchmark, rather than the average consumer targeted by the communication, as mentioned in Recital 34 CRD and *Walbusch Walter Busch* case.

Some of the first instance Dutch courts specifically mention the fact that the Dutch legislator recommended the use of the average consumer benchmark for assessing the transparency of the information, which traders provide to consumers.[68] This is often accompanied by statements that transparent information may not be provided in a 'small font'.[69] Further, Dutch courts emphasise that from a point of view of average consumers, it is insufficient if traders provide the mandatory information to them in their standard terms and conditions. After all, when the information is added to standard terms and conditions it may disappear amongst many other provisions there, losing its visibility.[70] Instead, traders should use the pre-contractual process to introduce consumers step by step to the pre-contractual

[65] ibid.

[66] European Commission DG Justice, 'Guidance document on the Consumer Rights Directive' (2014) <https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive_en> accessed 10 August 2020.

[67] See para 2.2. above.

[68] See eg Rb. Rotterdam 12 June 2020, ECLI:NL:RBROT:2020:6255, para 4.1; Rb. Noord-Holland 3 June 2020, ECLI:NL:RBNHO:2020:3509, para 2.4.

[69] See also *Kamerstukken II* 2012/13 33520 nr. 3, 48.

[70] See eg Rb. Rotterdam 19 April 2018, ECLI:NL:RBROT:2018:3062, para 4.3.

information, in a way that would leave no doubts that an average consumer had been made aware thereof.[71]

We may also find Dutch courts justifying the use of the average consumer benchmark by drawing comparisons with the CJEU's case law on UCTD provisions. For example, the court of first instance in Rotterdam reminds that the requirement of drafting consumer information in plain and intelligible language may be found not only in Dutch provisions implementing the CRD, but also in Articles 4(2) and 5 UCTD, as transposed to Dutch law in Article 6:238 paragraph 2 BW.[72] This court further mentions the transparency requirements as set in the *Kásler* case, which could also be decisive for determining the transparency under the regime of the CRD.[73]

Therefore, Dutch courts may justify their use of the average consumer benchmark either by referring to the Dutch legislator's guidance on the interpretation of the provisions implementing the CRD into Dutch law or by invoking the need for logical and coherent interpretation of the provisions of the European consumer law. This brings us to the various justifications for the use of the average consumer benchmark in the assessment of the transparency of consumer information.

4. Is the *ratio legis* there?

4.1. Objective standard of assessment and full harmonisation

The introduction of the average consumer benchmark to the UCPD was motivated mainly by the need to ensure an effective and harmonised assessment of the unfair character of commercial practices, which could only be achieved if the test included an objective standard.[74] Previous paragraphs have illustrated that at times this justification was repeated when the benchmark was used to protect consumers against other than unfair commercial practices scenarios. For the purpose of applying the transparency principle, it is indeed necessary to establish who the information is intended to be transparent to. Although the transparency requirements may differ somewhat between various European consumer law

[71] See (n 68).

[72] See (n 70).

[73] See para 2.1 above.

[74] See (n 6 and 7).

directives, it would benefit consumer protection if the transparency principle was perceived as a horizontal, overarching principle.[75] An introduction of an objective reference consumer helps to ensure legal certainty and compliance with this principle.

Recently, the European legislator conducted a fitness check of the European consumer protection, which also evaluated measures adopted by the UCTD, UCPD and CRD, and their implementation in all the Member States.[76] This fitness check pointed out inconsistencies in the application of the average consumer benchmark across the Member States, mostly regarding its use in situations, where the European consumer law was silent on its applicability, e.g. regarding the information obligations provided in the CRD.[77] Following this fitness check, the European Commission issued recommendations, in which it expressly advised the use of the average consumer benchmark for the assessment of the transparency of mandatory consumer information, which traders issue to consumers in their standard terms and conditions.[78] This applies regardless whether traders provide the mandatory information to consumers pursuant to the UCPD or CRD.[79]

The first limitation of this new recommendation is that it applies only to the information drafted in the trader's standard terms and conditions. Further, the criticism expressed in the fitness check report regarding the appropriateness of the benchmark and the need to adjust it to the results of the empirical research on consumer behaviour has not been addressed in

[75] See more on the inconsistencies of the requirements of the transparency principle eg in Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8 Journal of European Consumer and Market Law 97.

[76] See <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332> accessed 10 August 2020.

[77] See eg European Commission, 'Study on the application of the Consumer Rights Directive 2011/83/EU. Final Report' (May 2017) <http://ec.europa.eu/newsroom/document.cfm?doc_id=44637> accessed 10 August 2020.

[78] European Commission, 'Recommendations for a better presentation of information to consumers' (July 2019) <https://ec.europa.eu/info/sites/info/files/sr_information_presentation.pdf> accessed 10 August 2020, 5.

[79] ibid, 2.

these recommendations.[80] It has, therefore, been ignored that whilst the report indicates that there is a clear advantage to adopting an objective standard, it might be necessary to re-consider the bar, at which this standard is currently set. The works thereon have not yet commenced, as far as the author is aware.

Additionally, the report emphasises the added benefit of the average consumer benchmark which

'(…) allows authorities and courts in Member States to render a flexible decision, specifying the content of this concept in a manner that is appropriate for the specific case.'[81]

This flexibility seems to stand in the way of the full harmonisation argument also used to justify the introduction of the benchmark to the interpretation of the UCTD and CRD provisions. Namely, as previous paragraphs illustrated, the Advocates General and the CJEU argued for the uniformity in the application of the notions of the consumer and average consumer across various directives. This meant to ensure more clarity and consistency in the application of European consumer law across the Member States. However, if the national enforcement authorities perceive the average consumer notion itself as flexible, then the justification of the need for full harmonisation is significantly weakened.

It bears repeating that AG Pitruzzella showed a significant confusion in the *Romano* case, where he did not differentiate between the notion of a consumer and the average consumer benchmark. The European legislator has ensured that the most recent European consumer protection measures use the same notion of a consumer, harmonising this notion.[82] This process has not yet occurred for the benchmark of the average consumer. Contrarily, the European consumer protection measures more recent than the UCPD, e.g. the CRD, do not refer to this benchmark. As the CJEU becomes increasingly more proactive in the broadening

[80] European Commission, 'Study for the Fitness Check of EU consumer and marketing law. Final Report Part 1 – Main Report' (May 2017) <http://ec.europa.eu/newsroom/document.cfm?doc_id=44840> accessed 10 August 2020, 228.

[81] ibid, 227.

[82] See eg art 2(1) CRD; art 2(a) UCPD.

of the scope of the application of this benchmark to other than the UCPD areas of consumer protection, we could expect the European legislator to take a stand on this topic, as well. However, the most recently adopted measure amending provisions of the UCTD and the CRD, the Modernisation Directive,[83] again does not refer to the average consumer benchmark.

The European legislator has, therefore, so far, ignored the appeals for a review of the suitability of the average consumer benchmark, in light of the consumer behaviour research, to assure a more effective consumer protection. The CJEU may be forcing such a review by steadily extending the application of the benchmark in its judgments, bringing the limelight to it again. Although, if this were indeed the goal of the CJEU, we could have expected a more direct mention thereof to be made.

4.2. Collective vs individual interests of consumers

Whilst the justifications discussed above pertain to the general framework of the European consumer protection and its goals, each individual European consumer protection instrument has its own specific aims, which we should not overlook. Consumer protection against unfair commercial practices, e.g., from the outset implied focus on the collective interests of consumers.[84] That is why, initially, there were no individual remedies granted to consumers on the basis of the UCPD in most Member States and why it is often competitors and consumer organisations rather than consumers filing a complaint under this framework.[85] Although, the CJEU acknowledged that it sufficed for proving an unfair commercial practice if even only one consumer might have been affected by it, this did not change the general aim

[83] Directive (EU) 2019/2161 of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7 (Modernisation Directive).

[84] See eg Jules Stuyck, Evelyne Terryn and Tom van Dyck, 'Confidence through Fairness? : The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 Common Market Law Review 108; CMDS Pavillon, 'De Bindende Kracht van Tweezijdige Algemene Voorwaarden' (2015) 30 Nederlands Tijdschrift voor Burgerlijk Recht 367, paras 10-11.

[85] See eg European Commission, 'First Report on the application of Directive 2005/29/EC' (14 March 2013) COM/2013/0139 final, paras 4.1 and 5. This has now been addressed by the Modernisation Directive, see Recitals 4-7.

of the UCPD to protect collective consumers' interests.[86] Similarly, the justifications for the introduction of the CRD were quite openly geared towards protecting collective consumer interests, as the CRD aimed at removing further obstacles to cross-border trade resulting from the lack of harmonised traders' information obligations.[87]

The UCTD introduced an interesting mix of measures, allowing for the protection of both individual and collective consumer interests. The general unfairness test, expressed in Article 3 UCTD, seems to require an evaluation of individual circumstances of a given consumer, as it refers to all circumstances surrounding the conclusion of a specific contract. At the same time, however, as the standard terms and conditions are drafted for multiple contracts, rather than adjusted to individual consumers, it makes sense to assess their transparency with a reference consumer in mind.[88] Moreover, since the national courts have an obligation to assess the unfairness *ex officio*, this obligation would be easier performed, if the courts could consider the impact of a term on a benchmark consumer rather than an individual consumer.[89] Article 7(2) UCTD facilitates, further, an assessment of unfairness *in abstracto*, that is of terms 'drawn up for general use'. This enables, e.g., consumer organisations and authorities to control traders' compliance with the obligation to draft fair and transparent contract terms.

[86] See Case C-388/13 *UPC Magyarország* EU:C:2015:225, paras 41-41. Para 43 of this judgment emphasises the objective of consumer protection and paras 45-46 show that the CJEU did not think it would be procedurally-desirable to require consumers proving the recurrent breach by the trader. Of course, when the commercial practice affects only one consumer and the trader is familiar with this fact, we could claim that this consumer automatically becomes the targeted group. In such a situation then, the trader would need to account for the individual circumstances of this 'average' consumer of the targeted group, as long as these should have been known. This is, however, a rather unusual situation that would allow to take into account the individual circumstances of the consumer.

[87] See Recital 5 CRD.

[88] Loos (n 18) 188-189.

[89] On the *ex officio* test see further eg J Hijma, *Algemene voorwaarden* (4th edn, Wolters Kluwer 2016) 71-74. Although even if the *ex officio* assessment would use the objective consumer benchmark, then still the consequences thereof should remain individualised under the UCTD, ie an individual consumer should be able to object to the applicability of the sanction of the annulment of an unfair term.

The unfairness test *in abstracto* requires either the use of an objective consumer benchmark or a test case. It bears repeating here that in case of a choice for a benchmark, the UCTD provisions do not prescribe the use of an average consumer benchmark in this test.[90] We should note here that one of the main objectives of the UCTD is to protect consumers as weaker transactional parties from the introduction of substantively unfair terms that traders, as stronger contractual parties, could introduce to a contract.[91] This seems to preclude the use of a benchmark of the average consumer, interpreted as a reasonably observant, circumspect and well-informed consumer.

A further argument that can be made to support the introduction of an objective benchmark, in order to protect collective interests of consumers, is the general procedural apathy of consumers.[92] If the trader's compliance with their obligations towards consumers could only be ensured upon individual complaints, with national courts examining the impact of the provision of information on a given consumer, the consumer protection would be significantly weakened. Considering the low value of many consumer claims, consumers simply have no rational interest in enforcing their rights. The introduced possibility of protecting collective consumer interests strengthens, therefore, undeniably consumer protection and it necessitates the use of a reference consumer. Again, however, this does not signify the need to use the high standard of an average consumer.

5. Conclusions

The last couple of years documented a clear evolution in the application of the average consumer benchmark by the CJEU. This occurred mostly when the Court interpreted provisions of European consumer law regarding a transparent provision of consumer information. Various Advocates General unconvincingly attempted to justify the application of this benchmark under provisions of the UCTD or the CRD, which do not explicitly refer to it. In the author's opinion, the majority of justifications that have been provided are circular, far-fetched or even erroneous.

[90] See further on this Klauer (n 13) 200-202. Differently on the objectives of the UCTD, see eg Hugh Collins, 'Good Faith in European Contract Law' (1994) 14 Oxford Journal of Legal Studies 238.

[91] Loos (n 18) 188-189.

[92] See eg Maria Ioannidou, 'Compensatory Collective Redress for Low Value Consumer Claims in the EU: A Reality Check' (2019) 27 European Review of Private Law 1370-1371.

The assessment of the transparent provision of information to consumers could benefit from the application of an objective benchmark, as this facilitates the protection of collective interests of consumers. However, no provision of the CRD or UCTD suggests that this benchmark should be set on the same level as the average consumer benchmark in the UCPD. Moreover, an argument that the application of the same benchmark under these directives would contribute to more effective, fully harmonised consumer protection is flawed. First, the benchmark is flexible enough to accommodate national courts applying it differently in the same scenarios. Second, if the transparent provision of information were to be fully harmonised across various consumer protection instruments, this should be regulated on the level of the European legislator rather than the CJEU. In such a review of the consumer acquis it would then be necessary to critically examine whether the average consumer benchmark is the most suitable for the achievement of the legislator's goals.

The review could either lead to an introduction of a new consumer benchmark in the UCTD, the CRD and other consumer *acquis* measures, an adjustment of the standard of the average consumer benchmark from the UCPD or a decision being made that the current interpretation and application of the average consumer benchmark should be extended beyond the UCPD. Such a review should then consider, as mentioned above, both the insights from the behavioural scholarship and the objectives that various consumer protection measures aim to achieve. If the average consumer benchmark is to continue to apply throughout the European consumer *acquis*, for reasons of legal certainty it should have the same scope and standard. The undefined content of the average consumer benchmark in the UCPD would allow the European legislator to lower this standard to offer more consumer protection. However, if a thorough consideration of policy objectives shows that different European consumer instruments require an applicability of a different reference consumer, e.g., because they focus more on the protection of individual rather than collective consumer interests, then it would be best to adopt different consumer benchmarks.