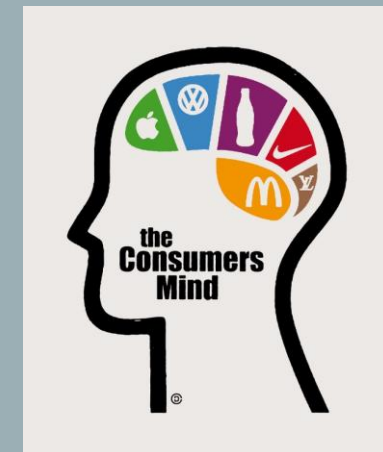


AVERAGE CONSUMER AND MISLEADING ADVERTISING

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WHAT IS MISLEADING?

THREE APPROACHES:

1. FRAUD FROM THE ADVERTISER(intend irrelevant to harm caused to consumers)
2. FALSITY OF THE ADVERTISEMENT MESSAGE(prove discrepancy),
3. MISLEADINGNESS OF CONSUMERS¹

¹ Edward Russo et al.: Identifying misleading advertising; Journal of Consumer Research Vol 8. September 1981

DEFINITION

- INCOMPABILITY BETWEEN A STATEMENT MADE IN THE ADVERTISEMENT OF A PRODUCT AND THE ACTUAL PERFORMANCE OF THE PRODUCT
- What is a false statement? To find this, we must search the advertisement's meaning, go beyond dictionary definitions, find how audiences understand the meaning, in their particular circumstances
- STARTING POINT? -> Consumer's beliefs and expectations for the product



THE PROBLEM OF DEFINITION: EXAMPLES

USA Food and Drug Administration (“FDA”): organic food²

- What does organic mean?
- United States Department of Agriculture: at least 95% organic content, but the rest can be non-organic if it is on an approved list.
- “made with organic” is a separate standard, requiring at least 70% organic content
- If consumers give a different meaning to it—there is an information problem, a misunderstanding concerning the definition
- MISLEADINGNESS?

² Rebecca Tushnet: It Depends on What the Meaning of 'False' is: Falsity and Misleadingness in Commercial Speech Doctrine; [Georgetown Public Law Research Paper No. 1117587](#) pg.115



“UNFAIR COMMERCIAL PRACTICES DIRECTIVE”

DIRECTIVE 2005/29/EC



ACCORDING TO THE DIRECTIVE...

Preamble-Paragraph (18):

- *In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes **as a benchmark the average consumer, who is reasonably wellinformed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.***
- *The average consumer test is **not a statistical test**. **National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case***



MISLEADINGNESS IN THE UCP

Misleading practices are divided into two categories:

- 1. Misleading action**=untruthful information/statement concerning the product
- 2. Misleading omissions** = hiding material information about the product

e.g. describing products as 'gratis', 'free', or 'without charge', if a consumer has to pay any other costs but the costs of responding to the commercial practice, collecting the item and the costs of its delivery, is deemed unfair and is prohibited by the directive ³

³Application of the Unfair Commercial Practices Directive Overview of the Commission's May 2016 guidance document, Jana Valant, EPRS pg.8



ACCORDING
TO THE
DIRECTIVE...

Article 6 - Misleading actions

1. A commercial practice shall be regarded as misleading if it contains **false information** and is therefore **untruthful** or in any way, including overall presentation, **deceives or is likely to deceive** the **average consumer**, even if the information is **factually correct**, in relation to one or more of the following elements, and in either **case causes or is likely to cause** him to take a **transactional decision** that he would **not have taken otherwise**:

- (a) the **existence or nature of the product**;
- (b) the **main characteristics of the product**, such as its availability, benefits, risks, execution, composition, accessories, aftersale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
- (c) the **extent of the trader's commitments**, the **motives** for the commercial practice and the **nature** of the **sales process**, any statement or symbol in relation to **direct or indirect sponsorship** or approval of the trader or the product;
- (d) the **price** or the **manner** in which the price is **calculated**, or the existence of a specific price advantage;

...



ACCORDING
TO THE
DIRECTIVE...

Article 7 Misleading omissions

1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, **it omits material information** that the average consumer needs, according to the context, to take an **informed transactional decision** and thereby causes or is likely to **cause the average consumer to take a transactional decision that he would not have taken otherwise.**

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a **trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information** as referred to in that paragraph or **fails to identify the commercial intent of the commercial practice if not already apparent from the context**, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.



AVERAGE CONSUMER?



WHAT DOES THE EUROPEAN COURT OF JUSTICE SAY?

CASE LAW OF THE ECJ



AVERAGE CONSUMER?

- What is the standard which the Court has to use in order to decide whether the consumer falls within the definition of the average consumer of the Directive?
- Are the average consumers suspicious of the advertisements, or are they naïve?
- If we agree that the standard is a critical-rational consumer, then the responsibility is up to the consumer's hands, if we agree that the standard is low, then it's the advertisers fault.
- These questions are significant, in order to determine, whether there has been indeed an unfair commercial practice.



MARS CASE (1995)

1. Mars company launched a new marketing campaign which sought to increase the ice cream bars by 10%.
2. This percentage was advertised on the wrappers, thus the wrapper was partly colored and bearing the marking “10%.”
3. These chocolate bars were imported from France to Germany.
4. The colored part of the wrapper which indicated the increase of the product by 10%, was bigger than 10% - the percentage written in the wrapper.



MARS CASE (1995)

5. The Association against Improper Practices in Trade and Businesses, sought an injunction against Mars.
6. The organization argued that the advertisement on the wrapper was against the Law of Unfair Competition which prohibited improper competitive practices concerning the use of misleading information.
7. **QUESTION:** the fact that the **colored part of the wrapping was bigger than the percentage which Mars advertised in the wrapper, misled the consumer.**
8. **HELD:**The CJEU ruled that this restriction concerning the wrapper would indeed **limit the free movement of goods and that this prohibition could not be justified in the light of the protection of consumers.**



MISLEADING?

“22 However, it is contended that the measure in question is justified because a not insignificant number of consumers will be induced into believing, by the band bearing the '+10%' marking, which occupies more than 10% of the total surface area of the wrapping, that the increase is larger than that represented.

23 Such a justification cannot be accepted.

24 Reasonably circumspect **consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase.**

25 The reply to the preliminary question must therefore be that Article 30 of the Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking '+10%', (22-25)...⁴

⁴ Case C-470/93, Judgment of the Court (Fifth Chamber) of 6 July 1995, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH, Reference for a preliminary ruling: Landgericht Köln – Germany, paragraph 22-25



CONCLUSION

THE COURT EMBRACES THE RATIONAL-REASONABLY CIRCUMSPECT CONSUMER AS THE BENCHMARK OF THE AVERAGE CONSUMER.

THE COURT EXPECTS THE CONSUMERS TO TAKE CARE OF THEIR OWN INTERESTS AND PAY ATTENTION TO THE INFORMATION AVAILABLE FOR THE PRODUCT.

THE COURT THUS ENCOURAGES EUROPEAN MARKETING STRATEGIES, DOESN'T LET MEMBER-STATES TO BE AN OBSTACLE.



GUT SPRINGENHEIDE

- Court finally clarified who is the average consumer
 1. This case concerns a pack of eggs which was called '6-Korn - 10 frische Eier' ('six-grain – 10 fresh eggs').
 2. The company argued that 'six grain' stood for the six varieties of cereals account for 60% of the feed mix used to feed the hens.
 3. There was also a slip of paper in each pack of eggs praising the beneficial effect of this feed on the quality of the eggs.
 4. The Office for the Supervision of Foodstuufs argued that the product name was misleading and that it violated the Article 10 of the Regulation on the marketing standards for eggs. According to this regulation the seller is obliged to supply certain information on the packaging but must not provide misleading information.



GUT SPRINGENHEIDE

“35 ...in certain circumstances at least, a national court might decide, in accordance with its own national law, to order an expert's opinion or commission a consumer research poll for the purpose of clarifying whether a promotional description or statement is misleading or not.

36 In the absence of any Community provision on this point, it is for the national court, which may find it necessary to order such a survey, to determine, in accordance with its own national law, the percentage of consumers misled by a promotional description or statement that, in its view, would be sufficiently significant in order to justify, where appropriate, banning its use.”⁹

→ **PROBLEM:** the test is too broad, the CJEU expects from the national courts to decide who is the average consumer

⁵ Case C-210/96, Judgment of the Court (Fifth Chamber) of 16 July 1998, Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung.





LIFTING CASE

1. A cosmetic company sold a cream called 'Monteil Firming Action Lifting'.
2. Estée Lauder -the competitor- brought a claim against the company, because the word 'Lifting' ⁶ 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". (par.13)
3. HELD: "29 In order to apply [the average consumer] 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 shortlived, thus neutralising any conclusion to the contrary that might be derived from the word 'lifting'.**" ⁶

⁶ Case C-220/98, Judgment of the Court (Fifth Chamber) of 13 January 2000, Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH, Reference for a preliminary ruling: Landgericht Köln – Germany, paragraph 29



LIFTING CASE

Social, cultural and linguistic factors for the application of the average consumer benchmark

While a commercial statement is not misleading in one Member State, it may be misleading in another.

General guidelines, final decision-> the **national court** taking into account the special circumstances of each case

NOT ONE EUROPEAN CONSUMER



ADOLF DARBO

- It concerns a jam that was described as ‘naturally pure’, but contained pectin which was exposed to pollution. The CJEU expected the consumers to be informed and know that a certain degree of pollution in the food ingredients is expected and predictable. -it’s inevitable
- **HELD:** “22 ...consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 6 of the Directive. In those circumstances, an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term naturally pure used on the label simply because the jam contains pectin gelling agent whose presence is duly indicated on the list of its ingredients .”⁷

⁷ Case C-465/98, Judgment of the Court (First Chamber) of 4 April 2000, Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG, Reference for a preliminary ruling: Oberlandesgericht Köln - Germany.



CONCLUSION, WHO IS THE AVERAGE CONSUMER ACCORDING TO THE ECJ?

CONSUMERS ARE EXPECTED TO:



show interest and know the available information about the product-be critical about them



protect themselves,



be suspicious,



rational, careful-attentive(read the labels-before purchasing the product- and ingredients),



is not misled because of a product packaging or name as long as it's relevant,



predict the potential dangers



PROBLEM OF THIS APPROACH

- We often make choices unconsciously - actual average consumer is thus not always a rational decisionmaker
- Just because the information is available, doesn't automatically mean that consumers will actually read and understand these information.
- TO READ THE AVAILABLE INFORMATION COSTS ENERGY+TIME



TO SUM UP

ACCORDING TO THE DIRECTIVE THE AVERAGE CONSUMER IS REASONABLY WELLINFORMED AND REASONABLY OBSERVANT AND CIRCUMSPECT, TAKING INTO ACCOUNT SOCIAL, CULTURAL AND LINGUISTIC FACTORS

IN INTERPRETING THE AVERAGE CONSUMER THE COURT PLACED THE BURDEN IN THE CONSUMER-> HIGH EXPECTATIONS, RATIONAL CONSUMER? (*ADOLF DARBO, MARS*)

A NATIONAL COURT SHOULD CARRY ITS OWN SURVEY? (*GUT SPRINGENHEIDE*)

SOCIAL, CULTURAL AND LINGUISTIC FACTORS FOR THE APPLICATION OF THE AVERAGE CONSUMER BENCHMARK (*LIFTING CASE*)



THE 'VULNERABLE CONSUMER'

UCP DIRECTIVE



UCP DIRECTIVE

Preamble- Recital Par(18)THE DIRECTIVE:

...contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly **vulnerable to unfair commercial practices**. Where a commercial practice is specifically aimed at a **particular group of consumers**, such as **children**, it is desirable that the **impact** of the commercial practice be **assessed** from the perspective of the **average member of that group**. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase.

Article 5 -Prohibition of unfair commercial practices

- 3. Commercial practices which are likely to materially distort the economic behaviour **only of a clearly identifiable group of consumers who are particularly vulnerable** to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, **shall be assessed from the perspective of the average member of that group**. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.



AGE? KIDS? ELDERS?

According to a research made in the Journal of Consumer in 1986 elderly consumers: ¹²

- Elders take longer to process information and are more isolated thus more likely to be influenced.
- It's harder for children to make 'rational' decisions, especially when they have to process large quantities of information. Moreover, the way the product is presented is highly relevant. Children lack experience and self control.⁸

⁸ John, Deborah & Cole, Catherine. (1986). Age Differences in Information Processing: Understanding Deficits in Young and Elderly Consumers. Journal of Consumer Research. 13. 297-315. 10.1086/209070,



THE END

Thanks for your attention😊



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