

Bram B. Duivenvoorde

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# The Consumer Benchmarks in the Unfair Commercial Practices Directive

# **Studies in European Economic Law and Regulation**

Volume 5

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# The Consumer Benchmarks in the Unfair Commercial Practices Directive

 Springer

Bram B. Duivenvoorde  
Hoogenraad & Haak advertising + IP advocaten /  
University of Amsterdam  
Amsterdam  
The Netherlands

ISSN 2214-2037 ISSN 2214-2045 (electronic)  
Studies in European Economic Law and Regulation  
ISBN 978-3-319-13923-4 ISBN 978-3-319-13924-1 (eBook)  
DOI 10.1007/978-3-319-13924-1

Library of Congress Control Number: 2015934458

Springer Cham Heidelberg New York Dordrecht London  
© Springer International Publishing Switzerland 2015

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# Acknowledgements

At times, writing a PhD thesis can be a tough and lonely task. Luckily, many people have helped and supported me throughout the process. Without them, I could not have completed the project.

First and foremost, I would like to thank my supervisors: Prof. Loos and Dr. Oderkerk. Marco and Marieke, you have been excellent as *Doktorvater* and *Doktormutter*. Like good parents, you have placed great trust in me, allowed me a good deal of freedom, encouraged me and, perhaps most importantly, supported me in difficult times. I am very thankful for your personal and warm-hearted approach to supervision.

I would also like to thank the members of the reading committee, Prof. Terry, Prof. Kabel, Prof. Rott, Prof. Rinkes, Prof. Howells and Prof. Van Boom, for their willingness to be part of the committee and to critically assess the manuscript of the book—in some cases already at earlier stages of the project.

Moreover, I would like to thank all those who welcomed me at their institutes to conduct parts of my PhD research. In particular, I would like to thank Ms. Halsen and Prof. Zimmermann of the *Max-Planck-Institut für ausländisches und internationales Privatrecht* (Hamburg), Ms. Gall and Ms. Kwietniewska of *Bucerius Law School* (Hamburg), Prof. Howells of the *University of Manchester* and Ms. Lenzi and Prof. Comandé of the *Scuola Superiore Sant'Anna* (Pisa). I would also like to thank Ms. Ciaralli and her colleagues of the *Autorità Garante della Concorrenza e del Mercato* in Rome for the very rewarding interview at their office.

Also very importantly, I would like to thank all my colleagues at the *Centre for the Study of European Contract Law* (CSECL) at the University of Amsterdam for providing a pleasant and stimulating environment. In particular, I owe thanks to my direct colleagues and *paranyphs* Candida Leone and Josse Klijnsma. You have been simply awesome, both professionally and personally.

There are many other people who have supported me in the process of writing this book. I cannot name them all, but I would at least like to thank Tim de Booys, Kai Purnhagen, Maurice Nürnberg, Vanessa Mak, Ivo Giesen, Ian Curry-Sumner, Roos Scheenstra, Karla Vonk-Teune, Jan Gerlach, Frank van Schendel, Renske Licht, Alie van 't Riet and my brothers, Maarten and Koen Duivenvoorde.

Finally, I owe specific thanks to my parents. Whether it was spending a year at the other end of the world as a high school student, studying law in Utrecht and Hamburg, or undertaking the great challenge of writing a PhD thesis, you have enabled and encouraged me to explore the many possibilities of life, while at the same time providing me with a safe and pleasant retreat at home in Zeeland.

Amsterdam, October 2014

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# Abbreviations

1.UWGÄndG	Erstes Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb
A.C.D.	Administrative Court Digest
AGCM	Autorità Garante della Concorrenza e del Mercato
AGCOM	Autorità per le Garanzie nelle Comunicazioni
All ER	All England Law Reports
BeckRs.	Beck-Rechtsprechung (Beck-Online database)
BERR	Department for Business, Enterprise and Regulatory Reform
BGB	Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BIS	Department for Business, Innovation and Skills
BT-Drs.	Drucksache des Deutschen Bundestages
BTLC	Butterworth's Trade Law Cases
CC	Codice Civile
CJEU	Court of Justice of the European Union
CMAR	Control of Misleading Advertisements Regulations
Cons.	Consiglio di Stato
CPUTR	Consumer Protection from Unfair Commercial Practices Regulations
DTI	Department of Trade and Industry
EC	European Commission
ECJ	European Court of Justice
ECR	European Court Reports
EC Treaty	Treaty establishing the European Community
EESC	European Economic and Social Committee
E.T.M.R.	European Trade Mark Reports
EU	European Union
EWHC	England & Wales High Court

FSR	Fleet Street Reports
Gazz. Uff.	Gazzetta Ufficiale
GC	General Court (European Union)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht: Internationaler Teil
K.B.	Law Reports, King's Bench
LFGB	Lebensmittel- und Futtermittelgesetzbuch
LG	Landesgericht
LMBG	Lebensmittel- und Bedarfsgegenständegesetz
LSG	Law Society's Gazette
NJW	Neue Juristische Wochenschrift
OFT	Office of Fair Trading
OHIM	Office for Harmonization in the Internal Market
OJ	Official Journal of the European Union
OLG	Oberlandesgericht
Riv. Dir. Comm.	Rivista del diritto commerciale e del diritto generale delle obbligazioni
S.I.	Statutory Instruments
Tar	Tribunale Amministrativo Regionale
TFEU	Treaty on the Functioning of the European Union
UCPD	Unfair Commercial Practices Directive
UkLaG	Unterlassungsklagengesetz
UWG	Gesetz gegen den unlauteren Wettbewerb
WL	Westlaw Transcripts
WLR	Weekly Law Reports
WRP	Wettbewerb in Recht und Praxis

# Table of Cases

## European Union

### *Court of Justice of the European Union (CJEU)*

- CJEU 11 July 1974, Case C-8/74, *ECR* 1974, p. 837 (*Dassonville*).
- CJEU 20 February 1979, Case C-120/78, *ECR* 1979, p. 649 (*Cassis de Dijon*).
- CJEU 15 December 1982, Case C-286/81, *ECR* 1982, p. 4575 (*Oosthoek*).
- CJEU 12 March 1987, Case C-178/84, *ECR* 1987, p. 01227 (*Reinheitsgebot*).
- CJEU 21 May 1987, Joined Cases C-133-136/85, *ECR* 1987, p. 2289 (*Walter Rau*).
- CJEU 14 July 1988, Case C-407/85, *ECR* 1988, p. 4233 (*Drei Glocken*).
- CJEU 16 May 1989, Case C-382/87, *ECR* 1989, p. 1235 (*Buet*).
- CJEU 7 March 1990, Case 362/88, *ECR* 1990, p. I-667 (*GB-INNO-BM*).
- CJEU 16 January 1992, Case C-373/90, *ECR* 1992, p. I-131 (*Nissan*).
- CJEU 18 May 1993, Case C-126/91, *ECR* 1993, p. I-2361 (*Yves Rocher*).
- CJEU 2 February 1994, Case C-315/92, *ECR* 1994, p. I-317 (*Clinique*).
- CJEU 6 July 1995, Case C-470/93, *ECR* 1995, p. I-1923 (*Mars*).
- CJEU 26 October 1995, Case C-51/94, *ECR* 1995, p. I-3599 (*Commission v Germany*).
- CJEU 26 November 1996, Case C-313/94, *ECR* 1996, p. I-6039 (*Graffione*).
- CJEU 11 November 1997, Case C-251/95, *ECR* 1997, p. I-6191 (*Sabel*).
- CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*).
- CJEU 28 January 1999, Case C-303/97, *ECR* 1999, p. I-513 (*Sektellerei Kessler*).
- CJEU 22 June 1999, Case C-342/97, *ECR* 1999, p. I-3819 (*Lloyd Schuhfabrik*).
- CJEU 16 September 1999, Case C-220/98, *ECR* 2000, p. I-117 (*Lifting*).
- CJEU 4 April 2000, Case C-465/98, *ECR* 2000, p. I-2297 (*Adolf Darbo*).
- CJEU 18 June 2002, Case C-299/99, *ECR* 2002, p. I-5475 (*Philips v Remington*).
- CJEU 5 December 2002, Case T-130/01, *ECR* 2002, p. II-5179 (*Real People, Real Solutions*).
- CJEU 20 March 2003, Case C-291/00, *ECR* 2003, p. I-2799 (*LTJ Diffusion v Sadas Vertbaudet*).
- CJEU 12 February 2004, Case C-218/01, *ECR* 2004 p. I-1725 (*Henkel*).
- CJEU 29 April 2004, Joined Cases C-473/01 and C-474/01, *ECR* 2004, p. I-5141 (*Proctor & Gamble*).
- CJEU 15 July 2004, Case C-239/02, *ECR* 2004, p. I-7007 (*Douwe Egberts v Westrom Pharma*).

CJEU 16 September 2004, Case C-329/02 P, *ECR* 2004, p. I-8317 (*Sat.1*).  
 CJEU 21 October 2004, Case C-64/02, *ECR* 2004, p. I-10031 and (*Erpo Möbelwerk*).  
 CJEU 12 January 2006, Case C-361/04, *ECR* 2006, p. I-643 (*Picasso*).  
 CJEU 19 September 2006, Case C-356/04, *ECR* 2006, p. I-8501 (*Lidl Belgium*).  
 CJEU 25 January 2007, Case C-48/05, *ECR* 2007, p. I-1017 (*Adam Opel*).  
 CJEU 10 April 2008, Case C102/07, *ECR* 2008, p. I-2439 (*Adidas*).  
 CJEU 23 April 2009, Joined Cases C-261/07 and C-299/07, *ECR* 2009, p. I-2949 (*VTB-VAB v Total/ Galatea v Sonoma*).  
 CJEU 3 September 2009, Case C-498/07 P, *ECR* p. I-7371 (*Aceites del Sur v Koipe*).  
 CJEU 14 January 2010, Case C-304/08, *ECR* 2010, p. I-217 (*Plus*).  
 CJEU 9 November 2010, Case C-540/08, *ECR* 2010, p. I-10909 (*Mediaprint*).  
 CJEU 18 October 2012, Case C-428/11 (*Purely Creative*) (not yet published in *ECR*).  
 CJEU 19 December 2013, Case C-281/12 (*Trento Svilupp*) (not yet published in *ECR*).  
 CJEU 30 April 2014, Case C-26/13 (*Kásler*) (not yet published in *ECR*).

### **General Court (GC)**

GC 5 December 2002, Case T-130/01, *ECR* 2002, p. II-5179 (*Real People, Real Solutions*).  
 GC 26 November 2003, Case T-222/02, *ECR* 2003, p. II-4995 (*Robotunits*).  
 GC 20 July 2004, Case T-311/02, *ECR* 2004, p. II-2957 (*Lissotschenko*).  
 GC 14 September 2004, Case T-183/03, *ECR* 2004, p. II-3113 (*Applied Molecular Evolution*).  
 GC 6 October 2004, Joined Cases T-117/03 to T-119/03 and T-171/03, *ECR* 2004, p. II-3471 (*New Look*).  
 GC 20 April 2005, Case T-211/03, *ECR* 2005, p. II-1297 (*Naber*).  
 GC 4 May 2005, Case T-359/02, *ECR* 2005, p. II-1515 (*Star TV*).  
 GC 25 May 2005, Case T-288/03, *ECR* 2005, p. II-1767 (*TeleTech*).  
 GC 15 September 2005, Case T-320/03, *ECR* 2005, p. II-3411 (*Live Richly*).  
 GC 15 December 2005, Case T-262/04, *ECR* 2005, p. II-5959 (*Bic*).  
 GC 12 January 2006, Case T-147/03, *ECR* 2006, p. II-11 (*Leclerc*).  
 GC 13 June 2007, Case T-441/05, *ECR* 2007, p. II-1937 (*IVG Immobilien*).  
 GC 10 October 2007, Case T-460/05, *ECR* 2007, p. II-4207 (*Bang & Olufsen*).  
 GC 20 November 2007, Case T-149/06, *ECR* 2007, p. II-4755 (*Castellani*).  
 GC 25 June 2008, Case T-36/07 (*Zipcar*).  
 GC 29 September 2009, Case T-139/08, *ECR* 2009, p. II-3535 (*Smiley Company*).  
 GC 19 November 2009, Case T-234/06, *ECR* II-4185 (*Cannabis*).

### **Belgium**

Cour de Cassation 12 October 2000 (*Saint-Brice NV/Etat Belge*).

### **England**

*Arsenal Football Club plc v Reed* [2001] RPC 922.  
*Ashurst v Hayes and Benross Trading Co Ltd* [1974] unreported.  
*Bollinger v Costa Brava Wine Co. Ltd.* [1960] Ch. 262.  
*British Airways plc v Ryanair Ltd* [2001] E.T.M.R. 24, 249.  
*Burleigh v Van den Berghs and Jurgens Ltd* [1987] BTLC 337.



*Clive Sweeting v Northern Upholstery Ltd* [1982] TR L 5; [1982] 79 LSG 1258.  
*Concentrated Foods Ltd v Champ* [1944] K.B. 342.  
*Consorzio del Prosciutto di Parma v Marks & Spencer plc et al* [1991] RPC 351.  
*De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd* [1975] F.S.R. 323.  
*Director General of Fair Trading v Tobyward Ltd* [1989] WLR 517, 522.  
*Dixons Ltd v Barnett* [1998] 153 JP 268.  
*Doble v David Greig Ltd* [1972] 1 W.L.R. 703.  
*Erven Warnink BV v Townend* [1979] 2 All ER 927.  
*Lewin v Purity Soft Drinks plc* [2005] A.C.D. 81.  
*McGuffic v Royal Bank of Scotland plc* [2009] EWHC 2386.  
*Neutrogena Corporation v Golden Ltd* [1996] RPC 473.  
*Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237.  
*Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWHC 106.  
*Office of Fair Trading v Purely Creative Ltd Industries* [2011] EWCA Civ 920.  
*R v AF Pears Ltd* [1982] unreported.  
*Reckitt & Coleman Products Ltd v Borden Inc and others* [1987] F.S.R. 505.  
*Reckitt & Coleman Products Ltd v Borden Inc and others* [1988] F.S.R. 601.  
*Reckitt & Coleman Products Ltd v Borden Inc and others* [1990] 1 WLR 491.  
*Southwark LBC v Time Computer Systems Ltd* [1997] WL 1104489.

## Germany

### **Bundesgerichtshof (BGH)**

BGH 23 October 1956, I ZR 76/54, GRUR 1957, 128– *Steinhäger*.  
 BGH 23 January 1959, I ZR 14/58, GRUR 1959, 365– *Englisch-Lavendel*.  
 BGH 26 September 1961, I ZR 55/60, GRUR 1962, 97– *Tafelwasser*.  
 BGH 26 February 1969, I ZR 108/67, GRUR 1969, 415– *Kaffeerösterei*.  
 BGH 29 April 1970, I ZR 123/68, GRUR 1970, 425– *Melitta-Kaffee*.  
 BGH 1 October 1971, I ZR 51/70, GRUR 1972, 129– *Der meistgekaufte der Welt*.  
 BGH 21 February 1975, I ZR 46/74, WRP 1976, 100– *Gewinnspiel*.  
 BGH 6 November 1981, I ZR 158/79, GRUR 1982, 311– *Berufsordnung für Heilpraktiker*.  
 BGH 18 December 1981, I ZR/79, GRUR 1982, 242– *Anforderungsscheck für Barauszahlungen*.  
 BGH 18 February 1982, I ZR 23/80, GRUR 1982, 563– *Betonklinker*.  
 BGH 29 April 1982, I ZR 111/80, GRUR 1982, 564– *Elsässer Nudeln*.  
 BGH 5 July 1984, I ZR 88/82, GRUR 1984, 741– *patented*.  
 BGH 15 June 1988, I ZR 51/87, GRUR 1988, 841– *Fachkrankenhaus*.  
 BGH 20 October 1988, I ZR 219/87, GRUR 1991, 548– *Umweltengel*.  
 BGH 20 October 1988, I ZR 238/87, GRUR 1991, 546– *aus Altpapier*.  
 BGH 5 October 1989, I ZR 56/89, GRUR 1990, 282– *Wettbewerbsverein IV*.  
 BGH 5 April 1990, I ZR 19/88, GRUR 1990, 604– *Dr. S.-Arzneimittel*.  
 BGH 4 October 1990, I ZR 39/89, GRUR 1991, 550– *Zaunlasur*.  
 BGH 13 December 1990, I ZR 103/89, GRUR 1991, 554– *Bilanzbuchhalter*.  
 BGH 14 December 1995, I ZR 213/93, NJW 1996, 1135– *Umweltfreundliches Bauen*.

- BGH 15 February 1996, I ZR 9/94, GRUR 1996, 910– *Der meistverkaufte Europas*.  
 BGH 23 May 1996, I ZR 76/94, NJW 1996, 3419– *PVC-frei*.  
 BGH 2 May 1996, I ZR 152/94, NJW 1996, 3153– *Preistest*.  
 BGH 26 March 1998, I ZR 222/95, WRP 1998, 857– *1000 DM Umweltsbonus*.  
 BGH 26 March 1998, I ZR 231/95, GRUR 1998, 1037– *Schmuck-Set*.  
 BGH 8 October 1998, I ZR 187/97, WRP 1999, 90– *Handy für 0,00 DM*.  
 BGH 8 October 1998, I ZR 7/97, WRP 1999, 94– *Handy-Endpreis*.  
 BGH 20 October 1999, I ZR 167/97, WRP 2000, 517– *Orient-Teppichmuster*.  
 BGH 17 February 2000, I ZR 239/97, GRUR 2000, 820– *Space Fidelity Peep Show*.  
 BGH 17 February 2000, I ZR 254/97, WRP 2000, 1248– *Computerwerbung I*.  
 BGH 24 May 2000, I ZR 222/97, GRUR 2001, 78– *Falsche Herstellerpreisempfehlung*.  
 BGH 19 April 2001, I ZR 46/99, WRP 2002, 81– *Anwalts- und Steuerkanzlei*.  
 BGH 26 April 2001, I ZR 314/98, GRUR 2001, 1178– *Gewinn-Zertifikat*.  
 BGH 3 May 2001, I ZR 318/98, GRUR 2002, 182– *Das Beste jeden Morgen*.  
 BGH 19 September 2001, I ZR 54/96, WRP 2001, 1450– *Warsteiner III*.  
 BGH 18 October 2001, I ZR 193/99, GRUR 2002, 550– *Elternbriefe*.  
 BGH 20 December 2001, I ZR 215/98, WRP 2002, 977– *Scanner-Werbung*.  
 BGH 25 April 2002, I ZR 272/99, GRUR 2002, 982– *Die Steinzeit ist vorbei*.  
 BGH 13 June 2002, I ZR 173/01, GRUR 2002, 976– *Kopplungsangebot I*.  
 BGH 26 September 2002, I ZR 89/00, WRP 2003, 275– *Thermal Bad*.  
 BGH 24 October 2002, I ZR 50/00, WRP 2003, 273– *Computerwerbung II*.  
 BGH 28 November 2002, I ZR 110/00, WRP 2003, 379– *Preis ohne Monitor*.  
 BGH 27 February 2003, I ZR 253/00, GRUR 2003, 538– *Gesamtpreisangebot*.  
 BGH 13 March 2003, I ZR 212/00, GRUR 2003, 626– *Umgekehrte Versteigerung II*.  
 BGH 3 April 2003, I ZR 222/00, WRP 2003, 1222– *Internetreservierungssystem*.  
 BGH 2 October 2003, I ZR 252/01, GRUR 2004, 162– *Mindestverzinsung*.  
 BGH 2 October 2003, I ZR 150/01, GRUR 2004, 244– *Marktführerschaft*.  
 BGH 11 December 2003, I ZR 83/01, GRUR 2004, 343– *Playstation*.  
 BGH 11 December 2003, I ZR 74/01, GRUR 2004, 344– *Treue-Punkte*.  
 BGH 22 September 2005, I ZR 83/03, GRUR 2006, 161– *Zeitschrift mit Sonnenbrille*.  
 BGH 6 April 2006, I ZR 125/03, GRUR 2006, 776– *Werbung für Klingeltöne*.  
 BGH 7 December 2006, I ZR 166/03, GRUR 2007, 606– *Color-rado*.  
 BGH 17 July 2008, I ZR 160/05, GRUR 2009, 71– *Sammelaktion für Schoko-Riegel*.  
 BGH 8 March 2012, I ZR 2012/10, BeckRs 2012, 18503– *Marktführer Sport*.

### **Lower courts**

- LG München 30 June 1983, 6 U 3450/82, WRP 1984, 46– *Sammelschnipsel*.  
 OLG Hamburg 10 April 2003, 6 U 6/03, WRP 2003, 1003– *Klingelton*.  
 OLG Frankfurt a.M. 4 August 2005, 6 U 224/04, GRUR 2005, 1064– *Lion-Sammelaktion*.  
 OLG Düsseldorf 9 September 2008, I-20 U 123/08, WRP 2009, 98– *Macht über die Karten*.

**Italy*****Corte Costituzionale***

Corte Costituzionale 14/21 January 1988, Gazz. Uff. 3 February 1988, pp. 31–32.

***Corte di Cassazione***

Corte di Cassazione 17 April 1962, GRUR Int. 1964, 515 (*Motta Alemagna*).

***Tribunali***

Tribunale di Torino, Riv. Dir. Comm. 1915 II, 166.

***Consiglio di Stato***

Cons. Stato, Sez. VI, 8 March 2006, No. 1263 (*Leonardo da Vinci*).

Cons. Stato, Sez. VI, 27 July 2010, No. 4905 (*Fastweb*).

Cons. Stato, Sez. VI, 24 March 2011, No. 1810 (*Telecom Italia*).

Cons. Stato, Sez. VI, 24 March 2011, No. 1811 (*Telecom Italia*).

Cons. Stato, Sez. VI, 24 March 2011, No. 1812 (*Telecom Italia*).

Cons. Stato, Sez. VI, 24 March 2011, No. 1813 (*Telecom Italia*).

Cons. Stato, Sez. VI, 4 April 2011, No. 2099 (*Neomobile*).

Cons. Stato, Sez. VI, 9 June 2011, No. 3511 (*Eni*).

Cons. Stato, Sez. VI, 20 July 2011, No. 4391 (*Mediamarket*).

Cons. Stato, Sez. VI, 23 February 2012, No. 1012 (*Carapelli Firenze*).

Cons. Stato, Sez. VI, 17 February 2012, No. 853 (*Eutelias*).

Cons. Stato, Sez. VI, 12 February 2012, No. 1385 (*Mo*).

Cons. Stato, Sez. VI, 12 March 2012, No. 1387 (*Congress*).

***Tar Lazio***

Tar Lazio, Sez. I, 7 August 2002, No. 7028 (*Medestea*).

Tar Lazio, Sez. I, 13 October 2003, No. 8321 (*Peter Van Wood*).

Tar Lazio, Sez. I, 3 March 2004, No. 2020 (*Sanremo giovani*).

Tar Lazio, Sez. I, 11 January 2006, No. 1372 (*Sigarette Lights*).

Tar Lazio, Sez. I, 25 February 2009, No. 3723 (*Videosystem & Areafilm*).

Tar Lazio, Sez. I, 25 March 2009, No. 3722 (*ENEL*).

Tar Lazio, Sez. I, 21 September 2009, No. 9083 (*Soc David 2*).

Tar Lazio Sez. I, 21 January 2010, No. 645 (*Telecom Italia*).

Tar Lazio Sez. I, 21 January 2010, No. 646 (*Telecom Italia*).

Tar Lazio Sez. I, 21 January 2010, No. 647 (*Zed Sms non richiesti*).

Tar Lazio, Sez. I, 21 January 2010, No. 648 (*Telecom Italia*).

Tar Lazio, Sez. I, 29 March 2010, No. 4931 (*Wind Absolute Tariffa*).

Tar Lazio, Sez. I, 19 May 2010, No. 12364 (*Accord Italia—Carta Auchan*).

Tar Lazio, Sez. I, 2 August 2010, No. 29511 (*Suonerie.it*).

Tar Lazio, Sez. I, 9 August 2010, No. 30421 (*Mediamarket*).

Tar Lazio, Sez. I, 9 August 2010, No. 30428 (*È Domenica papa*).

Tar Lazio, Sez. I, 13 December 2010, No. 36119 (*Bioscalin crescita capelli*).

Tar Lazio Sez. I, 18 January 2011, No. 449 (*Coin*).

Tar Lazio, Sez. I, 1 February 2011, No. 894 (*Fastweb*).

Tar Lazio, Sez. I, 23 May 2011, No. 4532 (*Benefit-BluPill*).

***Autorità Garante della Concorrenza e del Mercato (AGCM)***

AGCM 11 February 1994, No. 1784 (PI191), Boll. 6-7/1994 (*Ditta Euromail*).

AGCM 27 April 1994, No. 1922 (PI179), Boll. 17/1994 (*Bromelina*).

- AGCM 13 April 1995, No. 2951 (PI412), Boll. 15-16/1995 (*Centro Nazionale Enti Assistenza*).
- AGCM 13 April 1995, No. 2953 (PI445), Boll. 15-16/1995 (*IDOS*).
- AGCM 13 April 1995, No. 2954 (PI446), Boll. 15-16/1995 (*Argilla radiante*).
- AGCM 13 April 1995, No. 2955 (PI447), Boll. 15-16/1995 (*Il segreto di Venere*).
- AGCM 23 November 1995, No. 3412 (PI611) Boll. 47/1995 (*Divino Otelma*).
- AGCM 21 February 1996, No. 3640 (PI708), Boll. 8/1996 (*Piramide della Felicità*).
- AGCM 28 March 1996, No. 3753 (PI717), Boll. 13/1996 (*Meritene crema*).
- AGCM 30 May 1996, No. 3941 (PI650), Boll. 22/1996 (*Dieta Slimming*).
- AGCM 13 March 1997, No. 4778 (PI1084B), Boll. 11/1997 (*Euro Bio Med*).
- AGCM 13 March 1997, No. 4779 (PI1084A), Boll. 11/1997 (*Biosal*).
- AGCM 13 March 1997, No. 4780 (PI1084C), Boll. 11/1997 (*Agil*).
- AGCM 13 March 1997, No. 4781 (PI1084D), Boll. 11/1997 (*Rheumasan*).
- AGCM 13 March 1997, No. 4784 (PI1126), Boll. 11/1997 (*Euro Bio vit.*).
- AGCM 25 February 1999, No. 6937 (PI2225), Boll. 8/1999 (*Up 100 compresse*).
- AGCM 26 March 1999, No. 7024 (PI2245), Boll. 12/1999 (*Dimagrante Chitosan*).
- AGCM 16 March 2000, No. 8152 (PI2795), Boll. 11/2000 (*Greenlife*).
- AGCM 14 December 2000, No. 9009 (PI2996), Boll. 50/2000 (*Fastweb*).
- AGCM 21 December 2000, No. 9060 (PI3043), Boll. 51-52/2000 (*Adiposforte*).
- AGCM 22 March 2001, No. 9343 (PI3103), Boll. 12/2001 (*Rekorp G-Force Metabolic*).
- AGCM 29 March 2001, No. 9367 (PI3128), Boll. 13/2001 (*Fat Blocker Diet*).
- AGCM 5 July 2001, No. 9747 (PI3350), Boll. 27/2001 (*Tariffa Long TIM*).
- AGCM 1 August 2001, No. 9848 (PI2620C), Boll. 31/2001 (*Elettrostimolatore Beauty Center*).
- AGCM 8 August 2001, No. 9867 (PI3286), Boll. 32/2001 (*Newbody*).
- AGCM 6 September 2001, No. 9924 (PI3323), Boll. 35-36/2001 (*Bruciakal di prodotti naturali*).
- AGCM 11 October 2001, No. 10026 (PI3330), Boll. 41/2001 (*Fitness Beta 3*).
- AGCM 13 December 2001, No. 10230 (PI3400), Boll. 50/2001 (*D-Stock di Vichy*).
- AGCM 13 December 2001, No. 10232 (PI3418), Boll. 50/2001 (*Pectina di frutta dimagrante*).
- AGCM 17 January 2002, No. 10347 (PI3482), Boll. 3/2002 (*Hotel Laurens*).
- AGCM 24 January 2002, No. 10372 (PI3465), Boll. 4/2002 (*Body Slim*).
- AGCM 8 May 2003, No. 11994 (PI3981), Boll. 19/2003 (*Memorizzatore Genius*).
- AGCM 20 April 2005, No. 14253 (PI4702), Boll. 16/2005 (*Suonerie per cellulari "09"*).
- AGCM 11 January 2006, No. 15104 (PI4927), Boll. 2/2006 (*Sacchetti COOP degradabili al 100%*).
- AGCM 6 February 2007, No. 16470 (PI5497), Boll. 6/2007 (*Servizi teleunit per maggiorenni su riviste per ragazzi*).
- AGCM 21 August 2008, No. 18799 (PS457), Boll. 32/2008 (*10 SMS Gratis*).
- AGCM 2 October 2008, No. 18951 (PS322), Boll. 37/2008 (*Neomobile Suonerie Gratis*).

- AGCM 23 April 2009, No. 19791 (PS2681), Boll. 16/2009 (*Sensitiva Adelia Felice*).
- AGCM 28 May 2009, No. 19912 (PS2860), Boll. 21/2009 (*Stufetta Miracolosa*).
- AGCM 10 September 2009, No. 20284 (PS891), Boll. 36/2009 (*Bioscalin crescita capelli*).
- AGCM 14 April 2010, No. 21013 (PS4025), Boll. 15/2010 (*Medestea—Full fast*).
- AGCM 26 May 2010, No. 21174 (PS717), Boll. 22/2010 (*Mago Vito Lo Cascio*).
- AGCM 26 May 2010, No. 21179 (PS2300), Boll. 22/2010 (*Mago Anthony Carr*).
- AGCM 15 June 2010, No. 21260 (PS5445), Boll. 24/2010 (*Centri Dimagranti So-brino*).
- AGCM 21 July 2010, No. 21379 (PS3689), Boll. 29/2010 (*Benefit-BluPill*).
- AGCM 8 September 2010, No. 21539 (PS1898), Boll. 37/2010 (*Pool Pharma—Kilocal*).
- AGCM 15 December 2010, No. 21916 (PS5803), Boll. 49/2010 (*Italcogim Energie—Attivazioni non richieste*).
- AGCM 23 November 2011, No. 23011 (PS3764), Boll. 47/2011 (*Edison—Attivazioni non richieste*).
- AGCM 9 May 2012, No. 23551 (PS4791), Boll. 19/2012 (*UTET—Enciclopedia non richiesta*).
- AGCM 18 July 2012, No. 23744 (PS6576), Boll. 29/2012 (*Titel—Corso di informatica*).
- AGCM 8 August 2012, No. 23816 (PS7557), Boll. 33/2012 (*Federico Motta Editore—Modalità di vendita*).
- AGCM 20 February 2013, No. 24230 (IP141), Boll. 9/2013 (*FMR-ART'È—Vendita libri di pregio a domicilio*).

### **The Netherlands**

- Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2822 (*Spaarbeleg Sprintplan*).
- Rechtbank Utrecht 24 November 2004, ECLI:NL:RBUTR:2004:AT7000.
- Rechtbank Maastricht 21 March 2002, ECLI:NL:RBMAA:2002:AE0776.

# Chapter 1

## Introduction

**Abstract** This chapter introduces the Unfair Commercial Practices Directive and the consumer benchmarks in the Directive. It presents the aim and the research question of the book, its general research design and structure as well as the method and scope of each part of the book.

**Keywords** Consumer benchmarks · Unfair Commercial Practices Directive · Introduction · Research question · Methodology

### 1.1 Consumer Benchmarks and the Unfair Commercial Practices Directive

This Unfair Commercial Practices Directive (2005/29/EC) harmonises national laws on unfair commercial practices and has a broad scope, covering *inter alia* misleading advertising and other forms of marketing strategies, including post-sale practices.<sup>1</sup> The Directive aims to achieve a high level of consumer protection and to increase the smooth functioning of the internal market. The latter goal is to be achieved by increasing consumer confidence, and by removing barriers for traders, both of which should lead to an increase in cross-border trade.<sup>2</sup> In addition, the Directive aims more broadly to improve competition on the market.<sup>3</sup>

To a large extent, the Directive relies on general clauses that prohibit traders to act unfairly towards consumers. For example, one of the central clauses in the Directive prohibits traders from distorting the economic behaviour of consumers by misleading them. When a court or enforcement authority has to decide whether a commercial practice is unfair, e.g., because it is potentially misleading, that court or enforcement authority needs to determine what consumer benchmark it should

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<sup>1</sup> See also paragraph 2.2 of this book.

<sup>2</sup> See Article 1 Directive.

<sup>3</sup> This is not one of the formal goals as mentioned in Article 1 of the Directive, but it does follow from the Directive's Preamble (e.g. Recital 8) and the EC Guidance to the Directive (SEC (2009) 1666, p. 6). See also paragraphs 2.3 and 11.4 of this book.



apply. Should it decide on the basis of the benchmark of a critical consumer, who actively seeks the information he or she needs, and who is aware of potentially misleading marketing strategies? Or alternatively, on the basis of the benchmark of a trusting and perhaps somewhat naïve consumer, who relies on the good intentions of the seller?

The answer to this question can be decisive for the outcome of the case, i.e., for the decision whether a practice is found unfair.<sup>4</sup> It is, therefore, also an important indicator of the level of protection offered to consumers and of the extent to which intervention in the market by an enforcement authority or through a court judgment is legally possible.<sup>5</sup> Setting the benchmark at a critical consumer implies a low level of intervention in the market and an emphasis of the consumer's own responsibility. Setting the benchmark at a more trusting or naïve consumer, on the contrary, emphasises the trader's responsibility to act fairly, and allows for more intervention in the market. Hence, the choice of the consumer benchmark has important implications in relation to who is 'worthy' of protection and as to what type of commercial practices are found to be acceptable.<sup>6</sup>

Due to its central importance, the issue of the consumer benchmarks in the Unfair Commercial Practices Directive was one of the central subjects of debate in the Directive's adoption process.<sup>7</sup> The discussion reflects different political viewpoints, as well as differences in how Member States used to deal with this issue in their national laws.<sup>8</sup>

Already prior to the adoption of the Unfair Commercial Practices Directive, the Court of Justice of the European Union (CJEU)<sup>9</sup> held in *Gut Springenheide* (1998) that the benchmark should in principle be set at—what it called—the *average consumer*.<sup>10</sup> This average consumer is assumed to be 'reasonably observant and reasonably well-informed and circumspect'.

The average consumer benchmark was later incorporated into the Unfair Commercial Practices Directive and complemented by two alternative benchmarks that are supposed to prevent the exploitation of vulnerable consumers, i.e., the target group benchmark and the vulnerable group benchmark.<sup>11</sup> The *target group benchmark* applies if a commercial practice is directed at a particular group of

<sup>4</sup> See also J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 6.

<sup>5</sup> See also S Niemöller, *Das Verbraucherleitbild in der deutschen und europäischen Rechtsprechung* (Munich, Beck, 1999) 5–6.

<sup>6</sup> See also S Weatherill, 'Who is the average consumer?', in S Weatherill and U Bernitz (eds), *The regulation of unfair commercial practices under EC Directive 2005/29* (Oxford, Hart, 2007) 115.

<sup>7</sup> See also paragraph 2.4 of this book.

<sup>8</sup> See also G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 5–6 and 111–112.

<sup>9</sup> Formerly known as the European Court of Justice (ECJ). Throughout this book, the Court will be referred to as the CJEU.

<sup>10</sup> CJEU 16 July 1998, Case C-210/96, *ECR* 1998, p. I-4657 (*Gut Springenheide*). See also paragraph 3.2.8 of this book.

<sup>11</sup> See also Chap. 2 of this book.

consumers.<sup>12</sup> If that is the case, the average member of that group functions as the benchmark. This means that the benchmark can be set at, for example, the average member of a group of teenagers, in case of advertising directed at this group. However, even if the commercial practice is not targeted at a vulnerable group, such a group can be protected: the *vulnerable group benchmark* offers the possibility to set the benchmark at the average member of a vulnerable group that is particularly affected by the practice, without the need for this group to have been targeted by the commercial practice.<sup>13</sup>

## 1.2 Aim and Research Question

Despite the fact that the consumer benchmarks were a central subject of debate during the adoption process of the Directive, much uncertainty has arisen regarding how they are to be applied.<sup>14</sup> Moreover, the application of the average consumer benchmark has raised criticism in academic literature, both in terms of how realistic the assumptions of the behaviour of the average consumer are, and in terms of the suitability of the benchmark to reach the Directive's objective of achieving a high level of consumer protection.<sup>15</sup> Despite this criticism, the present state of the debate lacks an in-depth assessment of the consumer benchmarks as currently in place in the Unfair Commercial Practices Directive. Moreover, although attention has been paid to the average consumer benchmark in terms of the level of protection it offers to consumers, the discussion on the consumer benchmarks also lacks an assessment in relation to the other objectives of the Directive.

This book, therefore, investigates the Directive's regime of consumer benchmarks and assesses the benchmarks against each of the Directive's objectives. Accordingly, it addresses the following question:

To what extent does the regime of consumer benchmarks in the Unfair Commercial Practices Directive meet each of the goals of the Directive?

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<sup>12</sup> Article 5(2) Directive.

<sup>13</sup> Article 5(3) Directive.

<sup>14</sup> See, for example T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law 2007* (Aldershot, Ashgate, 2007) 217.

<sup>15</sup> See, for example, G Howells, H Micklitz and T Wilhelmsson, *European fair trading law; the Unfair Commercial Practices Directive* (Aldershot, Ashgate, 2006) 248–249, J Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (Inaugural lecture University of Amsterdam) (Amsterdam, Vossiuspers UvA, 2006) 5, T Wilhelmsson, 'The informed consumer v the vulnerable consumer in European unfair commercial practices law—a comment', in G Howells et al (eds), *The yearbook of consumer law 2007* (Aldershot, Ashgate, 2007) 219 and R Incardona and C Poncibò, 'The average consumer, the Unfair Commercial Practices Directive, and the cognitive revolution' (2007) *Journal of consumer policy* 21–38.



In this way, this research assesses whether the consumer benchmarks are suitable in terms of achieving the three goals of the Directive, namely (1) achieving a high level of consumer protection, (2) increasing the smooth functioning of the internal market and (3) improving competition in the market as such.

Through this assessment, this book aims to contribute to the discussion in academic literature on the consumer benchmarks in European unfair commercial practices law, by providing a thorough analysis of the consumer benchmarks and their relationship to the goals of the Directive. At a more practical level, it aims to provide insight into the working and consequences of the benchmarks that can be used in the evaluation of the Unfair Commercial Practices Directive and its application by the CJEU.<sup>16</sup> This assessment is important in particular because the Directive, while promising to regulate unfair commercial practices in a way that achieves the Directive's goals, has removed the possibility for Member States to regulate unfair commercial practices themselves.<sup>17</sup>

### 1.3 General Research Design and Structure

In order to address the main research question, four steps are taken. These steps also provide the four-part structure of this book.

Part I of this book (Chaps. 2–4) investigates the Directive's benchmarks at the European level. It analyses the benchmarks in the Unfair Commercial Practices Directive itself, as well as the application of the consumer benchmarks in the case law of the CJEU. This part forms the foundation to the book and, in the end, also to the assessment of the Directive's benchmarks against its goals.

Part II (Chaps. 5–8) discusses the application of the Directive's consumer benchmarks at the national level. The question is addressed to what extent and how the consumer benchmarks are applied in national law, and whether and to what extent the introduction of the European consumer benchmarks has resulted in changes compared to prior legislation and case law.

Although the assessment in this book focuses on the benchmarks as prescribed by European law, national law is relevant in two ways. Firstly, it is directly relevant for the assessment in terms of the extent to which the consumer benchmarks harmonise national unfair commercial practices laws. Harmonisation is one of the central elements of the objective to increase the smooth functioning of the internal

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<sup>16</sup> It is important to note that the focus is on the consumer benchmarks in the Unfair Commercial Practices Directive and in the national legislation implementing the Directive. In particular, this means that the use of the consumer benchmarks in other areas of law are only discussed to the extent that it is relevant for the application of the benchmarks in unfair commercial practices law. It also means that the focus is on the Unfair Commercial Practices Directive and not on consumer law in general. Some short remarks on the possibility of broader application of the Directive's consumer benchmarks are made in the epilogue of this book, see paragraph 12.4.

<sup>17</sup> Important in this context is that the Directive fully harmonises national unfair commercial practices laws, see also paragraph 2.2 of this book.

market.<sup>18</sup> Secondly, although the assessment focuses on the consumer benchmarks at the European level, national law can provide further insight into the concrete application of the consumer benchmarks.<sup>19</sup> This is especially important because of the limited number of cases in which the CJEU has applied the consumer benchmarks so far, and because the CJEU mostly limits itself to providing general guidelines on the application of the benchmarks, rather than applying the benchmarks to the facts of a particular case. The richness of national cases can, therefore, provide further insight into the suitability of the consumer benchmarks to reach the Directive's goals, also in terms of the level of consumer protection and/or the improvement of competition. Outcomes in concrete cases can show who is protected and under which circumstances. Furthermore, non-conform or non-uniform application of the rules at the national level may reveal problems presented by the consumer benchmarks as prescribed by European law, e.g., in terms of the level of consumer protection or of the traders' freedom to compete.

Part III (Chaps. 9 and 10) investigates the relationship between the consumer benchmarks and actual consumer behaviour, on the basis of existing consumer behaviour studies. It addresses how the behaviour assumed in light of the consumer benchmarks relates to actual consumer behaviour as understood in the field of behavioural sciences. The relationship between the consumer benchmarks and actual consumer behaviour is relevant for the level of protection that is offered by the Directive: unrealistically high expectations lead to a lower level of protection, whereas unrealistically low expectations lead to a higher level of protection for consumers. This, in turn, also has consequences for the other goals of the Directive, e.g., in terms of consumer confidence (relevant for the smooth functioning of the internal market) and in terms of traders' freedom to advertise for products and services (relevant for the competitive working of the market).<sup>20</sup>

Part IV (Chap. 11) of this book measures the consumer benchmarks in the Unfair Commercial Practices Directive against the Directive's goals. It first discusses the Directive's goals and then assesses the regime of consumer benchmarks in the Directive with respect to each goal. The assessment builds upon the previous chapters of the book, taking into account the application of the consumer benchmarks at both European and national level, as well as the relationship between the benchmarks and consumer behaviour.

As an epilogue, Chap. 12 of this book provides a number of recommendations to improve the Directive in relation to the Directive's consumer benchmarks. These recommendations build upon the assessment provided in part IV, but at the same time go beyond providing an answer to the main research question of this book.

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<sup>18</sup> See also paragraph 11.3.

<sup>19</sup> This is especially important because of the limited number of cases in which the CJEU applies the consumer benchmarks, and because the CJEU generally limits itself to giving general guidelines to their application rather than applying the benchmarks to the facts of the case.

<sup>20</sup> See also the more elaborate discussion on the Directive's goals in Chap. 11 of this book.