



## The Regulatory Consumer in EU and National Law? Case Study of the Normative Concept of the Consumer in Hungary and Poland

by

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### *Abstract*

This paper analyzes the question how EU and national laws implemented and how courts and regulatory authorities apply two opposing regulatory approaches and the corresponding legally defined images of consumers in market regulation: the active and responsible consumer concept on the one side along with the more protective concept of vulnerable consumers on the other side.

The paper examines the normative concept of the consumer from a broad perspective of market regulation by focussing on unfair commercial practices as this is a horizontal instrument involving a broad range of transactions in various markets and because the Unfair Commercial practices Directive 2005/29 specifically lays down the normative concept of the consumer (both ‘average’ and ‘vulnerable’) in its provisions. The analysis proceeds on the basis of the normative standard as developed in the ECJ’s jurisprudence on free movement rules and further provides a case study of two Central and Eastern European Member States – Hungary and Poland. It examines how EU law and national laws implemented, and how the ECJ and national courts and regulatory authorities interpret the normative concepts of the consumer (both ‘average’ and ‘vulnerable’).

The specific questions the paper analyzes are: Do the existing normative notions of the ‘average’ consumer and the definition of consumers in EU and national law correspond to public policy discourse on consumers’ active role in regulating markets? How do these laws address the vulnerability of consumers? How do the EU and national law notions conceptually link to each other? And most importantly how do courts and regulatory authorities interpret these notions?

The paper finds that while there are clear normative concepts of the consumer in the legislation and EU free movement jurisprudence, their application in other fields of EU consumer law, as well as in national law, demonstrate a more nuanced image of the consumer. The paper argues that the legal rules and the envisaged concepts of the consumer need to be enriched by insights from law enforcement. Moreover, both law and law enforcement must be informed both of how markets evolve and how the role of consumers changes as well as enriched by the results from other social sciences, most notably behavioural economics studying consumer behaviour.

### *Resumé*

Cet article analyse la question comment le droit de l’Union européenne et le droit national mettent en œuvre, ainsi que comment les tribunaux et les autorités de régulation appliquent, deux approches réglementaires opposées à l’image légal du consommateur dans le domaine de la réglementation des marchés : d’une part le concept de consommateur actif et responsable, et d’autre part le concept plus protectrice de consommateur vulnérable.

L’article examine le concept normatif du consommateur dans une large perspective de régulation du marché en mettant l’accent sur des pratiques commerciales déloyales. C’est parce que c’est un instrument horizontal qui implique un vaste

éventail de transactions sur les différents marchés et parce que la Directive 2005/29 relative aux pratiques commerciales déloyales des entreprises prévoit le concept normatif du consommateur («moyen» et «vulnérable») dans ses dispositions. L'analyse est basée sur le standard normatif développé dans la jurisprudence de la Cour de justice de l'Union européenne concernant les dispositions sur la libre circulation, mais elle fournit aussi une étude de cas de deux États Membres d'Europe centrale et orientale – la Hongrie et la Pologne.

Il examine comment le droit de l'Union européenne et les droits nationaux mettent en œuvre, et comment la Cour de justice de l'Union européenne, les cours nationales et les autorités de régulation interprètent, les concepts normatifs du consommateur («moyen» et «vulnérable»).

Les questions spécifiques analysées dans l'article sont suivantes:

Est-ce que les notions normatives concernant le consommateur «moyen» et la définition du consommateur dans le droit de l'Union européenne et la législation nationale correspondent aux discours de la politique publique sur le rôle actif des consommateurs dans la régulation des marchés? Comment ces lois traitent la vulnérabilité des consommateurs? Comment les concepts utilisés dans le droit de l'Union européenne et le droit national sont liées? Et surtout, comment les tribunaux et les autorités réglementaires interprètent ces notions?

L'article constate que bien qu'il existe des concepts normatifs clairs du consommateur dans la législation de l'Union européenne et dans la jurisprudence de la Cour de justice de l'Union européenne concernant la libre circulation, leur application dans d'autres domaines du droit européen, notamment dans le droit du consommateur, ainsi que dans le droit national, démontrent une image plus nuancée du consommateur. L'article affirme que les règles juridiques et les concepts du consommateur doivent être enrichis par les expériences de l'application du droit. De plus, le droit et le système de son application doivent prendre en compte comment les marchés évoluent et comment le rôle des consommateurs change. De plus, le droit et le système de son application doivent être enrichi par l'expérience d'autres sciences sociales, notamment l'économie comportementale focalisé sur le comportement des consommateurs.

**Key words:** consumer protection; consumer image; EU; Central and Eastern Europe; law enforcement

**JEL:** K23, K12

## I. Introduction

The image the consumer has long been associated with is that of a passive market actor who finds him/herself in a weak bargaining position *vis-à-vis* professional businesses. Consumers are thus believed to be unable to discipline

the market behaviour of firms because their lack information, power, voice and coordination. Accordingly, consumer laws and policies pro-actively intervened in markets by means of mandatory rules, while public authorities were given the mandate to assist and redress weak consumers<sup>1</sup>.

However, as large scale liberalization and de-regulation took place and global economic restructuring processes and technological changes expanded consumer markets, a noticeable transformation of the traditional role and concept of the consumer materialized.

Accordingly, the background of that transformation is the deepening of global and EU integration, which has been associated with the retreat of the interventionist State and the rise of the neo-liberal model of economic regulation. For that reason, regulatory goals and techniques changed and the government's position became de-centred by shifting and sharing regulatory powers of the State with international and regional organizations, independent authorities, the industry, non-governmental organizations and individuals. The emerging re-regulation took shape as 'de-centred regulation' (Black, 2001, p. 103–146). For consumers, among others, this meant that they could more directly and actively participate in markets and their regulation. It has been argued that de-centred regulatory approaches 'responsibilised' consumers, who actively contribute to regulatory practices through their ordering role in markets, instead of the invisible hand of private preferences<sup>2</sup>. In other words, consumers are viewed as self-confident economic agents whose purchasing decisions are key to well-functioning markets.

Through active participation in markets, consumers contribute to public policy goals of market regulation such as EU market integration, market competitiveness, and to European society and the legitimacy of market processes. For example, in the financial services market, they contribute to its stability while in energy markets, consumers play a key role in promoting competition, ensuring affordable energy prices and security of supply, as well as contributing to European environmental and climate goals by engaging in more efficient energy use.

At the same time, technical and economic developments posed new risks to consumers in terms of their health, safety, well-being or even their privacy. The

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<sup>1</sup> In fact, in Europe, the traditional mode of economic regulation was public ownership, which was justified by the need to protect consumers from private monopolies. However, this mode of economic regulation failed not only with respect to economic, social and political aspects but also in terms of consumer protection (Majone, 2010, p. 4–6; Hodges, 2016, p. 246).

<sup>2</sup> 'Responsibilisation' is, according to (Williams, 2007, p. 227) not the same as consumer empowerment. Consumer empowerment stands for reducing barriers to participation in markets and improving the accessibility of relevant information. 'Responsibilisation' increases individuals' exposure to risk and emphasizes consumers' ordering role in markets instead of the invisible hand of private preferences.

widening of consumer markets as well as technological developments, have significantly increased the amount and complexity of information consumers have to process, as well as the risks they take when entering transactions in the global marketplace. These developments, alongside the economic crisis, have pushed the public policy discourse towards greater consumer protection and the identification of a separate concept of the so-called ‘vulnerable’ consumer. What vulnerability exactly means is subject to extensive discussion, but it remains a concept to be filled with content by national legislators.

This paper analyzes the question how EU and national laws reflect these opposing regulatory approaches. In other words, how did EU and national laws implement, and how do courts and regulatory authorities interpret, the active and responsible consumer concept on the one side along with the more protective concept of vulnerable consumers on the other side. This question can be the best answered by analyzing the normative concept of the consumer as laid down in legislation and enforced by courts and regulatory authorities. The normative concept functions as a point of reference indicating the level of State intervention, and thus the level of protection consumers are provided by a certain legal system. The normative concept of the consumer establishes the balance between default and mandatory (consumer) rules, and thus defines the types of rights and legal instruments that give content to these rights. While earlier research has analysed the normative concept of the consumer (Mak, 2011; Duivenvoorde, 2015)<sup>3</sup>, these projects focused on EU Member States of Western Europe such as the Netherlands, Germany, UK and Italy. Building on this research, this paper will examine the normative concept in a broader perspective of market regulation and public policy goals, as well as provide a case study of two Central and Eastern European (hereafter, CEE) Member States – Hungary and Poland. With respect to legislation and law enforcement, this analysis will focus on unfair commercial practices as this is a horizontal instrument involving a broad range of transactions in various markets and because the Unfair Commercial Practices Directive 2005/29 specifically lays down the normative concept of the consumer (both ‘average’ and ‘vulnerable’) in its provisions and on the basis of the normative standard as developed in the ECJ’s jurisprudence on free movement rules<sup>4</sup>.

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<sup>3</sup> Mak, V. The ‘Average Consumer’ of EU Law in Domestic Litigation: Examples from Consumer Credit and Investment Cases (November 16, 2011). TISCO Banking, Finance and Working Paper Series No. 003/2011; Tilburg Law School Research Paper No. 004/2012, Duivenvoorde, B. *The consumer benchmarks in the unfair commercial practices directive.*, Springer, 2015.

<sup>4</sup> 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 (OJ L 149/22), recital 18 and Art. 5. Mak adds that the UCPD also shares practical and conceptual links with the field of intellectual property law in the sense that the ‘unfair’ character of advertising is determined

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The paper is structured as follows. The first section analyses the relevance of the normative concept of the consumer and makes a brief comparison between the EU and the US approach. The second section examines this concept in EU law as laid down in the Unfair Commercial Practices Directive (hereafter, UCPD) and most notably in the interpretation of the ECJ. The concept is broken down into two categories, the average consumer and the vulnerable consumer. The third section shifts the focus to the two chosen Member States, Hungary and Poland. It investigates their legislation concerning mainly the UCPD as well as the decision-making practice of their regulatory authorities and the jurisprudence of their courts. The fourth section closes with conclusions.

## **II. The normative concept of the consumer in law**

The normative concept of the consumer has a fundamental function in any given legal system – it establishes the type of consumer the law protects. It outlines what the presumed expectations of an average consumer should be in a given situation. Accordingly, whether and what kind of State intervention is necessary and what kind of legal protection such a consumer needs. As a result, this concept defines the rights and obligations between parties in B2C contracts. By establishing the balance between default and mandatory rules, it designates the kind of regulatory and/or legal tools the envisaged consumer needs in order to enter into effective and efficient transactions in a specific situation. The fundamental dilemma for law and policy-making is to strike the ‘right’ balance between default and mandatory rules. That decision may depend on what the legislator considers to be the goal of consumer law. For some, it is about justice and dealing with inequalities, whilst for others, particularly within the law and economics approach, the law should be concerned with promoting efficient solutions within market transactions, for example, by

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on the basis of consumer perception and thus both sets of rules rely on the risk of ‘consumer confusion’ as their touchstone for the applicability of the rules, and are not so much concerned with setting a general standard for the protection of consumers’ interests in specific circumstances as the other Directives are (Mak, 2010).

improving the flow of information on the basis of which consumers make their market decisions (Scott, 2009)<sup>5</sup>.

Legislators of consumer rules have to decide which trade practice or business behaviour harms consumers and thus should trigger state intervention, and whether such intervention should consist of introducing mere disclosure rules, mandatory standards or strict mandatory rules. The different models of consumer protection are thus determined by this fundamental relationship between State intervention and free market forces. The distribution of responsibilities, that is, rights and obligations between the State, individual consumers, consumer organizations and lobby groups, as well as suppliers and their organizations, illustrates the different models of regulatory policies. The adopted normative concept of the consumer is thus characteristic of a given legal system and illustrative of its underlying economic model. These models stand on the basis of different degrees of intervention and, accordingly, contain different combinations of market-conformity, market-complementary, and market-corrective tools (Reisch, 2004).

In EU law, as will be analyzed below, the normative concept of the consumer has evolved as the interpretation of the average consumer has emerged – and recently a second category of the ‘vulnerable’ consumer. Since the judgment in *Cassis de Dijon*<sup>6</sup>, EU consumer protection has been characterized by a normative concept of a well-informed and confident consumer and by the adoption of information provisions<sup>7</sup>. The ECJ developed a neo-liberal concept of the consumer, by emphasizing the consumer’s own responsibilities in the market and the beneficial working of market forces, such as the freedom of contracts and competition. This model is based on the idea that the consumer should be able to make informed choices, rather than his/her choice being defined by governmental regulations. Mandatory information disclosure creates a more informed bargaining environment and improves transparency.

Accordingly, the European normative concept is closer to free market mechanisms than social policy concepts, with its primary goal focused on the completion of the internal market. Consumer protection has been considered

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<sup>5</sup> Whilst the pursuit of these objectives is sometimes harmonious, it is often revealing of tensions between contrasting positions as to the very purposes of consumer law.

<sup>6</sup> Case 120/78 *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42. The ECJ acknowledged consumer protection as a *rule of reason* exception to the free movement rules. In this and similar cases, the ECJ found national consumer protection rules overprotective and (miss)using consumer protection as a justification for distorting market competition and holding back relevant information for consumers.

<sup>7</sup> Case C-362/88 *GB-INNO-BM*, ECLI:EU:C:1990:102; C-238/89 *Pall*, ECLI:EU:C:1990:473; C-126/91 *Yves Rocher*, ECLI:EU:C:1993:191; C-315/92 *Verband Sozialer Wettbewerb*, ECLI:EU:C:1994:34; C-456/93 *Langguth*, ECLI:EU:C:1995:206; C-470/93 *Mars*, ECLI:EU:C:1995:224.

as a ‘market-promoting objective’ (Benöhr, 2013, p. 36) of the EU and the consumer has primarily been seen in his/her capacity as an active market participant as the ‘marketised consumer’ (Micklitz, 2015, p. 23).

By way of comparison, in the US, the normative concept of the consumer has developed in deceptive trade practices as legislated by the Federal Trade Commission Act,<sup>8</sup> as amended by the Wheeler-Lea Act in 1938<sup>9</sup>, and enforced by the US Federal Trade Commission (FTC). The consumer concept evolved in three stages – originating from the cognitively limited creature of a member of the general public<sup>10</sup> to later evolve to the ‘reasonable consumer’ based on standard economic rationality notably influenced by the Chicago school<sup>11</sup>. Finally, after the financial crisis, the concept of bounded rationality emerged. The normative concept of the bounded rational consumer is being promoted by new regulatory agencies such as the Consumer Financial Protection Bureau (CFPB) recently created by the Dodd-Frank Act or the ‘US Behavioral Insights Team’ at the White House (Zamir, Teichman, Feldman, 2014). While behavioural economics is clearly shaping the US policy agenda, the revision of the reasonable consumer standard as employed by US courts has not yet taken place (Hacker, 2015, p. 310).

It needs to be added that while behavioural insights may bring the abstract normative concept of the consumer closer to actual consumer behaviour on the market, the relevance of behavioural economics for consumer protection lies not only in the fact that consumers are inhibited from rational decision-making by biases and heuristics, but also that sellers are able to take advantage of consumers’ reduced capabilities. Behavioural insights imply that government interventions might be justified even in competitive markets in order to help

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<sup>8</sup> 15 U.S.C. §§ 41–58 (2000).

<sup>9</sup> Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a) (2000)).

<sup>10</sup> Hacker argued that from the 1940s onwards, it was sufficient for the FTC to show that a trade practice reveals a tendency or capacity to deceive *any* substantial portion of the general public. This reference group comprised ‘that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyse but too often are governed by appearances and general impressions’. The standard was geared not towards a rational machine but towards a cognitively limited creature. The test therefore boiled down to whether a substantial number of consumers, regardless of their cognitive endowments and attention deficits, were deceived. *quoted in FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); see also *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944); Hacker, 2015, p. 308.

<sup>11</sup> FTC Policy Statement on Deception, Letter from James C. Miller III, Chairman of the FTC, to Rep. John D. Dingell, Chairman of the Commission on Energy & Commerce of the House of Representatives (Oct. 14, 1983); *Cliffdale Associates, Inc.*, 106 F.T.C. 110, 161 (1984) in this case most of the FTC adopted the new standard of the reasonable consumer and both the federal and state courts have widely adopted the standard afterwards (Hacker, 2015, p. 309).



consumers in their decision-making, for example, by decreasing available options<sup>12</sup>. Information disclosure, one of the most preferred government interventions in consumer protection policy, needs to be reassessed in the light of behavioural biases. Consumers either do not use, or only partially use the available information. The individual capacity for accepting and processing information can be viewed as emotionally controlled and influenced by many environmental stimulants.<sup>13</sup> These insights of behavioural economics change the way information has to be disclosed to and framed for consumers (Thaler and Sunstein, 2008; Luth, 2010; Cseres, 2012).

Neo-classical economic literature is critical to state interventions, since individuals are said to know best their own preferences and act accordingly (Epstein, 2007; Epstein, 2006). As a result, regulatory approaches implementing behavioural economics have been developed that leave free choice uninhibited – the so-called soft paternalism<sup>14</sup>. It has been argued that soft paternalism nudges<sup>15</sup> individuals into welfare-enhancing decisions, without imposing a particular choice on individual consumers. When biases, heuristics and non-rational influences on behaviour render individual consumer decision-making sub-optimal, these light-handed intervention strategies can be designed to enhance these decisions. Individuals can be de-biased, nudged into rational decisions by, for instance, providing less and better information. Choice strongly depends on the context, provided alternatives, and the presentation of the various options. These factors represent the so-called ‘choice architectures’ framing consumer decision-making (Luth, 2010; Thaler and Sunstein, 2008).

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<sup>12</sup> Most notably behavioural economics has challenged the concept of the consumer as a rational market actor. This stream of economics points to the institutional constraints on individual choice by showing how individuals make decisions and respond to law and policy. It deals with endogenous aspects of consumer decision-making. Consumers exhibit imperfect information-processing skills and prove to be poor negotiators. These insights into the decision-making process of individuals prove that predictions based on traditional rational choice theory often do not hold. Empirical observations of behavioural economics pointed to cognitive constraints of consumers in perceiving and assessing decisional options as well as in being able to reach rational choices. Behavioural economics demonstrates that consumer decision-making is affected by several biases and heuristics (Kahneman and Tversky, 1979; Kahneman, 2003; Loewenstein, 2009).

<sup>13</sup> There are relevant determinants of search, acceptance and the processing of information. An increase of rationality of purchase decisions over additional information itself seems, therefore, to be subjected to specific constraints (Kahneman, 2003; Loewenstein, 2000; Ölander and Thøgersen, 1995).

<sup>14</sup> There are several names devoted to this regulatory approach. Lighter hand intervention (OECD, 2006), asymmetric paternalism (Camerer et al, 2003) or libertarian paternalism (Sunstein and Thaler, 2003).

<sup>15</sup> ‘Nudges’ is an acronym which stands for six subtle methods for improving choice, devising a good choice architecture: iNcentives, Understanding mappings, Defaults, Giving feedback, Expecting errors, and Structuring complex choices (Thaler and Sunstein, 2008).

This short overview and reflection on the EU and US approach shows that the point State intervention begins, and thus the application of consumer protection rules, crucially depends on the chosen normative concept of the consumer, and may considerably differ also in terms of the chosen legal provisions and their enforcement<sup>16</sup>.

### III. The normative concept of the consumer in EU law

#### 1. Introduction

In EU law the normative concept of the consumer is directly linked to the notion of the internal market and as such it has been characterized as being both instrumental and protective (Micklitz, 2016, p. 23). Instrumental as its primary goal is to complete the internal market and to facilitate the functioning of free movement and competition rules. This goal has significantly influenced its protective function, shifting the European normative concept closer to free market mechanisms than social policy concepts.

The normative concept of the consumer in EU law has been developed by the ECJ in its free movement jurisprudence. Accordingly, EU law relies on the benchmark of an ‘average’ consumer who is a well-informed, reasonable and circumspect market actor. In cases such as *C-238/89 Pall Corp*, *C-315/92 Clinique*<sup>17</sup>, *C-470/93 Mars* and *C-373/90 Procureur de la Republique v. X*.<sup>18</sup> the ECJ has condemned national rules on alleged consumer protection as being over-regulatory and relied on the ‘reasonably circumspect consumer’ who is able to process information and make informed choices.<sup>19</sup> In these cases, the Court, in fact, defined the limits of national legislation that aimed

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<sup>16</sup> For a detailed comparison and overview of the various normative concepts see: (Hacker, 2015). Hacker shows how behavioural insights can be integrated into the consumer concept. He proposes three distinct ways: strictly empirical, strictly normative and their mix.

<sup>17</sup> In *Clinique*, a German law prohibited the use of the name ‘Clinique’ on the grounds that it can mislead and confuse consumers so as to believe that it is a medical product and not a cosmetic one. The Court again found that the alleged consumer confusion did not justify the effects of the rule, namely the impediment on trade and the restriction of market communication.

<sup>18</sup> Case *C-373/90 Procureur de la Republique v. X.*, ECLI:EU:C:1992:17.

<sup>19</sup> In *Yves Rocher*, the Court affirmed the relevance of market or product-related information and condemned a provision of the German law on unfair competition prohibiting individual price comparisons. The Court stated that ‘...the prohibition in question goes beyond the requirements of the objectives pursued, in that it affects advertising which is not at all misleading and contains prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts’ (*C-126/91 Yves Rocher*, para. 17).

to provide a higher degree of protection *vis-à-vis* EU consumer protection. Mak convincingly showed how the concept functions as an analytical tool that mediates between the different levels of regulation in the EU, that is, between the different normative standards of EU and national laws (Mak, 2011).

More importantly, this concept puts the emphasis on the ability of consumers to process and use information. It has thus given preference to rules that require information disclosure instead of market intervention (Weatherill, 2001, p. 174). The current definition of the normative concept is based on *Gut Springheide* where the Court explained that ‘...in order to determine whether a particular description, trade mark, promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer, who is reasonably well informed and reasonably observant and circumspect’<sup>20</sup>.

According to this jurisprudence, the consumer is a well-informed and confident market actor that can effectively participate in markets with the help of information provisions instead of corrective legal measures. This concept sets the borderline in EU law between the rights and duties of private parties in B2C transactions (Mak, 2015). The average consumer is granted mandatory rights (Micklitz, 2002, p. 588) in order to participate in markets and to realise the EU goal of market integration. The ECJ developed a neo-liberal concept of the consumer by emphasizing their own responsibilities in the market and stressing the importance of information as the main regulatory tool in this new regulatory architecture. This model is based on the idea that consumers should be able to use information and participate actively in the market by making informed choices rather than their choices being defined by governmental regulation.

Moreover, these rules also amalgamate public and private law aims. On the one hand, they are based on public policy goals of competition, market regulation and EU integration, and thus mainly consist of regulatory law to complete the internal market and strengthen competition building a new ‘horizontal’ regime of consumer contract law. They transcend, in fact, the internal relationship between producers or service providers and consumers to the external dimension of the well-functioning of markets (Reich, 2011, p. 71). On the other hand, they regulate the internal relationship of B2C transactions and thus protect weak and vulnerable consumers.

The following section will analyze how positive integration Directives, and their interpretation by the ECJ as well as the enforcement of trade mark law deviate from the above examined ‘average’ consumer concept.

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<sup>20</sup> C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, ECLI:EU:C:1998:369, para. 31, 32. See also C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, ECLI:EU:C:2010:660, para. 103.

## 2. Deviations from the ‘reasonably well informed and reasonably observant and circumspect’ consumer

Nevertheless, it has also been shown that the positive and negative measures of harmonization take significantly different stances on the image of the consumer and the level of intervention required at EU level (Unberath and Johnston, 2007; Mak, 2015, p. 382).

Positive measures of harmonization (legislation in the form of Directives) follow a more protective approach perceiving consumers as weak parties that need mandatory rules to be safeguarded. The interpretation of these Directives by the ECJ has, after an initial period of relying on the notion of an assertive consumer, has taken a more consumer friendly approach. This more consumer protective approach can be captured concerning the interpretation of Directive 13/93 on unfair contract terms. Already in *Océano Grupo*<sup>21</sup>, and in a number of more recent cases such as *Pénzügyi Lízing*, the Court of Justice stressed that the system introduced by the Directive is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier as regards both its bargaining power and his level of knowledge. As a result, the consumer may agree to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms<sup>22</sup>. It is because of that weaker position of the consumer that Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. This is a mandatory rule which aims to re-establish equality between the contracting parties<sup>23</sup>.

Similarly, ECJ jurisprudence on consumer sales and distance contracts shows the same concern for the ‘weak’ consumers. With reference to consumer sales, national courts have to grant an *ex officio* price reduction when the consumer only invoked a rescission of the contract as illustrated in *Soledad Duarte Hueros v. Autociba*<sup>24</sup> and, more recently, concerning the notification duty in *Froukje Faber*<sup>25</sup>. With reference to distance contracts, the obligation of traders to inform the consumer about their withdrawal right has become a fundamental requirement of consumer protection. In *Pia Messner*, the ECJ

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<sup>21</sup> Joined Cases C-240/98 and C-244/98 *Océano Grupo*, ECLI:EU:C:2000:346.

<sup>22</sup> Joined Cases C-240/98 and C-244/98 *Océano Grupo*, para. 25; see also C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675; C-40/08 *Asturcom Telecommunication*, ECLI:EU:C:2009:615, para. 29; C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350, para. 25; C-137/08 *VB Pénzügyi Lízing v. Ferenc Schneider*, ECLI:EU:C:2010:659, para. 46.

<sup>23</sup> C-137/08 *VB Pénzügyi Lízing v. Ferenc Schneider*, para. 46-48.

<sup>24</sup> C-32/12 *Soledad Duarte Hueros v. Autociba*, ECLI:EU:C:2013:637. See also (Jansen, 2014).

<sup>25</sup> C-497/13 *Froukje Faber*, ECLI:EU:C:2015:357. The CJEU’s approach was highly consumer friendly concerning notification duty in consumer sales law under Directive 1999/44. See for indepth analysis (Rott, 2016).

confirmed that consumers are in principle able to withdraw from distance contracts without paying usage compensation to the seller. The ECJ stated that a different judgment would harm the effectiveness and efficiency of the very right to withdraw by imposing a financial burden on consumers<sup>26</sup>. Moreover, in *Walter Endress*, the ECJ held that a national provision whereby a right to withdraw lapses, at the latest, one year after the payment of the first premium, where the policy-holder has not been informed about the right to cancel the contract, was contrary to EU law<sup>27</sup>. In *Heininger*<sup>28</sup> and *Schulte*<sup>29</sup>, the ECJ went even so far as to extend the right of withdrawal concerning the Directive on doorstep selling to enable consumers not only to get out of contractual obligations years after the conclusion of the contract, but also to get out of so-called linked contracts.

In *Kásler*, the ECJ went also as far as to state that substituting an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13, because according to settled case law, that provision is intended to substitute the formal balance established by the contract between the rights and obligations of the parties, by real balance re-establishing equality between them, rather than annul all contracts containing unfair terms<sup>30</sup>. Moreover, in cases such as *Mohamed Aziz*<sup>31</sup>, the ECJ opened the door for increased ‘proceduralization’ of the judicial review of unfair terms, where the national court was allowed to suspend mortgage enforcement proceedings in order to establish the unfairness of a contested term (where enforcement was initiated with respect to such term). Such interim relief was considered to ensure the judicial review of unfair terms. This ‘proceduralization’ of the Directive was continued in *Sánchez Morcillo*<sup>32</sup> and *Kušionová*<sup>33</sup> by assessing whether national procedural law governing mortgage enforcement proceedings ensures the effective judicial review of unfair terms in consumer contracts.

<sup>26</sup> C-489/07 *Pia Messner v. Firma Stefan Krüge*, ECLI:EU:C:2009:502, para. 6.

<sup>27</sup> C-209/12 *Walter Endress v. Allianz Lebensversicherungs AG.*, ECLI:EU:C:2013:864.

<sup>28</sup> 481/99 *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank AG*, ECLI:EU:C:2001:684.

<sup>29</sup> C-350/03 *Elisabeth Schulte and Wolfgang Schulte v. Deutsche Bausparkasse Badenia AG*, ECLI:EU:C:2005:637.

<sup>30</sup> C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, para. 79; C-453/10 *Pereničová and Perenič*, ECLI:EU:C:2012:144, para. 31, and C-168/10 *Banco Español de Crédito* EU:C:2012:349, para. 40 and case-law cited.

<sup>31</sup> C-415/11 *Mohamed Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164; C-226/12 *Constructora Principado SA v. José Ignacio Menéndez Álvarez*, ECLI:EU:C:2014:10.

<sup>32</sup> C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099.

<sup>33</sup> C-34/13 *Monika Kušionová v. SMART Capital, a.s.*, ECLI:EU:C:2014:2189.

In trade mark law, where the ECJ interprets the way in which businesses try to influence consumer choice in the Trade Mark Directive (TMD)<sup>34</sup> and the Trade Mark Regulation<sup>35</sup>, the jurisprudence of the ECJ is based on the average consumer test developed in free movement cases<sup>36</sup>.

However, the Court did recognise 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'<sup>37</sup>. This implies that there is room for divergence from the average consumer concept in national law and enforcement. The Court also recognised that the level of attention of an average consumer is likely to vary according to the specific category of goods or services at stake, and thus the average consumer test should be assessed *in concreto*<sup>38</sup>. Moreover, ruling on the Trade Mark Regulation in *Koipe Corporacion v. OHIM*<sup>39</sup>, the General Court considered that the average consumer is not circumspect but makes impulsive purchases without considering all the information<sup>40</sup>. This refers to insights from behavioural economics that looks at biases, heuristics and non-rational influences on behaviour which render individual consumer decisions sub-optimal. Consumers either do not use or only partially use the available information. The individual capacity for accumulating and processing information can be viewed as emotionally controlled and influenced by many environmental stimulants.<sup>41</sup> Accordingly, the way information is disclosed to and framed is crucial for consumers.

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<sup>34</sup> Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version) (OJ L 299/25) replaces Directive 89/104.

<sup>35</sup> Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark (OJ 1994 L 11/1), as amended, and eventually codified by Council Regulation 207/2009 of 26 February 2009 on the Community Trade Mark (OJ L 78/1).

<sup>36</sup> C-342/97 *Lloyd Schuhfabrik Meyer*, ECLI:EU:C:1999:323, para. 25.

<sup>37</sup> C-313/94 *Flli Graffione SNC v. Ditta Fransa*, ECLI:EU:C:1996:450, para. 22.

<sup>38</sup> C-342/97 *Lloyd Schuhfabrik Meyer*, para. 26.

<sup>39</sup> T-363/04 *Koipe Corporación, SL v. OHIM*, ECLI:EU:T:2007:264.

<sup>40</sup> The case concerned a figurative trade mark used for olive oil. The figurative trade mark of a competitor was rather similar, but there were also obvious differences between the two signs. See further J Stuyck, Consumer concepts in EU secondary law, in: Klinck, F. Riesenhuber, K. (eds.), *Verbraucherleitbilder, Interdisziplinäre und europäische Perspektiven, Schriften zum Europäischen und Internationalen Privat-, Bank- und Wirtschaftsrecht* 51, 2015, pp. 115-136.

<sup>41</sup> There are relevant determinants of search, acceptance and the processing of information. An increase of rationality of purchase decisions over additional information itself seems, therefore, to be subjected to specific constraints (Kahneman, 2003; Loewenstein, 2000; Ölander and Thøgersen, 1995).

The above analysis clearly shows that the EU's normative concept of the average consumer is far from being homogenous. In fact, it seems to be deviating from the *Gut Springheide* test in various ways.

The fact that the average consumer is less of the rational, circumspect and well-informed person ['less of' ie less than expected?] has also been confirmed in a recent empirical study. In an extensive study on consumer vulnerability published in 2016<sup>42</sup>, the EU Commission examined also the concept of the average consumer. The study looked at how the legal concepts of 'average' and 'vulnerable' consumers have been understood across EU Member States. It found that some level of divergence exists in their interpretation, even though these concepts have been used across a number of cases. The study examined the scope and the drivers of consumer vulnerability in the EU and while it focused on vulnerability, it also investigated the concept of the average consumer. It considered it in two ways – in relation to the indicators developed by the study to conceptualise consumer vulnerability, and in relation to the definition of the average consumer in the UCPD, that is, referring to the average consumer as reasonably 'well informed', 'observant' and 'circumspect'. The study found that the concept of the 'well informed' average consumer, as represented by the median consumer response per indicator, feels quite informed about prices, declares that he/she reads communications from the Internet, banking and energy providers (but admits to only glance over them or skim read them), and states that he/she does not rely on information from advertisements only.

Concerning the elements of the concept of the average consumer such as being 'observant' and 'circumspect', the study found that the median consumer sees him/herself as quite careful in dealing with people and in decision-making, as not very willing to take risks and that he/she does not believe that advertisements report objective facts.

The study argued that most of the above indicators reflect the self-reported average – as opposed to objective measures – of the concepts of being 'well-informed', 'observant' and 'circumspect' and should hence be interpreted with caution, as they are likely to be influenced – at least in part – by behavioural biases such as consumer overconfidence (EU Commission, 2016, p. 44).

EU law on the concept of the average consumer, who makes rational decisions in the marketplace, has been challenged from different perspectives in the last decade. First of all, the economic and financial crises of 2008 had a considerable impact on consumer confidence and purchasing power. Second, economic developments, such as the widespread liberalization of certain sectors,

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<sup>42</sup> EU Commission (2016), Consumer vulnerability across key markets in the European Union. Retrieved from: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/docs/vulnerable\\_consumers\\_approved\\_27\\_01\\_2016\\_en.pdf](http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf).

significantly increased the amount and complexity of information consumers must now process when entering transactions in the global marketplace. Third, as a reaction to these economic and social changes, a new stream of economic theory developed – behavioural economics that challenges rational consumer behaviour<sup>43</sup>. And last, in the age of technological innovations, consumer law and the notion of the consumer faces fundamental challenges as a result of increased digitalization<sup>44</sup>. EU law needs to react and adapt to these changes: a growing number of disadvantaged consumers as well as the fact that the needs and interests of consumers are shifting, extending to issues such as ethical and social objectives, as well as the necessity to deal with the new insights on the irrational or bounded rationality of consumers in processing information.

The next section will analyze one of these challenges: the concept of the vulnerable consumer.

### 3. The ‘vulnerable’ consumer in EU law

The notion of the ‘vulnerable’ consumer was first addressed in *Buet* where the Court made reference to people who are behind in their education as the potential purchasers of educational material. That fact makes them particularly vulnerable *vis-à-vis* salesmen who can easily persuade them to buy educational material which will improve their employments prospects<sup>45</sup>.

The notion of the disadvantaged or vulnerable consumer is now part of EU law, and yet the exact definition who exactly is a ‘vulnerable’ consumer, and what kind of intervention this position requires, is far from being decided. The definition of vulnerability remains within the competence of the Member States. Reich distinguishes three types of vulnerability: physical, intellectual and economic disability (Reich, 2016, p. 141). He clearly distinguishes the notion of ‘vulnerability’ from the concept of ‘weakness’. While weakness is a typical characteristic of consumers, and also a frequent feature of B2C transactions, vulnerability is a distinct and rare category of consumers.<sup>46</sup>

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<sup>43</sup> Commission, ‘A European Consumer Agenda – Boosting confidence and growth’ (Communication), COM(2012) 225 final, ‘Consumer policy as an essential contribution to Europe 2020’.

<sup>44</sup> See the COM(2015) 634 final. Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content.

<sup>45</sup> 382/87 *Buet*, ECLI:EU:C:1989:198, para. 13.

<sup>46</sup> Compare with Domurath, I. (2013). The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law. *Journal of European Consumer and Market Law*.



So far, the concept of a ‘weak’ consumer has mainly been interpreted by the CJEU, but other EU institutions also endorse the more protective policy that deals with the problem of vulnerable consumers. However, while both the European Parliament<sup>47</sup> and the Commission<sup>48</sup> have addressed the problem of vulnerable consumers this raises fundamental questions for both EU policy and law making<sup>49</sup> since, as a general principle, the definition of vulnerability remains a Member State competence.

In EU law reference to ‘particularly vulnerable consumer’ can be found in Article 5(3) of the UCPD 2005/29: vulnerable consumers are those more exposed to a commercial practice or a product because of their: (a) mental or physical infirmity, (b) age or (c) credulity. While Recital 34 of the Preamble of the Consumer Rights Directive 2011/83 also refers to vulnerable consumers, the notion has not been implemented in the text of the Directive. Recital 8 of the Preamble of the General Product Safety Directive 2001/95 also mentions vulnerable consumers (Waddington, 2013).

The notion of the vulnerable consumer has, however, been most notably recognized in sector specific Directives. The Universal Service Directive explicitly grants special rights to vulnerable consumers<sup>50</sup>.

Both the Second and Third Energy and Gas Package, which focused on improving the operation of retail markets for both electricity and gas consumers, has introduced particular provisions for the protection of vulnerable consumers. Article 3(7) of Directive 2009/72<sup>51</sup> refers to necessary

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<sup>47</sup> The European Parliament adopted on 22 May 2012 a non-legislative report on ‘vulnerable consumers’. European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)).

<sup>48</sup> A European Consumer Agenda, cited supra 112. European Commission, Consumer vulnerability across key markets in the European Union Final Report, January 2016.

<sup>49</sup> The Parliament urged for horizontal and sectorial approach, while the Commission emphasized the empowerment of consumers in order to enhance knowledge for consumers. Commission Staff Working document on knowledge-enhancing aspects of consumers empowerment 2012-2014, SWD(2012)235 final, 19.07.2012.

<sup>50</sup> See both Article 2 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108/51) and Articles 7 and 23a of Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337/11).

<sup>51</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211/55).

safeguards to protect vulnerable consumers with regard to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms and the switching of suppliers. Member States should also define the concept of vulnerability by referring to, for example, energy poverty and, *inter alia*, to the ban on disconnecting electricity supplies to such customers in critical times<sup>52</sup>.

The gap between the ‘vulnerable’ consumer standard in EU legislation and the ‘weaker’ consumer standard of ECJ jurisprudence shows that the concept of vulnerability needs to be implemented and made concrete by national legislation and case law.

## IV. Normative concepts of consumer in the Member States

### 1. Introduction

It has long since been acknowledged that the above analysed normative concept of the rational, empowered consumer can conflict with the more protective standard of the Member States<sup>53</sup>. With respect to the UCPD, which is the broadest legislation covering all kinds of commercial parties in B2C relationships, the CJEU has also acknowledged the existence of linguistic, cultural and social differences between EU Member States. This justifies a different interpretation of the message communicated in the commercial practice by the competent enforcement authority or court<sup>54</sup>. As part of the UCPD, almost every Member State implemented the concept and term of the

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<sup>52</sup> Article 3(8) of Directive 2009/72 calls Member States to take appropriate measures, such as formulating national energy action plans, providing benefits in social security systems to ensure necessary electricity supplies to vulnerable customers, or providing support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Art. 36(h) also obliges NRAs to help to achieve high standards of universal and public services in electricity supply contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching. See also (Lavrijssen, 2014).

<sup>53</sup> (Micklitz, 2015, p. 21–41) argues that EU consumer law is market bound while it is social policy bound in national law.

<sup>54</sup> In the *Estée Lauder* case (C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v. Lancaster Group GmbH*, ECLI:EU:C:2000:8), the emphasis was on the role of social, cultural and linguistic factors in advertising. Could the usage of the term ‘lifting’ mislead an average consumer when this term was used to promote cosmetics? In case C-313/94 *F.lli Graffione SNC v Ditta Fransa*, para. 22, the Court argued that ‘In a prohibition of marketing on account of the misleading nature of the trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States. [...] it is possible that because of

‘average’ consumer. However, there seems to be limited experience, and thus little interpretational practice, of the term in national case law<sup>55</sup>. Moreover, national interpretation differs considerably. For example, in the UK, the High Court of Justice stated that the term ‘average consumer’ relates to ‘consumers who take reasonable care of themselves, rather than the ignorant, careless or over-hasty’. The High Court also concluded that one cannot assume that the average consumer will read the small print on promotional documents<sup>56</sup>. In Germany, the *Oberlandesgericht Karlsruhe* found that people with impaired eyesight can also be considered average consumers and printing information in a very small font can be considered a misleading commercial practice<sup>57</sup>. This reflects indeed two very distinct views on the same concept.

In the following section, the application of the normative concepts of the ‘average’ and ‘vulnerable’ consumer will be analyzed in two EU Member States of CEE – Hungary and Poland.

## 2. Hungary

In Hungary, the UCPD has been implemented by Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers<sup>58</sup>. During the implementation process, the Hungarian legislator decided to break with the Hungarian legal tradition of protecting the interests of customers with regard to both B2C and B2B relations and the fairness of competition in the same piece of legislation. Instead, the legislator decided to transpose the UCPD in a single new act: Act XLVII of 2008 on Unfair Commercial Practices. Section 1 of this Act explicitly states that the scope of the Act extends to only consumers in B2C relations.

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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’.

<sup>55</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm), p. 141–142.

<sup>56</sup> [2011] EWCH 106 (Ch).

<sup>57</sup> (4 U 141/11) In 2010, the German Scientific Advisory Council to the Ministry of Food and Agriculture published a position paper distinguishing between trusting, vulnerable, and responsible consumers and calling for a more differentiated consumer policy in the context of the food sector. Statement of the Advisory Board for Food and Consumer Policy (2010): The trusting, vulnerable or responsible consumer? A plea for a diversified strategy in consumer policy. Berlin. Retrieved from: [http://www.vzbv.de/sites/default/files/downloads/Strategie\\_verbraucherpolitik\\_Wiss\\_BeratBMELV\\_2010.pdf](http://www.vzbv.de/sites/default/files/downloads/Strategie_verbraucherpolitik_Wiss_BeratBMELV_2010.pdf).

<sup>58</sup> English version of the Act is available at: [http://gvh.hu/data/cms998395/jogihatter\\_jogszab\\_gyujt\\_fttv\\_2008\\_m%C3%B3d\\_09\\_04\\_a\\_jav.pdf](http://gvh.hu/data/cms998395/jogihatter_jogszab_gyujt_fttv_2008_m%C3%B3d_09_04_a_jav.pdf).

During the transposition of the UCPD, Hungary decided to broaden the group of regulatory agencies that would enforce the provisions of UCPD. The legislator conferred competences in this regard to three supervisory agencies: to the National Consumer Protection Authority, to the Hungarian Financial Supervisory Authority (to enforce the provisions on unfair commercial practices in the financial sector), and finally to the Hungarian Competition Authority (hereafter, GVH) which is enforcing the Act in those cases where a distortion of competition can be established<sup>59</sup>. The GVH is actively enforcing the Act XLVII of 2008 on Unfair Commercial Practices. Its decisional practice as well as jurisprudence of Hungarian courts will be reviewed and analysed below.

### 2.1. The 'average' consumer in Hungarian law

Even before the implementation of this Act, the practice of the GVH and the courts emphasized that the consumer is a central market actor as his/her decisions in choosing certain products and services fundamentally determine the outcome of economic competition<sup>60</sup>.

While the Act does not contain a definition of the average consumer, Article 4 does state that '[I]n adjudicating on commercial practices the behaviour of the consumer shall be taken as a benchmark, who is reasonably informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors relating to the commercial practice or the goods in question'. The Curia of Hungary<sup>61</sup> has stated in a judgment concerning the question whether a specific advertising falls under the Act XLVIII of 2008 on Business Advertising Activity, that the national enforcement authority has to take account of the protective values of the society, the society's level of morality and tolerance<sup>62</sup>. In order to establish these factors, no scientific evidence or expert witness needs to exist.

The Metropolitan High Court of Appeal also emphasized that even though Article 4 of Act XLVII of 2008 does not contain a definition of the average consumer, the norm addresses the median consumer, the everyday man, the man on the street that represents the majority of the society, who has neither extraordinary capacities or knowledge nor people with interior capabilities. The Metropolitan High Court of Appeal ruled in a number of cases that a reasonable consumer is not suspicious and tends to trust in the fact that the information he/she received is valid and accurate. A reasonable consumer is neither a beautician nor a dermatologist, and accordingly does not possess

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<sup>59</sup> Article 10 of the Act on Unfair Commercial Practices

<sup>60</sup> Legf. Bír. Kf.II.39.104/2000/3, (55/1998. VJ), Legf. Bír. Kf.II.39.580/2001/6. (196/1999. VJ).

<sup>61</sup> The Curia is the highest judicial authority in Hungary.

<sup>62</sup> FKMB a 12.K.30.711/2014/6. számú ítéletében (104/2012. VJ).

specialized knowledge. He relies on his/her own experience and is not obliged to further search for the entire accurate content of the message delivered to him/her, unless the sender of the message emphatically draws his/her attention to it, or there is strong reference to such a duty in the text of the message<sup>63</sup>. Moreover, the GVH has stated in its decision 3/2010 VJ, that the notion of a reasonably circumspect consumer does not mean that the consumer exclusively acts on the basis of rationality. The consumer, during his/her decision-making process, is influenced by various emotional and cognitive factors. Rationality is thus not absolute but relative. Furthermore, the GVH argued in case 54/2011 VJ that the same consumer may act differently concerning different products, services and commercial practices. This has been confirmed in a more recent case on credit cards (VJ/44/2013 para. 71–72) where the GVH argued that the relevant information the consumer needs to take a well-informed decision has to be available in an easy and consumer friendly manner (para. 75). By so doing, the GVH acknowledged the behavioural insight that it is often not the availability of the information as such, but its large amount, selection and filtering, that is crucial for the consumer to make a good decision (para. 75). While it can be expected that the consumer, during his/her decision-making endeavours meant to maximise his/her utility and accordingly, conducts a reasonable information search, the liability for information search cannot be unlimitedly shifted onto the side of the consumer (para. 88).

The GVH also argued in a case concerning loyalty agreements of one of the biggest Hungarian mobile operators, Telenor, that even though the operator failed to make reference to the loyalty agreement in its posters concerning a handset campaign, consumers were aware of these loyalty practices and they would ask for more information and learn about such products and services themselves<sup>64</sup>.

## 2.2. Vulnerable consumers in Hungarian law

Article 4(2) of Act XLVII of 2008 defines the notion of susceptible consumers: '[...] certain characteristics such as age, credulity or physical or mental infirmity make consumers particularly susceptible to a commercial practice or to the underlying goods'. As can be seen, Hungary uses a modified wording for vulnerability. The GVH has clearly stated that the fact that the market is not transparent is, in itself, not a factor which can be taken into account when assessing whether a consumer is vulnerable according to

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<sup>63</sup> Fővárosi Ítéltábla, Magyar Telekom Nyrt and others, case ID: 2.Kf.27.171/2012/4. Fővárosi Ítéltábla 2.Kf.27.298/2012/7. Fővárosi Ítéltábla 2.Kf.27.024/2012/10. and Kfv.II.37.124/2013/8. GVH 145/2007. VJ.

<sup>64</sup> VJ/78/2012.

Article 4(2) of Act XLVII of 2008<sup>65</sup>. However, the GVH and the courts in their assessment of Article 4(2) created, in fact, an in-between category of vulnerability, which will be analyzed in the following section.

*2.2.1. Consumers who are more vulnerable than the ‘average’, but not as vulnerable as falling under Article 4(2)*

In a number of cases, a certain category of consumers has been distinguished that, without falling under Article 4(2) of Act XLVII of 2008 (which defines the notion of ‘vulnerable’ consumers) is nevertheless more vulnerable than the ‘average’ consumer. The fact that these consumers are more vulnerable than the average consumer, had to be taken into account when the relevant trade practice was assessed (Závodnyik, 2013, p. 113).

Many of these cases concerned financial products and services, characterized by significant information asymmetry between consumers and traders, where consumers have frequently limited knowledge about the numerous products on offer, where both the products and the available information is difficult to obtain and understand, and where consumer decisions involve high risks (Závodnyik, 2013, p. 114). For example, in one case, a financial service provider targeted consumers banned by credit institutions, and thus vulnerable in this specific situation, hence more easily attracted to the given advertisement. The case involved the omission of material information by a credit institution and specifically targeted consumers that had been banned by credit institutions due to their poor credit rating. As such, they were particularly susceptible to this specific offer<sup>66</sup>. Besides financial services, the GVH also considered trade practices in the field of cosmetics and pharmaceutical products, where the targeted consumers are often in a more vulnerable situation than the average consumer (without being vulnerable as defined in Article 2(4)) due to the confidential nature of the product or service). For example, consumers who want to lose weight or suffer infertility are more vulnerable concerning trade practices that advertise products or services targeting exactly this health issue<sup>67</sup> (Závodnyik, 2013, p. 114).

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<sup>65</sup> VJ 41/2013.

<sup>66</sup> Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011. See also Decision VJ-111/2009. Fővárosi Törvényszék, 16.K.33.365/2010/23.

<sup>67</sup> VJ 89/2009. VJ 125/2010. VJ 103/2010. VJ 70/2011. VJ 96/2011. VJ 6/2012. VJ 98/2013. Vj 15/2011. VJ/36/2013, para. 55–56.

### 2.2.2. *'Really' vulnerable consumers*

The Hungarian decisional practice includes several cases where trade practices specifically targeted elderly people and tried to exploit their credulity<sup>68</sup>. The elderly may, because of their health or financial situation, be more vulnerable, and accordingly more credulous, to buy a given product or service. Accordingly, the GVH has been paying close attention specifically to events which introduced new products on the market<sup>69</sup>.

Concerning specifically children, there are several layers of protection outside the Act XLVII of 2008. Act LVIII of 1997 on Business Advertising Activity, Act CIV of 2010 on press freedom and audiovisual media services, Act CLXXXV of 2010 on Media Services and Mass Media all contain specific provisions for the protection of children's ethical, psychical and mental development. In fact, jurisprudence emphasizes that this is a constitutional value, which has to be enforced even before other constitutional freedoms such as freedom of press or free speech (Závodnyik, 2013, p. 122–123).

Regarding credulity, several cases on prohibited trade practices targeted seriously ill people, who were highly susceptible to such practices as they hoped to reduce their symptoms or facilitate recovery<sup>70</sup>. With regard to mental or physical vulnerability especially the financial services markets has been closely monitored. The purpose was to eliminate any potential disadvantages deriving from a person's disabilities and to ensure equal treatment and equal opportunities. Accordingly, in 2012 the Hungarian Financial Supervisory Authority (PSZÁF)<sup>71</sup> issued a recommendation concerning the conduct of financial organizations when providing service to people with disabilities. The purpose of the recommendation was to enforce the rights of people with disabilities in the widest possible context, encompassing a high level of access to services and the provision of additional services that actually ensure equal opportunity and to remove barriers as soon as possible in a targeted manner.<sup>72</sup>

Furthermore, in 2014, the Hungarian legislator amended the Consumer Protection Act of 1997 in order to strengthen the protection of vulnerable consumers – the elderly, disabled and younger consumers in particular. According to the new provisions, the consumer protection authority is obliged to impose a fine if identified infringements concern vulnerable consumers.

<sup>68</sup> VJ 165/2008. 35/2009.

<sup>69</sup> 12/2014. VJ.

<sup>70</sup> VJ8/2009, VJ 115/2009, VJ 13/2011, VJ 35/2012.

<sup>71</sup> Since 2013 the tasks of the Authority has been passed on to the Hungarian National Bank.

<sup>72</sup> A Pénzügyi Szervezetek Állami Felügyelete elnökének 12/2012. (XI. 16.) számú ajánlása a fogyatékos ügyfelekkel kapcsolatos bánásmódról. (Recommendation No. 12/2012 (XI. 16.) on the treatment of customers with disabilities). See also: Hungarian Financial Supervisory Authority Annual Report 2012 at: [http://alk.mnb.hu/data/cms2405046/hfsa\\_annual\\_report\\_2012.pdf](http://alk.mnb.hu/data/cms2405046/hfsa_annual_report_2012.pdf).

This illustrates that the protection of vulnerable consumers is increasingly becoming a priority within Hungarian consumer policy.

There are a number of specific measures relevant to consumer vulnerability in Hungary<sup>73</sup>.

These relate mainly to the energy sector. Since 2008, energy law recognises vulnerable consumers on a social and on a health-related basis. In energy law, vulnerable customers mean those household customers who require special attention due to their social disposition, defined in the law, or some other particular reason, in terms of supplying them with electricity. Depending on their category, vulnerable consumers may benefit from deferred payments, pre-payment options and individual assistance to help them understand their bills. Moreover, consumers with disabilities whose life or health is directly jeopardized if disconnected from electricity supply system, including any service disruption, may not be disconnected in case of late payment or non-payment<sup>74</sup>.

### 3. Poland

The relevant legislations on consumer protection in Poland are the Act of 16 February 2007 on competition and consumer protection<sup>75</sup> and the Act of 23 August 2007 on combating unfair commercial practices<sup>76</sup>, which transposed the UCPD into Polish law. The Act of 16 February 2007 on competition and consumer protection contains neither the definition of the ‘average’ nor ‘vulnerable’ consumer while the Act of 23 August 2007 on combating unfair commercial practices contains both definitions. The Office for Competition and Consumer Protection (hereafter, UOKiK) is the key institution within the Polish consumer policy framework – it implements and enforces consumer policy in Poland, can initiate administrative proceedings against suppliers as well as monitor contract terms. It provides opinions on Polish legislation to ensure that consumer protection principles are sufficiently addressed and can initiate legislative measures in this area. Appeals against decisions issued by the UOKiK President are reviewed by the Court of Competition and Consumer Protection in Warsaw (hereafter, SOKiK) and then by the Court of Appeals in Warsaw and, on an extraordinary cassation complaint basis, by the Supreme Court (Bernatt, 2015, p. 9). SOKiK is a first-instance

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<sup>73</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm). Hungary.

<sup>74</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/2014\\_countryreports\\_hungary.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2014_countryreports_hungary.pdf),

<sup>75</sup> Consolidated text: Journal of Laws of 2015, item 184, 1618, 1634.

<sup>76</sup> Journal of Laws No 171, item 1206.



civil court (not an administrative court). SOKiK exercises judicial review of the administrative decisions issued by the UOKiK President – apart from annulling such a decision, SOKiK is entitled to change it in its judgment and review the case on a *de novo* basis (including facts).

### 3.1. Average consumer in Polish law

While previously the courts referred to the average consumer both in unfair competition and trademark cases, it was only with the implementation of the UCPD through the Act of 23 August 2007 on combating unfair commercial practices that the concept of the ‘average’ consumer was first laid down in legislation. According to Article 2(8) of this Act, the average consumer is sufficiently well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors as well as the fact that a given consumer may belong to a clearly identifiable group of consumers who are particularly vulnerable to unfair commercial practices because of characteristics such as age or the fact of being mentally or physically handicapped. Accordingly, Polish law closely follows the UCPD as well as the jurisprudence of the CJEU.

(Sikorski, 2009, p. 50–55) argued that the fact that the definition of the ‘average’ consumer had been implemented into Polish law was a very welcome development, considering that the concept of an average consumer had not always been properly understood by Polish courts or administrative authorities. In fact, this situation sometimes resulted in courts wrongly dismissing claims of unfair competition (Sikorski, 2009, p. 52–53). For example, they argued that customers of airline operators were observant and circumspect, and thus capable of verifying that a cheap flight advertisement had misleading content (that is, that they had checked the exact schedule of the advertised flight, which clearly indicated that the flight from Warsaw to Vienna was going to land, in fact, in Bratislava<sup>77</sup>). In another case concerning a misleading price indication in pharmaceutical advertising leaflets, the judiciary dismissed claims of misleading adverts by referring to the concept of the well-informed, reasonably observant and circumspect consumer. The courts rejected the arguments favouring the view that an average consumer of pharmaceutical products is usually ready to do anything to improve his/her health, and that very often it is an elderly person who has difficulty reading information in small print at the bottom of the advertising leaflet. Both courts simply disregarded the fact that what matters in advertising is the first impression of the addressee, and that this impression in this case was one of a significant price cut (Sikorski, 2009, p. 53).

<sup>77</sup> Judgement of the Court of Appeals in Warsaw, VI Aca 42/07, of 6 December 2007, quoted after: (Michalak, 2008, p. 64–65).

Concerning the recent decisional practice of the UOKiK President, the NCA is especially active in relation to information asymmetry in the financial services and telecoms sector where consumers are provided with imprecise and incomplete information by institutions which offer complex credit, insurance, or investment products<sup>78</sup>. (Namysłowska, 2013) showed how the characteristics of the average Polish consumer have often been assessed in the telecoms and banking sectors. The UOKiK President frequently stated that there is not a specific kind of consumer, whois being addressed in telecoms advertising<sup>79</sup>, or banking advertising on consumer credit<sup>80</sup> or time deposits<sup>81</sup>. Perhaps surprisingly, these decisions of the UOKiK President stated that the use of a mobile phone does not require any special skills nor knowledge of new technologies<sup>82</sup>. The acquisition of consumer credit, which is a basic financial product which, unlike other financial products, also does not require any specific knowledge of financial mechanisms<sup>83</sup>.

As a result, the UOKiK President considers the average and not a specific consumer in its decisions. According to the decisions of the UOKiK President, the average Polish consumer understands the information addressed to him/her as well as the language used in advertising (such as metaphors, exaggerations, shortcuts or its conventionality). While the average consumer trusts well-known traders, his/her knowledge is incomplete and not professional. Similarly to Hungarian practice, Polish decisions represent the view that the average consumer is not considered a specialist in a given field, and thus does not need to know everything. Again similarly to the Hungarian decisional practice, the average consumer may assume that the information provided by the trader is clear, unequivocal and not misleading<sup>84</sup> (Namysłowska, 2013, p. 72).

The UOKiK President argued that the level of attention of the average consumer, which influences the assessment of (un)fairness, differs depending on the advertised product itself. With regard to mobile phones, which are commonly used and very familiar to the public, consumers can easily switch to other telecoms providers and the average consumer can take

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<sup>78</sup> 2014 UOKiK Activity Report, Warsaw 2015, p. 15, 19–21.

<sup>79</sup> Decision of the UOKiK President No. RWA-44/2012 of 27 December 2012, p. 14; No. RWA-20/2011 of 14 December 2011, p. 9–10.

<sup>80</sup> Decision of the UOKiK President No. RPZ 46/2012 of 28 December 2012, p. 30.

<sup>81</sup> Decision of the UOKiK President No. 33/2008 of 12 December 2008.

<sup>82</sup> Decision of the UOKiK President No. RPZ 28/2010 of 9 December 2010, p. 12; No. RWA-44/2012, p. 14.

<sup>83</sup> Decision of the UOKiK President No. RPZ 46/2012, p. 30.

<sup>84</sup> See e.g. the decisions of the UOKiK President: No. DDK 14/2008 of 19 August 2008, p. 12; No. RPZ 28/2010, p. 13; No. RWA-44/2012, p. 15; No. RPZ 2/2013 of 12 March 2013, p. 15.

decisions without carefully analysing the details of a telecoms offer<sup>85</sup>. Yet the consumer of banking products has the right to reliable, true and full information as his/her decisions in this regard have financial repercussions and should thus not be made on the basis of an unfair practice (Namysłowska, 2013, p. 72)<sup>86</sup>.

However, it has also been argued that some Polish courts do not think that an average Polish consumer fits the established rules and standards. The Court of Appeals in Warsaw in its judgment of 13 January 2013 (case file VI ACa 1069/12) held that the average Pole, who is the average consumer, has low legal awareness mainly due to social and cultural backgrounds. This view is shared by the Polish legal community. The standard of an average Polish consumer cannot in any way be compared to the standard of the average consumer in Western Europe that has for many decades been subjected to intensive consumer education<sup>87</sup>.

### 3.2. Vulnerable consumers

Even though the concept of the vulnerable consumer has already been in place within national consumer policy independently of the UCPD transposition, the concept of a vulnerable consumer is not clearly defined in Polish legislation. Article 2(8) of the Act on Combating Unfair Commercial Practices first defines the average consumer and adds that this definition is assessed by taking account of ‘the belonging of the particular consumer to a specific consumer group’ that is ‘particularly receptive to the influence of a commercial practice or the product to which the commercial practice applies’ providing specific examples: age, physical or mental disability. No further definition or details are provided.

The vulnerability concept has, however, received a prominent place in the UOKiK’s latest consumer policy strategy document published in 2015. Older consumers, as well as children and minors have been identified as groups particularly vulnerable to certain marketing practices<sup>88</sup>. The UOKiK also initiated a campaign called ‘My Consumer ABC’ as early as 2006, which was

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<sup>85</sup> Decisions of the UOKiK President: No. RWA-20/2011, p. 10; No. RWA-44/2012 of 27 December 2012, p. 15.

<sup>86</sup> Decision of the UOKiK President No. RWA-44/2012, p. 36.

<sup>87</sup> T.Rychlicki, Consumer protection, case VI ACa 1069/12, March 9th, 2013, available at: <http://rychlicki.net/en/issue/consumer-protection-law/>.

<sup>88</sup> The strategy acknowledges that both groups need to be targeted by appropriate informational and educational actions. It also identifies online marketing as a particularly problematic area for children and youth. <https://uokik.gov.pl/download.php?plik=16694>.

designed to equip weaker market participants with information on how to effectively deal with prevalent consumer problems.<sup>89</sup>

Despite the fact that there are no legislative instruments specifically addressing particular consumer groups, certain measures exist that take potential vulnerability into account. For example, in the telecommunications sector which require contracts to be presented in a clear and easily accessible manner. In the energy sector, vulnerable consumers are eligible for financial support, while in the financial sector new legislation is in progress, which will focus, among others, on so-called “reverse mortgages”.<sup>90</sup>

The UOKiK has also taken action in specific cases linked to consumer vulnerability. It has in particular taken action against suppliers using small and illegible text in advertising aimed at older consumers, but concerning complex contracts in the construction industry, and actions against misleading information provided by the payday loan industry.<sup>91</sup>

The concept of consumer vulnerability is most clearly present in the energy sector where vulnerable consumer groups are entitled to financial support<sup>92</sup>. The Polish Energy Law Act of 1997, which was last amended in 2015, defines the notion of vulnerable consumers and the new law paid much attention to the issue of strengthening customer rights. The new law not only stressed that information addressed to customers must be formulated clearly and precisely, both when concluding a transaction and when the service is provided, but it has also emphasized that the way in which the gas and electricity supplier should inform consumers about price or rate increases (determined in approved tariffs) should also be specified.<sup>93</sup>

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<sup>89</sup> It is a campaign aimed at developing consumer awareness of Polish citizens: children, teenagers and adults. One of its key objectives was to teach children the practical skills needed to distinguish advertisements from other messages they encounter in the electronic media and in the press and also to utilize other sources of information on products available on the market. The campaign was devised to help consumers strengthen their assertiveness towards market offers, marketing tools and sales techniques. The topics addressed during the campaign were selected on the basis of public surveys and analysis of complaints reaching the UOKiK and the consumer ombudsmen ([https://uokik.gov.pl/education\\_campaigns.php?pytanie=514#faq514](https://uokik.gov.pl/education_campaigns.php?pytanie=514#faq514)).

<sup>90</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm); p. 514.

<sup>91</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm); p. 514.

<sup>92</sup> In the financial sector, the preparation of similar new legislation is in progress, which will focus, among others, on ‘reverse mortgages’. Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08), p. 514.

<sup>93</sup> <http://www.ure.gov.pl/en/communication/news/208,Amendment-to-the-Energy-Law-Act-entered-into-force.html>.

The definition of ‘vulnerable’ customers has for the first time been introduced in this amended law. Vulnerable electricity consumers are persons, who were granted a housing benefit, are a party to a common service agreement, or a sale agreement concluded with an energy company, and live in the place to which electricity is supplied. The Energy Law Act states that a ‘vulnerable’ customer of electricity is a person who is eligible to a housing allowance (income support) because the level of his/her income remains below a certain level. This means that the concept of vulnerable customers is based on poverty<sup>94</sup>.

It has been argued by stakeholders that even though the notion of the average consumer is interpreted in a wide range of practices<sup>95</sup>, and the notion of vulnerable consumer is used and specific consumer groups being identified as target groups for consumer policy, there is no clear definition of both consumer vulnerability and the notion of average consumer, which could be interpreted in a number of ways depending on the situation<sup>96</sup>.

## V. Conclusions

The normative concept of the consumer is a core element of consumer law. It delineates the relationship between the State, markets and individuals. It defines the level of protection provided by the law and is decisive when it comes to which legal and non-legal tools are considered necessary to protect or enable consumers in their daily transactions with businesses.

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<sup>94</sup> INSIGHT\_E, Energy poverty and vulnerable consumers in the energy sector across the EU: analysis of policies and measures, Policy Report May 2015. Retrieved from: [https://ec.europa.eu/energy/sites/ener/files/documents/INSIGHT\\_E\\_Energy%20Poverty%20-%20Main%20Report\\_FINAL.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/INSIGHT_E_Energy%20Poverty%20-%20Main%20Report_FINAL.pdf).

Within the protection system, a vulnerable consumer of electricity is granted an energy allowance, which monthly amounts to 1/12 of the annual energy allowance published by the minister in charge of the economy. Such an allowance is granted by the head of a relevant local authority through a decision and at the customer’s request. Concerning gas, a customer is recognized as vulnerable if he/she: was given fuel allowance and is a party to common service agreement or gas sale agreement concluded with an energy company and lives in the place to which the gas is supplied. Also, the regulation obliges distribution companies to install, upon a request of a vulnerable customer, prepayment metering and billing system. <http://www.ure.gov.pl/en/communication/news/208,Amendment-to-the-Energy-Law-Act-entered-into-force.html>.

<sup>95</sup> The concept of average consumer is also used in the context of payday loan advertising, where the UOKiK makes use the notion of ‘average consumer’ to identify problematic practices in the field, singling out advertising that is likely to mislead such a consumer.

<sup>96</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08), p. 514.

In the EU and its Member States, the normative concept of the average consumer has been adopted in the jurisprudence of the ECJ concerning free movement rules and later legislated on in the Unfair Commercial Practices Directive. While that jurisprudence has firmly regarded the average consumer to be well-informed, reasonably observant and circumspect, an analysis of consumer law Directives and their subsequent interpretation by the ECJ shows that in fact the consumer is perceived to be in a weak position *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge. Accordingly, the consumer may agree to certain contract terms drawn up in advance by the seller or supplier without being able to influence their content. Hence, the consumer should be protected, for example, by being able to withdraw from such contracts, even from linked contracts, or raise the claim of the unfairness of a contractual condition. Moreover, national courts must take action *ex officio* in order to re-establish a formal balance between the rights and obligations of contracting parties. In trademark law, the Court did first recognise that the average consumer standard may diverge across Member States due to linguistic, cultural and social differences. It then stated that the average consumer is not circumspect but, for example, makes impulsive purchases without taking note of all the information. A recent empirical study performed across all Member States confirmed these interpretations of the notion of the average consumer. It argued that the current concept of the average consumer concept should be interpreted with caution, as it is likely to be (partly) influenced by behavioural biases. The analysis of Hungarian and Polish legislation and cases showed that while the laws follow the EU normative concepts very closely, their interpretation does point to a more nuanced notion. Both legal systems acknowledge the consumer as a rational market actor, well-informed and circumspect, but they do emphasize that all these characteristics are relative. Consumers' rational behaviour is not absolute but relative.

Looking at the normative concept of the 'vulnerable' consumer, the legislative basis is limited to a few Directives, most notably on Unfair Commercial Practices and Consumer Rights, and its interpretation is scarce. The notion of the vulnerable consumer has been most notably recognized in sector specific Directives on energy and telecoms. There seems to be a gap between the 'vulnerable' consumer standard in EU legislation and the 'weaker' consumer standard in ECJ jurisprudence. The way the concept of vulnerability has been implemented by national legislation and enforced in their case law does confirm this gap. While a concept of vulnerable consumers exists in both Hungarian and Polish law, especially in the energy field, their interpretations seem to be far from clear. The Hungarian decision-making practice and jurisprudence developed, in fact, a separate category of consumers placed

somewhere between the ‘average’ and the ‘vulnerable’ consumer concept. This practice is rather similar to EU Directives’ and ECJ’s interpretation of the ‘average’ consumer as a weak market actor. Both countries are in the process of taking further legal and policy actions in order to address the vulnerability of their consumers.

This contribution thus comes to the conclusion that while there are clear normative concepts of the consumer in the legislation and EU free movement jurisprudence, their application in other fields of EU consumer law, as well as in national law, point to a more nuanced image of the consumer. The average consumer is rational, but his behaviour proves to be seen in law enforcement as that of the man or woman on the street who may also exhibit behavioural biases when taking his/her decisions. In certain markets, most notably in financial services, both EU courts as well as national enforcers consider consumers to be in a clearly weak position and, accordingly, lean towards more protective measures. The concept of vulnerable consumer is thus separate from that of weak consumers and often involves consumers with some kind of physical, intellectual or economic disadvantage.

This does not necessarily mean that legal rules should be changed but rather that their application, and the envisaged concepts of the consumer need to be enriched by insights from law enforcement. Moreover, they must be informed both of how markets evolve and how the role of consumers changes as well as enriched by the results from other social sciences, most notably behavioural economics studying consumer behaviour.

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